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*George Mason Law Review's Twentieth Antitrust Symposium:  
Twenty Years in Antitrust and Lessons for a New Administration*

Antonin Scalia Law School, George Mason University  
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*Hon. Maureen K. Ohlhausen\**

INTRODUCTION

Thank you, Henry, for the introduction. I am very pleased to be joining you this morning at the Antonin Scalia Law School, my alma mater, to open the Law Review's 20th Annual Antitrust Symposium.<sup>1</sup> Although this is my first time addressing you as Acting Chairman of the FTC, I will focus on a topic that has defined much of my legal career: economic liberty.

Margaret Thatcher observed, "There can be no liberty unless there is economic liberty." Like her, I believe in the power of competition and free-markets to spur innovation, new business models, economic opportunity and growth. The competitive process not only drives our economy, it provides greater access, choice, quality, and other benefits for consumers. And the freedom to work at a job of our choosing is fundamental to the American way of life.

My belief in the power and benefits of free markets has motivated my ongoing fight for economic liberty. I am proud of my role in the work started by Tim Muris in 2001 to limit antitrust immunity for anticompetitive private

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<sup>1</sup> The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

actions under the color of state authority.<sup>2</sup> That state action work set the foundation for recent successes, most notably the FTC Supreme Court victory in the NC Dental case.<sup>3</sup>

Yet, despite those important wins, far too many job-seeking Americans still face significant government barriers that restrict participation in the economy. And few of these barriers have a substantial public safety or health rationale.

As Acting Chairman of the FTC, I have committed to make economic liberty and regulatory humility touchstones of my leadership of the agency. Today, I'd like to tell you more about how I plan to carry out that commitment, with a particular focus on the problem of occupational licensing regulation.

### I. *Occupational Licensing Inhibits Economic Liberty*

Too often, government regulations block or suppress competition and diminish economic opportunities. This can happen because of overreach or at the behest of incumbent market participants. Approximately two years ago, I spoke at George Mason's Global Antitrust Economic Conference about what I call the "Brother, May I?" problem.<sup>4</sup> That problem occurs where a competitor controls market entry of others, often through some kind of regulatory permission. I also talked about the "Mother, May I?" problem, which involves an innovator needing government permission to enter a market.<sup>5</sup> Such regulations can endure for decades. Unfortunately, the trend has been to add rather than eliminate or narrow these regulations.

Last week, the Heritage Foundation released its global Index of Economic Freedom. For the ninth time since 2008, America has lost ground.<sup>6</sup>

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<sup>2</sup> See FTC Press Release, Staff Report Recommends Clarifications of the Antitrust State Action Doctrine (Sept. 23, 2003) (in 2001, FTC Chairman Timothy J. Muris established the State Action Task Force; in 2003, the task force produced its report; the Commission continued its work on state action issues), <https://www.ftc.gov/news-events/press-releases/2003/09/ftc-staff-report-recommends-clarifications-antitrust-state-action>; FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (2003), [https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports/report-state-action-task-force-recommendations-clarify-and-reaffirm-original-purposes-state-action/stateactionreport_0.pdf).

<sup>3</sup> N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015).

<sup>4</sup> Prepared Remarks of Commissioner Maureen K. Ohlhausen, *Brother May I?: the Challenge of Competitor Control Over Market Entry*, May 29, 2016, <https://www.ftc.gov/system/files/documents/public-statements/645861/150529gmukeynote.pdf>.

<sup>5</sup> *Id.*

<sup>6</sup> Anthony B. Kim, *US Economic Freedom Has Hit a Historic Low. What Happened?*, Feb. 15, 2017, <https://www.heritage.org/international-economies/commentary/us-economic-freedom-has-hit-historic-low-what-happened>.

The United States now ranks 17th out of 180 rated economies.<sup>7</sup> Business freedom and labor freedom, two of the twelve factors evaluated, are among those that have declined since 2011.<sup>8</sup>

Occupational licensing stands out as a particularly egregious example of this erosion in economic liberty. In the 1950s, less than five percent of jobs required a license.<sup>9</sup> Estimates today place that figure between 25 and 30 percent.<sup>10</sup> Today, licensing requirements reach far beyond doctors, electricians, and other fields where public health and safety issues are clearer. Instead, licensing requirements extend to auctioneers, interior designers, make-up artists, hair-braiders and numerous other occupations.<sup>11</sup>

The public safety and health rationale for regulating many of those occupations ranges from dubious to ridiculous. Consumers can, and do, easily evaluate the quality of interior designers, make-up artists, hair-braiders, and others. I challenge anyone to explain why the state has a legitimate interest in protecting the public from rogue interior designers carpet-bombing living rooms with ugly throw pillows. Market dynamics will naturally weed out those who provide a poor service, without danger to the public. For many other occupations, the costs of added regulation limit the number of providers and drive up prices. These costs often dwarf any public health or safety need and may actually harm consumers by limiting their access to beneficial services.

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Other evidence suggests that such regulations are unnecessary or overly broad. Studies by the Institute for Justice and other organizations have found that different states regulate different occupations.<sup>12</sup> All states have licensing requirements for doctors, school bus drivers, and truck drivers. But beyond

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<sup>7</sup> *Id.*; see also Heritage 2017 Index of Economic Freedom, Country Rankings, Feb. 2017, <https://www.heritage.org/index/ranking>.

<sup>8</sup> Heritage 2017 Index of Economic Freedom; Explore the Data, Feb. 2017, <https://www.heritage.org/index/explore?view=by-variables?view=by-variables> (selecting United States 2011-2017).

<sup>9</sup> See Morris M. Kleiner, THE HAMILTON PROJECT, REFORMING OCCUPATIONAL LICENSING BOARDS (2015), <http://brook.gs/1ZARuJ2>.

<sup>10</sup> See *id.*; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173 (2013); Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 BRIT. J. INDUS. REL. 2 (2010).

<sup>11</sup> See generally Dick M. Carpenter II, PH. D., Lisa Knepper, et al., LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING (2012) [IJ Report], <http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf>.

<sup>12</sup> See, e.g., IJ Report *supra* note 11; Kleiner *supra* note 9; Prepared Statement of Jason Furman, Chairman, Council of Economic Advisors, *License to Compete: Occupational Licensing and the State Action Doctrine*, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary (Feb. 2, 2016), <https://www.judiciary.senate.gov/imo/media/doc/02-02-16%20Furman%20Testimony.pdf>.

those and a handful of other professions, state licensing of occupations varies significantly.<sup>13</sup> Moreover, the particular licensing requirements, such as the number of months of training required, varies greatly among states regulating the same occupation.<sup>14</sup> This uneven licensing of the same occupation and different requirements to obtain the same license across states strongly suggest that many occupational licenses do not advance public health, safety, or other legitimate goals.

The proliferation of unnecessary and overbroad occupational licensing regimes not only burdens consumers and the economy, it hurts many average Americans who want to enter these occupations.<sup>15</sup> A 2011 study using standard economic models estimated that restrictions from occupational licensing resulted in up to 2.85 million fewer jobs with an annual cost to consumers of \$203 billion.<sup>16</sup>

I am particularly concerned that occupational licensing disproportionately affects those seeking to move up the lower and middle rungs of the economic ladder, as well as military families and veterans. Occupational licensing regulations can prevent individuals from using their vocational skills and entering new professions, as well as starting small businesses or creating new business models. Furthermore, because military families often must move frequently, occupational licensing is a significant barrier for a trailing spouse seeking to practice his or her profession in a new state that may have additional or different licensing requirements. Occupational licensing also can be a barrier for veterans seeking to return to civilian employment. Reforms that promote reciprocity among states and credit work experience in place of additional educational requirements are among the changes that would help remove barriers to entry and competition, particularly for military families and veterans.

If such regulations are not necessary to protect consumers, why do they exist? Often, such regulation reflects regulatory capture, replacement, or

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., Prepared Remarks of Commissioner Maureen K. Ohlhausen, *From Hammurabi to Hair Braiding: The Ongoing Struggle for Economic Liberty*, Apr. 28, 2016, [https://www.ftc.gov/system/files/documents/public\\_statements/946853/160428instituteofjustice.pdf](https://www.ftc.gov/system/files/documents/public_statements/946853/160428instituteofjustice.pdf); Prepared Statement of the Fed. Trade Comm'n, *License to Compete: Occupational Licensing and the State Action Doctrine*, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary (Feb. 2, 2016), <https://www.ftc.gov/public-statements/2016/02/prepared-statement-federal-trade-commission-license-competite-occupational>; Prepared Statement of Jason Furman, Chairman, Council of Economic Advisors, *License to Compete: Occupational Licensing and the State Action Doctrine*, before the U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Committee on the Judiciary (Feb. 2, 2016), <https://www.judiciary.senate.gov/imo/media/doc/02-02-16%20Furman%20Testimony.pdf>.

<sup>16</sup> See Morris M. Kleiner, Alan B. Krueger & Alex Mas, *A Proposal to Encourage States to Rationalize Occupational Licensing Practices: A Proposal to the Brookings Institution Hamilton Project*, Apr. 2, 2011; Kleiner *supra* note 9.

overreach. Indeed, as in the *North Carolina Dental* case, it is often not the state itself acting but self-interested active market incumbents imposing occupational licensing requirements to prevent competition. Public choice theory recognizes that industry capture of regulators for private economic gain is most likely when incumbent providers can obtain a concentrated benefit while dispersing the competitive harm among many consumers.<sup>17</sup> Such unproductive rent-seeking behavior limits competition in the market. And it often protects higher pricing by incumbents than would exist in a competitive market.

## II. *An FTC Economic Liberty Task Force*

This “Brother May I” problem is precisely what I would like to work with interested parties including the states, to prevent and where possible reverse. Often, state and local legislators are only hearing one side of the story from the party who will receive the concentrated benefit. They often do not hear about the substantial, albeit diffuse costs such regulation will impose on the very constituents they wish to protect. I think it is important that state and local legislators hear both sides of the story.

To be clear, I believe in federalism and the important principles that it embodies. If politically accountable state actors have a clearly articulated policy and make the decision to displace competition in favor of state regulation, we must and should respect that decision. Their constituents will hold them accountable.

Often, however, such regulation reflects not the expressed will of the people through the political process, but rather regulatory capture by a narrow group of interests. It often lacks accountability to the state’s voters and imposes high cost on the state’s consumers. This is especially true when a state delegates regulatory authority to a licensing board controlled by the profession itself. Studies suggest that in some states, market participants control more than 90 percent of licensing boards.<sup>18</sup> When market participants control state boards that impose regulations on potential new entrants and competition in their own profession, self-interest often supersedes consumer welfare and undermines the industry knowledge that such participants can impart.

So the question is: As a federal competition agency, what can the FTC do?

Here is my response: I am creating an Economic Liberty Task Force within the FTC to advance economic liberty issues, with a particular focus on occupational licensing regulations. The Task Force will bolster the

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<sup>17</sup> See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 35 (1998).

<sup>18</sup> See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103, 1157-64 (2014).

agency's efforts to address occupational licensing restrictions and other barriers to economic opportunities.

The Task Force will coordinate the use of the FTC's tools to increase economic liberty. The FTC has two primary tools: advocacy and enforcement. Since the 1970s, the Commission has issued hundreds of comments and amicus briefs to states, state boards, and self-regulatory entities addressing professional licensure across a wide-range of industries.<sup>19</sup> State legislators and boards often ask the FTC for input on changes to existing occupational regulations. In its submissions, for example, the Commission has identified the benefits of expanding the use of telehealth for the provision of certain services, maintaining the same standard of care but expanding access to needed services, often to underserved and remotely located populations.<sup>20</sup> The FTC also has advocated for expanded roles for advanced practice registered nurses, APRNs, and for physician assistants to increase access, choice, and even quality through enhanced competition while still meeting public health and safety goals.<sup>21</sup>

As an early step, the task force will create a special area of the FTC website focused on economic liberty. This portal will highlight the FTC's excellent work on competition advocacy and occupational licensing, and it will also gather the many existing resources of the FTC into a central repository for other stakeholders to access.

The Task Force will also seek input from an array of parties. Fortunately, many people want to expand economic opportunity, including many state leaders. Thus, the Task Force will seek to partner with stakeholders,

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<sup>19</sup> For an overview of the Commission's advocacy efforts in the area of occupational licensing and regulation, see Prepared Statement of Fed. Trade Comm'n on Competition and the Potential Costs and Benefits of Professional, *Barriers to Entrepreneurship: Examining the Anti-Trust Implications of Occupational Licensing*, before the H. Comm. on Small Bus., 113th Cong. 14 (2014), <https://www.ftc.gov/public-statements/2014/07/prepared-statement-federal-trade-commission-competition-potential-costs>.

<sup>20</sup> See, e.g., FTC Staff Comment to the Delaware Board of Occupational Therapy Practice (Aug. 3, 2016), <https://www.ftc.gov/news-events/press-releases/2016/08/ftc-staff-comment-delaware-occupational-therapy-board-proposal> (regarding its proposed telehealth regulation); FTC Staff Comment to the Delaware Board of Dietetics/Nutrition (Aug. 16, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/08/ftc-staff-comment-delaware-board-dieteticsnutrition>; FTC Staff Comment to Steve Thompson, Rep., Alaska State Legislature (Mar. 25, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/03/ftc-staff-comment-alaska-state-legislature-regarding> (regarding telehealth provisions in Senate Bill 74, which would allow licensed Alaska physicians located out-of-state to provide telehealth services).

<sup>21</sup> See, e.g., FTC Staff Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses*, <https://www.ftc.gov/news-events/press-releases/2014/03/ftc-staff-paper-state-legislators-should-carefully-evaluate>; FTC Staff Comment to the Dep't of Veterans Affairs (July 25, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/07/ftc-staff-comment-department-veterans-affairs> (supporting proposed rule that would allow APRNs to provide services required by the VA without the oversight of a physician); FTC Staff Comment to the Iowa Dep't of Public Health (Dec. 20, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/12/ftc-staff-comment-professional-licensure-division> (regarding the appropriate level of supervision of physician assistants).

including state elected leaders and other officials, to eliminate and narrow overbroad occupational licensing restrictions that are not narrowly tailored to satisfy legitimate health and safety goals.

This is a time of change and many Americans are demanding less regulation and more economic opportunity. I am pleased to say that governors and state legislators in many states are already identifying problematic occupational licensing and prioritizing the roll back of occupational regulations. Accordingly, I hope to create a new level of partnership with Governors, state Attorneys General, state legislative leaders, and other state and local officials, to integrate competition considerations into their decision-making process.

I have good reason for optimism in developing these partnerships. For example, during the 2012-2013 legislative sessions, Iowa Governor Terry Branstad vetoed a proposal to license four additional counseling occupations in the health care sector, favoring voluntary certification.<sup>22</sup> He continues to include reform of occupational licensing as part of his agenda.<sup>23</sup> At that same time, then Governor Mike Pence vetoed licensing in Indiana of diabetes educators, anesthesiologist assistants, and dietitians.<sup>24</sup> And initiatives by governors appear to be increasing. Earlier this year, the governor of Nebraska launched an occupational licensing reform initiative.<sup>25</sup> The governors in Arizona, Missouri, and Wisconsin also are each seeking to remove occupational licensing restrictions that limit job opportunities and hamstring those seeking to start small businesses.<sup>26</sup>

I am hopeful that we can help inform the review of new and existing regulations and encourage states to incorporate competition considerations in their assessments. This includes examining, among other things: the extent

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<sup>22</sup> Letter from Terry E. Branstad, Gov., State Of Iowa, to the Honorable Kraig Paulsen, Speaker of the House, State Of Iowa (Apr. 26, 2013), <https://governor.iowa.gov/sites/default/files/wp-content/uploads/2013/04/4-26-13-Veto-Message-for-HF-569.pdf>.

<sup>23</sup> Letter from Terry E. Branstad, Gov., State of Iowa, to the Honorable Paul Pate, Sec'y of State, State of Iowa (May 27, 2016), <https://governor.iowa.gov/sites/default/files/documents/House%20File%202459%20Veto%20Message.pdf>.

<sup>24</sup> Press Release, Office of Gov. Mike Pence, State of Indiana, Governor Pence Vetoes Licensing Legislation (May 8, 2013), [http://www.in.gov/archivecalendar/EventList.aspx?fromdate=5/8/2013&to date=5/8/2013&display=Day&type=publi%20c&eventidn=98912&view=EventDetails&information\\_id=181201&print=print](http://www.in.gov/archivecalendar/EventList.aspx?fromdate=5/8/2013&to date=5/8/2013&display=Day&type=publi%20c&eventidn=98912&view=EventDetails&information_id=181201&print=print).

<sup>25</sup> Press Release, Office of Gov. Pete Ricketts, State of Nebraska, Gov. Ricketts, Senators Unveil Occupational Licensing Reforms (Jan. 10, 2017), <https://governor.nebraska.gov/press/gov-ricketts-senators-unveil-occupational-licensing-reforms>.

<sup>26</sup> Press Release, Office of the Governor Doug Ducey, State of Arizona, Eliminating Economic Burdens For Families And Small Businesses (Sep. 28, 2016), <https://azgovernor.gov/governor/blog/2016/09/eliminating-economic-burdens-families-and-small-businesses>; Eric Greitens, Governor, State of Missouri, 2017 State of the State Address: A Message From The People (Jan. 17, 2017) <https://governor.mo.gov/news/speeches/2017-state-state-address>; Press Release, Office of Gov. Scott Walker, State of Wisconsin, Governor Walker's 'Reform Dividend' (Feb. 8, 2017), <https://walker.wi.gov/press-releases/governor-walker-highlights-reform-dividend-governors-conference-economic-development>.

to which a regulation could affect, or already has affected, competition; whether there is concrete evidence a regulation is necessary to achieve a legitimate public policy goal; whether the regulation is narrowly tailored and reasonably limited to achieve the identified goal; and whether less restrictive alternatives might be available that would satisfy the goal while preserving to the greatest extent possible the benefits of increased competition.

By focusing the FTC's expertise, stakeholders' knowledge, and the FTC's advocacy efforts in partnership with state actors, I believe we can bring more competition into markets, help those seeking to enter and compete, and enhance consumer choice and access, innovation and quality.

Of course, in some instances enforcement may be an appropriate tool, consistent with the Supreme Court's ruling in *North Carolina Dental* and other state action cases.<sup>27</sup> This is particularly the case when the "Brother, May I?" problem exists. Active market participants still control many state boards that impose licensing restrictions. Thus, the question revolves around whether the state is actively supervising the board actions that displace competition. When warranted, the FTC will bring enforcement actions in appropriate cases. But advocacy and partnership will be the primary work of the FTC's Economic Liberty Task Force.

## CONCLUSION

Economic liberty affects American workers and consumers in their everyday lives. As the country struggles to revive economic opportunity for all, we have a unique opportunity to challenge unnecessary occupational licensing. Together with the many entities who have done good work in this area and with state and local partners, we can make progress on removing longstanding barriers to competition, and thereby expand economic liberty. I look forward to overseeing the Task Force's work on this important goal. Thank you.

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<sup>27</sup> See, e.g., *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. 1101; *Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).