UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TRISHA ECK,	:	
Plaintiff,	:	CIVIL ACTION NO.
v.	:	1:14-CV-962-MHS
TANJA D. BATTLE, in her official capacity as Executive Director of the Georgia Board of Dentistry, et al.,	:	
Defendants.	:	

ORDER

This action is before the Court on defendants' motion to dismiss. For the following reasons, the Court grants the motion in part and denies it in part.

Background

Plaintiff Trisha Eck brings this action for declaratory and injunctive relief against the Executive Director and Members of the Georgia Board of Dentistry ("Dental Board") and the Attorney General of Georgia in their official capacities. Plaintiff seeks a declaratory judgment that Georgia's Dental Practice Act, O.C.G.A. § 43-11-1 et seq., and rules promulgated thereunder, as applied by defendants to prohibit non-dentists from providing

teeth-whitening services like those provided by plaintiff violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution. Plaintiff seeks a permanent injunction prohibiting future enforcement of the statute and rules against her and other persons providing similar teeth-whitening services. The following facts are taken from the allegations of plaintiff's complaint and are assumed to be true for purposes of deciding defendants' motion to dismiss.

I. Teeth Whitening

Teeth whitening is a popular cosmetic practice in which the appearance of stains or discolorations on the tooth enamel are reduced through the use of a whitening agent, typically hydrogen peroxide or the related chemical carbamide peroxide, which breaks down into hydrogen peroxide. Teeth-whitening products are widely available for over-the-counter purchase in varying concentrations from supermarkets, drug stores, and on the internet.

Because teeth-whitening products are regulated by the U.S. Food and Drug Administration as "cosmetics," no prescription is required for their purchase. Anyone may legally purchase teeth-whitening products in any commercially available concentration and apply them to their own teeth with no supervision or instruction.

As teeth whitening has become more popular, entrepreneurs have begun offering teeth-whitening services in shopping malls, spas, and salons. The risks associated with teeth whitening are minimal and consist primarily of temporary tooth or gum sensitivity. For identical self-administered products, the risks of teeth whitening are the same whether a person applies the product to their teeth at home, in a salon, or at a shopping mall.

II. Plaintiff's Business

In November 2012, plaintiff began operating Tooth Fairies Teeth Whitening as a sole proprietorship. She performed teeth whitening at parties, conventions, and other locations where she was invited. In December 2012, plaintiff expanded her business and began offering teeth whitening from a suite within a medi-spa in Warner Robins, Georgia.

Plaintiff's services consisted of (1) selling customers a prepackaged teeth-whitening product in the form of a disposable plastic mouth tray pre-filled with a whitening agent;[1] (2) instructing customers on how to apply the product to their teeth just as they would at home; (3) providing customers a comfortable chair to sit in while using the product; and (4) providing

[1] The products plaintiff sold had a 12% to 16% concentration of hydrogen peroxide. There are many commercially available teeth-whitening products with hydrogen peroxide concentrations of 35% or higher.

customers with an LED "enhancing light" that either she or the customer would position in front of the customer's mouth.[2] Plaintiff did not make diagnoses and did not place anything in her customers' mouths.

Plaintiff and other teeth-whitening entrepreneurs compete with dentists for customers seeking whitening services. According to a 2008 Gallup poll, 80% of dentists nationwide offer teeth-whitening services. However, teeth-whitening entrepreneurs like plaintiff typically charge much less than dentists do for cosmetic teeth whitening. Plaintiff charged between $79 and $109, depending on the source of the customer and the application of various coupons and discounts.

III. Dental Practice Act

A. Unlawful Practice of Dentistry

Under Georgia's Dental Practice Act, any person who engages in any activity considered to be the practice of dentistry "without obtaining a license to practice from the board shall be guilty of a felony" and subject to fines and imprisonment. O.C.G.A. § 43-11-50. The unlawful practice of dentistry is punishable by imprisonment of two to five years, a fine of not less than $500,

[2] These lights, like the teeth-whitening products themselves, are available for purchase without a prescription and may legally be used at home without supervision or instruction.

or both. *Id.* The Dental Practice Act defines acts which constitute the practice of dentistry to include the supplying or fitting "directly for or to an ultimate user of the product in the State of Georgia, any appliance, cap, covering, prosthesis, or cosmetic covering, as defined by rules and regulations established by the board . . . ." *Id.* § 43-11-17(a)(6).

B. Application to Teeth Whitening

According to rules and regulations promulgated by the Dental Board, an "appliance" includes any "removable structure" used to "chang[e] the appearance of teeth " or "chang[e] the shape or shade of teeth." Ga. Comp. R. & Regs. 150-14-.01. In the opinion of the Dental Board, this means that "altering the shade of teeth, such as is done by the current whitening techniques is the practice of dentistry." Compl., Ex. A (emphasis in original). "Therefore," according to the Dental Board, unless "a business that provides a 'stand alone' teeth whitening enterprise . . . has a Georgia licensed, direct supervision dentist present for the treatment, it is a violation of the Dental Practice Act and the laws of the State of Georgia." *Id.* As a result, "[s]uch facilities that do not have a dentist performing and supervising the services would be charged with the unlicensed practice of dentistry, which is a felony in this state." *Id.*

C. Obtaining a Licence to Practice Dentistry

To become a licensed dentist in Georgia, one must have a doctoral degree in dentistry and pass an examination approved by the Dental Board. Ga. Comp. R. & Regs. 150-03-.04. A doctoral degree in dentistry is typically a four-year course of study in addition to a four-year undergraduate degree. The cost of dental school tuition in Georgia for a four-year doctoral degree ranges between $85,000 and $240,000, depending on the school chosen and the state of residency of the student.

The Dental Board does not require dentists to have any experience or demonstrated proficiency with teeth-whitening practices as a condition of licensure, nor does it require dental schools to teach teeth-whitening practices as a condition of accepting graduates of those schools for licensure in Georgia. The practical and written examinations accepted by the Dental Board for licensure as a dentist in Georgia do not cover teeth whitening.

IV. Investigation of Plaintiff and Approval of Cease and Desist Order

The Dental Board opened an investigation of plaintiff and her business to determine whether she was violating the Dental Practice Act by offering teeth whitening to customers in Georgia. On September 30, 2013, the Dental Board issued a subpoena to plaintiff demanding copies of all her client lists,

promotional materials, invoices, protocols, contracts, and billing records, among other materials. On October 17, 2013, plaintiff complied with the subpoena and turned over all materials demanded by the Dental Board.

On or about November 1, 2013, upon learning of the Dental Board's official position that the teeth-whitening techniques she used constituted the unlawful practice of dentistry, plaintiff voluntarily closed her business and vacated her suite at the Warner Robins medi-spa. Plaintiff intends to remain closed in order to avoid being subject to fines or imprisonment until such time as the law has changed or the Dental Practice Act is judged unconstitutional as applied to teeth-whitening services such as those provided by her.

On March 14, 2014, the Dental Board approved a Voluntary Cease and Desist Order prohibiting plaintiff from operating her business subject to fines of $500 per transaction and other potential civil and criminal penalties. On April 1, 2014, plaintiff filed this action.

Discussion

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), defendants move to dismiss plaintiff's complaint on the following grounds: (1) the Court lacks subject matter jurisdiction under the *Rooker-Feldman* doctrine; (2) plaintiff's claims are barred by *res judicata*; (3) the Court should abstain under the

Burford and *Younger* abstention doctrines; (4) neither injunctive nor declaratory relief is available; and (5) the complaint fails to state a claim upon which relief can be granted. The Court addresses each of these arguments in turn.

I. *Rooker-Feldman* Doctrine

Defendants argue that the Dental Board's Voluntary Cease and Desist Order deprives this Court of subject matter jurisdiction under the *Rooker-Feldman* doctrine. Under that doctrine, "a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in the [United States Supreme Court]." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Defendants argue that the doctrine applies in this case even though the Cease and Desist Order was issued by a state administrative agency rather than a state court because plaintiff had the ability to seek judicial review of the Order, the Order has preclusive effect under Georgia law, and the proceedings leading to issuance of the Order were judicial in nature.

Defendants' argument is foreclosed by the Eleventh Circuit's decision in *Narey v. Dean*, 32 F.3d 1521 (11th Cir. 1994). In that case, the court held that the *Rooker-Feldman* doctrine "applies only to state court decisions, not

to state administrative decisions." *Id.* at 1525 (citations omitted). The court noted that the doctrine would apply "[i]f the decision of a state agency has been upheld by a state court." *Id.* (citation omitted). "The effect of *unreviewed* state administrative decisions, however, is a matter of *res judicata*. . . ." *Id.* (quotation omitted) (emphasis in original). The court specifically rejected the argument, which defendants also make in this case, that "the doctrine should be applied to any state administrative proceeding that is judicial in nature." *Id.*

Defendants rely on *Alyshah Immigration Agency, Inc. v. State Bar of Georgia*, No. 1:04-CV-1017-TWT, 2005 U.S. Dist. LEXIS 43624 (N.D. Ga. Mar. 11, 2005). In that case, this Court held that it lacked subject matter jurisdiction under the *Rooker-Feldman* doctrine over a lawsuit claiming that a state court consent order prohibiting the plaintiffs from engaging in the unauthorized practice of law violated the plaintiffs' constitutional rights. *Id.* at *3-*6. *Alyshah*, however, is distinguishable because it involved a consent order entered by a state court rather than a state administrative agency. Accordingly, this Court has subject matter jurisdiction over plaintiff's complaint.

II. *Res Judicata*

The doctrine of *res judicata* refers to "[t]he preclusive effects of former adjudication." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). The doctrine "is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.'" *Id.* "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Id.* "Issue preclusion," on the other hand, "refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Id.* (citation omitted).

In this case, defendants argue that plaintiff's constitutional claims are barred by *res judicata* because plaintiff could have asserted them in the state proceedings, and the Voluntary Cease and Desist Order has preclusive effect under Georgia law. This argument invokes the doctrine of claim preclusion as opposed to issue preclusion. Defendants do not contend that the constitutional claims raised by plaintiff in this case were litigated and decided in the state proceedings. Instead, they argue that plaintiff could have advanced those claims in that proceeding, and that her failure to do so has preclusive effect under Georgia law.

The Supreme Court has held that state *issue* preclusion rules must be applied in federal section 1983 actions to preclude relitigation of factual issues actually decided by a state administrative agency. *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 799 (1986). However, the Eleventh Circuit has held that this rule should not be extended to *claim* preclusion. *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1064-65 (11th Cir. 1987). In *Gjellum*, the court held that "unreviewed state agency decisions will not receive claim preclusive effect in a section 1983 action regardless of whether a court of the state from which the judgment arose would bar the section 1983 claim." *Id.* at 1070. In accordance with *Gjellum*, the unreviewed Voluntary Cease and Desist Order has no claim preclusive effect in this case regardless of whether the Georgia courts would give it such effect. Defendants' reliance on *Alyshah* is again misplaced because that case involved a consent order entered by a state court rather than a state administrative agency.

III. Abstention

Defendants argue that this case satisfies the requirements for abstention under both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1970). The Court concludes that neither *Burford* abstention nor *Younger* abstention is appropriate in this case.

A. *Burford* Abstention

The Supreme Court has summarized *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of public concern."

New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colo. River Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

The Court finds no basis for *Burford* abstention in this case. The Fifth Circuit's decision in *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950 (5th Cir. 1977), is particularly instructive. In that case, the plaintiffs filed suit in federal court challenging the constitutionality of an amendment to the Florida Banking Code that prohibited non-Florida bank holding companies from providing investment advisory services to any person. *Id.* at 952-53. The court of appeals found *Burford*-type abstention improper, reasoning as follows:

> Although the challenged statutes are part of a large and perhaps complex regulatory scheme–*i.e.*, the Florida Banking Code–it must be remembered that appellants focus their attack upon a single statute whose possible invalidation could scarcely be expected to disrupt Florida's entire system of banking regulation. In this context, we discern no overriding state interest, special state competence, or threat to Florida's administration of its own affairs that would warrant denying appellants access to their chosen federal forum and relegating their various federal claims to the courts of Florida.

Id. at 955 (footnote omitted).

Similarly, in *Rindley v. Gallagher*, 929 F.2d 1552, 1556-57 (11th Cir. 1991), the Eleventh Circuit held that *Burford* abstention was improper in a suit brought by a dentist challenging, *inter alia*, the constitutionality of Florida's procedure for issuing dentists letters of guidance without notice and a hearing. The court observed that "[t]he state of Florida's ability to regulate professionals will not be seriously affected if the letter of guidance procedure is declared unconstitutional." *Id.* at 1557 (footnote omitted). The court further noted that the state had failed to "explain in what manner the regulatory system would be disrupted should it be determined that notice and hearing are constitutionally required before the issuance of letters of guidance." *Id.* The court concluded that "[n]o overriding state interests or special competence or threat to administrative integrity is implicated by [the

plaintiff's] requested invalidation or modification of [the statute] that warrants denying him access to federal court." *Id.*

Likewise, in this case, although Georgia's Dental Practice Act may be a large and perhaps complex regulatory scheme, plaintiff focuses her attack on a single statute and the rule interpreting that statute whose possible invalidation can scarcely be expected to disrupt Georgia's entire system of dental regulation. The state of Georgia's ability to regulate dentists will not be seriously affected if the application of the Dental Practice Act to teeth-whitening services like plaintiff's is found to be unconstitutional. Nor have defendants explained how the regulatory system would be disrupted if it is determined that such teeth-whitening services cannot constitutionally be defined as the practice of dentistry. Consequently, the Court discerns no overriding state interest, special state competence, or threat to Georgia's administration of its own affairs that would warrant denying plaintiff access to her chosen federal forum.

B. *Younger* Abstention

The prerequisites for *Younger* abstention are (1) an ongoing state judicial proceeding that (2) implicates important state interests and (3) provides an adequate opportunity for raising federal constitutional

questions. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). In this case, the parties dispute whether there is an ongoing state proceeding. Defendants argue that the Cease and Desist Order constitutes an ongoing proceeding because it provides that it "shall remain in effect until such time as [plaintiff] is properly licensed with the Board, or until further order." Compl., Ex. B. Plaintiff, on the other hand, points out that the terms of the Order state that it is "evidence of the final disposition of any proceedings presently before the Board." *Id.*

The Court concludes that there is no "ongoing" state proceeding. Under Georgia law, although the Cease and Desist Order remains in effect, any action to enforce the Order would require the institution of "further proceedings before the board." O.C.G.A. § 43-1-20.1(b). Unless and until such "further proceedings" are instituted, the Cease and Desist Order represents, as it specifically recites, "the *final* disposition of any proceedings *presently* before the Board." Compl., Ex. B (emphasis added). Although plaintiff could have obtained state judicial review of the Cease and Desist Order under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-19(b), she chose not to seek state court review. Therefore, the state proceedings are now at an end.

Even though the state proceedings have ended, the *Younger* doctrine might still apply. *See Moore v. City of Asheville*, 396 F.3d 385, 395 (4th Cir. 2005) (holding that "the *Younger* doctrine applies to bar federal court reconsideration of state coercive proceedings even when the state proceedings have ended, as long as the federal proceeding casts aspersion on the state proceedings or annuls their results"). In *Moore*, the plaintiff was cited for violating a city noise ordinance and rather than pursuing his rights of state administrative appeal and judicial review, he filed suit in federal court challenging the constitutionality of the ordinance. Even though the state proceedings had apparently ended, the Fourth Circuit held that *Younger* abstention was required because the complaint "seeks to annul the effects of the prior state administrative proceedings to the extent that Moore seeks a declaratory judgment that the City of Asheville unconstitutionally applied its ordinance to cite him in the past and demands direct and consequential monetary damages from the City for its actions." *Id.* at 396.

Conversely, the *Moore* court recognized that "*Younger* does not bar a *wholly prospective* federal action even if the plaintiff failed to exhaust his state appellate remedies on a prior conviction." *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 711 (1977)) (emphasis in original). In *Wooley*, the

federal plaintiff had been convicted of violating a state statute and had already served his sentence when he brought suit in federal court seeking a declaratory judgment that the statute under which he had been convicted was unconstitutional and an injunction against his future prosecution under the statute. 430 U.S. at 708-09. Even though the plaintiff had failed to seek review of his conviction in the state courts, the Supreme Court held that *Younger* did not require the federal court to abstain because the plaintiff sought prospective relief against future prosecution and did not seek to "have his record expunged, or to annul any collateral effects" of his conviction. *Id.* at 711.

This case is like *Wooley* and not *Moore*. Like the plaintiff in *Wooley*, plaintiff in this case is seeking wholly prospective relief against future enforcement of an allegedly unconstitutional interpretation of state law. Unlike the plaintiff in *Moore*, plaintiff in this case does not seek to annul the effects of the prior state administrative proceedings. Plaintiff does not seek a declaration that the Board unconstitutionally applied the law to cite her in the Cease and Desist Order, nor does she demand monetary damages from the Board for its actions. Therefore, *Younger* abstention is not appropriate.

V. Availability of Injunctive and Declaratory Relief

Title 42 U.S.C. § 1983 provides in part that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Defendants contend that this provision grants them immunity from suit for injunctive relief because they were acting in a judicial capacity in the state administrative proceedings at issue. This argument is without merit. Even assuming that defendants qualify as "judicial officers," the cited provision grants immunity to such officers sued in their individual capacities, whereas defendants in this action are sued solely in their official capacities. *See Kentucky v. Graham*, 473 U.S. 159, 167 (1985) ("The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment."); *see also VanHorn v. Oelschlager*, 502 F.3d 775, 779 (8th Cir. 2007) (defense of absolute, quasi-judicial immunity not available to state administrative officials for claims brought against them in their official capacities). The Eleventh Circuit case on which defendants rely involved a suit brought against federal judges and prosecutors in their individual capacities and is

therefore distinguishable. *See Bolin v. Story*, 225 F.3d 1234, 1238 n.4 (11th Cir. 2000).

Defendants also argue that equitable relief is unavailable because plaintiff had an adequate remedy at law in the form of state judicial review that she failed to pursue. Defendants rely on cases holding that plaintiffs may not obtain equitable relief in individual capacity suits challenging judicial officers' rulings in prior actions because the plaintiffs had an adequate legal remedy in the form of an appeal from the rulings. *See Bolin*, 225 F.3d at 1242-43; *Simmons v. Edmondson*, No. 1:06-CV-1541-WSD, 2006 U.S. Dist. LEXIS 75127, at *5-*7 (N.D. Ga. Oct. 16, 2006). But this is not an individual capacity suit challenging defendants' ruling in the prior administrative proceedings. This is an official capacity suit seeking prospective relief against defendants' future application to plaintiff's teeth-whitening business of an allegedly unconstitutional interpretation of state law. The fact that plaintiff had available state judicial remedies in the prior administrative proceedings that she chose not to pursue does not bar her from seeking such relief in this Court. *See Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 516 (1982) (exhaustion of state administrative remedies is not required as prerequisite to bringing § 1983 action).

VI. Viability of Constitutional Claims

Defendants contend that plaintiff's complaint fails to state a claim for violation of the Fourteenth Amendment's Equal Protection Clause, Due Process Clause, or Privileges or Immunities Clause. Plaintiff concedes that under the current state of the law she cannot state a claim under the Privileges or Immunities Clause. Accordingly, the Court grants defendants' motion to dismiss that claim. However, for the reasons discussed below, the Court concludes that plaintiff's complaint adequately alleges both equal protection and due process violations.

A. Equal Protection

"The Equal Protection Clause requires that the government treat similarly situated persons in a similar manner." *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337 (11th Cir. 2002). "When legislation classifies persons in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends upon the basis for the classification." *Id.* (citations omitted). "If a fundamental right or a suspect class is involved, the court reviews the classification under strict scrutiny." *Id.* (citations and footnote omitted). "If an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims

relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose." *Id.* (quoting *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000)). In this case, plaintiff does not allege that a fundamental right or a suspect class is involved. Therefore, her equal protection claim is subject to the rational basis test.

Defendants contend that plaintiff fails to state a rational basis equal protection claim because "[p]laintiff and her business have not been subjected to unequal treatment and instead are subject to the same restrictions on the practice of dentistry as apply to all persons in Georgia." Br. in Support of Defs.' Mot. to Dismiss at 25. According to defendants, "the relevant comparison is between trained and licensed dentists, on the one hand, and on the other hand untrained and unlicensed individuals who would hold themselves out to the public as capable of providing and [who] in fact provide dental services." *Id.* "The State rationally could determine," defendants argue, "that the public health is best served by requiring that dental services be provided by persons who are trained and licensed to provide such services." *Id.*

Defendants' argument misconstrues plaintiff's claim. Plaintiff does not contend that the law irrationally discriminates between those who are and those who are not licensed to practice dentistry. Instead, plaintiff alleges that the law, as interpreted by the Dental Board, irrationally discriminates between two classes of non-dentists: those who sell teeth-whitening products for customers to apply to their own teeth at home, who are not regulated under the Dental Practice Act; and those like plaintiff, who sell the same teeth-whitening products for customers to apply to their own teeth in a shopping mall or at a salon, who are considered to be engaged in the practice of dentistry. Compl. ¶¶ 67-68.

Defendants argue that plaintiff is not similarly situated to persons who sell teeth-whitening products for home use because plaintiff does not merely sell teeth-whitening products but also provides teeth-whitening services. According to the allegations of the complaint, however, the only services plaintiff provides consist of "selling customers a prepackaged teeth-whitening product; instructing customers on how to apply the product to their own teeth; providing customers with a comfortable chair to sit in while using the product; and providing customers with an enhancing light." Compl. ¶ 48. Plaintiff further alleges that "[p]roducts identical to those previously sold by

[her] are available for purchase in supermarkets, drug stores, and online," that "[i]nstructions for use of those products are . . . either provided with the products themselves or online," and that "[e]nhancing lights identical to those used by [plaintiff] are available for purchase and home use without a prescription." *Id.* ¶¶ 64-65. These allegations are sufficient to show that plaintiff and sellers of teeth-whitening products for home use are "*prima facie* identical in all relevant respects." *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006) (quoting *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)). Both sell the same products, both provide instructions on how to use the products, and customers of both may choose to use an enhancing light. The only difference between the two is where the product is used, which plaintiff contends is not rationally related to the state's legitimate interest in protecting public health. Accordingly, the complaint states a viable equal protection claim.

B. Due Process

The Supreme Court has indicated that "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment . . . subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291-92

(1999) (citations omitted). The line of cases establishing this liberty interest "all deal with a complete prohibition of the right to engage in a calling" and not merely a "brief interruption" in one's ability to pursue an occupation. *Id.* Plaintiff's complaint sufficiently alleges that the requirement to obtain a license to practice dentistry, which requires years of schooling costing tens of thousands of dollars, effectively prohibits her from engaging in her chosen occupation of teeth whitening. Compl. ¶¶ 25-27, 54.

Plaintiff's substantive due process claim is subject to the same rational basis test as her equal protection claim. *See Gary*, 311 F.3d at 1338 n.10 ("[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim.") (citation omitted); *see also Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) ("Regulations on the entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession.") (quoting *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957)). As discussed above, plaintiff's complaint adequately alleges that requiring those who sell teeth-whitening products for use in a commercial setting, rather than at home, to have a license to practice dentistry is not rationally related to any

legitimate state purpose. Accordingly, the complaint states a viable substantive due process claim.

Summary

For the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART defendants' motion to dismiss [26]. Defendants' motion is GRANTED as to plaintiff's claim under the Privileges or Immunities Clause, and that claim is hereby DISMISSED. Defendants' motion is DENIED as to plaintiff's equal protection and due process claims.

IT IS SO ORDERED, this 14th day of July, 2014.

Marvin H. Shoob, Senior Judge
United States District Court
Northern District of Georgia