No. 15-507

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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondents' brief in opposition underscores why this Court should grant the petition for certiorari. As explained in Section I, while Respondents argue strenuously that the Second Circuit correctly decided this case, Respondents essentially ignore the fact that the Second Circuit's ruling deepened two circuit splits among the federal courts of appeals. As explained in Section II, the fact that the Second Circuit offered alternative grounds for its ruling is not an obstacle to certiorari where each of the two alternative rulings implicates one of these existing circuit splits. Finally, as explained in Section III, this Court need not re-weigh any evidence in order to resolve this case in Petitioner's favor, because the facts relevant to Petitioner's second Question Presented were undisputed for purposes of summary judgment.

I. The Brief in Opposition Does Not Dispute That This Case Presents an Opportunity to Resolve Two Independent Circuit Splits.

The most important aspect of Respondents' brief in opposition is what it does *not* do. It does not dispute that there is an actual circuit split among the courts of appeals over whether protecting favored groups from economic competition is a legitimate government interest. *See* Pet. 13-26. Further, it does not dispute that there is an actual circuit split over whether plaintiffs in rational-basis cases can defeat a motion for summary judgment by introducing undisputed evidence negating purported rational bases for

a challenged rule. *See* Pet. 26-34. And it does not suggest this case contains any procedural problems that would prevent the Court from reaching these questions.

Instead, Respondents expend nearly all of their energy arguing that the decision below was correct under this Court's precedents. BIO 10-18. But this effort misunderstands the factors that this Court considers in choosing to grant certiorari. As Supreme Court Rule 10 makes clear, the question before this Court at the moment is not whether the Second Circuit was right – though Petitioner contends that it was not – but, rather, whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." The opinion below presents two such conflicts, and *Respondents do not dispute this.*[1]

As explained in the Petition, this case, on this record, would not have resulted in a grant of summary judgment to the government in other jurisdictions, including but not limited to the Fifth and Sixth Circuits. Pet. 14-18, 27-32. Both of those courts have

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[1] Certiorari on Petitioner's first Question Presented – regarding economic protectionism – is also warranted under Rule 10 because the Second Circuit's ruling conflicts with binding precedent from this Court, specifically *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). *See* Pet. at 18-23. Respondents do not even cite *Ward*, let alone dispute that it conflicts with the decision below.

squarely held (contrary to the decision below) that pure economic protectionism is not a legitimate interest for purposes of the rational-basis test, and both of those courts have squarely held (again, contrary to the decision below) that rational-basis plaintiffs who adduce evidence that disproves the government's asserted bases for a law do not merely survive summary judgment but may actually prevail at trial. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-25 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220, 224, 226 (6th Cir. 2002).

Respondents make no attempt to explain how the opinion below can be squared with the legal rules or outcomes in *St. Joseph Abbey* or *Craigmiles*. Indeed, their brief does not cite those cases – or any other decision from any court of appeals. Even if Respondents were correct in asserting that "the Second Circuit correctly applied the long standing legal standards of this Court," BIO 4, that simply means that the Fifth and Sixth Circuits have departed from those standards.[2] Either way, review in this case is warranted.

[2] Respondents' assertion is incorrect: This Court has consistently held, ever since it first articulated the rational-basis standard in *Carolene Products*, that rational-basis plaintiffs may defeat asserted rational bases for a law by showing that the facts underlying those assertions "have ceased to exist" or that the application of a statute in a particular circumstance "is without support in reason." *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938); *accord Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981).

This failure to even dispute the Rule 10 grounds asserted in the Petition is tantamount to a concession that those grounds exist. The Petition should be granted to give the Court the opportunity to decide both of the important Questions Presented.

II. The Fact That Each Question Presented Is Potentially Dispositive Is Not an Obstacle to Review in This Case.

Respondents suggest that this case does not present a suitable vehicle to review the split of authority – raised in Petitioner's first Question Presented – over whether economic protectionism is a legitimate government interest. In Respondents' view, because the Second Circuit concluded that Connecticut's regulation was rationally related to public health and safety, the Second Circuit's announcement that it was also joining the Tenth Circuit in holding that economic protectionism is a legitimate government interest was "pure dicta." BIO 5.[3] Respectfully,

[3] Respondents also claim in a footnote that the question of economic protectionism was never briefed by the parties below but "was raised for the first time by Judge Calabresi during oral argument before the Second Circuit." BIO 7 n.2. This assertion is false; the issue was discussed in briefing before both the trial court and the appellate court, which is why the Second Circuit addressed it at length. *See, e.g.*, Brief of Appellant with Special Appendix at 28-30, *Sensational Smiles LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015) (No. 14-1381-cv); Brief of Professor Todd J. Zywicki as *Amicus Curiae* in Support of Plaintiff-Appellant, *Sensational Smiles LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015) (No. 14-1381-cv); Pet. App. 61-62 (portions of district-court

(Continued on following page)

this objection ignores both the text of the Second Circuit's ruling and the long-recognized distinction between dicta and alternative holdings. Further, Respondent's objection does nothing to diminish this case's status as a good vehicle for resolving the disputed question of whether pure economic protectionism is legitimate for purposes of the Fourteenth Amendment.

As the Petition explains, the Second Circuit resolved this case on two independent grounds. First, it said that the government was entitled to summary judgment because it had a rational health-and-safety basis for the challenged regulation. Pet. App. 5-8. Alternatively, the court said that the government was entitled to summary judgment because, irrespective of any health-and-safety justifications, the challenged regulation could be constitutionally justified as sheer economic protectionism. Pet. App. 8-13. In the Second Circuit's view, either of these holdings – which form the basis for the two Questions Presented in the Petition – provided sufficient basis for a grant of summary judgment to the government.

Respondents' claim that the second of these holdings is mere "dicta" is belied by the text of the decision below. The Second Circuit's opinion is unambiguous that its statements regarding economic

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opinion citing *Craigmiles*); Memorandum in Support of Plaintiff's Motion for Summary Judgment at 22, 28-29, *Martinez v. Mullen*, 11 F. Supp. 3d 149 (D. Conn. 2014) (No. 3:11-cv-01787).

protectionism are intended as a holding: "[*W*]*e hold today* . . . that there are any number of constitutionally rational grounds for the Commission's rule, *and that one of them is the favoring of licensed dentists at the expense of unlicensed teeth whiteners*." Pet. App. 13 (emphasis added). In reaching this "hold[ing]," the Second Circuit was also aware that it was taking sides in an established circuit split: "We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment." Pet. App. 9.

This is not, to put it mildly, the language of "dicta" – the Second Circuit was not hypothesizing on what it *might* hold in some future case with different facts. This language is instead what this Court has recognized for more than a century as an alternative holding. And where, as here, "there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter [dictum], but each is the judgment of the court and of equal validity with the other.'" *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pac. R.R. Co. v. Mason City & Ft. Dodge R.R. Co.*, 199 U.S. 160, 166 (1905)); *see also MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 346 n.4 (1986) ("[S]ince the Superior Court did not rest its holding on only one of its two stated reasons, it is appropriate to treat them as alternative bases of decision.").

In short, the decision below contains two holdings and, to reverse the decision below, this Court would need to find in Petitioner's favor on both Questions

Presented. And as long as both Questions Presented afford the Court an opportunity to address an important circuit split (which they do, and which Respondents have not disputed), there is no reason not to grant the Petition and address both questions.

III. This Case Does Not Require the Court to "Weigh Conflicting Evidence."

Finally, Respondents are incorrect to assert that reviewing this case would require the Court to "weigh conflicting evidence." BIO 10. Respondents misunderstand both Petitioner's argument and the procedural posture of this case.

Respondents' misunderstanding seems to stem from a belief that Petitioner's argument turns on the *government's* burden in a rational-basis case. The Brief in Opposition repeatedly invokes the proposition that the government in rational-basis cases has no initial burden of producing any evidence at all. *E.g.*, BIO 18. Petitioner does not dispute this. Petitioner's contention, instead, is that summary judgment for Respondents was inappropriate because *Petitioner* adduced *unrebutted* evidence that negated any conceivable connection between the government's policy and its asserted goal of promoting public health and safety.

Specifically, Petitioner's summary-judgment evidence shows that there could be no conceivable health-and-safety benefit to prohibiting Petitioner from positioning low-powered LED lights in front of

their customers' mouths while allowing other, similarly situated businesses to supervise and instruct customers on the positioning of these lights. Pet. 7-8 & n.3.[4] This is because, whatever minimal risks might be associated with the use of LED teeth-whitening lights, those risks do not vary up or down based on whether Petitioner positions the light for its customers or instead merely supervises and instructs the customer on the positioning of the light; in both cases the ultimate position of the light is (1) the same, and (2) determined by Petitioner. At no point in this case has anyone disputed this evidence – not Respondents and not the Second Circuit below.

This evidence is all the more important because of the *procedural posture* in this case: a grant of summary judgment to the government. In the ordinary course of a summary-judgment motion, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, to rule for Petitioner, this Court need not weigh conflicting evidence or even determine the rationality of Connecticut's teeth-whitening policy. It need only hold that where (as here) a rational-basis

[4] As the Petition notes, the original Declaratory Ruling was an attempt to monopolize the teeth-whitening business along the lines of the regulation reviewed by this Court in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). *See* Pet. 5-7. The current restriction on positioning LED lights is a litigating position adopted by the Board's counsel. *Id.*

plaintiff adduces competent evidence that (1) there is no rational connection between the government's goals and its chosen means of pursuing those goals and (2) literally no one has ever said otherwise, then summary judgment for a government defendant is inappropriate.

Respondents, like the Second Circuit below, do not address this argument. Instead, Respondents place great weight on the fact that the Connecticut Dental Commission, before adopting its original rule, heard testimony from a licensed dentist, Jonathan Meiers, that might support the conclusion that the use of some types of teeth-whitening lights might pose risks to the oral health of the public.[5]

As an initial matter, Dr. Meiers's out-of-court statements to the Dental Commission were largely irrelevant to the facts of Petitioner's business. As Petitioner explained below, Dr. Meiers provided no opinions regarding the sort of low-powered LED lights used by Petitioner. Instead, the only specific testimony regarding those lights was the summary-judgment testimony of Petitioner's expert, Dr. Martin Giniger, who testified that the low-powered LED lights Petitioner used – and that are commonly used by non-dentist teeth-whiteners throughout the

[5] To be clear, Dr. Meiers was not designated as an expert and did not testify in this action; Respondents rely only on his hearsay testimony before the Connecticut Dental Commission. Pet. App. 48-50.

country – are no more powerful or dangerous than a household flashlight. Pet. App. 86-87.

In any event this Court need not *weigh* Dr. Meiers's statements to the Dental Commission against Dr. Giniger's sworn testimony in this case, because Petitioner's argument does not hinge on the harmlessness of LED lights (though on the summary-judgment record below they are demonstrably harmless). Instead, as noted above, Petitioner's argument is that Connecticut's policy of prohibiting non-dentists from physically positioning these low-powered LED lights for their customers – while simultaneously allowing non-dentists to supervise and instruct customers on the positioning of these same lights – cannot possibly ameliorate any hypothetical harms from those lights. Nothing in Dr. Meiers's statements to the Dental Commission – or in any of the evidence proffered by Respondents – contradicted Petitioner's evidence that there is no conceivable mechanism by which the risks associated with these two methods of positioning lights vary, and therefore there is no basis for believing that it is rational to treat one of these activities as a felony while leaving the other totally unregulated.

Despite Petitioner's unrebutted evidence on this matter, the Second Circuit still granted summary judgment to the Dental Commission. As a result, the second Question Presented in this case boils down to whether the rational-basis test is so deferential that it suspends the ordinary operation of the Rules of Civil Procedure, entitling the government to summary

judgment even when a rational-basis plaintiff has produced undisputed evidence that there is no rational connection between the government's ends and the means chosen to pursue those ends.

Because of the ruling below, that is now the case in the Second Circuit. But it is not the case in other courts of appeals, which, relying on the same kind of evidence disregarded here, allow plaintiffs not just to survive summary judgment, but to win at trial. In *St. Joseph Abbey*, for example, the court struck down the use of Louisiana's funeral-director law to prohibit non-licensees from selling caskets to consumers. 712 F.3d at 227. There, as here, there was an easily perceived rational basis for regulating the broader industry (of funeral directing or of teeth whitening). *Id.* at 223-24. And there, as here, the plaintiff produced evidence that there was no conceivable way in which the plaintiff's proposed activity (there, selling caskets, here, positioning flashlight-level LED lights as opposed to instructing and supervising the positioning of those lights) could pose a danger to anyone. *Id.* at 224-26. But there, unlike here, that evidence mattered to the ultimate outcome.

When federal courts of appeals applying the same legal standard and presented with similar evidence reach completely opposite outcomes, that is a split of authority. The petition for certiorari should be granted so this Court has an opportunity to resolve that split.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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