



CENTER FOR PUBLIC INTEREST LAW
University of San Diego School of Law
5998 Alcalá Park
San Diego, CA 92110-2492
P: (619) 260-4806 / F: (619) 260-4753

2751 Kroy Way
Sacramento, CA 95817 / P: (916) 844-5646
www.cpil.org



June 20, 2018

The Hon. Hannah-Beth Jackson, Chair, and members
Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, CA 95814

Re: AB 2483 (Voepel) — Oppose Unless Amended

Dear Chair Jackson:

The Center for Public Interest Law (CPIL), Responsive Law, and California Public Interest Group, Inc. (CALPIRG) strongly urge you to oppose AB 2483 (Voepel), unless it is amended to include important provisions to protect the public from potentially anticompetitive behavior by professional members of regulatory boards, and ensure that taxpayers are not left financially responsible for board members' violations of federal antitrust laws.

While the proposed bill may seem innocuous at first glance, it has dire implications for the public that must not be overlooked. As a former plaintiff's-side antitrust litigator and consumer advocates, we can tell you that this bill—which opens up the extremely deep pockets of a state with a \$200 billion budget without imposing any concomitant reforms to fix the underlying problem—will most certainly increase the likelihood that antitrust lawsuits will be filed in California: on the taxpayers' dime.

CPIL'S, RESPONSIVE LAW'S, AND CALPIRG'S EXPERTISE IN BOTH ANTITRUST AND LICENSING BOARD MATTERS

The undersigned organizations are well-positioned to lend their expertise to this Committee.

CPIL employs attorneys and academics who are experts both in antitrust law and occupational licensing law—two complex areas of jurisprudence. Concerning antitrust law, CPIL's Executive Director created the nation's first antitrust enforcement unit in a local law enforcement agency (the San Diego District Attorney's Office). He served as a state antitrust prosecutor and was cross-commissioned as a federal antitrust prosecutor to bring federal actions as well. He has brought numerous cases and obtained judgments, many of them involving the intersection of "state action" and federal antitrust law. Moreover, CPIL's Administrative Director has seven years of civil antitrust litigation experience, and two years clerking for a Federal District Judge.

Senator Jackson
June 20, 2018
2

CPIL itself brought antitrust actions, including *Shames v. California Travel & Tourism Comm'n, et al.*, 626 F.3d 1079 (9th Cir. 2010), in which the Ninth Circuit upheld CPIL's claim of antitrust liability involving a state agency. Regarding licensing agencies, the Legislature and executive branch have long relied upon CPIL's expertise. CPIL staff have been appointed as Enforcement Monitors for the State Bar, the Contractors' State License Board, and the Medical Board. For 38 years, we have run an academic program at the law school focused on the licensed professions; a program unique in the nation. That work includes the publication of the [California Regulatory Law Reporter](#).¹

Responsive Law is a national nonprofit organization working to make the civil legal system more affordable, accessible, and accountable to its consumers. It testified on numerous occasions to the American Bar Association and to state regulators about the bar's responsibility to give greater weight to increasing access to justice when interpreting rules of professional conduct, and to avoid interpretations that have an anticompetitive impact. Responsive Law led a coalition of businesses, academics, and non-profits in filing an amicus brief with the U.S. Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, outlining the impact of anticompetitive regulations implemented by state bar associations without active state supervision on consumers.

CALPIRG is a consumer group that stands up to powerful interests whenever they threaten our health and safety, our financial security, or our right to fully participate in our democratic society. For decades, CALPIRG has stood up for consumers, countering the influence of big banks, insurers, chemical manufacturers, and other powerful special interests.

AB 2483 LACKS CRITICAL PUBLIC PROTECTION SAFEGUARDS

AB 2483 aims to address the U.S. Supreme Court's landmark decision in [North Carolina Board of Dental Examiners v. FTC](#), U.S. , 135 S. Ct. 1101 (2015) ("*North Carolina*"). That decision recognizes the inherent conflict of interest that exists when a state licensing board is controlled by members of the profession regulated by that board. Therefore, it holds **that boards are not immune from federal antitrust scrutiny unless 1) they are controlled by public members (and not licensees) or 2) the state has created a mechanism to actively supervise the acts and decisions of these boards to ensure they benefit the public**, and not merely the professions themselves.² In other words, the state must take appropriate steps to ensure that regulatory boards are, in fact, fulfilling their statutory mandate to prioritize public protection above all other interests.³

¹ <http://digital.sandiego.edu/crlr/>.

² See also the Federal Trade Commission Staff [guidance](#) regarding antitrust compliance for state boards responsible for regulating occupations, including recommendations for compliance with the *North Carolina* decision: www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

³ See, e.g., Business and Professions Code section 2001.1 ("Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and

Today—over three years after the *North Carolina* decision, and although many of its boards are in fact controlled by members of the regulated profession—California has yet to implement any of the safeguards the Supreme Court prescribed to ensure its boards are in full compliance with the antitrust laws.⁴ Now, rather than implement reforms that would obviate the likelihood of antitrust liability in the first place, AB 2483 would instead simply indemnify any Board members who violate the law!

Under this proposal, consumers would be doubly harmed: first, by higher prices due to anticompetitive policies imposed by the offending boards; and, then again, as taxpayers on the hook to pay the bill. This is not only unjust, but also unnecessary.

AB 2483 IMPOSES A SIGNIFICANT FINANCIAL BURDEN UPON THE STATE AND TAXPAYERS

We respectfully disagree with the Assembly analyses opining that this bill would impose “negligible fiscal impact” on the Department of Consumer Affairs (“DCA”) or its boards. To the contrary, the risk of antitrust litigation against state boards on a *North Carolina* theory is real. As you know, violations of the federal statutes here at issue are profound. They are criminal felony offenses and also can trigger traditional civil antitrust cases for damages, which are automatically trebled, plus costs and attorney fees—significant sums of money, often in the millions of dollars.

Indeed, at least 25 cases have been filed against regulatory boards nationwide on this theory, and multiple district courts have upheld antitrust claims on motions to dismiss.⁵

TREBLE DAMAGES ARE PUNITIVE AND SHOULD NOT BE INDEMNIFIED BY THE STATE

AB 2483’s proposal to deem treble damages in antitrust matters “not punitive” is similarly problematic. California has maintained a longstanding policy that punitive sanctions must NOT be indemnified by the taxpayers. We do not assess the public for the intended punishment of liable individuals. Why, then, would we make an exception for collusive behavior?

The very nature of treble damages is punitive—they are intended to deter what Congress (and this state via the Cartwright Act) has determined is egregiously wrongful conduct. For California

disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.”)

⁴ [SB 1194 \(Hill\)](#), a 2016 bill which CPIL supported, would have codified the absolute minimum action that California must take in order to implement the *North Carolina* decision, but that bill was defeated in the face of objections from various trade associations.

⁵ See, e.g., *Veritext Corp. v. Bonin*, 259 F. Supp. 3d 484, 493 (E.D. La. 2017); *Colindres v. Battle*, No. 1:15-CV-2843-SCJ, 2016 WL 4258930, at *8-*9 (N.D. Ga. June 6, 2016); *Teladoc, Inc. v. Texas Med. Bd.*, No. 1-15-CV-343 RP, 2015 WL 8773509, at *6-*10 (W.D. Tex. Dec. 14, 2015).

Senator Jackson
June 20, 2018
4

to declare a policy that they should not be treated as such for state officials is presumptuous and insulting.

THIS BILL SHOULD BE AMENDED TO ENSURE NORTH CAROLINA COMPLIANCE

If the Legislature truly wishes to avoid antitrust liability, it should amend this bill to comply with the safeguards prescribed by the Supreme Court.

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 consumers from the harm that flows from such anticompetitive conduct, and to protect boards and their members from antitrust liability, California must ensure that these boards are subject to a state supervision mechanism that “provide[s] *‘realistic assurance’* that a [board’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, 100-101 (1988)) (emphasis added).

What is “active state supervision?” According to the United States Supreme Court, to qualify as “active state supervision” three elements are required:

- “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 state supervisor may not itself be an active market participant.”

Id. at 1116-117 (citations omitted, emphasis added).

For all of these reasons, CPIL, Responsive Law, and CALPIRG urge you to **oppose** AB 2483, unless it is amended to impose a mechanism, like the one initially proposed in SB 1194 (Hill), that would simultaneously protect the public from undue anticompetitive harm, and also obviate the need to indemnify board members. We would be happy to work with you in the development of such a mechanism if you are so inclined.

Very Sincerely,



Bridget Fogarty Gramme
Administrative Director,
Center for Public Interest Law
University of San Diego School of Law



Tom Gordon
Executive Director
Responsive Law

Senator Jackson

June 20, 2018

5

A handwritten signature in cursive script that reads "Michael Landis".

Michael Landis

Litigation Director

California Public Interest Research Group, Inc.
("CALPIRG")

cc. Hon. Randy Voepel;
Alexis Podesta, Secretary, Business, Consumer Services, and Housing Agency
Dean Grafilo, Director of the Department of Consumer Affairs
Hon. Jerry Hill, Chair, Senate Business, Professions and Economic Development
Committee
Hon. Evan Low, Chair, Assembly Business and Professions Committee