ALAN WILSON
ATTORNEY GENERAL

April 20, 2016

The Honorable Chip Huggins, Member
South Carolina House of Representatives
District No. 85
323B Blatt Building
Columbia, SC 29201

Dear Representative Huggins:

Attorney General Alan Wilson has referred your request dated April 14, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

**Question:**
Whether the South Carolina General Assembly has the authority to regulate nonprofit corporations the way 2015-2016 Bill S.687 attempts to do so

**Discussion:**
It is this Office's understanding the current version of proposed 2015-2016 Bill S.687 defines "mobile veterinary practice" as:

> any form of clinical veterinary practice that may be transported or moved from one location to another for delivery of services to a pet. 'Pet' means a domesticated animal kept as a pet but does not include livestock, as defined in Section 47-0-210(1).

S. 687 40-69-265(C). The current version of the proposed bill prohibits mobile veterinary practices "affiliated with, operated by, or supported by a public or private nonprofit animal shelter" from operating within two miles of the nearest privately-owned veterinarian practice in some counties or within one mile in other counties. 2015-2016 S.C. Bill S. 687 (proposed § 40-69-265(B)) (emphasis added). It is our understanding it is the prohibition of nonprofit animal shelters from operating a mobile veterinary clinic from certain areas that you question.

As you are likely aware, the General Assembly's power in South Carolina is plenary, except as limited by the Constitution. See, e.g., Op. S.C. Att'y Gen., (S.C.A.G. February 18, 2015) (citing Hampton v. Haley, 403 S.C. 395, 403-4, 743 S.E.2d 258, 262 (2013)). As this Office has previously stated regarding our General Assembly's power to legislate:

> [i]nitially, it must be noted that the statute is presumed to be valid as enacted unless and until a court declares it to be invalid. Our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the

> General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939).
> Moreover, only a court and not this Office may strike down an act of the General Assembly as inequitable or unconstitutional. While this Office may comment upon what we deem an apparent inequity or unconstitutionality, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997. Furthermore, pursuant to the separation of powers doctrine, it is a well established principle of law that only the General Assembly can repeal or amend a statute that it has enacted.

Op. S.C. Att'y Gen., 2003 WL 21471509, (S.C.A.G. June 11, 2003). Thus we begin this opinion with the presumption that the proposed bill's handling of nonprofit corporations does not violate any authority.

The South Carolina Constitution authorizes the South Carolina General Assembly to provide for the law regarding corporations and their "powers, rights, duties, and liabilities" within the State. S.C. Const. Art. IX, § 2. The General Assembly has power to amend or repeal all or any part of Chapter 31 of Title 33 (the South Carolina Nonprofit Corporation Act) at any time. S.C. Code § 33-31-102. Nonprofit corporations in South Carolina have many rights, including[1] perpetual duration, and:

> the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
> ...
> (4) to purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with, real or personal property or any legal or equitable interest in property, wherever located;
> ...
> (7) to make contracts and guaranties, incur liabilities, borrow money, issue notes, bonds, and other obligations, and secure any of its obligations by mortgage or pledge of any of its property, franchises, or income;
> ...
> (17) to carry on a business;
> (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

S.C. Code § 33-31-302. Moreover, South Carolina General Assembly regulates animals and animal shelter in Title 47 of the South Carolina Code of Laws. The General Assembly authorizes counties and municipalities to enact ordinances and promulgate regulations concerning animals, animal shelters and to create animal shelters. S.C. Code §§ 47-3-20, 47-3-70, 47-3-55, et seq.. The General Assembly regulates veterinarians in Title 40 of Chapter 69. Veterinarians must be licensed by the Department of Labor, Licensing, and Regulation. S.C. Code § 40-69-5. Additionally, the General Assembly created the Board of Veterinary Medical Examiners and defined its powers and duties. S.C. Code § 40-69-10, et seq.. The General Assembly has defined the practice of veterinary medicine as:

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[1] Unless its articles of incorporation state otherwise

> (13) "Practice of veterinary medicine" means to:
>
> > (a) diagnose, prescribe, or administer a drug, medicine, biologic, appliance, or application or treatment of whatever nature for the cure, prevention, or relief of a wound, fracture, or bodily injury or disease of an animal;
> > (b) perform a surgical operation, including cosmetic surgery, upon an animal;
> > (c) perform a manual procedure for the diagnosis or treatment for sterility or infertility of an animal, including embryo transplants;
> > (d) offer, undertake, represent, or hold oneself out as being qualified to diagnose, treat, operate, or prescribe for an animal disease, pain, injury, deformity, or physical condition;
> > (e) use words, letters, or titles in such connection or under such circumstances as to induce the belief that the person using them is engaged in the practice of veterinary medicine.

S.C. Code S 40-69-20(13) (1976 Code, as amended). Certainly, the General Assembly has the authority to legislate regarding nonprofit corporations in South Carolina including those providing certain veterinary services..

It is this Office's understanding there are concerns of possible antitrust violations regarding the bill and the General Assembly's authority specifically in regards to nonprofit corporations. South Carolina law prohibits both monopolies and agreements or contracts that adversely affect competition or prices. S.C. Code §§ 39-3-10; 39-3-120. Any agreement or contract prohibited by law includes those "between two or more ... corporations ... that may affect in any manner the full and free competition ... or prices in any branch of trade, business or commerce." S.C. Code §§ 39-3-10. South Carolina also prohibits unfair competition or unfair acts by its Unfair Trade Practices Act. S.C. Code § 39-5-10 et seq.. Federal law has similar prohibitions, including contracts and conspiracies that result "in restraint of trade or commerce among the several States or with foreign nations." 15 U.S.C.A. § 1; 15 U.S.C.A. § 45, etc.. However, the Local Government Antitrust Act prohibits damages from claims based on official actions by a local government. 15 U.S.C.A. §§ 35, 36. Thus, if this were a county or city law passed in furtherance of regulation authorized by the State, a plaintiff would not be able to recover damages against the county or city, even if it violated antitrust laws. 15 U.S.C.A. §§ 34-36. The same prohibition of damages remains on the State level, as long as the State is acting in "clearly expressed state policy." 18 S.C. Jur. Monopolies § 18 (citing Savage v. Waste Management, Inc., 623 F.Supp. 1505 (D.S.C. 1985), etc.). "Clearly expressed state policy" includes action that is "a 'foreseeable result' of regulatory activity authorized by the state." Savage v. Waste Management, Inc., 623 F. Supp. 1505, 1508 (D.S.C. 1985) (quoting Town of Hallie v. City of Eau Clair, 471 U.S. 34, 105 S.Ct. 1713, 1717, 85 L.Ed.2d 24 (1985)). It is also our understanding there is question as to the feasibility of enforcement of such a bill in regards to regulating the distance between mobile veterinary clinics associated with a nonprofit shelter and privately-owned veterinary clinics. However, this opinion is only in regards to the authority to pass the bill, not the merits. Therefore, we will leave other issues such as regulation to the General Assembly.

Regarding whether or not there is a valid state policy behind such a restriction on a nonprofit corporation, involves review of the intent for such a bill. For example, if the South Carolina Board of Veterinary

Medical Examiners were to have passed this as a restriction instead of the General Assembly[2], it would be very comparable to the North Carolina State Board of Dental Examiners v. FTC case, 717 F.3d 359 (4th Cir. 2013), 574 U.S. ____ (2015). In that case, the Federal Trade Commission determined that the North Carolina State Board of Dental Examiners violated 15 U.S.C. § 45 by "engaging in unfair competition in the market for teeth-whitening services in North Carolina." N. Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 364 (4th Cir. 2013), aff'd, 135 S.Ct. 1101, 191 L. Ed. 2d 35 (2015). While that case involved dentists regulating their own field of practice under the State's authority, this bill involves the South Carolina General Assembly legislating, not a board. In the North Carolina State Board of Dental Examiners ("Dental Board") case, the Dental Board would be comparable to the South Carolina Board of Veterinary Medical Examiners in that:

> [t]he Board is a state agency, N.C. Gen.Stat. § 90–48, created because the "practice of dentistry" in North Carolina affects "the public health, safety and welfare," N.C. Gen.Stat. § 90–22(1)(a). The eight-member Board is comprised of six licensed dentists, one licensed dental hygienist, and one consumer member. N.C. Gen.Stat. § 90–22(b). Dentists elect the six dental members, and dental hygienists elect the hygienist member. *Id.* § 90–22(c).

N. Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 364 (4th Cir. 2013), aff'd, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015). While we recognize there are differences between the two boards, such in the appointment of members, there are notable similarities. S.C. Code § 40-69-10. In the Dental Board case, the Court explained:

> [w]e begin with the Board's contention that it is exempt from the antitrust laws under the "state action" doctrine.[2] Under this doctrine, the antitrust laws do "not apply to anticompetitive restraints imposed by the States 'as an act of government.' " *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (quoting *Parker v. Brown*, 317 U.S. 341, 352, 63 S.Ct. 307, 87 L.Ed. 315 (1943)). In *Parker*, the Supreme Court announced this doctrine after recognizing that "nothing in the language of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350–51, 63 S.Ct. 307. The *Parker* Court cautioned, however, that a state cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351, 63 S.Ct. 307.
> 345 There are "three situations in which a party may invoke the *Parker* doctrine." *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442 (4th Cir.2006). First, a state's own actions "ipso facto are exempt" from the antitrust laws.[3] *367 *Hoover v. Ronwin*, 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). Second, private parties can claim the *Parker* exemption if acting pursuant to a "clearly articulated and affirmatively expressed as state policy" *and* their behavior is "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (internal quotation marks omitted). Third, as the Supreme Court recently reaffirmed, municipalities and "substate governmental entities do receive

[2] Though this opinion is not implying the State Board of Veterinary Medical Examiners has the authority to do so pursuant to its powers given in S.C. Code § 40-69-70

> immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service." *FTC v. Phoebe Putney Health Sys., Inc.*, — U.S. ——, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (internal quotation marks omitted). ...
> 6 While *Parker* is available in these three circumstances, in *Phoebe Putney* the Court cautioned that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.' " *Phoebe Putney,* 133 S.Ct. at 1010 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)). Thus, "we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.' " *Id.* (quoting *Ticor,* 504 U.S. at 635, 112 S.Ct. 2169).
> ...
> The FTC Act makes unlawful "[u]nfair methods of competition." 15 U.S.C. § 45(a)(1). In this case, the FTC determined that the Board's conduct violated *371 § 45(a)(1) because it was a violation of § 1 of the Sherman Act, which we have previously recognized is a "species" of "unfair competition." *South Carolina Bd. of Dentistry,* 455 F.3d at 443 n. 7. Accordingly, because the FTC limited its review to whether the Board's conduct violated § 1, we do the same. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination ..., or conspiracy, in restraint of trade." 15 U.S.C. § 1. To establish a § 1 antitrust violation, a plaintiff must prove "(1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade." *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir.2002). Here, the Board challenges both of these requirements, arguing that, under the intracorporate immunity doctrine, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), it is incapable of conspiring with itself, and that, to the extent that doctrine does not apply, the FTC failed to prove a combination or conspiracy that imposed an unreasonable restraint of trade.

N. Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 366-367, 370-72 (4th Cir. 2013), aff'd, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015) (emphasis added). However, the concurring opinion did note that:

> [i]f the Board members here had been appointed or elected by state government officials pursuant to state statute, a much stronger case would have existed to remove the Board from the reach of *Midcal* 's active supervision prong.* *See FTC v. Phoebe Putney Health System, Inc.*, —U.S. ——, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (holding that municipal and certain "substate" entities of government receive immunity from antitrust scrutiny when they act pursuant to clearly articulated and affirmatively expressed state policy to displace competition, without regard to whether their activities are actively supervised by the state).
> I further observe that subjecting the Board to *Midcal* 's active supervision prong does not impose an onerous burden on either the Board or the state. The Supreme Court explained that "the requirement of active state supervision serves essentially an *evidentiary function:* it is one way of ensuring that the actor is engaging in the

> challenged conduct pursuant to state policy." *Town of Hallie v. *377 City of Eau Claire,* 471 U.S. 34, 46, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) (emphasis added). Accordingly, if a state creates an agency and directs that the members of that agency be selected in a manner similar to the process employed here, the agency may still enjoy antitrust immunity if, for example, the state "monitor[s] market conditions or engage[s] in [a] 'pointed reexamination' " of the agency's actions, *Midcal,* 445 U.S. at 106, 100 S.Ct. 937, or if the agency's actions have been authorized by the state's judiciary or are subject to judicial enforcement proceedings, *Bates v. State Bar of Arizona,* 433 U.S. 350, 361–62, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).
>
> In this case, I do not doubt that the Board was motivated substantially by a desire to eliminate an unsafe medical practice, namely, the performance of teeth whitening services by unqualified individuals under unsanitary conditions. The Board was aware that several consumers had suffered from adverse side effects, including bleeding or "chemically burned" gums, after receiving teeth-whitening services from persons not licensed to practice dentistry. Additionally, the Board was aware that many of the "mall kiosks" where such teeth-whitening services are performed lack access to running water. The Board also received reports that non-licensed persons performed teeth-whitening services without using gloves or masks, thereby increasing the risk of adverse side effects. Accordingly, in my view, the record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services.
>
> North Carolina is entitled to make the legislative judgment that the benefits of prohibiting non-dentists from performing dental services related to stain removal outweigh the harm to competition that results from excluding non-dentists from that market. That kind of legislative judgment exemplifies the very basis of the state action immunity doctrine. However, because "state-action immunity is disfavored," *Phoebe Putney,* 133 S.Ct. at 1010, when the state makes such a judgment, the state must act as the state itself rather than through private actors only loosely affiliated with the state.
>
> Here, the fact that the Board is comprised of private dentists elected by other private dentists, along with North Carolina's lack of active supervision of the Board's activities, leaves us with little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition for teeth whitening services. Accordingly, the Board's actions are those of a private actor and are not immune from the antitrust laws under the state action doctrine. With these observations, I am pleased to join the majority opinion.

N. Carolina State Bd. of Dental Examiners v. F.T.C., 717 F.3d 359, 376-77 (4th Cir. 2013), aff'd, 135 S. Ct. 1101, 191 L. Ed. 2d 35 (2015) (emphasis added). This language in the concurring opinion does not support the authority of the General Assembly to regulate such an industry using state action without a state policy and regulatory scheme for such state action. We have not been informed of what the policy is behind this legislation nor is it clear from the language of the law and related statutes.

As an aside, a concern has been raised that Bill S. 687 could interfere with any existing or potential contracts that a nonprofit may have to park their mobile veterinary practice. While South Carolina law recognizes the torts of interference with contractual relations and potential contractual relations, that would require a factual determination, which we are not able to determine in this opinion. 30 S.C. Jur. Torts §§ 18, 19 (citing Todd v. S.C. Farm Bureau Mut. Ins. Co., 283 S.C. 155, 321 S.E.2d 602 (Ct.App. 1984), etc.). Moreover, while it does not pertain directly to the bill, it is worth noting that South Carolina does not favor covenants not to compete. 18 S.C. Jur. Monopolies § 9 (citing Collins Music Co., Inc. v. Parent, 288 S.C. 91, 340 S.E.2d 794 (Ct.App. 1986)).

**Conclusion:**

It is for all of the above reasons our advice to you is that we believe a court will find the General Assembly has the authority to regulate nonprofit corporations and animal shelters, but will determine the bill needs additional legislative clarification as to what the state policy and regulatory scheme is behind such a limitation on nonprofit corporations.[3] However, this Office is only issuing a legal opinion based on the current law and bill at this time as presented in the information provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,

Anita S. Fair

Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General

[3] Please note this opinion was requested on pending legislation. Due to the time constraints of pending legislation, we want to disclaim that there may be more information relevant to this opinion that we were not able to research and address but will be glad to in a follow-up opinion, if needed.