

In The
Supreme Court of the United States

SENSATIONAL SMILES, LLC, D/B/A SMILE BRIGHT,

Petitioner,

v.

JEWEL MULLEN, DR., in her official capacity as Commissioner of Public Health; JEANNE P. STRATHEARN, DDS, in her official capacity as a Member of the Connecticut Dental Commission; LANCE E. BANWELL, DDS, in his official capacity as a Member of the Connecticut Dental Commission; PETER S. KATZ, DMD, in his official capacity as a Member of the Connecticut Dental Commission; STEVEN G. REISS, DDS, in his official capacity as a Member of the Connecticut Dental Commission; MARTIN UNGAR, DMD, in his official capacity as a Member of the Connecticut Dental Commission; BARBARA B. ULRICH, in her official capacity as a Member of the Connecticut Dental Commission,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

BRIEF IN OPPOSITION

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**COUNTER-STATEMENT OF
QUESTIONS PRESENTED FOR REVIEW**

Whether this Court should grant Petitioner's Petition for Writ of Certiorari ("Petition") when, even assuming this Court accepts Petitioner's questions presented and the Court ruled in Petitioner's favor on the issue of economic protectionism, it would not result in a different outcome in this particular case because Petitioner's questions are unrelated to the actual holding of the Second Circuit.

Whether this Court should grant Petitioner's Petition in a routine case involving the application of the long standing, rational-basis doctrine to a declaratory ruling issued by the Connecticut State Dental Commission ("Commission") when the Second Circuit Court of Appeals ("Second Circuit") held that there are a number of rational grounds for the rule.

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COUNTER-STATEMENT OF THE CASE

Petitioner's statement of facts incorrectly asserts that the holding of the Second Circuit is related to the question of economic protectionism. Petition for Writ of Certiorari ("Petition") i. In fact, the holding of the Second Circuit is based upon the routine application of rational-basis review of state action. The Court's holding is clearly stated in the first paragraph of its decision. The Court held that, "[b]ecause we conclude that there are any number of rational grounds for the rule, we affirm the judgment of the District Court." *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 283 (2d Cir. 2015) (App. 2). After this statement, and the Court's explanation for its decision that the minor restriction on teeth whitening easily withstands rational-basis analysis, the balance of the Court's opinion, including its discussion of economic protectionism, is dicta.

Briefly, by way of background, Connecticut law provides that no person shall engage in the practice of dentistry unless such person has first obtained a license from the Connecticut Department of Public Health ("Department"). Conn. Gen. Stat. § 20-106. The practice of dentistry is defined as the diagnosis, evaluation, prevention or treatment of an injury, deformity, disease or condition of the oral cavity or its contents. Conn. Gen. Stat. § 20-123. The Connecticut State Dental Commission ("Commission") that issued the Ruling at issue in this case is created by statute and most of its members are licensed dentists. Conn. Gen. Stat. § 20-103a.

The Commission is authorized to issue Declaratory Rulings, and such rulings shall have the same status and binding effect as an order issued in a contested case. Conn. Gen. Stat. § 4-176(h). After a hearing in which it received expert testimony indicating that there is some risk in performing teeth whitening with the use of LED lights, the Commission issued a Declaratory Ruling (“Ruling”) that generally *allowed* teeth whitening by non-dentists except when such conduct would constitute the practice of dentistry under Connecticut law. App. 76-84.

Despite admitting that the Commission’s interpretation of Connecticut law allows non-dentists to legally offer teeth whitening services, including the use of LED lights, Petitioner makes the bald, unsupported conclusory statement that the ruling’s “sole effect was to provide an economic benefit to dentists at the expense of their non-dentist competitors in the market for teeth-whitening services.” Petition 2. Petitioner’s claim has no factual basis in the record below. There was simply no evidence in the record below which indicated that the minor restriction placed on non-dentists (that they cannot position the LED light in front of a patient’s mouth) has an economic effect on their business or the business of licensed dentists. In fact, Petitioner readily admits that non-dentists can offer virtually the same services for less money which would, of course, increase competition and provide an economic benefit to non-dentists.

Petitioner also mistakenly asserts that it was “forced to shut down.” Petition 4. This is incorrect and misleading. Petitioner indicates that its services were “limited to providing customers a prepackaged teeth-whitening product; instructions on how to apply the product to their own teeth; a chair to sit in while using the product; and an enhancing light.” *Id.* All of these services are allowed by the Ruling.

As clearly noted in the Ruling, there was no ban on non-dentists providing teeth whitening services. In fact, the Ruling expressly allowed individuals and businesses to sell teeth whitening gels of differing strengths. In addition, as noted by the District Court in its memorandum granting the defendant’s summary judgment motion: “The parties agree that the Ruling permits Plaintiff to provide a chair, a LED light, and a place for the customer to sit and shine the LED light on herself during teeth whitening.” App. 39.¹ Therefore, the only issue before the District Court and then the Second Circuit was whether the Constitution forbids a state from prohibiting a non-dentist from positioning a LED light at a customer’s mouth during teeth whitening. *Sensational Smiles*, 793 F.3d at 283 (App. 3).

Importantly, as discussed in detail by the Second Circuit, prior to issuing its Ruling, the “Commission

¹ In their Petition, Petitioner admits: “To be clear, the Commission does not object to Smile Bright making teeth-whitening lights available in its stores for customers to use.” Petition 6.

received expert testimony indicating that potential health risks are associated with the use of LED lights to enhance the efficacy of teeth-whitening gels.” *Id.* at 284 (App. 5). This, of course, is the fundamental reason why the decision to grant summary judgment in a case involving rational-basis analysis was made by the District Court and affirmed by the Second Circuit.



REASONS FOR DENYING THE PETITION

As the Second Circuit correctly held, the Commission’s Declaratory Ruling (“Ruling”) easily survives rational-basis scrutiny for state action that does not involve a suspect class or infringe on a fundamental right. The issues raised by the Petitioner do not warrant this Court’s attention for three main reasons.

First, even if the Second Circuit was incorrect with respect to its analysis of the issue of economic protectionism, the outcome of this case would be the same because the Second Circuit held that there were a number of rational grounds for the Ruling. Second, the review requested by Petitioner would require this Court to engage in the weighing of evidence that this Court has consistently held is not proper. Finally, the Court should deny the Petition because this is a routine case involving traditional rational-basis analysis, and the Second Circuit correctly applied the long standing legal standards of this Court.

I. Even If This Court Concluded That The Dicta Of The Second Circuit Was Legally Flawed, The Outcome Of This Case Would Remain The Same.

The Second Circuit's holding is clear. It held that the Ruling of the Commission survived rational-basis analysis because there was at least some evidence that LED lights may cause some harm to consumers and there is some relationship between the Commission's Ruling and the harm it seeks to prevent. *Sensational Smiles*, 793 F.3d at 285 (App. 7-8). Therefore, the "rule does not violate either due process or equal protection." *Id.* In fact, the Second Circuit concluded that there are "any number of rational grounds for the rule." *Id.* at 283 (App. 2). The rest of the Second Circuit's decision is pure dicta.

The majority's intention to go beyond the evidence-based rational reason for upholding of the decision is made clear by the Court before addressing the issue of economic protectionism. The Court states: "This would normally end our inquiry, but . . . [the issue of] naked economic protectionism . . . raises a question of growing importance." *Id.* at 285-86 (App. 8).

In its dicta, the majority decided to address the issue of whether legislation survives rational-basis review if it is "nothing but naked protectionism." *Id.* The Second Circuit stated: "We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the

Fourteenth Amendment.” *Id.* at 286 (App. 9). The Court did not need to address this question as it held that there was a separate rational basis for the Commission’s Ruling and that the Ruling was based on actual evidence.

Judge Droney made this point clearly in the first paragraph of his concurring opinion, acknowledging that the case was resolved—for him and for the majority—on traditional rational-basis grounds, and he wrote separately to express his disagreement with the Court’s dicta. He states:

I join the majority opinion in its conclusion that the Dental Commission’s declaratory ruling is rationally related to the state’s legitimate interest in protecting the public health. *Because this is sufficient to resolve the appeal, I would not reach the question of whether pure economic protectionism is a legitimate state interest for purposes of rational basis review. The majority having chosen to address that issue, I write separately to express my disagreement.*

Id. at 288 (Droney, J., concurring in part and concurring in the judgment) (App. 13-14) (emphasis supplied). Thus, it is even unclear that the Second Circuit would consider itself bound by this decision in subsequent cases. This Court has very recently indicated that it is not bound by previous dicta in its own cases. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S.Ct. 1351, 1369 (2013).

Notably, the District Court did not address the issue of economic protectionism in its decision upholding the Ruling on rational-basis grounds. App. 21-67. Neither the Appellant nor the Appellee briefed the issue before the District Court and the Second Circuit regarding whether pure economic protectionism is a legitimate state interest for the purposes of rational-basis review.² The dicta is not controlling especially when the point now at issue was not fully debated. *Id.*, citing *Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935). Thus, the Second Circuit answered a purely hypothetical question.

Further, there was no evidence in the record that the Ruling was based upon any desire of the Commission to secure a financial benefit for dentists. In fact, as noted above, the Ruling allowed virtually all of Petitioner's teeth-whitening practices to continue. Its ruling was a narrowly tailored decision meant only to prohibit practices that fell within the statutory definition of the practice of dentistry. See Conn. Gen. Stat. § 20-123. In fact, the District Court referred to the restriction that prohibited non-dentists from positioning the LED lights as a "minor intrusion" on Petitioner's ability to conduct its business. App. 64.

² In fact, this precise issue was raised for the first time by Judge Calabresi during oral argument before the Second Circuit.

Finally, the outcome of this particular case would not change even if this Court reviewed the Second Circuit's dicta. The Second Circuit addressed the issue of its own dicta by stating, "even if, as appellants contend, the Commission was in fact motivated purely by rent-seeking, *the rational reasons we have already discussed in support of the regulation would be enough to uphold it.*" *Sensational Smiles*, 793 F.3d at 286 (App. 10) (emphasis supplied). Thus, even if this Court decided to grant certiorari, and reached the opposite conclusion of the Second Circuit and held that pure economic protectionism was not rational for the purposes of review under the Fourteenth Amendment, the outcome of this case would remain the same. This is true because the holding of the Second Circuit is not based upon an analysis of the issue of economic protectionism.

The holding is contained in the second sentence of the Second Circuit decision where the Court concluded that "there are any number of rational grounds for the rule . . ." *Id.* at 283 (App. 2).

Therefore, for all of the reasons stated above, even if this Court determined that pure economic protectionism was insufficient to survive rational-basis analysis, the decision of the Second Circuit would still have to be affirmed because its holding was not on these grounds, and the Second Circuit's decision followed a long, unbroken line of this Court's precedent with respect to review of state action on rational-basis grounds.

In addition, this Court has already denied petitions for writs of certiorari in two of the cases cited by Petitioner in his attempt to demonstrate that there is a split among the circuit courts. This Court denied a petition for writ of certiorari in the *Powers* case from the Tenth Circuit. *Powers v. Harris*, 544 U.S. 920 (2005). The Second Circuit cited to *Powers* as evidence that a protectionist purpose is legitimate. *Sensational Smiles*, 793 F.3d at 286 (App. 9). Just three years ago, this Court also denied a petition from the Fifth Circuit for writ of certiorari in the *St. Joseph Abbey* case. *Castille v. St. Joseph Abbey*, 134 S.Ct. 423 (2013), a case in which Petitioner argues holds that mere economic protection of a particular industry is not a legitimate governmental purpose. So this Court has already decided that the concern raised by Petitioner may not warrant review by this Court. Even assuming arguendo that this Court had some interest in addressing the issue of pure economic protectionism, this case is a particularly poor vehicle for doing so because even if the Court conducted its review and reached a conclusion consistent with Petitioner's view, the outcome of this particular case would not change as there were a variety of rational reasons for the Commission's Ruling.

II. The Review Requested By Petitioner Would Require This Court To Engage In The Weighing Of The Evidence That This Court Has Held Is Not Proper.

Although Petitioner claims that review by this Court would not require it to weigh conflicting evidence, that is exactly what this Court would have to do in order to reverse the Second Circuit on rational-basis grounds. As discussed above, there was evidence in the record to support the Commission's findings and Ruling regarding teeth whitening. This is true despite the fact that this Court has held that: "A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). In fact, rational speculation is sufficient even if such speculation is unsupported by record evidence. *Id.*

The fact that Petitioner has found an expert who asserts that there is no harm in using LED lights to enhance teeth whitening gel is constitutionally irrelevant. What matters is that plaintiff failed to "negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320-321. Different experts can have different and even contrary opinions about the potential harm of LED lights, but the Dental Commission is statutorily charged with evaluating such evidence. Given this Court's precedent, the District Court properly noted that Petitioner simply "misapprehends its burden in a rational basis challenge." App. 48.

Petitioner asks this Court to review the question of whether litigants under the rational-basis test may defeat summary judgment by demonstrating that the challenged regulation is not rationally related to a legitimate government interest. Petition 12. This presents a hypothetical question as both the District Court and the Second Circuit relied on evidence actually presented at the Commission's administrative hearing regarding teeth whitening. The question is not relevant because in this particular case, expert testimony and literature in support of that testimony was provided to the Commission with authority to issue a declaratory ruling. Petitioner simply disagrees with the evidence. That disagreement, in the face of reliable evidence presented to the Commission, is constitutionally irrelevant.

Petitioner has maintained throughout the litigation that the identity of the person positioning an LED light is not relevant, and that if there is a potential harm, that harm exists whether the light is positioned by an unlicensed person or a dentist. The Commission does not have jurisdiction over individuals who may choose to provide treatment to themselves. "The law . . . does not require perfect tailoring of economic regulations." *Sensational Smiles*, 793 F.3d at 285 (App. 7). The Commission can only legally define the practice of dentistry, and it has limited, if any, control of what people do to their own mouths. *Id.* However, the Commission is authorized by state statute to regulate the practice

of dentistry. The Commission can, and does, regulate what a non-licensed person can do to another if it falls within the statutory definition of dentistry. See Conn. Gen. Stat. §§ 20-114 and 20-123.

The District Court’s conclusion, affirmed by the Second Circuit, that the Commission might rationally have concluded that restricting the use of LED light would protect the oral health of the public easily survives rational-basis analysis. As noted by the District Court, the “Constitution does not prevent government officials from taking prophylactic measures to protect the public in the face of uncertainty.” App. 55.

The District Court and the Second Circuit properly made an inquiry into whether there was some rational basis to support the Commission’s ruling. The Second Circuit, having concluded that there are “any number of rational grounds for the rule” completed its rational-basis review. This Court would have to overturn decades of well-established precedent and decide to evaluate the sufficiency of evidence in a rational-basis analysis case. See for example, *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955); *Heller*, 509 U.S. at 320; *FCC v. Beach Communications*, 508 U.S. 307, 314 (1993).

Petitioner’s statement that the Second Circuit “conducted rational-basis review without regard for record evidence” is simply not true. Petition 29, citing App. 7. In fact, the text in the Appendix specifically refutes Petitioner’s claim. The Second Circuit states:

In sum, given that at least some evidence exists that LED lights may cause some harm to consumers, and given that there is some relationship (however imperfect) between the Commission's rule and the harm it seeks to prevent, we conclude that the rule does not violate either due process or equal protection.

Sensational Smiles, 793 at 285 (App. 7-8).

The Petitioner is attempting to create an issue that simply does not exist. The Second Circuit held that the Ruling survives constitutional rational-basis analysis because there was “any number of rational grounds for the rule.” *Id.* at 281 (App. 2). Included among these rational grounds was consideration of the evidence actually presented to the Commission at the Declaratory Ruling hearing.

III. In This Routine Case Involving Traditional Rational-Basis Analysis, The Second Circuit Correctly Applied The Long Standing Legal Standards Of This Court.

Because the Commission’s Ruling does not involve a suspect class or involve a fundamental right, it is analyzed under traditional rational-basis scrutiny. *Heller*, 509 U.S. at 320. Petitioner has always agreed that this is the correct standard to use in this case. This Court has consistently held that with respect to economic policy, a statutory classification that “neither proceeds along suspect lines nor infringes fundamental constitutional rights

must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *FCC*, 508 U.S. at 313 (emphasis supplied). In fact, this Court held that Petitioner must “negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Heller*, 509 U.S. at 320-21.

Not only is there a conceivable state of facts that could provide a rational basis for the classification, there is also an actual state of facts that do so. The Commission relied on expert testimony from a licensed dentist, Jonathan C. Meiers, DMD, who has particular expertise in the field of teeth whitening. App. 79. He provided reliable and credible oral and pre-filed testimony to the Commission. *Id.* After summarizing the evidence presented by Dr. Meiers, the District Court held that the Commission “might rationally have concluded that restricting the use of LED lights would protect the oral health of the public.” App. 55. This clearly meets the highly deferential standard of this Court with respect to rational-basis analysis.

As this Court has noted on several occasions, rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Heller*, 509 U.S. at 319. In fact, the District Court and the Second Circuit followed this mandate and appropriately determined that a rational basis existed for the Ruling. For example, the Second Circuit noted that the Commission might have

rationally concluded that in view of the “health risks posed by LED lights” persons seeking to use them should first receive an individualized assessment from a licensed dentist. *Sensational Smiles*, 793 F.3d at 285 (App. 6).

The threat does not have to be imminent or involve extreme danger in order for the state to act. As it often does, the State can act prophylactically to protect the public in the face of some threat even if the threat is small and even when the evidence is not overwhelming. More than a century ago, this Court acknowledged that, “[e]ven in the face of imperfect knowledge and potential threats to public health, States facing ‘opposing theories’ must, ‘of necessity, . . . choose between them.’” *Jacobson v. Massachusetts*, 197 U.S. 11, 30-31 (1905) (upholding constitutionality of mandatory-vaccination program).

The Second Circuit noted that the Commission also found as fact that the decision to recommend bleaching agents and use bleaching lights on a particular person requires significant diagnostic expertise and skill to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration. *Sensational Smiles*, 793 F.3d at 285 (App. 6-7). In addition, the Second Circuit held that if there was a basis for believing that LED lights could cause some harm during the teeth whitening process, the Commission might have reasoned that if there was some burning or other harm, a licensed dentist would be best equipped to make a decision

regarding whether to modify or stop the use of the LED light. *Id.*

This Court had held that: “Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884-85 (1992).

In fact, this Court has a long history of recognizing the interest of a State in protecting public health and safety.

We recognize that “the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 . . . (1975); see also *Ferguson v. Skrupa*, 372 U.S. 726, 731 . . . (1963); *Dent v. West Virginia*, 129 U.S. 114, 122 . . . (1889).

Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992).

The Commission’s actions were rationally related to the legitimate governmental purpose of protecting the public health. The Equal Protection Clause does

not forbid the state from making classifications. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). Petitioner's Petition would require the Court to answer the hypothetical question of whether the Ruling is constitutional if the Commission acted without regard to the public health and solely based on some perceived economic benefit. There is nothing in the record below, the District Court's decision or the Second Circuit's decision that would indicate that this question is anything but hypothetical and speculative.

The standard for rational-basis analysis is based upon a long history of this Court's interpretation of law and the Court's view of the role of courts in evaluating constitutional challenges to legislation. This Court has clearly stated that a "legislative choice is not subject to courtroom finding and may be based on *rational speculation unsupported by evidence or empirical data.*" *Heller*, 509 U.S. at 320 (emphasis supplied). A classification does not fail rational-basis scrutiny because "it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 321.

In this case, the Commission could have made its decision based solely upon its own expertise and it still would have survived constitutional challenges. In fact, as the Second Circuit found, the Commission relied upon expert testimony that far exceeds the standard established by this Court. Even decisions that may not, in retrospect, be wise "will eventually be rectified by the democratic process" and judicial

intervention in these matters is unwarranted no matter how unwisely the Court may think a particular political branch has acted. *FCC*, 508 U.S. at 314.

There is simply no reason for this Court to review the Second Circuit's decision. It fits squarely in the long line of this Court's cases which use the deferential rational-basis standard to review legislation that does not affect a suspect class. The three judge panel of the Second Circuit unanimously determined that there was evidence in the record to support the Commission's decision. As discussed above, this Court has held that there does not have to be *any* evidence in the record to support legislation that is related to a legitimate governmental purpose. *Heller*, 509 U.S. at 320.

As acknowledged by the Petitioner, protecting the public health is a legitimate governmental purpose. The Commission's decision furthers that purpose. This case should not be subject to further review as the questions Petitioner wants answered are hypothetical.

CONCLUSION

This Court should deny certiorari because the Second Circuit followed Supreme Court precedent in holding that there was a rational basis for the Commission's decision. The issue of economic protectionism is not relevant to this case as it was the

dicta of the Second Circuit, and a pronouncement by this Court contrary to the Second Circuit would not change the outcome for the litigants involved in this matter. In addition, the other issues raised by Petitioner are hypothetical and not part of the Second Circuit's holding.

Respectfully submitted,

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