IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Sensational Smiles LLC,
d/b/a Smile Bright,

Plaintiff,

Civil Action No.
3:11-CV-01787-MPS

v.

Date: April 8, 2013

Dr. Jewel Mullen, et al.,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a case about the right to earn an honest living free from arbitrary or unreasonable government restrictions. Plaintiff Sensational Smiles LLC (hereinafter Smile Bright) is a Connecticut company owned by entrepreneurs Steve Barraco and Tasos Kariofyllis. Before it was forced stop doing so, Smile Bright offered teeth-whitening services in malls and salons in Connecticut. Described in more detail below, these services essentially consisted of:

1. Selling an over-the-counter teeth-whitening product;
2. Instructing customers in the use of that product;
3. Providing customers with a clean, comfortable environment in which to apply the product to their own teeth, just as they would at home; and
4. Positioning a blue LED light—which is no more powerful than a household flashlight—in front of their customers' mouths.

Under Connecticut law, anyone may purchase identical products or lights and use them at home with no prescription, no supervision, and no instruction. Nevertheless, the Connecticut State Dental Commission and the Connecticut Department of Public Health (collectively, "the Dental Commission") have taken the position that Smile Bright and other businesses offering similar services are engaged in the unlicensed practice of dentistry, a crime in Connecticut that is punishable by up to $25,000 in civil fines or up to five years in jail per customer. Unwilling to risk crippling fines or jail time, Smile Bright has stopped offering teeth-whitening services.

The Dental Commission's actions are unconstitutional. The Equal Protection and Due Process Clauses of the Fourteenth Amendment protect the right to earn an honest living subject only to reasonable government regulation, and there is nothing reasonable about requiring a person to acquire eight years of higher education at a cost of tens of thousands of dollars before they may lawfully sell safe, non-prescription teeth-whitening products and position harmless LED lights in front of their customers' mouths. The unrebutted testimony of Plaintiff's expert

witness, Dr. Martin Giniger, establishes that Plaintiff's services are safe; literally millions of people worldwide have had their teeth whitened in this manner without a single reported incident of significant or permanent harm. Dr. Giniger's testimony further establishes that the only possible harm from these services is temporary tooth sensitivity and gum irritation, and that the risk of these minor, transient side effects is the same whether a person whitens her teeth at a mall or salon, which the Dental Commission considers the illegal practice of dentistry, or in the privacy of her own home, which is totally unregulated. Even under the deferential rational-basis standard, the Dental Commission's arbitrary and irrational regulations cannot be permitted to put entrepreneurs like Messrs. Barraco and Kariofyllis out of business.

STATEMENT OF ISSUES

1. Whether, under the Equal Protection Clause of the Fourteenth Amendment, there is a rational basis for regulating non-dentist teeth whiteners like Plaintiff as dentists while placing no similar restrictions on individuals who sell teeth-whitening products or enhancing lights for use at home.
2. Whether, under the Due Process Clause of the Fourteenth Amendment, there is a rational basis for requiring non-dentist teeth whiteners like Plaintiff to become fully licensed dentists in order to offer their services.

FACTS

Before the Dental Commission sent them a cease-and-desist order, Plaintiff Smile Bright provided teeth-whitening services to customers in Connecticut. Local Rule 56(a)(1) Statement of Undisputed Facts ("SUF") ¶ 1. Teeth whitening is a popular cosmetic procedure that temporarily lightens the color of stains on a person's teeth. SUF ¶ 2. Although there are multiple ways to remove tooth stains or reduce their appearance, this case concerns teeth whitening performed with peroxide-based gels that customers apply to their own teeth. SUF ¶ 3. In section I, below,

Plaintiff will describe the history and process of peroxide-based teeth whitening. In section II, Plaintiff will describe the teeth-whitening services they previously offered in Connecticut. Section III will describe the unrebutted testimony of Plaintiff's expert, Dr. Martin Giniger, concerning the safety of teeth whitening services like those Plaintiffs previously offered and the irrelevance of dental education to those services. Section IV will describe Connecticut's current prohibition of non-dentist teeth whitening and the manner in which it was adopted. Finally, Section V will describe the harm to Smile Bright and consumers caused by the Dental Commission's prohibition on non-dentist teeth whitening.

I. Peroxide-based Teeth Whitening

Peroxide-based teeth-whitening products temporarily reduce the appearance of "extrinsic stains," which are defined as stains on the surface of teeth. SUF ¶ 4. Extrinsic stains are caused when chemicals present in certain foods or beverages, like coffee or red wine, or produced by certain bacteria, bind with the surface of the teeth and cause discoloration. SUF ¶ 5. Many of these stains can be physically removed by polishing the surface of the teeth. SUF ¶ 6. It is also possible, however, to temporarily lighten the stains and make teeth appear whiter through the use of peroxide-based teeth-whitening products. SUF ¶ 6. These products do not physically remove the stain particles from the surface of the tooth. SUF ¶ 7. Rather, they cause the stain particles to temporarily decolorize. SUF ¶ 7.

The ability of hydrogen peroxide to whiten teeth was discovered by chance in 1989 when a dentist "observed that when a hydrogen peroxide oral antiseptic was administered by dental tray to address gingival irritation and inflammation, vital teeth also became whiter." SUF ¶ 8. This quickly led to the development of commercial whitening products. SUF ¶ 8. These products are now widely available for purchase from drug stores, on the Internet, from dentists, or from

entrepreneurs like Plaintiff Smile Bright. SUF ¶ 9. Literally millions of people worldwide have whitened their teeth using peroxide-based products. SUF ¶ 10.

The active ingredient in peroxide-based teeth-whitening products is either hydrogen peroxide or a related chemical called carbamide peroxide, which breaks down into hydrogen peroxide in the presence of water and salivary enzymes. SUF ¶ 11.[1] Carbamide peroxide is preferred by some manufacturers of teeth-whitening products because it is more shelf-stable than hydrogen peroxide. SUF ¶ 13. Regardless of which of these chemicals is used as an active ingredient, however, the whitening process is the same. SUF ¶ 13.

Hydrogen peroxide is commonly used in the production of food and cosmetics. SUF ¶ 14. Teeth-whitening products containing hydrogen peroxide or carbamide peroxide are both regulated by the FDA as cosmetics, which means that they are available for sale, without a prescription, to any person. SUF ¶ 14.

Many peroxide-based teeth-whitening products are used in conjunction with LED "enhancing lights." SUF ¶ 15. These lights consist of a multitude of light-emitting diodes mounted side by side so that they can illuminate all of a person's visible teeth. SUF ¶ 15. The LED lights emit blue light that is distributed across a band of 420–480nm with a power that is equivalent to an 8-watt light bulb, or less. SUF ¶ 16. There are no legal limits on who may purchase LED enhancing lights. SUF ¶ 16. The lights are available for purchase directly by consumers, and some at-home teeth-whitening products are packaged with LED enhancing lights. SUF ¶ 16.

[1] Carbamide peroxide breaks down into hydrogen peroxide in a ratio of approximately 3:1. SUF ¶ 12. Thus, a teeth-whitening product with a 30% concentration of carbamide peroxide is approximately equivalent in strength to a product with a 10% concentration of hydrogen peroxide. SUF ¶ 12.

II. Smile Bright's Whitening Procedure

Sensational Smiles LLC d/b/a Smile Bright is a Connecticut limited-liability corporation formed in 2007 by entrepreneurs Steve Barraco and Tasos Kariofyllis to offer peroxide-based teeth-whitening services. SUF ¶ 17. At various times, Smile Bright has offered teeth-whitening services at home shows, in shopping malls, and in salons. Regardless of the location, however, the whitening process was the same. SUF ¶ 17. A complete description of the whitening process that Smile Bright previously offered is given below. A video demonstrating the process is also available at http://www.youtube.com/watch?v=IjZ_8qbzsGI. SUF ¶ 18.

Smile Bright's services begin with an explanation of the product they sell and the process of teeth whitening. SUF ¶ 19. Customers are asked to review and sign an informational sheet indicating that they will follow all of the instructions supplied with the product and affirming that they do not have any condition that would contraindicate whitening, such as difficulty breathing comfortably through their nose during the 20-minute procedure, gum disease, or a recent oral piercing or surgery. SUF ¶ 20. Customers are told that not all causes of tooth discoloration will respond to peroxide-based whitening and that they should only whiten their teeth if they have healthy teeth, but Smile Bright employees never attempt to diagnose the underlying cause of any tooth discoloration or whether a customer's teeth are actually healthy. SUF ¶ 21. Smile Bright does not offer teeth whitening services to minors or to women who indicate that they are nursing or pregnant. SUF ¶ 22. Smile Bright has no basis for believing that teeth whitening is dangerous for such people; they simply take this step out of an abundance of caution. SUF ¶ 22.

After the customer has reviewed the form and consented to the whitening process, they are invited to sit in a reclining chair like those used in salons. SUF ¶ 23. A Smile Bright employee then measures the color of the customer's teeth using a device known as a shade guide.

SUF ¶ 24. The shade guide is simply a device that holds a row of artificial teeth of varying shades, arranged from lightest to darkest. SUF ¶ 24. To measure the shade of the customer's teeth, the employee compares the color of the customer's teeth to the shade guide and selects the shade that is closest to the customer's natural shade. SUF ¶ 25. This comparison is purely visual and the employee makes no effort to diagnose the cause of any tooth discoloration the customer might have. SUF ¶ 25. Using a handheld mirror, the customer is also allowed to look at the shade guide, so that the customer can decide for herself whether the employee has accurately judged the shade of the customer's teeth. SUF ¶ 26. The purpose of using the shade guide is so that customers can evaluate results of the whitening process and see how much whiter their teeth have become. SUF ¶ 26.

Next, the Smile Bright employee dons disposable gloves and hands the customer a pre-packaged "brush up," a disposable tooth-cleaner that fits over the index finger like the finger of a glove. SUF ¶ 27. The customer is instructed to open the brush up, slide it over her finger, and gently rub the surface of her visible teeth to ensure that they are free of any debris before the whitening. SUF ¶ 27.

The employee then opens a prepackaged teeth-whitening mouth tray containing a 30% carbamide peroxide gel. SUF ¶ 28. These one-size-fits-all trays are disposed of immediately after use. SUF ¶ 28. The employee inspects the tray to ensure that it has shipped with whitening gel in it and that the gel is evenly distributed across the tray. SUF ¶ 29. If the tray does not have sufficient gel, the employee adds gel to the tray from a sterile, disposable, prepackaged plastic syringe. SUF ¶ 29. If the gel has settled unevenly during transport, the employee uses a disposable wooden stick, similar to a tongue depressor, to spread the gel evenly across the tray. SUF ¶ 29. The employee then places the tray into a disposable plastic bowl and hands it to the customer. SUF ¶ 29.

After handing the tray to the customer, the employee instructs the customer to insert the tray into her mouth and to wiggle the tray slightly to ensure that the gel is evenly distributed over the surface of her teeth. SUF ¶ 30. The employee provides the customer with a pair of tinted glasses and then activates a blue LED light and positions it in front of the customer's mouth. SUF ¶ 30. After 20 minutes the light automatically shuts off. SUF ¶ 31. The customer then removes the tray and places it back into the disposable plastic bowl. SUF ¶ 31. The employee hands the customer a small cup of water so that the customer can rinse her mouth. SUF ¶ 31. After rinsing, the customer spits the water into the disposable plastic bowl and the gloved employee discards the bowl. SUF ¶ 31. Finally, the employee and the customer use the shade guide to measure the change in the color of the customer's teeth. SUF ¶ 32.

After each customer, a Smile Bright employee disinfects the sunglasses, chair, and light. SUF ¶ 33. Each time the employee leaves the customer and returns, or goes to work with a new customer, the employee dons clean gloves. SUF ¶ 34. At no time during the whitening procedure does the employee put her hands, or anything else, into the customer's mouth. SUF ¶ 35. The application of the teeth-whitening product itself is performed entirely by the customer, just as they would at home. SUF ¶ 35.

III. Dr. Giniger's Expert Testimony on the Harmlessness of Teeth Whitening in General and as Practiced by Smile Bright, and on the Irrelevance of Dental Education to Teeth Whitening.

Dr. Martin Giniger is a licensed dentist and an expert on the history, practice, and safety of peroxide-based teeth whitening. SUF ¶ 36. He holds a DMD from Fairleigh Dickinson University School of Dental Medicine (1984), an MSD in Oral Medicine from the University of Connecticut (1993), and Ph.D. in Biomedical Science with a concentration in oral biology, also from the University of Connecticut (1993). SUF ¶ 36. Dr. Giniger has taught basic and advanced courses in oral diagnosis, diagnostic sciences, and treatment planning at the Louisiana State

University Medical Center School of Dentistry and the University of Medicine and Dentistry of New Jersey. SUF ¶ 37. Dr. Giniger also has extensive experience developing and testing the safety and effectiveness of a variety of oral-care products, including teeth-whitening products. SUF ¶ 38. He previously provided expert testimony in *FTC v. North Carolina Board of Dental Examiners*, No. 9343, in which he was retained by the United States Federal Trade Commission to testify regarding the safety of peroxide-based teeth-whitening services like those offered by Plaintiff. SUF ¶ 39. Dr. Giniger's full CV is attached as exhibit 1 to his declaration in support of Plaintiff's motion for summary judgment.

As described below, Dr. Giniger provided unrebutted testimony that:

- Teeth whitening as practiced by Smile Bright is perfectly safe, both in absolute terms and in comparison to at-home use of identical products;
- LED enhancing lights are safe;
- The specific whitening products and LED lights that Smile Bright uses are safe;
- Teeth whitening is far safer than other oral procedures that Connecticut does not consider to be the practice of dentistry, like oral piercing; and
- Teeth whitening is not a standard part of dental curriculum and is rarely, if ever, taught in dental school.

These facts lead Dr. Giniger to conclude that the Dental Commission, "in excluding non-dentists from the market for teeth whitening services, has injured consumers and teeth whitening entrepreneurs needlessly." SUF ¶ 67.

A. The safety of peroxide-based teeth whitening

Dr. Giniger testified that all of the possible side effects of peroxide-based teeth whitening are mild and invariably temporary. SUF ¶ 40. Despite the fact that millions of people worldwide have whitened their teeth using peroxide-based products, the published literature does not reveal a single instance of anyone suffering permanent or serious harm as a result. SUF ¶ 40. Instead, the most common side effects are temporary tooth and gum sensitivity, which the reported

literature finds resolve on their own within days of the whitening. SUF ¶ 40. Further, Dr. Giniger also testified that there is no evidence that the temporary side effects of teeth whitening are more prevalent or severe with non-dentist-provided teeth whitening as compared to teeth whitening accomplished with drugstore preparations or those found on-line. SUF ¶ 41. Indeed, he testified that these side effects may be "most frequent and pronounced with dentist-provided chairside bleaching owing to the greater concentration of hydrogen peroxide and more intense light/heat activation often used in dental offices." SUF ¶ 41.

Dr. Giniger surveyed the literature regarding the effect of teeth whitening on tooth enamel and reported that there was no evidence—"[e]ven in conditions of plainly excessive use"—that peroxide-based whitening could cause anything beyond minor and reversible surface change in the enamel. SUF ¶ 42. Even these changes are "no different from those that occur after drinking a glass of orange juice" and are "quickly reversed when teeth are exposed to saliva." SUF ¶ 42. Further, Dr. Giniger noted that there are "no literature reports that suggest that bleaching in lay-operated bleaching facilities results in any more 'surface changes' than are found with dentist-provided bleaching or bleaching through self-application of products available from drugstores or on-line." SUF ¶ 43.

Dr. Giniger next considered the possibility of systemic side effects from exposure to hydrogen peroxide and found such side effects to be an unrealistic concern. SUF ¶ 44. The level of systemic exposure to hydrogen peroxide during teeth whitening is "quite low." SUF ¶ 44. Dr. Giniger "very conservatively" estimated that a 70 kg (154 lbs.) person would have to be exposed to two grams (2000 mg) of hydrogen peroxide before any systemic side effects were plausible, and that a teeth-whitening customer could expect to be exposed to between .005 and .01125 grams (i.e., between 5 and 11.25 mg) of hydrogen peroxide for services provided by non-dentists and dentists, respectively. SUF ¶ 44. By comparision, a recent independent review of the safety

profile of Crest WhiteStrips concluded that the maximum daily exposure to hydrogen peroxide from use of its products is between 42 and 49 mg. SUF ¶ 44. Even this exposure, which is significantly higher than the exposure Dr. Giniger estimates would occur in "chairside" whitening, is "well below any known risk level for humans." SUF ¶ 44.

Finally, Dr. Giniger testified about sanitation and infection control with regard to non-dentist teeth whitening. He testified that non-dentist teeth whitening as practiced by Plaintiff (*see* Section II, *supra*), provides "little opportunity for cross contamination between bleaching center personnel and the consumer," and that he was "aware of no incidence of such cross-contamination being reported in the scholarly literature." SUF ¶ 45. Dr. Giniger further noted that "hydrogen peroxide is itself a potent antimicrobial agent and likely helps prevent any possible cross contamination." SUF ¶ 46. Although allowing that "[t]here may be periodic breaches of proper sanitation and infection control in lay-operated bleaching facilities," Dr. Giniger noted that "that will be true in dental offices as well," pointing to a recent study which found "a lack of understanding of the basics of infection control and the prevention of transmission of communicable infectious diseases not only in large percentages of dental and dental hygiene students, but also in graduate students and among the dentists and dental hygienists who responded to this survey." SUF ¶ 47. Dr. Giniger concluded that while breaches of "proper sanitation and infection control practices might warrant action against the specific dentist or non-dentist teeth bleaching facility involved," the inevitability of such breaches "hardly seems to warrant exclusion of all non-dentist providers from the market, any more than occasional breaches of sanitation by make-up artists warrants exclusion of everyone but licensed dermatologists from the practice of make-up artistry." SUF ¶ 48.

B. The safety of LED enhancing lights

Dr. Giniger testified that the LED lights used in teeth whitening are very low energy and emit light over a narrow band of the visible spectrum. SUF ¶ 49. They generate little heat and no measureable collateral UV B or C radiation, making them no more harmful than a typical consumer flashlight. SUF ¶ 49. Moreover there is no published literature showing that any person has ever been harmed as a result of being exposed to the type of low-powered LED bleaching lights used by non-dentists. SUF ¶ 50.

Dr. Giniger has conducted first-hand scientific experiments with several of the LED bleaching lights available to non-dentists and found none of them able to generate additional external heat energy change above 1°C (1.8°F). SUF ¶ 51. This is significant because, as Dr. Giniger notes, the dental literature shows that it is necessary to cause at least a 5.5°C (9.9°F) increase in the temperature of the tooth pulp to cause any possible transient tooth harm. SUF ¶ 51. Dr. Giniger concluded that "it would be scientifically and practically impossible for these lights to cause any more harm than a household flashlight (in other words, no chance)." SUF ¶ 52.

C. Smile Bright's whitening products and LED lights

In addition to testifying to the safety of teeth whitening generally, Dr. Giniger reviewed the formulation of the teeth-whitening gel sold by Smile Bright and the specifications for the LED light Smile Bright uses, and concluded that these products are safe. SUF ¶ 53.

Dr. Giniger noted that the carbamide peroxide gel used in Smile Bright's teeth-whitening trays, which is equivalent to 10 to 12% hydrogen peroxide, is less concentrated than the gel found in the over-the-counter product Crest WhiteStrips Supreme, which utilizes 14% hydrogen peroxide and has been safely used by millions of consumers. SUF ¶ 54. The hydrogen peroxide ampules Smile Bright uses for filing trays shipped with insufficient gel are even less

concentrated at only 6% hydrogen peroxide. SUF ¶ 55. All of the inactive ingredients used in the trays and ampules, including glycerine, propylene glycol, alcohol and flavorings are recognized as safe and are commonly used in medicine, food, and cosmetics. SUF ¶ 56. Indeed, the specific formulation used in the trays Smile Bright sells is sold to about 50% of all non-dentist teeth-whitening clinics throughout the world, and Dr. Giniger is unaware of any complaints regarding its safety. SUF ¶ 57.

With regard to the specific light Smile Bright uses, Dr. Giniger concluded that the light is "extremely safe" and has "no potential for human harm when used as directed." SUF ¶ 58. The light is "equivalent in strength to many home LED flashlights sold in drugstores and retail chains." SUF ¶ 58. Additionally, even more powerful lights are sold for home use. SUF ¶ 58.

D. The safety of teeth whitening compared to other oral procedures that are not considered to be the practice of dentistry

Dr. Giniger testified that the risk of injury associated with teeth-whitening services like Smile Bright's is "far lower than the risks associated with the practice of tongue piercing, which is commonly performed in lay establishments with no oversight by a licensed dentist." SUF ¶ 59.

Potential complications from oral piercings are numerous and include:

- increased salivary flow;
- gingival injury or recession;
- damage to teeth, restorations, and fixed porcelain prostheses;
- interference with speech, chewing or swallowing;
- scar-tissue formation;
- development of metal hypersensitivities;
- prolonged bleeding;
- airway obstruction; and

- infection.

SUF ¶ 60.

Secondary infection from oral piercing can be serious. SUF ¶ 61. Dr. Giniger noted that "[a] recent article in the British Dental Journal reported a case of Ludwig's angina, a rapidly spreading cellulitis . . . that manifested four days after the 25-year-old patient had her tongue pierced. Intubation was necessary to secure the airway. When antibiotic therapy failed to resolve the condition, surgical intervention was required to remove the barbell-shaped jewelry and decompress the swelling in the floor of the mouth." SUF ¶ 61.

Dr. Giniger is unaware of any facts that would justify treating the comparatively harmless practice of teeth whitening as dentistry while allowing laypeople to perform tongue piercing. SUF ¶ 62. Dr. Giniger did note, however, that—unlike teeth-whitening services—dentists typically do not offer piercing services. SUF ¶ 63.

E. The irrelevance of dental education to teeth whitening

Based on his experience as a dental educator and his review of the relevant literature, Dr. Giniger testified that teeth whitening is rarely, if ever taught in dental schools, and that not one of the 65 dental schools in North America has any clinical requirement for teeth whitening. SUF ¶ 64. In other words, to graduate from dental school it is not necessary to have performed even a single teeth-whitening procedure. SUF ¶ 64. In Dr. Giniger's experience, the absence of teeth whitening from dental-school curricula is attributable to the lack of available time in an already crowded curriculum and the fact that the techniques are so simple that no training is necessary. SUF ¶ 65.

Dr. Giniger analogized requiring dental students to learn about teeth whitening to requiring dermatology students to learn about make-up application. SUF ¶ 66. Indeed, he considers it even more irrational because—while there are no documented incidents of any

person anywhere ever suffering permanent injury as a result of teeth whitening—there are documented instances of people suffering permanent damage to their skin from the use of cosmetics. SUF ¶ 66.

IV. Connecticut's Regulation of Teeth Whitening

Under Connecticut's Dental Practice Act, no person may engage in the "practice of dentistry or dental medicine" unless that person is a fully licensed dentist. SUF ¶ 68; Conn. Gen. Stat. §§ 20-106, -123. "The practice of dentistry or dental medicine" is defined as "the diagnosis, evaluation, prevention or treatment by surgical or other means, of an injury, deformity, disease or condition of the oral cavity or its contents, or the jaws or the associated structures of the jaws." SUF ¶ 69; Conn. Gen. Stat. § 20-123(a). Additionally, "[n]o person, except a licensed and registered dentist, and no corporation, except a professional service corporation organized and existing under chapter 594a for the purpose of rendering professional dental services, and no institution shall own or operate a dental office, or an office, laboratory or operation or consultation room in which dental medicine, dental surgery or dental hygiene is carried on as a portion of its regular business." SUF ¶ 70; Conn. Gen. Stat. § 20-122(a). Violation of any of these provisions is a felony offense punishable by a fine of $500, five years in jail, or both. SUF ¶ 71; Conn. Gen. Stat. § 20-126. Further, under Conn. Gen. Stat. § 20-126, "each instance of patient contact or consultation" that is in violation of the prohibition on the unlicensed practice of dentistry "shall constitute a separate offense." SUF ¶ 71.

The Connecticut State Dental Commission is a nine-member body with the authority to issue declaratory rulings interpreting the Dental Practice Act and to impose civil penalties for violations of the Dental Practice Act. SUF ¶ 72; Conn. Gen. Stat. §§ 20-103a, -114. By statute, six of the nine members of the Commission must be practicing dentists. SUF ¶ 73; Conn. Gen. Stat. §§ 20-103a(a). The Connecticut Dental Commission has authority to impose civil penalties

of up to $25,000 for any violation of the Dental Practice Act or for "the aiding or abetting in the practice of dentistry, dental medicine or dental hygiene of a person not licensed to practice dentistry, dental medicine or dental hygiene in this state." SUF ¶ 74; Conn. Gen. Stat. §§ 19a-17(6), 20-114(a).

On September 8, 2010, the Connecticut Dental Commission began a declaratory ruling proceeding to determine under what circumstances teeth-whitening services constituted the "practice of dentistry" as set forth in Conn. Gen. Stat. § 20-123. SUF ¶ 75. On June 8, 2011, the Dental Commission issued a declaratory ruling—attached as Exhibit 1 to the Declaration of Paul Sherman in Support of Plaintiff's Motion for Summary Judgment—concluding that teeth-whitening services constitute the practice of dentistry when they include:

> (1) assessing and diagnosing the causes of discoloration; (2) making recommendations of how to perform teeth whitening; (3) customizing treatment; (4) utilizing instruments and apparatus such as enhancing lights; (5) selecting or advising individuals on the use of trays; (6) preparing or making customized trays for individuals; (7) applying teeth whitening products to the teeth of a customer; (8) instructing a customer on teeth whitening procedures or methods; or, (9) other activities as discussed in [the] declaratory ruling.

SUF ¶ 76. At the time the Dental Commission issued its declaratory ruling, two of the public seats on the Commission were vacant. SUF ¶ 77.

The Commission has subsequently clarified that it is not the practice of dentistry for an individual to:

- "merely sell a self-administered teeth-whitening product for use at the place of purchase";
- "[p]rovid[e] a client with the instructions that are provided by the manufacturer of the product";
- "provide the purchaser of a self-administered teeth-whitening product with a place to use and dispose of the product"; or
- "use a shade guide to demonstrate to a customer the shade of their teeth either before or after the use of a teeth-whitening product."

SUF ¶ 78.

Defendants have stated that it is not the practice of dentistry to make an LED enhancing light available for use by a teeth-whitening customer, but that it *is* the practice of dentistry to position that light for the customer. SUF ¶ 79. The Commission has also stated that it is the practice of dentistry to "provid[e] personalized instruction to a consumer and instruct[] a person based on an assessment or supervis[e] the use and application of tooth bleaching or lightening fluids or other agents to that person's teeth to improve or change the color of the teeth." SUF ¶ 80.

Despite requiring that individuals attend dental school in order to offer teeth-whitening services, neither the Department of Public Health nor the Connecticut Dental Commission requires aspiring dentists to demonstrate any experience with or proficiency in teeth whitening. SUF ¶ 81. Defendants do not require that applicants for dental licensure demonstrate that they studied teeth whitening in dental school. SUF ¶ 82. Nor is teeth whitening covered on any of the tests required for licensure as a dentist in Connecticut. SUF ¶ 82.[2]

V. Harm to Smile Bright and Consumers

In 2009, Smile Bright was a thriving small business. SUF ¶ 86. It had locations in two shopping malls and one salon. SUF ¶ 86. It had been featured repeatedly on local television news. SUF ¶ 86. And it was not only looking at renewing leases for its two shopping mall locations, it had begun negotiations to open in a third mall. SUF ¶ 86.

[2] Defendants do not write any of the tests accepted for licensure as a dentist in Connecticut and instead rely on tests designed by outside testing groups. SUF ¶ 83. Defendants have stated that they do not know whether those tests cover teeth whitening. SUF ¶ 83. Defendants' own website, however, directs aspiring dentists to the websites of the various testing agencies, all of which provide guides describing the content of their examinations. SUF ¶ 84. None of those exam-preparation guides indicate that teeth whitening is covered on any exam required for licensure as a dentist in Connecticut. SUF ¶ 85.

Then its owners heard that the Dental Commission was considering issuing a declaratory ruling on teeth whitening. SUF ¶ 87. This cast a pall over Smile Bright's entire business. Mr. Barracco and Mr. Kariofyllis had seen the results of similar efforts in other states, and were unwilling to renew their leases at their existing mall locations or enter into new leases at additional malls if, as seemed likely, the Dental Commission was going to criminalize their method of doing business. SUF ¶ 87.

Anticipating the outcome of the Dental Commission's declaratory ruling, Smile Bright wound up their operations at the West Farms and Enfield Square shopping malls. SUF ¶ 88. They released the four employees who were working for them and began limiting their services to a salon. SUF ¶ 88. Up to that point, Smile Bright had served hundreds of customers at their mall locations, averaging approximately 125 to 150 customers per week. SUF ¶ 88. Not one of these customers was ever injured by Smile Bright's services. SUF ¶ 88.

Smile Bright kept open their salon location in the hopes that this would still be permitted following the declaratory ruling. SUF ¶ 89. Following the declaratory ruling, however, the Connecticut Department of Public Health prepared a letter—dated July 11, 2011—instructing Stephen Barraco, co-owner of Smile Bright, to "voluntarily cease the practice of offering teeth whitening services" and threatening legal action if he did not. SUF ¶ 90. The letter cited as authority the Dental Commission's declaratory ruling. SUF ¶ 90. During the 30(b)(6) deposition of the Department of Public Health, the Department claimed to have sent the letter because Mr. Barraco was positioning the LED enhancing light for his customers, which he was, and concern that he may have been making a determination about the health of his customers' teeth, which he was not. SUF ¶¶ 91-92.[3]

[3] The Department of Public Health made the following statement regarding a cease-and-desist letter sent to Plaintiff:

The letter, however, did not specify which component of Plaintiff's business constituted the practice of dentistry, but merely restated the language of the declaratory ruling. SUF ¶ 93. Neither Mr. Barraco nor Mr. Kariofyllis is licensed as a dentist and neither is currently eligible to become licensed. SUF ¶ 94.[4] Additionally, Smile Bright is not licensed as a professional-services corporation as required under Chapter 594a of the Connecticut Statutes for corporations that offer services that constitute the practice of dentistry, and is not eligible to become licensed as a professional-services corporation. SUF ¶ 94. Mr. Barraco and Mr. Kariofyllis feared civil or even criminal penalties because the declaratory ruling named several things they did as now the practice of dentistry, including "making recommendations of how to perform teeth whitening," "utilizing instruments and apparatus such as enhancing lights," "advising individuals on the use of trays," and "instructing a customer on teeth whitening procedures or methods," all of which they reasonably believe describe their business model. SUF ¶ 95.

> Q: Was it the department's opinion that Smile Bright was not in compliance with the law at the time you prepared this [cease-and-desist] letter?
> A: We believed he was not because of the enhancing light.
> Q: Okay. What was it about the enhancing light?
> A: My understanding was that he was placing the enhancing light, and that was what the declaratory ruling prohibited.
> Q: Was there any other aspect of his business that the department believed was not in compliance with the law?
> A: I think there were some concerns about the fact that they—their literature talked about describing healthy teeth and who was making the determination as to whether the teeth were healthy before the procedure was implemented.
> Q: Okay. With regard to the light, was it solely the fact that Mr. Barraco was positioning the light?
> A: Correct.

Decl. of Paul Sherman in Supp. of Pl.'s Mot. for Summ. J., Ex. 3, at 30:13-31:10.

[4] Mr. Barraco and Mr. Kariofyllis also have no intention of taking the steps necessary to become licensed dentists. Among other reasons, doing so would be prohibitively expensive. SUF ¶ 96.

Unwilling to run the risk of fines or jail time, Smile Bright stopped offering teeth-whitening services entirely. SUF ¶ 97. Smile Bright's business is currently limited to selling teeth-whitening products for home use over the Internet—the same products they used to sell in their mall and salon locations. SUF ¶ 97. If it were lawful to do so, Smile Bright would immediately resume offering teeth-whitening services and begin searching out retail space in shopping malls for new locations. SUF ¶ 98.

In addition to harming Smile Bright, Connecticut's prohibition on non-dentist teeth whitening harms consumers. Dentists routinely charge more for teeth-whitening services than do businesses like Smile Bright. SUF ¶ 99. This is true of the members of the Dental Commission themselves, five of whom offer teeth-whitening services. SUF ¶ 100. One Commission member, for example, Dr. Peter Katz, charges as much as $625 for teeth-whitening services. Smile Bright, by contrast, charged between $75 and $100, depending on what specials they were offering. SUF ¶¶ 100-101. Perhaps not coincidentally, complaints about non-dentists offering teeth whitening come almost exclusively from dentists and the state dental association. SUF ¶ 102.

LEGAL STANDARD

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). On summary judgment, the Court is to view the evidence and draw inferences in the light most favorable to the nonmoving party. However, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the evidence produced by the nonmoving party is not significantly probative, summary judgment is warranted. *Id.* at 249-50.

ARGUMENT

The Dental Commission's declaratory ruling—and the threat of civil and criminal penalties implicit in that ruling—has shut down the thriving industry of non-dentist teeth whitening for no rational reason. As explained below, these actions implicate Smile Bright's rights under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Dental Commission's restrictions on Smile Bright and other similar businesses are unconstitutional because they have no plausible connection to public health and safety, impose costs on entrepreneurs that are vastly disproportionate to any conceivable public benefit, and accomplish nothing more than protecting dentists from economic competition.

I. The Dental Commission's Declaratory Ruling Implicates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The essence of this guarantee is "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). In this case, Smile Bright is similarly situated to countless businesses that sell teeth-whitening products for use at home. Every product that Smile Bright provided to its customers is available over the counter, and anyone with an Internet connection and a credit card can purchase these products—the trays, the whitening gel, the lights, everything—and use them at home with no supervision or instruction. The only differences between businesses like Smile Bright and other businesses that sell whitening supplies online or in drug stores are the physical location where the whitening happens and the trivial assistance of an employee who hands over the products and positions the LED light. Nevertheless, the Dental Commission considers Smile Bright to be engaged in the unlicensed practice of dentistry, while drug store and Internet retailers are left totally unregulated.

By treating Smile Bright as if it were engaged in the practice of dentistry—and not simply selling a product—the Dental Commission also runs afoul of the equally important equal-protection principle that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Smile Bright's employees never attempted to diagnose diseases, or take x-rays, or perform root canals or tooth extractions, all of which are actually taught in dental school and tested for licensure in Connecticut. All they did was sell a self-applied, over-the-counter product, instruct customers on the use of that product, and point a blue LED light at their customers' mouths—acts that require no diagnostic skill or expertise, are not taught in dental school, and are not tested as a condition of dental licensure in Connecticut. Nevertheless, the Dental Commission treats Smile Bright and its employees as if they were engaged in the core practice of dentistry.

In addition to implicating the Equal Protection Clause by treating Smile Bright like dentists and unlike other teeth-whitening retailers, the Dental Commission's prohibition on non-dentist teeth whitening also implicates the substantive protections of the Due Process Clause. The right to pursue an honest living is a liberty interest within the protection of the Due Process Clause. Indeed, the U.S. Supreme Court has long recognized that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915). As with all liberty interests, the government is prohibited from arbitrarily or irrationally restricting the right to earn an honest living. *Craigmiles v. Giles*, 312 F.3d 220, 223-24 (6th Cir. 2002).

Although the Equal Protection and Due Process Clauses protect different interests, their substantive analyses converge in this case because Connecticut's prohibition on non-dentist teeth whitening does not make distinctions among suspect classifications, and because the U.S.

Supreme Court does not consider the right to earn an honest living to be a "fundamental" right. Accordingly, under either clause, Connecticut's prohibition on non-dentist teeth whitening is reviewed with rational-basis scrutiny. *See Merrifield v. Lockyer*, 547 F.3d 978, 984-86 (9th Cir. 2008); *Craigmiles*, 312 F.3d at 223-24.

"[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012). As explained below, plaintiffs prevail in rational-basis cases when they demonstrate that there is no plausible connection between the government's regulations and any legitimate government interest, when they demonstrate that the harm caused by a statutory classification vastly outweighs any conceivable benefits created by that classification, or when they demonstrate that the only interest actually advanced by the challenged law is an illegitimate interest, such as an interest in economic protectionism. Applying those standards to the facts of this case, the Dental Commission has no constitutionally sufficient justification for shutting down harmless businesses like Smile Bright.

II. There Is No Plausible Connection Between Connecticut's Regulation of Non-dentist Teeth Whiteners and Public Health or Safety.

To satisfy the rational-basis test it is not enough for the government merely to articulate a legitimate government interest; the government's regulation must also be rationally related to the promotion of that interest. *St. Joseph Abbey v. Castille*, 2013 U.S. App. LEXIS 5701, *18-19 (5th Cir. Mar. 20, 2013) ("[T]he State Board's chosen means must rationally relate to the state interests it articulates . . . ."). In this case, the only interest claimed by the government is the promotion of public health and safety. As explained below, while that interest is surely legitimate, there are multiple reasons why Connecticut's prohibition on non-dentist teeth whitening does not rationally advance that interest. Further, the facts of this case are more

extreme than those in other cases in which federal courts have held that an occupational-licensing scheme was not rationally related to a legitimate government interest.

A. Dental education is irrelevant to teeth whitening because dental schools do not teach teeth whitening, Connecticut does not test teeth whitening, and because teeth whitening is perfectly safe for non-dentists to perform.

Limiting teeth whitening to dentists is not rationally related to the promotion of public health and safety because Connecticut does not require dentists to have any experience or proficiency with teeth whitening as a condition of licensure. None of the exams that Connecticut accepts for licensure test aspiring dentists about teeth whitening, nor does Connecticut require applicants to demonstrate that they studied teeth whitening in dental school. SUF ¶¶ 81-85. Indeed, doing so would be impossible because, overwhelmingly, dental schools do not teach teeth whitening. SUF ¶¶ 64-65. As Dr. Giniger testified, the likely reason that aspiring dentists are not required to study teeth whitening is the same reason aspiring dermatologists are not required to study make-up application: because one does not need eight years of higher education to safely offer teeth-whitening services like Smile Bright's. SUF ¶ 65.

Literally millions of people across the world have whitened their teeth in this manner, and the published literature does not reveal even a single incident of permanent, non-transitory harm. SUF ¶ 40. Instead, the only harms that are reported are temporary tooth sensitivity and temporary irritation of the soft tissue of the mouth, all of which resolve on their own without the need for medical intervention. SUF ¶ 40. The presence or absence of an LED light in no way increases the risk of harm from teeth whitening, which is hardly surprising, given Dr. Giniger's testimony that such lights are no more powerful than household flashlights. SUF ¶ 49. Simply put, prohibiting non-dentist teeth whitening cannot rationally be expected to promote public health and safety because non-dentist teeth whitening poses no threat to public health and safety. *See* SUF ¶ 67.

Teeth-whitening services like Smile Bright's are not only safe in absolute terms, they are also as safe or safer than other activities that the Dental Commission does not consider to be the practice of dentistry. Most notably, under Connecticut law, any person may buy a peroxide-based teeth-whitening product and use that product at home, with or without an enhancing light, with no prescription, no supervision, and no instruction. Dr. Giniger provided unrebutted testimony that there is no conceivable way that the application of teeth-whitening products or the use of an LED enhancing light at home is any safer than the use of those products at a shopping mall or salon. SUF ¶ 41. Indeed, Dr. Giniger testified that the presence of a person with experience in teeth whitening to supervise the self-application of the product can only enhance the safety of the product. SUF ¶ 62. Still other activities left unregulated by the Dental Commission, like oral piercing, pose a vastly greater threat to public health and safety because, unlike teeth whitening, they carry a significant risk of infection. SUF ¶¶ 59-62.

B. Other federal courts have invalidated occupational-licensing schemes under less extreme facts.

The facts of this case are more extreme than those in other cases in which federal courts, both in and outside the Second Circuit, have found no rational connection between an occupational-licensing scheme and a state's asserted interest. In *Baccus v. Karger*, for example, the United States District Court for the Southern District of New York invalidated a New York bar rule that prohibited aspiring lawyers from sitting for the bar if they began their legal education before the age of 18. 692 F. Supp. 290 (S.D.N.Y. 1988). Although the New York Board of Law Examiners argued that the restriction was critical to ensuring that applicants had sufficient maturity to practice law, the court rejected this unsupported assertion, noting that "[l]aw schools are not in the maturity business," and concluding that the government's interest was sufficiently served by a separate requirement prohibiting aspiring lawyers from sitting for

the bar examination before they were 21 years old. *Id.* at 299-300. *Baccus* is noteworthy because legal education is directly relevant to the core practice of law that the plaintiff in that case wished to engage in. In this case, by contrast, dental education is entirely irrelevant to teeth-whitening services like those Smile Bright wishes to offer. SUF ¶¶ 64-66.

Federal courts have invalidated occupational-licensing schemes that are not rationally related to a legitimate government interest even when the state has asserted an interest in protecting public health and safety. In *Cornwell v. Hamilton*, the United States District Court for the Southern District of California considered a challenge by an African hair braider to California's cosmetology licensing scheme and found that scheme to be unconstitutional. The court examined the scope of the braider's activities, the scope of the cosmetology curriculum California forced upon the braider, and the relevance of the curriculum to the scope of the braider's activities. *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1107-18 (S.D. Cal. 1999). The Court concluded that it was irrational to require hair braiders to undertake 1,600 hours of cosmetology training when only 110 of those hours were even arguably applicable to promoting health and safety in hair braiding. *Id.* at 1109. The United States District Court for the District of Utah reached the same conclusion in another hair-braiding case just last year, concluding that Utah's 2,000-hour requirement for cosmetologists was unconstitutional as applied to an African hair braider when, at most, 20 to 30 percent of that time was applicable to hair braiding. *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012).

In this case, by contrast, the educational requirement is vastly longer and more expensive than those in *Cornwell* or *Clayton*, requiring eight years of higher education at a cost of tens of thousands of dollars, and the proportion of that education that is relevant to teeth whitening is vastly smaller (if not nonexistent). SUF ¶ 64-66. A regulation that mandates extensive knowledge in such a vast amount of irrelevant information cannot be said to "have a rational

connection with the applicant's fitness or capacity" to engage in the chosen occupation. *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 239 (1957). Thus, just as in *Cornwell* and *Clayton*, Connecticut has improperly adopted a regulatory scheme that "treats persons performing different skills as if their professions were one and the same, i.e., it attempts to squeeze two professions into a single, identical mold." *Cornwell*, 80 F. Supp. 2d at 1103.

While the rational-basis test does not require "a perfect fit" between the government's asserted interests and the means employed to attain it "the fit must be reasonable. There must be some congruity between the means employed and the stated end or the test would be a nullity." *Id.* at 1106; *see also Baccus*, 692 F. Supp. at 294 ("[R]ational review is not a paper tiger."). In this case there is not even a plausible connection between Connecticut's prohibition on non-dentist teeth whitening and the promotion of public health and safety, let alone a reasonable fit. Accordingly, Connecticut's prohibition cannot satisfy even the deferential standard of rational-basis scrutiny.

III. The Costs of Connecticut's Prohibition on Non-dentist Teeth Whiteners Vastly Outweigh Any Conceivable Public Benefit.

As explained in the preceding section, Connecticut's prohibition on non-dentist teeth whiteners like Smile Bright bears no plausible connection to the promotion of public health or safety. This prohibition does, however, impose high costs on both non-dentist teeth whiteners and consumers. This is significant because, under the rational-basis test, the U.S. Supreme Court rejects statutory classifications where there is such an extreme mismatch between a law's alleged benefits and its demonstrable harms that no rational legislator would countenance them. In *Plyler v. Doe*, for example, the government asserted that denying public education to the children of illegal immigrants could help save government funds, which the Court rejected as a "wholly

insubstantial [benefit] in light of the costs involved to these children, the State, and the Nation" of creating a subclass of illiterates. 457 U.S. 202, 230 (1982).

The Court applied similar principles in *Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336 (1989). In *Allegheny*, the state of West Virginia used the most recent purchase price of land to assess property taxes, but because some property had not changed hands for decades this resulted in recent purchasers paying taxes as much as 35 times more than neighbors who had purchased long ago. *Id.* at 340-41. The county argued that, as a general proposition, purchase price was the most precise measure of property value, and that the wild disparities that resulted in some circumstances should be accepted as a necessary evil. *Id.* at 343. The Supreme Court, however, rightly refused to allow the county to impose gross disparities simply because doing so was in some vague sense easier for county officials. *Id.* at 345-46. Thus, the mere fact that some small benefits (like cost savings) could plausibly be attributed to an unequal classification will not save it from invalidation if it achieves those small benefits at the price of imposing grossly disproportionate burdens.[5]

In this case, as demonstrated by Dr. Giniger's unrebutted expert testimony, the public benefits of prohibiting Plaintiff Smile Bright and other similar companies from offering teeth-whitening services are nonexistent. SUF ¶ 67. The costs of Connecticut's prohibition, however, are extreme. For non-dentists who wish to be able to offer teeth-whitening services, the cost amounts to eight years of higher education and tens of thousands of dollars in tuition in order to

[5] *See also James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the harm inflicted on debtors by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate the state funds saved); *Lindsey v. Normet*, 405 U.S. 56, 77-78 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and conferred a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by excluding women from service as administrators in certain cases would be unconstitutionally arbitrary).

acquire the education necessary to become a licensed dentist in Connecticut. SUF ¶ 96. For consumers, the cost amounts to fewer teeth-whitening options and the necessity of paying higher prices for these reduced options. SUF ¶¶ 99-101. Accordingly, because the alleged benefits of Connecticut's prohibition on non-dentist teeth whitening are "wholly insubstantial in light of the costs," *Plyler*, 457 U.S. at 230, Connecticut's regulatory scheme is unconstitutionally irrational.

IV. The Only Interest Apparently Served by Connecticut's Prohibition on Non-dentist Teeth Whiteners Is an Illegitimate Interest in Protecting Dentists from Economic Competition.

When a court cannot find a rational relationship between an economic regulation and any articulated legitimate purpose of the government, courts are often left with a "more obvious illegitimate purpose to which [a] licensure provision is very well tailored": pure economic protectionism for favored interests. *Craigmiles*, 312 F.3d at 228; *see also Cornwell*, 80 F. Supp. 2d at 1117-18 ("indicia of irrationality" included the obvious financial incentives that licensed cosmetologists and cosmetology schools—the drivers of the existing licensing scheme—had to create and maintain that scheme). It is well established, however, that the bare desire to benefit one interest group at the expense of another, disfavored group is not a legitimate government interest. *Craigmiles*, 312 F.3d at 229; *Merrifield*, 547 F.3d at 991 n.15.[6] The facts of this case suggest that such economic protectionism is the primary effect, if not the intended purpose, of Connecticut's prohibition on non-dentist teeth whitening.

[6] Plaintiff is aware of a single case, the Tenth Circuit's ruling in *Powers v. Harris*, that has found pure economic protectionism to be a legitimate government interest. 379 F.3d 1208, 1221 (10th Cir. 2004) ("[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."). Although the Second Circuit has not considered the validity of the Tenth Circuit's conclusion in *Powers*, that aberrant holding conflicts with the holding of the Sixth Circuit in *Craigmiles*, 312 F.3d at 229, and has been expressly rejected by the Fifth and Ninth Circuits. *See St. Joseph Abbey v. Castille*, No. 11-30756, 2013 U.S. App. LEXIS 5701, *17 (5th Cir. Mar. 20, 2013); *Merrifield*, 547 F.3d at 991 n.15.

While there is no evidence of *public* benefits from Connecticut's prohibition of non-dentist teeth whiteners, it is clear that this restriction does confer a *private* benefit on licensed dentists. Smile Bright charges between $75 and $100 for teeth whitening services. SUF ¶ 101. This is substantially less than the amount charged by most dentists, including the members of the Dental Commission themselves. SUF ¶¶ 99-100. It is not surprising that the overwhelming majority of the complaints received by the Dental Commission concerning non-dentist teeth whitening came, not from consumers, but from licensed dentists or the Connecticut State Dental Association, which represents the interests of licensed dentists. SUF ¶ 102.

Similar facts in North Carolina lead the Federal Trade Commission to conclude that the North Carolina Board of Dental Examiners violated federal antitrust law when it enacted a restriction on teeth whitening by non-dentists that is virtually identical to the restriction at issue in this case. *In re N.C. Bd. of Dental Exam'rs*, No. 9343, Slip Op. at 1-5 (F.T.C. Dec. 7, 2011), *available at* http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf. In that case, the FTC concluded that North Carolina's actions had the effect of harming competitors and consumers, resulting in higher prices for teeth-whitening services. *Id.* at 32 ("In addition to increasing prices, the Board's conduct deprived consumers of choice."); *See also* Fed. Trade Comm'n, *FTC Concludes North Carolina Dental Board Illegally Stifled Competition by Stopping Non-Dentists From Providing Teeth Whitening Services* (Dec. 7, 2011), http://ftc.gov/opa/2011/12/ncdental.shtm (last visited April 5, 2013).

This sort of industry self-dealing cannot be allowed to stand. The Equal Protection and Due Process Clauses of the Fourteenth Amendment prohibit "naked attempt[s] to raise a fortress protecting the monopoly rents that [special interests] extract from consumers." *Craigmiles*, 312 F.3d 229. Measures that "privilege certain businessmen over others at the expense of consumers [are] not animated by a legitimate governmental purpose and cannot survive even rational basis

review." *Id.*; *see also St. Joseph Abbey*, No. 11-30756, 2013 U.S. App. LEXIS 5701, at *17 ("[N]aked economic preferences are impermissible to the extent that they harm consumers." (quotation marks and citation omitted)).

CONCLUSION

The undisputed facts demonstrate that Connecticut has shut down a popular consumer service for no rational reason. The only interest even arguably advanced by Connecticut's prohibition is an illegitimate interest in protecting dentists who offer teeth whitening from honest competition by companies like Smile Bright. Accordingly, this Court should grant Plaintiff's motion for summary judgment, declare that Connecticut's prohibition on non-dentist teeth whitening is unconstitutional as applied to services like Plaintiff's, and enjoin Defendants from enforcing Connecticut's Dental Practice Act against Plaintiff and others who offer similar services.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 8, 2013, a true and correct copy of the foregoing **MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** was sent via the Court's CM/ECF to the following counsel of record:

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