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**Connecticut State Medical Society**  
**Testimony in support of**  
**House Bill 6785 An Act Concerning Cooperative Healthcare Arrangements**  
**Labor and Public Employees Committee**  
**February 26, 2015**

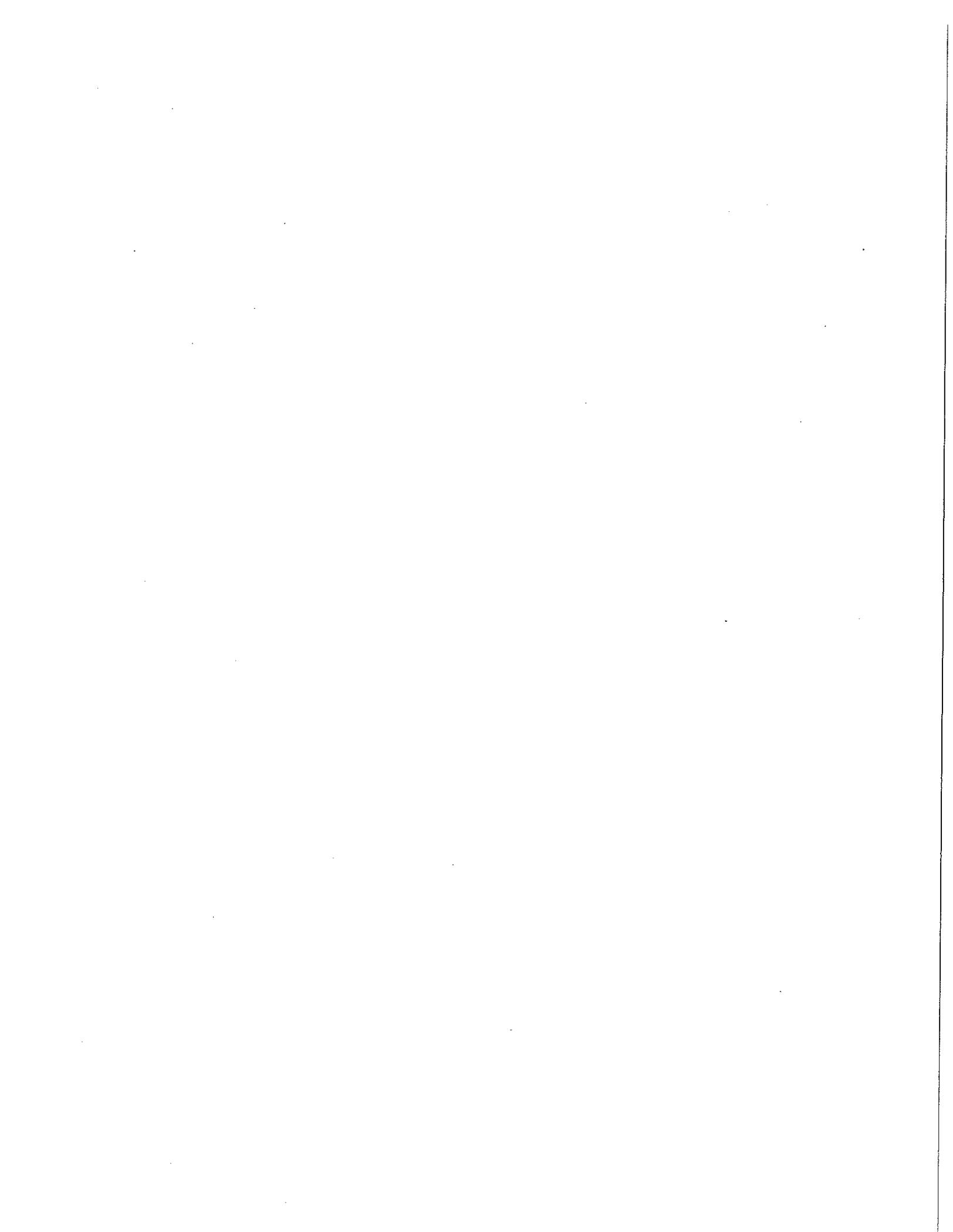
Senator Holder Winfield, Representative Tercyak and members of the Labor and Public Employee Committee, on behalf of the physicians and physician-in-training members of Connecticut State Medical Society (CSMS) thank you for the opportunity to present this testimony to you today in support of **House Bill 6785 An Act Concerning Cooperative Health Care Arrangements**. **House Bill 6785 An Act Concerning Cooperative Health Care Arrangements** will begin to address and correct many issues we raise today that place undue burdens on physicians in Connecticut and impact access to healthcare.

A significant number of Connecticut physicians practice in small, non-integrated offices with virtually no power to negotiate the terms of their provider agreements, especially with a health insurance market that is consolidated and highly concentrated. These physicians want to maintain their independence. However, the unequal bargaining power between them and health insurers places Connecticut at a substantial risk of losing its independently practicing physicians. This situation requires a state-based legislative solution as considered in HB 6785 in order to address this imbalance.

The intent of House Bill 6785 would permit balanced, informed and good-faith negotiations by physicians with health insurers and other entities, specific to how medical care is delivered to patients in the state of Connecticut.

Such good-faith negotiations do not regularly occur in today's managed care environment. However, the need is becoming increasingly necessary to ensure that physicians and other health care providers can negotiate decisions on medical care and treatment such as: (i) transparent medical payment policies so physicians and the patients know what is covered; (ii) the language by which patients are informed about adverse claims decisions which involve a physician's medical judgment; (iii) how disputes get resolved; and (iv) fair and adequate reimbursement of exceptional costs that they incur for the costs of malpractice insurance, for employees' salaries, for rent and other costs, all while providing access to all manner of medical procedures for their patients.

Through the Affordable Care Act (ACA), or "healthcare reform" as it is more commonly known, many provisions are designed to improve efficiencies in health care delivery by encouraging physicians and other providers to coordinate their care efforts and reduce or eliminate duplicative and fragmented care. That is the goal of this bill; to encourage health care practitioners to create integrated care arrangements with the potential to improve care and lower health care costs. The concept of the health



care collaborative gives us a pathway for the creation of integrative arrangements reviewed and approved by the state.

#### State Action Immunity:

The lack of clarity in how the antitrust laws treat physician led integration efforts has historically deterred the formation of integrated care arrangements for benefit of consumers and improved access to health care. This Bill proposes to use a legal doctrine known as "State Action Immunity." State Action Immunity allows states to develop a clear regulatory approach under the concept of "state action".

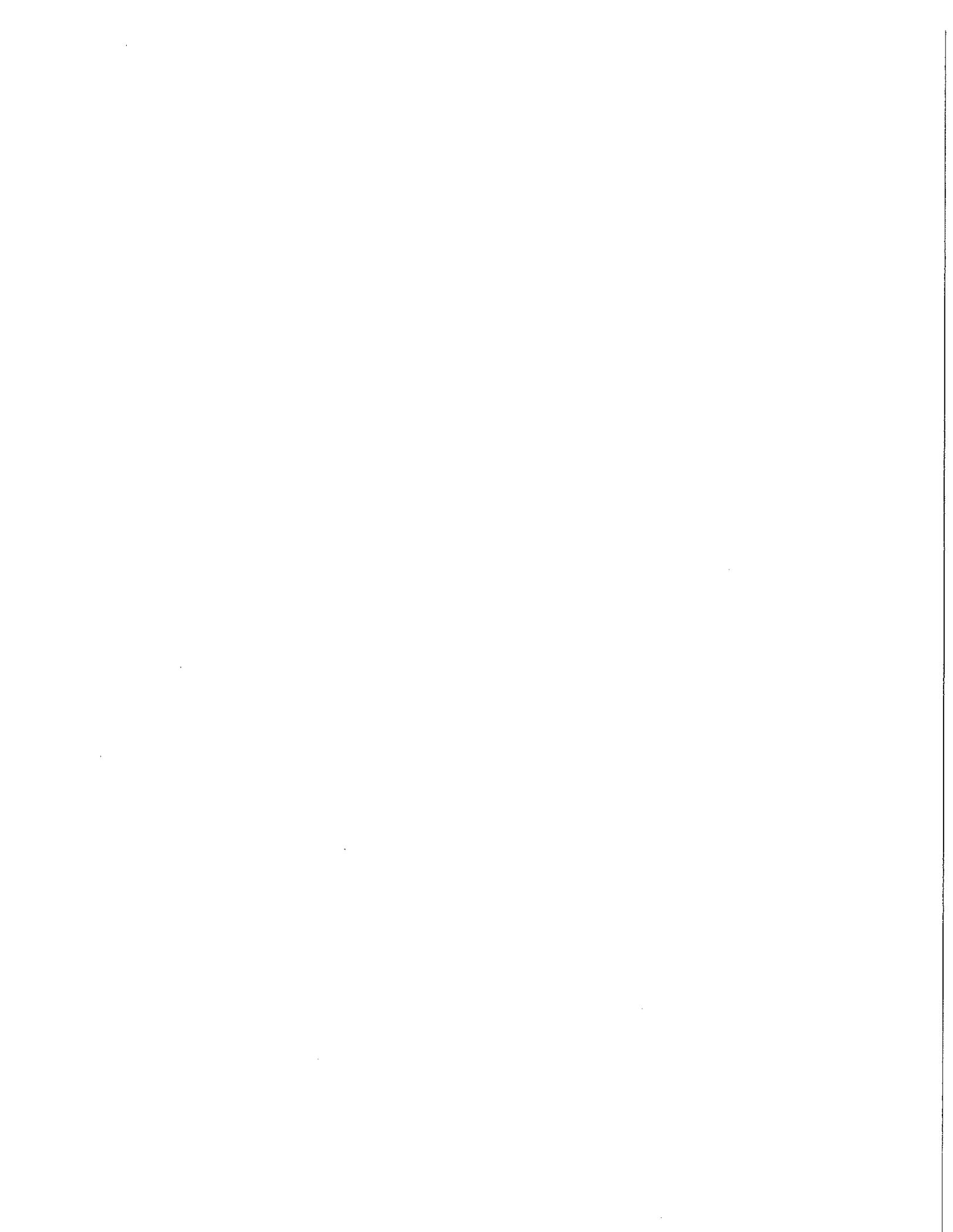
Under such regulatory framework, physicians forming a health care collaborative could seek approval from the Healthcare Advocate (Advocate) to form a Health Care Collaborative. If approved by the Advocate under statutorily prescribed criteria and subsequently followed by active supervision that promotes the public welfare, the collaborative would be awarded a certificate of public advantage that would provide the healthcare collaborative "state action immunity." This would allow for the much needed yet currently prohibited communication under strict state oversight.

#### Collaborative Formation:

Under this Bill, an entity comprised of health care practitioners may qualify as a health care collaborative in one of two ways. First, it may institute real risk sharing arrangements that place the health care practitioners at financial risk for inefficient healthcare delivery. Alternatively, it may implement a clinical integration program that creates a high degree of interdependence and cooperation among the healthcare practitioners, creating a mechanism that reduces or eliminates unnecessary care, more effectively manages chronic health conditions, and reduces the need for patients to use hospital emergency rooms.

HB 5345 would supply physicians with a set of incentives to form and operate a health care collaborative. A healthcare collaborative would be granted the ability negotiate fees and other terms covered in provider agreements with health plans, again under strict, active state supervision and subject to state approval to promote the public welfare. As a result, this conduct too will be exempt from antitrust liability under state action immunity. Both health plans and the collaborative would be required to negotiate in good faith. The process would be subject to mandatory mediation by a state designated mediator should negotiations reach an impasse. Thus, physicians investing in expensive health information technology and other collaborative infrastructure will know that if they build it, health insurers will at least come to the table and be less likely to "free ride" by taking advantage of efficiencies, such as reduced health care utilization, generated by the collaborative without investment in their development. It should be emphasized that this good-faith bargaining obligation is mutual -- it applies to both the health plan and the collaborative.

#### Federal Trade Commission:



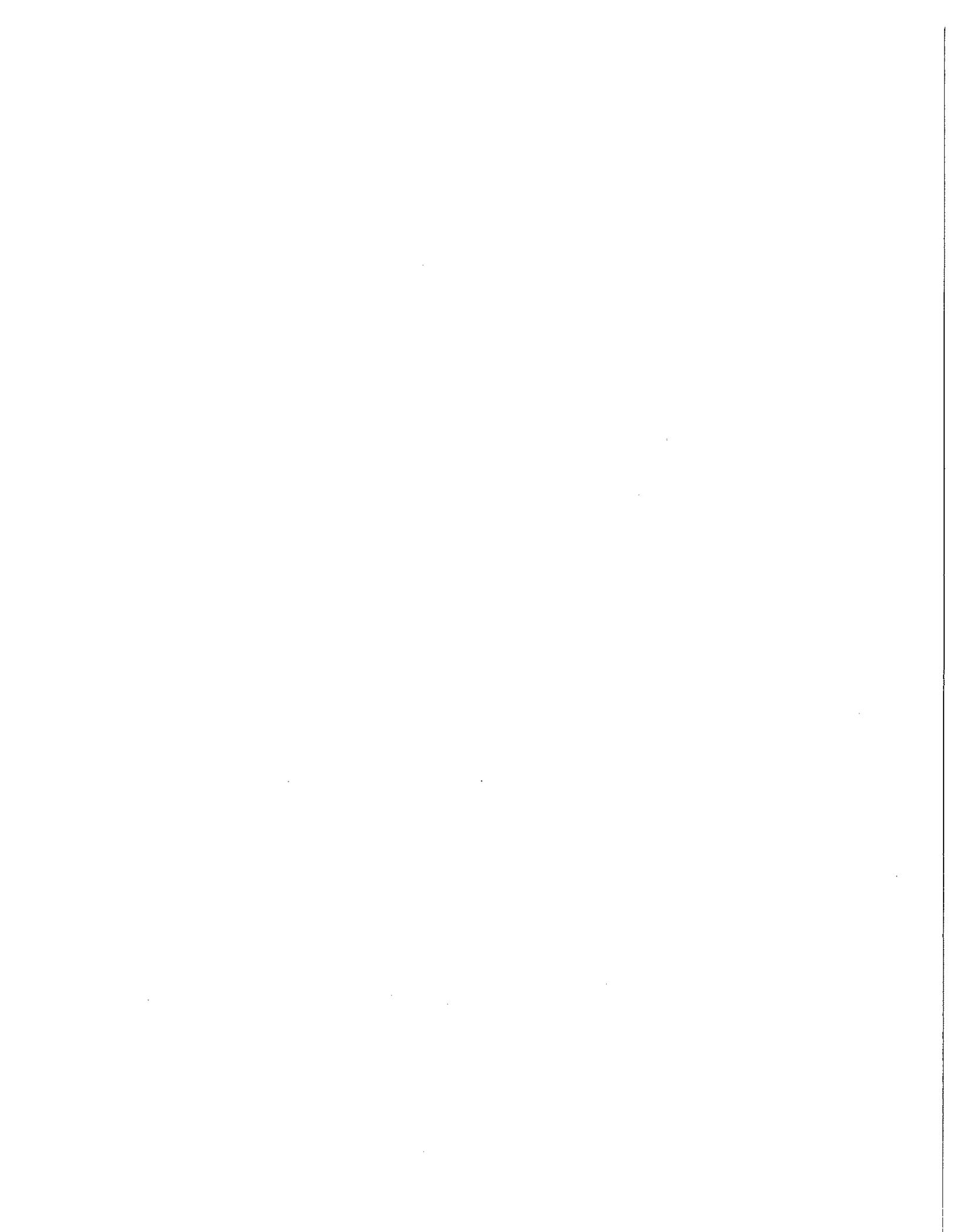
The Federal Trade Commission (FTC) historically has opposed all legislation through which a state regulates competition and thus displaces the antitrust laws, including legislation directed at state action immunity. We recognize and respect the FTC's opinion. However, we strongly believe that that this regulatory scheme developed falls squarely within state action immunity exception. In fact the FTC recently recognized the need for addressing healthcare practitioner fears over antitrust compliance by publishing a statement on its antitrust enforcement policies regarding accountable care organizations (ACO), similar to the collaborative envisioned by this Bill, but without many of the underlying financial and practical difficulties that come with forming an ACO. In ACO antitrust analysis, the FTC will afford rule of reason treatment (rather than apply the per se illegal price-fixing rule) to an ACO that participates in the Medicare Shared Savings Program. Moreover, ACO's with a combined market share of 30% or less will fall within a safety zone. However, this FTC guidance on FTC enforcement policy provides little comfort to practicing physicians. FTC guidance covers merely the federal government's present intentions. These FTC views do not preclude potential private plaintiffs such as health plans and other health care market participants from bringing antitrust claims. Even with respect to FTC enforcement, the guidance offers no comfort to many physicians who wish to build clinically integrated collaborations that do not participate in the Medicare Shared Savings Program. For these health care collaboratives, envisioned under this Bill, the sufficiency of their clinical integration (assumed by the FTC in the case of ACOs participating in the Medicare Shared Savings Program) is left in doubt.

The regulatory program offered in this Bill complies with the federal requirements for state action immunity. Even the FTC, when asked last year by Connecticut legislators for its view on whether a Bill similar to the present Bill complied with the state action immunity doctrine, expressed no concerns as to whether the bill's regulatory program satisfied the state action immunity doctrine. Instead FTC's opposition was limited to health policy concerns over the bill's alleged adverse effect on consumers and the alleged absence of any need to encourage physician-driven collaborative arrangements. Attached to this testimony we offer language that addresses the FTC concerns by demonstrating the appropriate checks and balances are in place to ensure that the health care collaborative will have a positive impact on consumers and afford greater access to quality health care. It contains numerous provisions for state supervision ensuring that any negotiated health plan agreement fosters reasonably priced, quality, physician services.

#### Conclusion:

The Connecticut marketplace needs more physician-driven health care collaboratives that can offer competitive alternatives to those formed by hospitals. Many hospitals are building ACOs through their acquisitions of physician practices. This practice is consolidating healthcare markets and raising significant competition problems, which will grow over time.

In order for independent physicians in Connecticut to continue to remain independent, the gap in the unequal bargaining power between physicians and health plans must be closed. This Bill provides one method of closing that gap, at the same time increasing access quality physician services. At the end of the day, many physicians lack the resources to hire sophisticated antitrust lawyers and health economists needed to obtain favorable agency advisory letters or counseling on antitrust compliance, or



to defend enormously expensive antitrust challenges. Nor can physicians afford to incur the risk of antitrust liability that might result in treble damages, attorney fee awards and possible criminal sanctions-catastrophic outcomes for individual practitioners. This Bill addresses these problems by providing a clear pathway for physicians to form health care collaboratives that are protected from antitrust liability. The result will benefit consumers by enhancing health care efficiency and by reducing the rate of hospital-based market consolidation that ultimately leads to higher prices.

Please support House Bill 6785

