November 10, 2015

Honorable Jerry Hill, Chair, and Members
Senate Committee on Business, Professions and Economic Development
Sacramento, CA 95814

Honorable Susan Bonilla, Chair, and Members
Assembly Committee on Business and Professions
Sacramento, CA 95814

Re: Follow-Up to October 22 Informational Hearing on Revised Structure of State Regulation Compelled by the U.S. Supreme Court’s decision in North Carolina State Board of Dental Examiners v. FTC

Dear Chairs Hill and Bonilla, and Honorable Committee Members:

I write to thank you for holding this important hearing of both committees on the impact of the U.S. Supreme Court’s seminal decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission (February 25, 2015) (hereinafter “ North Carolina”), and for allowing the Center for Public Interest Law (CPIL) to contribute to it. This letter supplements the written handout that CPIL submitted at the October 22 hearing (which is attached).

I also write to correct some errors in the testimony you heard, and to clarify some confusion reflected in questions and discussion. Such confusion is understandable given the complexity of federal antitrust law and the “state action immunity” doctrine here at issue. But appreciating the radically altered law following this decision and its implications is properly a high priority for all of us. Failure to accomplish “sovereign status” for Department of Consumer Affairs (DCA) regulatory boards subjects board members and the state treasury to serious liability. And — as discussed below — such liability is not hypothetical; nor may approval by the legislature, agencies, or the California Supreme Court resolve the difficulty, because the application of federal antitrust law supersedes state jurisdiction on this question.

CPIL is familiar with this issue as an active monitor of California regulatory boards for the last 35 years, including attendance at the meetings of most major DCA boards by our law students and staff. CPIL is also familiar with antitrust law and policy.1 And CPIL has also been active in

1 Recently, CPIL successfully litigated a federal antitrust action against a California agency that was facilitating price-fixing — a per se antitrust violation — by the rental car industry. See Shames v. California Travel and Tourism Commission, et. al, 626 F.3d 1079 (9th Cir. 2010).
auditing the enforcement programs of three state agencies (the State Bar, the Medical Board, and the Contractors’ State License Board) as “enforcement monitors” under prior legislation. My own background with the antitrust/regulatory interface includes nine years of litigation as a state and federal antitrust prosecutor, publications in the field, service as a member and chair of the California Athletic Commission, sponsorship and drafting of part of the state’s Unfair Competition Law, and teaching antitrust law at the University of San Diego School of Law, the National College of District Attorneys and the U.S. Supreme Court’s National Judicial College training state court judges.

I write to provide you with an overview of the kinds of decisions by boards that constitute antitrust violations, and to advise you that neither the existing authority of the Office of Administrative Law (OAL), the DCA Director, nor that of other board “advisors” constitutes “active state supervision” of regulatory board acts and decisions, as required by North Carolina. Finally, I will summarize CPIL’s suggested approaches for compliance with North Carolina, and the reasons therefor. In particular, I will discuss why an “active state supervision” mechanism might be efficiently incorporated into the existing OAL.

I. THE UNDERLYING PROBLEM BRIEFLY STATED

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).

Most DCA occupational licensing boards are 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 entry standards for licensure. These entry conditions necessarily limit supply. They decide who is allowed to practice a trade or profession and who is excluded, with the force of law. DCA board members revoke licenses, specify how licensees are to practice, and control supply 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.

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3 I contributed to four bills authored by Alan Sieroty in the 1970s which amended the previous Civil Code section 3369 and created most of what is now section 17200 et seq. of the Business and Professions Code (the Unfair Competition Law).

4 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).
In a series of decisions starting with *Parker v. Brown*, 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.”

The October 22 informational hearing included much discussion of the “reasonable” character of DCA board members and their general mindset to only fashion restraints that benefit the public interest. Indeed, the DCA witnesses repeatedly cited the “training” of board members as providing such assurance. DCA and the Attorney General’s representative at the hearing appeared to opine that minor technical changes to the DCA Director’s authority would likely create compliance with the *North Carolina* decision. Regrettably, these contentions are in error.

Critically, and contrary to the discussion at the hearing, there is no such thing as a “reasonable price-fix by horizontal competitors.” Most DCA boards are controlled by licensees who are technically competitors, and they engage in *per se* antitrust violations every day. No defense based on the “reasonableness” of the restraint or any of the other factors discussed at length at the hearing are permitted or admissible. Neither the strong merits of the restraint nor the designation of state official titles to those making the decision constitutes a defense. And to repeat for emphasis, it does not matter that board members or the DCA Director (or any other state official) believe in good faith that a restraint is in the public interest, or even that we agree with them. This was the point being made by CPIL’s Ed Howard at the hearing. We want some restraints on entry (albeit tied to a proper rationale); we want boards to excise licensees who have become incompetent or negligent; we want board members to feel safe in properly regulating a trade in the public interest. We want to restore “sovereign status” to DCA’s boards so they can claim “state action immunity” when they are alleged to have acted anticompetitively. Consistent with the *North Carolina* holding, and to ensure that status, the legislature must either reconfigure the composition of most DCA boards or impose an “active state supervision” mechanism that can review and veto anticompetitive acts of boards that continue to be controlled by “active market participants.” That purpose of that review is to ensure that these decisions are, in fact, made by public officials representing the broad interests of the public.

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5 317 U.S. 341 (1943).

6 *See, e.g., U.S. v. Socony-Vacuum Oil*, 310 U.S. 150, 224 (1940) (“Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned…”).

7 We understand that the October 22 hearing, and the jurisdiction of these committees, is limited to DCA boards. But we reiterate for the record that the decision is equally applicable to the State Bar Board of Trustees (BOT) and to other non-DCA boards that are controlled by “active market participants.” The BOT is controlled by a
II. THE BASICS

We briefly and respectfully correct the record as to several comments and assertions made at the October 22 informational hearing:

- **The Holding Applies to California.** Several hearing participants commented that the facts of the *North Carolina* case, including the nature of its dental board and the enforcement actions it undertook, differ from the situation in California. The implication was that the decision may not even apply to our state. However, this seminal 6–3 U.S. Supreme Court decision has a clearly stated holding applicable to every state in the nation. The Court explicitly stated that state boards regulating trades and professions throughout the country will not enjoy “state action immunity” from federal antitrust scrutiny if they are controlled by “active market participants in the trade regulated,” unless they are subject to “active state supervision.” The specific distinguishing features of North Carolina dental regulation and its alleged violation do not limit the categorically stated requirements of the holding. This is not a narrow “as applied” decision. It spells out the elements necessary for a state board to obtain “sovereign status” and qualification for “state action” exemption from federal antitrust law. To argue otherwise is similar to contending that California police officers do not have to afford *Miranda* warnings because they are highly disparate from the Arizona police officers whose conduct framed that holding. Our police officers could be practicing priests and penitents — and it would not matter.

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8 Some hearing participants mentioned the “morass” that the decision might cause. That characterization was contained in the dissenting opinion of Justices Alito, Scalia, and Thomas. The dissent is irrelevant. The majority decision is the law.

9 To quote the decision: “The Board argues entities designated by the States as agencies are exempt from *Midcal*’s second requirement. That premise cannot be reconciled with the Court’s repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*’s supervision requirement was created to address. ... This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals. ... The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. ... When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. ... *The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy Midcal’s active supervision requirement in order to invoke state-action antitrust immunity.*” *North Carolina plain*, 135 S.Ct. at 1113–15 (internal citations omitted) (emphasis added).
The Holding is Unambiguous: If California Wishes to Preserve the Current Composition of its Occupational Licensing Boards, It Must Create an Oversight Mechanism that is Authorized to Exercise “Active State Supervision” for Anticompetitive Effect. The Court explicitly asserted the prohibition on “active market participant” control of state regulatory boards, and did not choose to make the method of selection of board members a factor. Where such active market participants control decisions, “active state supervision” for anticompetitive impact is required. Justice Kennedy noted that some flexibility exists as to the “how” of that supervision. But he also set forth minimum elements that any such independent review must have, including specific examination for anticompetitive effect by a non-market participant person or group, and clear authority to “veto or modify” board decisions. Importantly, he expressly provided that the state’s review for anticompetitive impact must not be pro forma. That is important and is well illustrated in one case not discussed at the hearing but cited repeatedly by the Court in the North Carolina decision — the leading antitrust case of Midcal. In that case, the U.S. Supreme Court looked at an “active state supervision” arrangement — and it happened to be at a California agency. It involved the review of price schedules submitted by wine producers and wholesalers. California’s Department of Alcoholic Beverage Control had clear power to review and reject such price schedules, and in fact did review all such prices, but it generally rubberstamped them; it did not change or examine them substantively in depth. The Court rejected such review as inadequate in that case, and reinforced that message repeatedly in the North Carolina decision. Interestingly, the recent FTC Staff Guidance on application of this case — a somewhat more complete advisory than the opinions issued by Legislative Counsel or the California Attorney General — advises information-gathering, data collection, public hearings, and written decisions as part of that element.

10 To quote the decision: “[T]he 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.’ ... The Court has identified only a few constant requirements of active supervision: 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[.]’ Further, the state supervisor may not itself be an active market participant.” North Carolina, 135 S.Ct. At 1116 (internal citations omitted).


12 “The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any ‘pointed reexamination’ of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” Midcal, 445 U.S. at 105–06.

13 Federal Trade Commission Bureau of Competition, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants (October 2015).


16 FTC Staff Guidance, supra note 13, at 10-11.
III. CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURES DO NOT ENSURE “ACTIVE STATE SUPERVISION” OF REGULATORY BOARD ACTIONS FOR ANTICOMPETITIVE EFFECT

Many participants at the October 22 informational hearing surprisingly opined that California’s current processes and supervision mechanisms already afford “active state supervision” of regulatory board decisions and actions for anticompetitive impact. Regrettably, that judgment is not close to accurate.

  The Attorney General’s Opinion draws the unfounded conclusion that the rulemaking process governed by the Administrative Procedure Act (APA) and overseen by the Office of Administrative Law (OAL) “is a fairly safe area for board members, because of the public notice, written justification, [DCA] Director review, and review by the Office of Administrative Law...” Although the Attorney General is correct in that the APA rulemaking process is replete with “review” by non-“active market participants,” none of those reviewers is required to, tasked with, authorized to, or trained to review for anticompetitive impact; further, none of them are empowered to “modify” board regulations, as explicitly required by North Carolina. OAL’s six areas of specified review do not include “anticompetitive” effects at all, nor is it qualified to make such determinations. And while OAL may reject board regulations, it may not modify them. We discuss this issue further below, and outline our proposed changes to the structure of OAL and the APA rulemaking process to efficiently incorporate a review mechanism for anticompetitive impact.

- The Current Authority of the DCA Director Does Not Constitute “Active State Supervision” for Anticompetitive Effect.
  The informational hearing included the acknowledgment by the attending Deputy Attorney General that the current authority of the DCA Director does not satisfy the “active state supervision” requirements of the North Carolina decision. He is correct. The Deputy Attorney General noted two deficiencies: (a) the Director’s review does not include all of the various categories of board acts and decisions related to licensing examinations and requirements that form the heart of the per se antitrust offense often at issue; and (b) the Director does not have the unfettered power to make final decisions in his review function, but may be overridden by boards controlled by “active market participants.” Both of these objections are warranted. But they do not reach numerous other deficiencies that clearly defeat any assertion that the DCA Director exerts “active state supervision” of DCA board acts and decisions.

The relevant points not clearly made at the hearing by counsel for the Attorney General or DCA include the following:

17 Gov’t Code § 11340 et seq.

18 Attorney General’s Opinion No. 15-402 at 8.
1) While the DCA Director is authorized to review and reject board rulemaking,\textsuperscript{19} the Director is not required to review such rulemaking for anticompetitive effect, as \textit{North Carolina} requires. Nor is the DCA Director necessarily an expert in economics, antitrust law, or other field that might qualify him/her to recognize and meaningfully review any board act or decision for anticompetitive effect.\textsuperscript{20}

2) Further, the DCA Director is not authorized to “modify” such regulations, as \textit{North Carolina} requires. 135 S.Ct. at 1116.

3) Several categories of rulemaking involving per se antitrust violations are exempt from the DCA Director’s review.\textsuperscript{21} And, as noted by the Deputy Attorney General, a Director’s veto of board regulations may be overridden by a unanimous vote of the usually “active market participant”-controlled board.\textsuperscript{22}

4) The DCA Director’s “review” authority under Business and Professions Code section 313.1 is limited to rulemaking. Most board acts and decisions do not require rulemaking, and no statute cited in the Attorney General’s Opinion\textsuperscript{23} either \textit{authorizes} the DCA Director to review, amend, or modify non-rulemaking board acts and decisions \textit{for anticompetitive effect}, or \textit{requires} him/her to review such non-rulemaking acts and decisions \textit{for anticompetitive effect}, as \textit{North Carolina} requires. Indeed, the issuance of cease and desist letters (the very offending conduct at issue in \textit{North Carolina}) are not subject to DCA (or OAL) review under the present scheme.

The statutes at Business and Professions Code section 300 \textit{et seq.} merely \textit{authorize} the DCA Director to inquire into many aspects of DCA board activity and decisionmaking. They do not \textit{require} the Director to review any board act or decision for anticompetitive impact, nor do they authorize the Director to overturn or modify any non-rulemaking act or decision due to anticompetitive effect. DCA boards are called “semi-autonomous” for a reason: With the sole exception of rulemaking that is not related to licensing exams, licensing requirements, or fees, boards make the final decision and the DCA Director is powerless to “veto or modify” any such decision, as is required by \textit{North Carolina}.\textsuperscript{24}

\textsuperscript{19}Bus. & Prof. Code § 313.1.

\textsuperscript{20}Indeed, Business and Professions Code sections 150 and 151 contain no substantive qualifications for individuals who may be appointed as DCA Director by the Governor.

\textsuperscript{21}Bus. & Prof. Code § 313.1; the Director is not authorized to review and/or reject regulations “relating to examinations and qualifications for licensure,” or “fee changes proposed or promulgated by any of the boards, commissions, or committees within the department.”

\textsuperscript{22}Bus. & Prof. Code § 313.1(e)(3).

\textsuperscript{23}See Attorney General’s Opinion No. 15-402, notes 43–56.

\textsuperscript{24}In any event, the authorities set forth in Business and Professions Code section 300 \textit{et seq.} are rarely exercised by the DCA Director. CPIL has been observing DCA boards for 35 years, longer than anyone currently at DCA and/or
Underlining these points is the testimony of the DCA Director at the informational hearing. It included reassurances (repeated by others) that California is a model state that really does not need to change anything. He cited the fact that board members are being trained about the North Carolina decision and about the boards’ statutory priority for public protection. In fact, the Director conceded that he has never rejected or changed a single decision made by any DCA board or program during his tenure, and is unaware of any such action over the past decade.

Thus, existing law and DCA practice do not constitute “active state supervision” of regulatory board decisions for anticompetitive impact. Obviously, and as was discussed at the hearing, the statutes conferring (and restricting) the DCA Director’s authority as to the semi-autonomous boards within the Department could be amended. However, it will not be enough to simply allow the Director to review examination, licensing, and other regulations where he/she is currently foreclosed, or to give him/her the theoretical power to reject or modify a regulation without board override. The many statutes cited in the Attorney General’s Opinion would have to be amended to require DCA Director review of all acts and decision of all of the Department’s boards for anticompetitive effect, and to further authorize the Director to “veto or modify” such acts and decisions prior to their effective date. Some of these changes might be helpful, but — as described below — CPIL believes that the “active state supervision” requirement might more efficiently be incorporated into the existing Office of Administrative Law, which already reviews all rulemaking of all DCA boards and could be supplemented to incorporate review (upon appeal or request) of non-rulemaking acts and decisions of DCA boards for anticompetitive effect.

- **Interaction with DCA Boards by the Attorney General, DCA Attorneys, Board Executive Officers, and/or the Legislature is Inadequate to Provide “Active State Supervision” of Board Actions for Anticompetitive Effect.** The hearing included contentions that various advisors, counsel, the legislature, board executive officers, and/or other non-“active market participants” can and do provide the requisite “active state supervision” over board acts and decisions. The first grouping so identified was attorneys, either those from DCA or from the Attorney General’s Office. Counsel properly discouraged such a conclusion at the hearing. These attorneys represent boards as their clients. They have a fiduciary duty to each such client. To be sure, the Attorney General is the chief law enforcement officer of the State and has other over-arching obligations. But these attorneys have conflicts that would prevent them from assuming this “supervision” role. In addition, they lack expertise and obviously do not have the

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on staff of the legislative committees, and the use of these authorities is exceedingly rare. DCA Interim Director Patricia Harris convened public hearings on the enforcement program of the Board of Registered Nursing in 2009 after that Los Angeles Times published a series of embarrassing articles about the program. DCA Director Kathleen Hamilton convened a series of public hearings on DCA’s complaint disclosure policy in 2001. In 1999, DCA Director Jim Conran required the Medical Board to hold a series of public hearings on MBC’s enforcement program in response to a scathing audit of the program; the audit was prompted by complaints to Conran by Medical Board investigators that Board members and senior management were instructing them to throw out complaints rather than investigate them. In the early 1990s, Conran also confronted the Board of Landscape Architects over its use of a national licensing examination with a 6% pass rate. Over the past fifteen years, we can count on one hand the number of times that a DCA Director has vetoed board rulemaking. Regrettably, these authorities are ephemeral and are rarely exercised because DCA lacks general fund money to run an active consumer protection and education program. Little Hoover Commission, Consumer Protection: A Quality of Life Investment (June 1998).
authority to reject or modify a board decision. Counsel does not make substantive decisions. His/her recourse — should an agency seek to commit unlawful acts — is to withdraw as counsel.

For similar reasons, board executive officers cannot possibly perform “active state supervision” of board acts and decisions. Executive officers serve at the pleasure of the board members who selected them. They are not even decisionmakers; their job is to carry out the policy decisions of the boards at whose pleasure they serve — a board that is usually controlled by active market participants in the profession regulated by that board. Nor is the legislature in a position to provide such supervision. Certainly its “sunset review” process is important — perhaps a model for legislative review nationally — but it typically occurs every four years. Thus, the legislature is not in a position to examine decisions before they take effect (as North Carolina requires), and otherwise lacks a mechanism to provide detailed restraint of trade review.

IV. OTHER ERRORS / OMISSIONS AT THE OCTOBER 22 HEARING

In addition to the misunderstanding of the basics — the explicit requirement of “active state supervision” where there is “active market participant” control — the hearing included numerous arguments and discussion that reflect a misunderstanding of basic, applicable law.

- **Training of Board Members is Admirable but Irrelevant to Compliance.** There was much discussion at the October 22 hearing about how the holding in this decision is being addressed through the training of board members. Such training has undoubted merit but, as discussed above, is irrelevant to the liability at issue. It does not provide a defense to antitrust liability in any way, shape, or form. The Supreme Court did not state that “active market participants may control public policy on behalf of the People if they have been instructed by state officials to defer their proprietary gain in favor of the public good.” As the applicable quotes from the decision in the notes above provide, this is a bright-line, categorical prohibition.

- **The Characterization of a Violation as “In the Public Interest” Does Not Provide Immunity, Particularly for Core Agency Decisions that Are Per Se Antitrust Offenses.** The hearing included much discussion about how some antitrust violations are permitted, and that “reasonable restraints” are lawful. As noted above, that discussion reflects a misunderstanding of the antitrust law prohibition — particularly the per se categories often involved in agency actions. As noted, if a restraint (including the price-fixing of supply control) is per se, it is automatically unreasonable. Assertions and/or defenses that “it is really a good idea” or “the public will benefit” are irrelevant.

As CPIL’s Ed Howard repeated at the hearing, CPIL wants boards to make decisions that will be necessarily per se violations of antitrust law. To be sure, we want boards to focus on the needed competence for public protection, and not on collateral motivations or effects. Our own experience over the last 35 years, consistent with the holding of this case, is that those in the trade or profession have a self-interested view of entry and other market rules. Sometimes that view is consonant with the public interest. But not always. And the broader perspective that they may understandably not recognize exists in large measure without discussion or even
recognition. Do the entry criteria really assure competence? What is the pass rate on the licensing examination? What is the impact of supply limitations on prices? Does the filtering that takes place relate to its purpose? How closely? These are the considerations that underlie the state’s proper decisions about supply controls that restrain trade.

The problem is that those in a trade or profession often make tribal assumptions based on common empathy lines. The solution is not to delegate state police power to a self-interested grouping — particularly where such associations have organized to an unprecedented degree in state capitols and in Washington, D.C. — but to draw upon the needed and applicable expertise they or their members may have while giving decisionmaking power to those reflecting the general body politic that is properly the bedrock of a democracy.26

- Valuable Expertise Can Contribute to Decisions Without Ceding Control to a Cartel. The discussion at the hearing repeatedly emphasized the value that “active market participants” can contribute to board decisionmaking given their expertise in the subject matter. We agree that expertise is important. It allows the consideration of unintended consequences and the full understanding of what may or may not work. But this discussion inflates the benefit of expertise over the issue of state policy control by self-interested participants. There are many ways to avail a board of the expertise of the neurosurgeon or accountant without vesting unto that grouping the power of the State. Perhaps a public member supermajority board could be assisted by a non-voting advisory committee of “active market participants.” Or perhaps we should simply recognize that active market participants and their trade associations already heavily lobby board members, attend all board meetings, and offer their expertise as a matter of course. We may want a good CPA to advise on the consequences of various levels of ignorance or on effective ways to test for competence, but may not want a group of CPAs to determine exactly how many new CPA entrants there will be to enhance supply and diminish their market power and hourly rates.

Moreover, not all expertise is the same. Expertise is most valuable where it is “on point.” The notion that a physician member of the Medical Board who is a psychiatrist will know the details of optimum practice as a dermatologist is dubious. The assumption that all physicians are beknighted with in-depth knowledge of all specialties of medicine is unfounded, and the same

25 Justice Kennedy recognized this dynamic: “Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for *established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.* Dual allegiances are not always apparent to an actor.” *North Carolina*, 135 S.Ct. at 1111 (emphasis added).

26 Note that the hearing focused on medical and accounting regulation where incompetence means irreparable harm. Many DCA boards are not so essential to public protection; barbers, landscape architects, and others do not pose the same level of irreparable harm danger as may be the case with a surgeon. And those sophisticated consumers who hire geophysicists or petroleum engineers arguably do not require the state to assure competence. The motivation for most agencies is a mix of public protection and proprietary tribalism. We agree that the trade association board members are not necessarily venal actors attempting maximum revenue and protection from competition. They certainly do not believe that is what they are about. But there is a substantial difference between the views of a trade association and those that might arise from a more generalist background. The trick is to combine expertise and independence for an optimum outcome. The *North Carolina* decision has drawn a bright line to assure some balance in those judgments by foreclosing unilateral “active market participant” control.
holds true today for most trades and professions. Many are divided into separate areas of expertise. Indeed, the Medical Board recognizes this need by using multiple lists of “medical consultants” in various specialties to advise it on a number of levels. There are ways to tap “on point” expertise that more fully provide that benefit without conferring control of the final decision on active market participants.

- The Contention that Board Discipline Decisions are Currently Subject to “Active State Supervision” For Anticompetitive Effect is Without Merit. DCA witnesses distinguished board enforcement action from rulemaking, contending that the former is currently subject to “active state supervision.”27 The discussion included the facts that a board’s executive officer controls the prosecution decision, a deputy attorney general is involved at the initial stage of accusation filing, the matter is set for hearing before an independent administrative law judge, and judicial review outside the board is available to all disciplined respondents. However, these elements do not qualify as “active state supervision” of enforcement decisions for anticompetitive effect. First, as noted above, the executive officer serves at the pleasure of the board.28 Second, the deputy attorney general is counsel for the board — which is the moving party in disciplinary proceedings. It is possible that counsel could refuse to prosecute an individual case, but that is not a realistic check. The deputy attorney general is not in a position to determine prosecution priorities or penalties. Nor does he/she necessarily have expertise in the subject matter of the required review, nor has the Attorney General’s Office ever — to our knowledge — examined any agency decision in terms of anticompetitive effect.

The administrative law judge is usually not an “active market participant,” but he/she is not in a position to examine the anticompetitive effect of a board disciplinary matter, nor does he/she possess the power to modify an enforcement priority. That judge simply receives evidence and rules whether the respondent violated a law or regulation. Further, as the hearing discussion acknowledged, the ALJ writes only a “proposed decision,” and the board — often controlled by “active market participants” — makes the final decision. Nor do courts on writ review of board disciplinary decisions examine anticompetitive effects of those decisions. Courts are passive and are unable to sua sponte gather evidence of impact that is required for such a judgment. Their focus is on procedural due process and the existence of facts and evidence that support a violation.29

What is important to recognize is that boards controlled by “active market participants” sometimes target discipline at persons providing competition that serves the public but

27 The Attorney General’s Opinion concurred with this position. Attorney General Opinion No. 15-402 at 8 (“broadly speaking, disciplinary decisions are another fairly safe area because of due process procedures; participation of state actors such as board executive officers, investigators, prosecutors, and administrative law judges; and availability of administrative mandamus review”).

28 And some executive officers are required to be licensees of the board. See, e.g., Bus. & Prof. Code § 2708 (executive officer of the Board of Registered Nursing is required to be “a nurse currently licensed under this chapter”).

29 Note that the subjects of the North Carolina “cease and desist orders” theoretically had judicial redress — they could have brought a writ to challenge that enforcement action.
undermines maximum profit for the regulated profession (as did the dentists on the North Carolina Board of Dental Examiners). Behind the theoretical discussion of the roles of counsel and courts, the mere decision to bring an action is critical and possibly constitutes an anticompetitive effect. Accused respondents are not provided with counsel. Further, California has a questionable policy of assessing costs and attorneys’ fees against respondents who do not win complete dismissal of an accusation.\footnote{Bus. & Prof. Code § 125.3.} While some wealthy licensees may be able to afford these proceedings, a dry wall contractor or a barber can hardly do so. The power of the accusation process is immense and can be the basis for restraints of trade. Indeed, that was the format of the North Carolina case itself.

V. RESPONSIBLE AND EFFECTIVE COMPLIANCE CHOICES

California is simply not compliant with the North Carolina holding. Its many “active market participant”-controlled boards lack “state sovereignty” status and are vulnerable to significant federal antitrust liability. This legislature must take action.

The hearing discussion repeatedly noted the historical absence of antitrust suits against state boards. Not entirely. As noted above, CPIL recently filed and won \textit{Shames v. California Travel and Tourism Commission}, an antitrust lawsuit which successfully challenged the facilitation by a state agency of price-fixing by the rental car industry.\footnote{626 F.3d 1079 (9th Cir. 2010).} Additionally, CPIL appeared as \textit{amicus curiae} in support of plaintiff Bonnie Moore, who challenged a regulation of the Board of Accountancy which, composed in supermajority of CPAs (8–4), threatened to enforce a regulation stating that no one but a CPA may use the unmodified term “accountant” or “accounting” in its business name or advertising, even though non-CPAs are statutorily permitted to perform some tasks that can only be characterized as “accounting.” CPIL challenged the rule on due process and antitrust grounds.

In a 4–3 decision, the California Supreme Court found the rule unconstitutional as overbroad but refused to strike it.\footnote{Bonnie Moore v. California State Board of Accountancy, 2 Cal. 4th 999, 1026 (1992) (emphasis added).} In dissent, Justice Mosk agreed with CPIL that “Regulation 2 is itself of questionable validity. In 1948, at the time it was adopted, the Board consisted entirely of licensed accountants. ... Presently, it consists of 12 persons, 8 of them accounting professionals licensed by the state, and 4 public members. None of the members of the Board, according to \textit{amicus curiae}, the Center for Public Interest Law, is an unlicensed person performing accounting work. \textit{Amicus curiae} states that a large percentage of the accounting work available is of the type that is performed by both licensed and unlicensed accountants. The Board majority has an obvious pecuniary interest in preventing those without a license from advertising to the public that they are performing accounting services. Regulation 2 furthers that interest. \textit{The law has long looked with disfavor on rules adopted by a regulatory body the majority of which consists of members of a profession with a pecuniary stake in restricting the rights of competitors.”} As noted in the text, the state of the law prior to February 2015 caused litigants to base challenges to the decisions of “active market participant”-controlled boards on doctrines other than federal antitrust law. There is no shortage of those kinds of cases. \textit{See, e.g., Gibson v. Berryhill}, 411 U.S. 514 (1973) (on due process grounds, U.S. Supreme Court struck abusive disciplinary actions initiated by “active market participant”-controlled Alabama Board of Optometry against competitor corporate optometrists); \textit{Filipino Accountants’ Ass’n v. California State Board of Accountancy}, 155 Cal. App. 3d 1023 (1984) (Filipino accountants’ association successfully sued “active market participant”-controlled board under civil rights laws for discriminating against Filipino accountants in the licensing process); \textit{Le Bup Thi Dao v. Board of Medical Quality Assurance}, an unreported case brought by CPIL challenging — under federal civil rights laws — the Medical Board’s refusal to license 32 Vietnamese physicians in California; the board settled the matter and CPIL was awarded $100,000 in attorneys’ fees. This legislature should expect that cases of this type will now freely be filed under the federal Sherman Act, to which (absent curative legislation) state boards will be unable to assert the “state action immunity” defense.
that Commission from claiming state action immunity are now applicable to most DCA entities. One reason there have not been many cases is because of the state of the law prior to the North Carolina ruling in February 2015. However, that categorical, generalized, and pervasive “state action immunity” defense asserted by state boards to antitrust challenges is now unavailable, unless this Honorable Legislature fashions a cure — hopefully one that will comply with the spirit as well as the letter of the law.

Having noted that decisions beyond rulemaking may have an anticompetitive effect, we also realize that many anticompetitive decisions can be beneficial (as CPIL’s Ed Howard described) and many non-rulemaking decisions should not trigger detailed review with attendant costs and delays. To wit, barriers to entry that restrict supply may be in the public interest where directly related to qualification and competence that are necessary to prevent consumer harm. That is, supply restrictions may be a form of *per se* price-fixing, but are nevertheless needed where regulation and competence assurance is warranted.

Taking into account all of the above, what is the optimum solution to achieve “state sovereignty” status for California’s regulatory boards? How do we create effective “active state supervision” that qualifies but does not impede the speed of agency action or the efficacy of what may be justifiable restraints? Our suggestions were contained in our written submission to the committees (attached) but — because of the importance of the problems that require resolution — we respectfully rephrase and clarify the two alternatives there presented.

- **Change Board Composition to a Supermajority of Public Members.** The legislature could restructure the composition of DCA boards so that no more than a minority of a quorum of a board could be “active market participants.” That way, no action taken can be controlled by “active market participants.” Perhaps one or two public member positions may be designated for retired market participants, or for those who teach in the applicable subject area. They may not be considered “active market participants.”

In the alternative, boards could be composed of a simple public member majority (as with the current Board of Accountancy), with the added proviso that no vote shall be effective if conducted by a quorum with a majority of “active market participants” voting.

This option will engender the opposition of the trade associations, consistent with comments made at the hearing by the associations representing the medical, dental, and nursing professions. Such associations (considered critical “stakeholders”) have gathered immense political power at the federal level and in most states. But their preference to have the power of the People delegated to their members for the regulation of their own professions does not warrant agreement, and can no longer be lawfully accomplished as a practical matter.

- **And/or Create an “Active State Supervision” Mechanism that Qualifies for Sovereign Status.** The above-described composition change solves the problem. But if status quo as to board composition is preferred, then the legislature must provide for actual independent
state supervision of both rulemaking and non-rulemaking acts and decisions of boards controlled by “active market participants.”

◆ **As for rulemaking**, the optimum way to provide “active state supervision” for anticompetitive effect is to create a panel of independent experts attached to the Office of Administrative Law (OAL), which — as noted above — already oversees the APA rulemaking process and reviews all regulatory changes of all DCA boards not just for procedural compliance with the APA but also for six substantive criteria under Government Code section 11349.32 OAL already requires boards to publish numerous impact statements for all rulemaking under the APA.33 Under the APA, OAL already requires boards to formally publish proposed rulemaking for a 45-day public comment period,34 affords the option of a public hearing,35 requires boards to draft a final statement of reasons,36 and requires boards to compile a rulemaking file which documents procedural compliance with the APA, includes a substantive showing on each of the six criteria, and contains adequate responses to all comments submitted during the public comment period and at the public hearing (if any).37

As discussed at the hearing, the current six criteria of OAL do not include restraint of trade impact analysis, nor is OAL empowered to modify a regulation. It would be relatively easy to (1) amend section 11349 to add a seventh criterion: substantive review for anticompetitive impact; and (2) amend section 11346.5 to require boards to add another impact statement: impact on competition. But that does not mean that the generalist attorneys at OAL are qualified to analyze anticompetitive impact. CPIL suggests the creation — within OAL — of an independent panel of experts in economics, competition, and antitrust law. That panel would be required to perform an anticompetitive effect analysis of board rulemaking at the same time a generalist OAL attorney is analyzing the rulemaking file for APA procedural compliance, the six existing criteria, and adequate response to comments. Consistent with *North Carolina*, the panel must also be authorized to modify regulations. Placing such a panel of economic experts within OAL’s structure could achieve efficient and adequate “active state supervision” for anticompetitive effect without undue delay. The panel would have access to the entire rulemaking file, including impact statements, comments and data received during the comment period, and agency response to comments.

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32 Note that, contrary to the discussion at the hearing and the description of DCA counsel who should know better, OAL does not just review the “process of rulemaking.” OAL reviews the “authority” of the agency to adopt the rules in question, and even inquires into its “necessity.” Those two of its six review elements go beyond procedure, but OAL does not address anticompetitive effects, nor is it authorized to modify regulations.

33 *See, e.g.*, Gov’t Code §§ 11346.3, 11346.5.

34 *Id.* at §§ 11346.3(a), 11346.5.

35 *Id.* at § 11346.8.

36 *Id.* at § 11346.9.

37 *Id.* at § 11347.3.
Non-rulemaking Anticompetitive Decisions. The final issue is how to handle all of the non-rulemaking decisions that may restrain trade and are included in the North Carolina holding. We agree that the majority of these kinds of decisions do not raise anticompetitive concerns. But they can. Indeed, decisions about examination pass rates and other barriers to entry into a profession are at the heart of agency restraints. So the dilemma of an arena of many decisions without anticompetitive effect and some with a high degree of such impact is resolved by creating a filtering system. We would establish a presumption of no anticompetitive effect for non-rulemaking decisions, but create a nuanced review system that allows that presumption to be overridden. The categorical exclusion of all non-rulemaking decisions from review will not comply with the law as it now exists. Hence, an effective override mechanism to selectively but effectively subject such decisions to review is needed. We suggest the creation of a position or unit within OAL, connected to the expert panel discussed above. That independent unit would receive complaints about anticompetitive effect from a non-rulemaking decision, a pattern of enforcement decisions, a policy or other decision, or may make inquiries on its own. When that unit finds that agency actions create a “reasonable suspicion” that substantial anticompetitive effects are present, it would then refer the matter to the expert panel. A relatively small number is likely to be submitted to such a unit for screening, and an even smaller number would be referred by it to the expert panel for full consideration. The end result would be oversight with filtering to reconcile the requirement of independent supervision with the legitimate need to reduce unnecessary cost, delay, and red tape. Adding the competition review element to OAL will prevent the inadequate and fragmented option of visiting this function on the DCA Director.38

38 The DCA director review option is unrealistic given his/her limited scope over both rulemaking and non-rulemaking decisions by its boards, and the need for separate review timelines complicating agency approval, including the possible imposition of hearing and decision writing not now a part of his/her review.
IV. CONCLUSION

Failure to comply with the law by the method suggested above or some other effective means subjects board members to theoretical criminal liability. Moreover, it portends treble damage liability that is perhaps more germane and likely. These board members are appointed by this legislature as well as by the Governor, and that liability is not fair. On the one hand, we need to stop the shameful delegation of unchecked public power to those with conflicts of interest; at the same time, we want restraints that do protect the public allowed and rendered enforceable. Both of these missions can be accomplished as outlined above.

Sincerely,

[Signature]

Robert C. Fellmeth, Executive Director
Center for Public Interest Law
Price Professor in Public Interest Law

cc: Honorable Edmund G. Brown Jr., Governor
Honorable Anna M. Caballero, Secretary, Business, Consumer Services and Housing Agency
Honorable Kamala Harris, Attorney General
Honorable Diane Boyer-Vine, Legislative Counsel
Awet Kidane, Director, Department of Consumer Affairs
Bill Gage, Chief Consultant, Senate Committee on Business, Professions and Economic Development
Le Ondra Clark Harvey, Chief Consultant, Assembly Committee on Business and Professions
David Pasternak, President, State Bar of California Board of Trustees
Elizabeth Rindskopf Parker, Executive Director, State Bar of California

39 We do not expect this option to be exercised by U.S. Attorneys or the Antitrust Division without substantial warning and extreme facts. But the fact of such liability is a legitimate source of concern, as are the more likely litigation consequences from a treble damages-incentivized statute. We know of at least a dozen such suits that have already been filed against “active market participant”-dominated boards across the country.
Introduction


> Limits on state-action immunity are *most essential when the State seeks to delegate its regulatory power to active market participants*, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. *In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.*

*Id.* at 135 S. Ct. at 1111 (emphases added), citing *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) (“Midcal”) (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”).

Today, many of California’s occupational licensing boards are controlled by “active market participants” – licensees who stand to directly benefit from anticompetitive decisions the board makes. Thus, to protect boards and their members from antitrust liability, California must either 1) re-constitute the boards to include a supermajority of non-conflicted “public members,” or 2) ensure that all actions of a board dominated by active market participants are subject to a state supervision mechanism that “provide[s] ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.'” *North Carolina*, 135 S.Ct. at 1116, quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (emphasis added).

If the legislature considers changing the composition of the boards, it is important to note that a simple majority of public members on a board will not suffice. On October 14, 2015, the Federal Trade Commission – indeed the prevailing party in the *North Carolina* case – issued staff guidance
regarding the implementation of North Carolina. See Appendix Ex. A. According to the FTC, “[a]ctive market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure or fact, by active participants in the regulated market (e.g., through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.” Ex. A at p. 8.¹

If California chooses not to reconstitute the boards, it must implement a supervision mechanism which reviews “the substance of the anticompetitive decision, not merely the procedures followed to produce it…” North Carolina, 135 S.Ct. at 1116 (citations omitted, emphasis added). Moreover, “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. The Supreme Court’s Midcal decision holds that “state supervision” must be specific and bona fide; in other words, state “rubber stamping” of a regulatory board’s action will not suffice. Midcal, 445 U.S. at 105-106.

**Anticompetitive regulatory action**

Many of the decisions occupational licensing boards make on a regular basis necessarily “restrain trade.” For example, they decide who is allowed to practice a trade or profession and who is excluded, with the force of law. They revoke licenses, and specify how the licensees are to practice. These acts, if committed by a cartel – or any private grouping of competitors – would be per se antitrust violations under federal law (e.g., Sherman Act, 15 U.S.C. § 1 et seq.) For example, licensing boards control supply by limiting entry into the profession or market. These barriers to entry are effectively “group boycotts” and/or price fixing, which, as per se offenses, constitute antitrust violations without recourse to their “reasonableness” or other related defenses. The federal remedy for any violation of the Sherman Act includes potential felony prosecution, as well as private civil treble damages relief.

**The Attorney General’s Opinion Misses Two Critical Points**

While the Attorney General’s Opinion No. 15-402, issued September 10, 2015, provides a thorough and generally accurate analysis of the North Carolina opinion, there are two elements that must also be considered when implementing a mechanism for protecting California’s regulatory boards from antitrust liability:

1) **Status Quo Rulemaking Review is Inadequate: Neither OAL nor DCA Currently Reviews Any Board Regulations for Anticompetitive Effect:** The opinion’s finding that “… promulgation of regulations is a fairly safe area for board members, because of the public notice, written justification, [Department of Consumer Affairs] Director review, and review by the Office of Administrative Law as required by the Administrative Procedure Act” (Op. at 8) is inaccurate. In fact, there is no entity in state government that currently reviews regulations for anticompetitive effect, nor is there an entity which has the power to

¹ Courts look to FTC guidance with deference with interpreting cases involving its jurisdiction. See Harris v. Home Depot U.S.A., Inc., Case No. 15-CV-01058-VC, --- F.Supp.3d ---; 2015 WL 4270313, at *1 (N.D. Cal. June 30, 2015); see also Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000) (Although an opinion letter by an agency charged with administering a statute, such as the FTC, is not entitled to “Chevron deference” [] it is well established that it is entitled to “respect” and is persuasive).
modify or disapprove of regulations for anticompetitive reasons. The opinion misses two key factors:

a. **The DCA Director is not required to review DCA boards’ regulations for anticompetitive effect.** See Bus. & Prof. Code § 313.1. In fact, that same provision precludes the DCA Director from reviewing several kinds of regulations at all. *Id.*

b. **Anticompetitive impact is not one of the six criteria** reviewed by the Office of Administrative Law (OAL) under current law. *See Gov’t Code § 11349.1,* which lists necessity, authority, clarity, consistency, reference, and nonduplication as the six standards which OAL must review under the Administrative Procedure Act (APA).

2) **Non-DCA Boards Are Excluded from the AG’s Analysis:** The opinion does not consider the impact of the *North Carolina* decision on non-DCA boards -- most significantly, the State Bar of California, whose governing Board of Trustees consists of a supermajority of active market participants, including six lawyers who are elected to the Board by lawyers in various parts of the state. The legislature must consider a mechanism to ensure that decisions and acts of the State Bar and other non-DCA boards are actively supervised with respect to anticompetitive conduct.\(^2\)

**Independent State Supervision Defined**

The FTC also provided specific guidance regarding the post-*North Carolina* features of independent state supervision. *See Appendix Ex. A at p. 10.* Specifically, the following factors determine whether the active supervision requirement has been satisfied:

1) **Consideration of all Relevant Information:** The supervisor must obtain the information necessary for a proper evaluation of the action recommended by the regulatory board, including ascertaining relevant facts, collecting data, conducting public hearings, inviting and receiving public comments, investigating market conditions, conducting studies, and reviewing documentary evidence.

2) **Evaluation of the Substantive Merits:** The supervisor must assess whether the recommended action comports with the standards established by the legislature.

3) **Written Decision:** The supervisor must issue a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such a decision.

**The Center for Public Interest Law’s Proposal for California:**

1) **Ensure expert competitive impact review at OAL:** The Government Code should be amended to ensure OAL is reviewing all rulemaking for anticompetitive effect. For example,

\(^2\) The *North Carolina* opinion expressly includes regulation of attorneys. 135 S. Ct. at 1111, *quoting Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").
the legislature could create a panel of economic experts as a part of OAL, and add a seventh
criterion to Government Code § 11349.1, requiring the panel or other expert(s) to review all
rulemaking for “anticompetitive effect.”

a. Independence: The expert review panel or any other person/entity that is
reviewing these decisions should be independent of any profit stake interest in any
matter before it.

b. Simultaneous Review: The expert review panel should conduct its review of
anticompetitive impact as part of the OAL review process, with OAL simultaneously
handling the other six elements as per current law.

c. Modification/Veto Power: The expert review panel, unlike OAL, should have
broad authority to revise or reject proposed rules, and issue a written decision as to
its findings regarding the anticompetitive impact of the rule. This written decision
would be included with OAL’s final determination.

2) Create a position at OAL to accept and evaluate complaints regarding non-
rulemaking acts and decisions: Many restraints of trade are accomplished by decisions
other than rulemaking, including unreasonably difficult licensing exams, patterns of
enforcement, or as in the North Carolina case, cease and desist letters to non-licensees.
Accordingly, the Government Code should be amended to establish a position, also housed
at OAL, to accept and evaluate complaints about such conduct. This individual would have
a background in the economics of competition, and would refer any board actions that may
have an anticompetitive effect to the expert panel for review and final decision. Individual
disciplinary decisions would not be referred to the expert review panel unless there is a
pattern of revocation or discipline, or a clear anticompetitive motivation beyond an alleged
rule or statutory violation. Such a threshold filter will ensure that non-rulemaking activities
may be addressed and reviewed, without unduly burdening the expert review panel with
complaints about decisions that do not truly have anticompetitive impact.

3) Require a “Competition Impact Statement” for all Rulemaking: The Government
Code should be amended to require agencies conducting rulemaking to include a
“competition impact statement,” similar to the other statements agencies are required to
include in their rulemaking file. See, e.g., Gov’t Code § 11346.3. The competition impact
statement must include the scope and nature of possible restraints; their effect on prices and
competition; and any ameliorating exceptions, checks, or public interest justifications.

4) Require all State Bar Actions to be Reviewed for Anticompetitive Effect: The
legislature must either convert the Bar’s Board of Trustees to a public member
supermajority, or subject the Bar to the same expert review set forth above. This active
supervision could be performed by the OAL panel, or a separate one as the Supreme Court
might decide. The State Bar will contend that it is already “actively supervised” by the
Supreme Court, but this is not the case. The Supreme Court does review the Bar’s proposed

3 This format is designed to accommodate anticompetitive review within the present structure in order to avoid
additional delay. The rulemaking file would be expanded to incorporate anticompetitive impact, and the same
rulemaking file would be simultaneously available to OAL and the expert review panel.
changes to the Rules of Professional Conduct (RPC), but the Business and Professions Code only requires the Supreme Court’s “approval;” it does not mandate anticompetitive impact review. Bus. & Prof. Code § 6076. Nor does the Supreme Court review any changes to the myriad number of non-RPC rule compilations maintained by the State Bar. And the Court reviews State Bar Court disciplinary decisions, but only if such a decision is appealed to it by the subject attorney and the Court decides to hear the matter; its review of State Bar Court disciplinary decisions is discretionary. California Rule of Court 9.16; see also In Re Mason Harry Rose V, 22 Cal. 4th 430 (2000).

CPIL submits that this mechanism will ensure that California complies with the North Carolina decision in a manner that uses an existing structure to minimize delay and complexity. It will provide meaningful review for anticompetitive impact, and ensure that relevant information is provided and considered. It will also ensure that individuals who review this conduct have the relevant expertise as well as independence from a profit stake interest in the decision. Critically, this model is fully supported by the FTC guidance on the subject.

Current Examples of Anticompetitive Actions by California Regulatory Boards

- **California Board of Accountancy** ("CBA"): CBA continues to administer the Uniform Certified Public Accountant Examination as a prerequisite to CPA licensure in California. That test is wholly controlled by the American Institute of Certified Public Accountants (AICPA) – a trade association completely dominated by market participants. All national trade associations that once controlled the licensing exam used by states to bar entry into a profession have divested themselves of such control due to the obvious conflict of interest – except the CPA profession. Only the accountancy profession – in the form of the AICPA – retains control over the licensing examination used in 54 jurisdictions to license its members. While CBA will argue it retains the power to supervise the exam, there is no evidence it has actually exercised such supervision in a way that would insulate the Board from antitrust liability as required by *Midcal*. Instead it impermissibly delegates this authority to the AICPA.

- **Medical Board of California's Contemplated Support of the Federation of State Medical Boards’ “Licensing Compact”**: If the Medical Board enters into this compact developed by the FSMB, it would necessarily delegate some of its licensing authority to other state medical boards and to a new commission within FSMB – all of which are dominated by active market participants in the medical profession.

- **Veterinary Medical Board**: VMB is currently considering proposed regulations mandating that “animal rehabilitation” may be performed by non-veterinarians only under the direct supervision of a licensed veterinarian. These proposed regulations have been challenged by hundreds of individuals and groups which argue that many aspects of “animal rehabilitation” – as defined in the proposed rules – do not constitute the practice of veterinary medicine and may not be restricted by the Board; these commenters also argue that the Board is simply attempting to protect the business of its DVM licensees by limiting business competition from non-veterinarians.
Center for Public Interest Law’s Interest and Qualifications

The Center for Public Interest Law (CPIL) is a nonprofit, nonpartisan, academic center of research, teaching, learning, and advocacy in regulatory and public interest law based at the University of San Diego School of Law. Since 1980, CPIL has studied the state’s regulation of business, professions, and trades, and monitors the activities of state occupational licensing agencies, including the regulatory boards within the Department of Consumer Affairs (DCA). CPIL publishes the California Regulatory Law Reporter, which chronicles the activities and decisions of 25 California regulatory agencies. CPIL’s founder and Executive Director is Professor Robert C. Fellmeth, who holds the Price Chair in Public Interest Law at the USD School of Law. Prior to founding CPIL, Professor Fellmeth was an antitrust prosecutor at the San Diego District Attorney for nine years; he was cross-commissioned as a U.S. Attorney so he could bring antitrust suits in federal court. He co-authors California White Collar Crime and Business Litigation, 4th Ed. (with Thomas A. Papageorge) (Tower, 2013).

CPIL’s expertise has long been relied upon by the legislature, the executive branch, and the courts where the regulation of licensed professions is concerned. CPIL personnel have served as enforcement monitors at the State Bar (1987-1992), the Medical Board of California (2003-2005), and the Contractors’ State License Board (2001-2003). These multi-year projects have resulted in numerous reports and successful reform legislation at these agencies.