No. _____

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

PETITION FOR WRIT OF CERTIORARI

INSTITUTE FOR JUSTICE
PAUL M. SHERMAN*
ROBERT J. MCNAMARA
DANA BERLINER
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
psherman@ij.org

Counsel for Petitioner

**Counsel of Record*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

In its decision below, the Second Circuit – joining the Tenth Circuit and expressly rejecting contrary holdings from the Fifth, Sixth, and Ninth Circuits – held that "laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition" survive rational-basis review under the Fourteenth Amendment because they are a rational means of enriching politically favored groups at the expense of politically disfavored groups. In an alternative holding – splitting with the same circuit-court decisions on the role of evidence under the rational-basis test – the Second Circuit held that the government was entitled to summary judgment even though Petitioner introduced undisputed evidence showing that there was no plausible connection between the challenged regulation and the government's asserted interest in promoting public health and safety.

The Questions Presented are:

1) Is protecting favored groups from economic competition a legitimate government interest under the Fourteenth Amendment?

2) In a case challenging economic regulation under the Fourteenth Amendment, can a plaintiff defeat a motion for summary judgment by introducing evidence showing that there is no plausible connection between the challenged regulation and the government's asserted ends?

PARTIES TO THE PROCEEDINGS

The Petitioner is Sensational Smiles, LLC d/b/a Smile Bright, a Connecticut limited liability company.

The Respondents are Jewel Mullen, MD, 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; and Barbara B. Ulrich, in her official capacity as a Member of the Connecticut Dental Commission.[1]

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The petitioner has no parent corporation and no publicly held corporation owns 10% or more of its stock.

---

[1] There are currently three vacancies on the Connecticut Dental Commission, including one created by the departure of former defendant Elliot S. Berman, DDS. In accordance with Supreme Court Rule 35.3, counsel will alert the Clerk when these vacancies are filled.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 793 F.3d 281 (2d Cir. 2015). The order of the district court, App. 21, is reported at 11 F. Supp. 3d 149 (D. Conn. 2014).

JURISDICTION

The order of the court of appeals was entered on July 17, 2015. This petition is timely filed on October 15, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiff below brought this action under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses, which provide:

> No state shall . . . deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The challenged provisions of the Connecticut Dental Practice Act, as well as the Dental Commission's declaratory ruling interpreting those statutes, are reproduced in the Appendix at 68-84.

STATEMENT

This case is a challenge under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to a Connecticut law that regulates teeth-whitening services. As interpreted by the Connecticut Dental Commission, Connecticut law permits non-dentists to legally offer teeth-whitening services, to make low-powered teeth-whitening lights available for use in their shops, and to supervise and instruct customers on the use of those lights. But any non-dentist who physically positions a teeth-whitening light in front of his customer's mouth is guilty of the felony of the unlicensed practice of dentistry and may be sentenced to up to five years in jail or fined $25,000 per customer.

Petitioners challenged this law on the grounds that, as interpreted and applied by the Dental Commission, its 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.

And, remarkably, the Second Circuit held that that was just fine, because, in its view, "economic favoritism is rational for purposes of . . . the Fourteenth Amendment." App. 9. In so holding, the Second Circuit announced that it was siding with the Tenth Circuit – and against the Fifth, Sixth, and Ninth Circuits – in an acknowledged circuit split over the question of whether pure economic protectionism is a legitimate government interest.

Alternatively, the Second Circuit held that Connecticut's law was rationally related to public health and safety. But this alternative holding presents an additional, unacknowledged circuit split with the same circuit-court decisions about the role of evidence under the rational-basis test. Although the Fifth, Sixth, and Ninth Circuits have all held that plaintiffs in rational-basis cases may prevail in a rational-basis challenge by adducing evidence that a challenged regulation does not plausibly advance the government's asserted interest in public health and safety, the Second Circuit below held that such evidence – even when undisputed or admitted to – is insufficient even to defeat summary judgment.

The practical effect of the Second Circuit's ruling is to render this Court's rational-basis test a nullity. Yet this Court has repeatedly held that rational-basis review, while deferential, is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Accordingly, this Court should grant certiorari to reaffirm that there remain some government interests – such as economic protectionism – that are categorically illegitimate.

This Court should also grant certiorari to reaffirm that the mere invocation of a legitimate government interest does not entitle the government to summary judgment where undisputed record evidence demonstrates that it is not plausible that the law does anything to advance that interest. Doing so would not require this Court to re-weigh evidence or scrutinize the fact-finding of a lower court. Instead, because this case involves a grant of summary judgment to the Dental Commission despite Petitioner producing far more than a scintilla of evidence in its favor, the Court can resolve the straightforward legal dispute simply by deciding whether courts applying the rational-basis test may ignore undisputed record evidence, or whether they must instead take into consideration "proof of facts tending to show that the statute as applied . . . is without support in reason." *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

I. Petitioners and their business

Petitioner is Sensational Smiles, LLC d/b/a Smile Bright, a Connecticut company owned by entrepreneurs Taso Kariofyllis and Steve Baracco that offers affordable teeth-whitening services. App. 31-32. Before being forced to shut down, Smile Bright's 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." App. 32. The particular light that Smile Bright

uses is a low-powered LED light. App. 47-48; 86-87.[2] A video showing an accurate demonstration of Smile Bright's services, including the use of the LED light that is at the center of this petition, is available at http://www.youtube.com/watch?v=IjZ_8qbzsGI.

II. The Dental Commission's declaratory ruling and its effect on Petitioners

In September of 2010, the Connecticut Dental Commission initiated a declaratory-ruling proceeding regarding whether, and under what circumstances, teeth-whitening services like those described above constitute the practice of dentistry. App. 76. Ultimately, on June 8, 2011, the Commission adopted a broadly worded declaratory ruling stating that teeth whitening constitutes the practice of dentistry when those services include, among other things, "advising individuals on the use of [teeth-whitening] trays," "instructing a customer on teeth whitening procedures or methods," or "utilizing instruments and apparatus such as enhancing lights." App. 84. Based on that ruling, the Connecticut Department of Public Health sent cease-and-desist letters to teeth whiteners throughout Connecticut, including Smile Bright, that repeated this broad language. App. 31.

Because the unlicensed practice of dentistry is a felony offense in Connecticut, punishable by up to five

[2] LED is an acronym for "light-emitting diode."

years in jail or $25,000 in civil fines per customer, Smile Bright closed its two locations in shopping malls and ceased offering teeth-whitening services in salons. App. 32. Shortly thereafter, Smile Bright filed a lawsuit in the Federal District Court for the District of Connecticut, challenging the Dental Commission's declaratory ruling under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. App. 33.

Over the course of litigation, the Dental Commission backed away from the broad wording of its declaratory ruling. App. 36-38. While the plain text of the ruling appeared to outlaw many components of Smile Bright's business, by the time the parties submitted their summary-judgment briefing, the Commission had taken the position that Smile Bright's only activity that was actually prohibited by the declaratory ruling was positioning low-powered LED teeth-whitening lights in front of their customers' mouths. App. 39.

To be clear, the Commission does not object to Smile Bright making teeth-whitening lights available in its stores for customers to use. The Commission does not even object to Smile Bright instructing customers on the use of those lights or supervising customers to ensure that they use the lights only in the manner that Smile Bright instructs. Instead, the only thing that the Connecticut Dental Commission prohibits is the physical positioning of the lights: Such lights may only be positioned by fully licensed dentists, dental hygienists operating under a dentist's

supervision, or by teeth-whitening customers, who are not required to have any training whatsoever and who may be relying entirely on the guidance of a non-dentist teeth whitener. Anyone else who positions such a light is guilty of a felony.

III. Proceedings below

At summary judgment, in response to the Dental Commission's argument that its policy promoted public health and safety, Smile Bright presented unrebutted testimony that there has never been a recorded incident of a person being harmed by a low-powered LED teeth-whitening light like those that Smile Bright uses. App. 86. This is unsurprising, because unrebutted expert testimony established that Smile Bright's light is no more powerful than a household flashlight, and, as Smile Bright's expert testified, is physically incapable of causing the sort of temperature change that would be necessary to cause harm to a human tooth. App. 86-87. Further, the Dental Commission conceded that, even if teeth-whitening lights posed some hypothetical risk to teeth-whitening customers, there was no conceivable mechanism by which Connecticut's policy of prohibiting non-dentist teeth whiteners from positioning these lights in front of their customers' mouths could produce public health benefits when Connecticut simultaneously permitted non-dentist teeth whiteners

to supervise and instruct customers on the position of these lights.[3]

The district court nonetheless granted summary judgment to the Dental Commission. The court acknowledged that Smile Bright had "raised serious questions about the wisdom of the Commission's

---

[3] Specifically, Smile Bright proposed as undisputed the fact that "[t]he presence of a non-dentist who is familiar with the use of teeth-whitening products directing the application of those products can only enhance the safety of teeth whitening" (a claim supported by the testimony of Smile Bright's expert witness). App. 88. In response to that proposed undisputed fact, the Dental Commission did not deny this fact, but instead stated that "[t]he defendants have insufficient information to admit or deny, and this claim is wholly unrelated to the lawsuit and the Declaratory Ruling." App. 89. Under the Federal Rules of Civil Procedure and the local rules of the Federal District Court for the District of Connecticut, the Dental Commission's equivocal and unsupported response constituted an admission. *See, e.g.*, *Karazanos v. Madison Two Assocs.*, 147 F.3d 624, 626 (7th Cir. 1998) (holding that the "equivocation" that a party lacks sufficient information to admit or deny a properly supported fact is "an admission, not a denial"); *Gateway Equip. Corp. v. United States*, 247 F. Supp. 2d 299, 304 n.10 (W.D.N.Y. 2003) (accepting plaintiff's proposed facts as true where "[t]he government did not admit or deny them in its Statement of Disputed Facts; it simply responded that such facts were 'irrelevant'"); *see also* D. Conn. L. R. 56(a)(1) ("All material facts set forth in [a proposed statement of undisputed facts] and supported by the evidence will be deemed admitted unless controverted by the statement required to be filed and served by the opposing party in accordance with Local Rule 56(a)2."); D. Conn. L. R. 56(a)(3) ("[E]ach denial in an opponent's Local Rule 56(a)2 Statement, *must* be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial." (emphasis added)).

applying the dental practice statute to forbid non-dentists from deploying lights." App. 44. Like the Dental Commission, the court also did not dispute Smile Bright's claim that there is no conceivable mechanism by which it is safer for a non-dentist teeth whitener to instruct and supervise customers on the positioning of teeth-whitening lights than it would be for that same teeth whitener to physically position the light himself. Instead, the court held that this fact was irrelevant under the rational-basis test, and concluded that "[t]he fact that some harm may still result because a customer may apply the light to his own mouth does nothing to undercut the rationality of the restriction." App. 61.

Smile Bright timely appealed to the Second Circuit, which affirmed the district court's ruling. App. 1-13. Writing for the majority, Judge Guido Calabresi agreed that Connecticut's policy was rationally related to public health and safety, though, once again, the majority did not identify any mechanism by which it was safer for a teeth whitener to instruct and supervise customers on the positioning of teeth-whitening lights rather than to physically position the light himself. App. 5-8. Accordingly, the court ignored the law's differential treatment of teeth whiteners who physically position lights for their customers (whom the law considers felons) and those who merely provide instruction and supervision on the positioning of those lights (who are free to remain in business), and focused instead on the question of whether it was rational for the law to distinguish

between non-dentist teeth whiteners and teeth-whitening customers. App. 7.

This holding ultimately proved unnecessary to the Second Circuit's decision, because the court went on to justify Connecticut's policy on the far more sweeping grounds that the policy was constitutional under the Fourteenth Amendment as a means of protecting licensed dentists from economic competition. App. 10. Although recognizing that, "[i]n recent years, some courts of appeals have held that laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition cannot survive rational basis review," App. 9, the majority explicitly embraced the Tenth Circuit's contrary holding in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), "and conclude[d] that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment." App. 9.

Thus, according to the majority, Connecticut's restriction on the identity of who may position LED lights was constitutional "even if the only conceivable reason for the LED restriction was to shield licensed dentists from competition." App. 10. Under this view of the rational-basis test, any "consumer-friendly rationale is unnecessary . . . as a simple preference for dentists over teeth-whiteners would suffice" to establish a legitimate basis for regulation. App. 11; *see also id.* ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics.").

Judge Christopher Droney, without any further elaboration, joined the majority's opinion to the extent it concluded that Connecticut's law promoted public health and safety. He wrote separately, however, to object to the majority's holding that pure economic protectionism was a legitimate government interest. App. 13-20. Instead, Judge Droney concluded, consistent with the approach taken by the Fifth, Sixth, and Ninth Circuits, that "there must be at least some perceived public benefit for legislation or administrative rules to survive rational basis review under the Equal Protection and Due Process Clauses." App. 14. Judge Droney also noted that the practical effect of the majority's holding was to "render[ ] rational basis review a nullity in the context of economic regulation." App. 18; *see also* App. 19 ("If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth."). He concluded that "no matter how broadly we are to define the class of legitimate state interests, I cannot conclude that protectionism for its own sake is among them." App. 20.

This petition timely followed.

REASONS FOR GRANTING THE WRIT

This case presents two important questions that merit this Court's review. The first is whether pure

economic protectionism – stifling economic competition merely to confer a benefit on group A at the expense of group B – is a legitimate government interest. The Second Circuit held that it was. But as explained in Section I, that ruling deepens a split among the circuits (the majority of which have reached the opposite conclusion), conflicts with this Court's precedent, and will have profound consequences if allowed to stand.

This case also presents a second question that is no less vital: whether litigants under the rational-basis test may defeat summary judgment by demonstrating, through record evidence, that a challenged regulation is not "rationally related" to a legitimate government interest. In this case, the Second Circuit dismissed as irrelevant undisputed evidence that Connecticut's policy cannot possibly promote the state's legitimate interest in public health and safety. But, as explained in Section II, this approach conflicts with the approach taken by other federal circuit courts and by this Court, both of which have held that, where a plaintiff demonstrates that there is no reasonably conceivable set of facts under which a challenged government policy could be thought to advance the government's interest, that policy fails rational-basis review and summary judgment for the government is inappropriate.

I. The Second Circuit's holding that pure economic protectionism is a legitimate government interest deepens an existing circuit split, conflicts with this Court's precedent, and will have profound consequences.

As discussed in Part A, below, the Second Circuit's decision has reinvigorated a circuit split about whether pure economic protectionism is a legitimate government interest. Under the rational-basis test, a law or regulation will be held unconstitutional if it is not rationally related to a legitimate government interest. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Thus, there are two ways that a law or regulation can fail the rational-basis test: a litigant may demonstrate that the government's asserted interest, while legitimate, is not plausibly advanced by the government's policy, or a litigant may demonstrate that the only interest plausibly advanced by the policy is illegitimate. But this Court has not identified the complete universe of illegitimate government interests, nor has it provided detailed guidance on how lower courts are to determine which government interests are or are not legitimate. As a result, the Second and Tenth Circuits have held that pure economic protectionism is a legitimate government interest, while the Fifth, Sixth, and Ninth Circuits have all rejected that interest. This Court should grant certiorari to resolve this split. Sup. Ct. R. 10.

This Court should also grant certiorari to bring the law of the Second and Tenth Circuits in line with this Court's precedent. As discussed in Part B, this Court has spoken directly to the central issue in this case, holding in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), that pure economic protectionism is not a legitimate government interest. The lower courts that have endorsed economic protectionism as a legitimate government interest (including the court below) have either ignored *Ward* entirely or have attempted to distinguish it on unconvincing grounds.

Finally, as discussed in Part C, although this is not the first time this issue has been brought to the Court's attention, this case is the best vehicle in which this issue has been raised. The Second Circuit's decision has revived a split that seemed moribund the last time this Court considered the issue, and will have profound consequences if allowed to stand.

A. The Second and Tenth Circuits have held that economic protectionism is a legitimate government interest, while the Fifth, Sixth, and Ninth Circuits have expressly rejected that conclusion.

The Second Circuit's decision below is merely the latest chapter in a circuit split that has existed for more than a decade. To date, five circuits have expressly considered whether economic protectionism is a legitimate government interest. The first was the

Sixth Circuit in *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). In that case, the court considered the constitutionality of a Tennessee law that granted licensed funeral directors a monopoly on the sale of caskets. Although the funeral board asserted that the law was intended to promote public health and safety, the court concluded that the law was not rationally related to those interests. Accordingly, the court considered the legitimacy of the "more obvious" purpose to which the law was "very well tailored": protecting licensed funeral directors from economic competition. The Sixth Circuit concluded that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose," *id.* at 224, and invalidated the casket-sales ban.[4]

A circuit split developed shortly thereafter with the Tenth Circuit's ruling in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004). That case involved a

[4] Other courts within the Sixth Circuit have subsequently relied on that ruling when reviewing other economic regulations. In *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014), a Kentucky district court struck down restrictions on entry into the market for commercial movers where evidence showed that the only possible interest plausibly advanced by the restrictions was economic protectionism. Similarly, in *Bokhari v. Metropolitan Government of Nashville & Davidson County*, No. 3:11-00088, 2012 WL 6018710 (M.D. Tenn. Dec. 3, 2012), a Tennessee federal court denied a municipality's motion for summary judgment in a challenge to a minimum-fare requirement for limousines after the plaintiffs produced sufficient evidence to demonstrate the existence of a disputed issue of material fact on whether the law served only to promote economic protectionism.

substantively identical ban on casket sales by anyone other than a licensed funeral director. But the Tenth Circuit upheld the law, rejecting the argument that economic protectionism was an illegitimate government interest. While recognizing that this Court has repeatedly held that *interstate* economic protectionism is illegitimate, the Tenth Circuit reasoned that *intrastate* economic protectionism is simply politics as usual: "[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." *Id.* at 1221.[5]

Later courts rejected the Tenth Circuit's reasoning, siding with the Sixth Circuit's *Craigmiles* ruling. In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the Ninth Circuit invalidated a licensing requirement for persons offering structural pest-control services. Under California law, a license was required for anyone offering these services for the purpose of deterring mice, rats, or pigeons, but not those offering these services for the purpose of deterring skunks, raccoons, squirrels, bats, or birds other than pigeons. *Id.* at 981-82. The panel, per Judge O'Scannlain, concluded that this "irrational singling out of three types of vertebrate pests from all other vertebrate animals was designed to favor economically certain constituents at the expense of others similarly situated."

---

[5] As discussed in Section I.B., *infra*, the Supreme Court case law upon which the Tenth Circuit relied stands for no such principle.

Id. at 991. The panel then expressly rejected the Tenth Circuit's decision in *Powers*, reasoning that "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest." *Id.* at 991 n.15.

The Fifth Circuit similarly rejected *Powers* in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), which again involved a ban on casket sales by anyone other than a licensed funeral director. The Fifth Circuit's holding is noteworthy because of its examination of the Supreme Court precedent upon which the Tenth Circuit had relied. As the Fifth Circuit saw it, that precedent, rather than establishing the legitimacy of economic protectionism for its own sake, instead stands for the far less controversial notion that "protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of *the public interest or general welfare*." *Id.* at 222 (second emphasis added). The court went on to conclude that "neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose," and that, absent any plausible public benefit, such protectionism was "aptly described as a naked transfer of wealth." *Id*. at 222-23.

Thus, for over a decade, the Tenth Circuit's ruling in *Powers* had been the sole outlier in an unbroken series of circuit-court decisions concluding that the raw use of government power to stifle economic competition for the purpose of benefiting a favored

interest group was not legitimate. The Second Circuit was well aware of this split and expressly sided with *Powers*. App. 9 ("In recent years, some courts of appeals have held that laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition cannot survive rational basis review. . . . We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment."). Accordingly, this case presents a clear, acknowledged, and consequential split of authority among the courts of appeals. This Court should grant certiorari to resolve this split of authority. Sup. Ct. R. 10(a).

B. The Second Circuit's holding conflicts with this Court's decision in *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), which rejected economic protectionism as a legitimate government interest.

The Second Circuit's holding is worthy of this Court's review not only because it revived and deepened a split among the circuits, but also because it conflicts with this Court's precedent. Contrary to the Second Circuit's decision below that economic protectionism standing alone is a legitimate justification for government regulation, this Court rejected that argument 30 years ago.

The controlling case is *Metropolitan Life Insurance Co. v. Ward*, in which this Court invalidated an

Alabama law designed to protect local insurance companies from out-of-state competition. 470 U.S. 869, 883 (1985). Because Congress had, through the McCarran-Ferguson Act, immunized such laws from challenge under the dormant aspect of the Commerce Clause, this Court reviewed the law under the Equal Protection Clause. Ultimately, this Court concluded that the law was simply naked economic favoritism with no rational connection to any other valid public justification. *Id.* at 878. Reasoning that this sort of pure economic protectionism was not a legitimate interest, this Court struck down the law under rational-basis scrutiny. *Id*. at 882.

The Second Circuit was aware of this Court's decision in *Ward*; as the Second Circuit noted in its ruling, the case was specifically discussed at oral argument when the court raised, for the first time, the argument that Connecticut's law was a rational means of promoting economic protectionism. *See* App. 11 n.4. Yet the Second Circuit concluded in a footnote and with no additional analysis that "*Ward* is inapposite . . . because it deals with economic discrimination based on out-of-state residence, not with purely intrastate economic regulation."

Respectfully, there is no basis in this Court's case law for the Second Circuit's apparent belief that *interstate* economic protectionism is forbidden, while *intrastate* economic protectionism is perfectly legitimate. Indeed, *Ward* itself forecloses this argument. In response to Alabama's argument that the plaintiffs in *Ward* were relying on "Commerce Clause rhetoric in

equal protection clothing," 470 U.S. at 880, this Court discussed in detail the different purposes served by the Commerce and Equal Protection Clauses. While the Commerce Clause "protects interstate commerce," the Fourteenth Amendment "protects persons." *Id.* at 881. Nothing in either the text of the Fourteenth Amendment or in *Ward* suggests that this protection turns on the state citizenship of those persons. To the contrary, the Fourteenth Amendment requires that every state provide equal protection to "*any person* within its jurisdiction." U.S. Const. amend. XIV, § 1 (emphasis added).[6]

Rather than follow the clear holding of *Ward*, the Second Circuit instead followed a handful of cases that it claimed stood for the proposition that government may legitimately enact laws solely for the purpose of favoring A at the expense of B. App. 10-11. But the court misreads these cases, which stand instead for the well-established principle that a law that is rationally believed to provide a *public* benefit cannot be struck down merely because it also results in a private economic benefit.[7] Thus, when this Court in *Williamson v. Lee Optical of Oklahoma, Inc.*,

---

[6] The Due Process Clause of the Fourteenth Amendment similarly speaks to the rights of "any person" without regard to their state of citizenship. *See* U.S. Const. amend. XIV, § 1.

[7] The Second Circuit relied on the same Supreme Court cases that the Tenth Circuit relied upon in *Powers v. Harris*. *See* 379 F.3d at 1220-21. Both courts misread these cases in the same manner.

upheld a law that prohibited opticians from replacing eyeglass lenses without a prescription from a licensed ophthalmologist or optometrist, it did so not because the law financially benefited ophthalmologists and optometrists, but because this Court considered the law a rational means of promoting vision health among members of the public. 348 U.S. 483 (1955). Similarly, in *City of New Orleans v. Dukes*, this Court upheld a ban on street vending in New Orleans's French Quarter not because the ban benefited the small number of vendors who were grandfathered in, but rather because the law was a rational means of preserving the historic character of that neighborhood. 427 U.S. 297 (1976).

The Second Circuit's citations to *Fitzgerald v. Racing Ass'n of Central Iowa*, 539 U.S. 103 (2003), and *Nordlinger v. Hahn*, 505 U.S. 1 (1992), also provide no basis for the Second Circuit's sweeping conclusions that the Fourteenth Amendment sanctions economic protectionism qua protectionism. In *Fitzgerald*, the owners of racetracks challenged a law that legalized slot machines at race tracks but subjected them to higher taxes than slot machines on river boats. But, as this Court noted, this law actually *benefited* racetrack owners; it simply did not benefit them as much as they would have liked. 539 U.S. at 108. Moreover, this Court found that the differential treatment of riverboats was justified not solely by a desire to financially benefit riverboats, but by the state's desire "to encourage the economic development of river communities." *Id.* at 109. Similarly, in

Nordlinger, this Court upheld California's system of differential property-tax assessments on the grounds that the financial benefits provided to longer-term homeowners discouraged rapid turnover in home ownership as a means of promoting "neighborhood preservation, continuity, and stability," not on the grounds that it provided a windfall to a favored group of citizens. 505 U.S. at 12.[8]

In short, there is no basis in this Court's precedent for the Second Circuit's conclusion that pure economic protectionism is a legitimate government interest. Indeed, if it were so, much of this Court's precedent would look radically different. Decisions like *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*, 488 U.S. 336 (1989), in which this court invalidated a systematically discriminatory system of property-tax assessments, would have to be reversed. Even cases in which plaintiffs lost under the rational-basis test would look different. There would, for example, have been no reason for this Court to discuss factors such as administrative convenience when upholding the municipal tax at issue in *Armour v. City of Indianapolis*, 132 S. Ct. 2073 (2012). Under the Second Circuit's

[8] *Fitzgerald* and *Nordlinger* are also distinguishable from this case because both involved judicial review of tax rates, which this Court has noted are entitled to particularly deferential review. *See, e.g.*, *Nordlinger*, 505 U.S. at 11 (observing that the rational-basis test is "especially deferential in the context of classifications made by complex tax laws").

ruling, such discriminatory taxes could be justified solely by a preference for those who benefit from the discrimination. But that is not – nor has it ever been – this Court's interpretation of the Fourteenth Amendment. Accordingly, this Court should grant certiorari to resolve the conflict between this Court's precedent and the decision of the Second Circuit below. Sup. Ct. R. 10(c).

C. This case is a better vehicle than another recent case in which this Court declined to take up this question.

Petitioner is not the first litigant to ask this Court to consider the question of whether economic protectionism is a legitimate government interest. That issue was present in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), *cert. denied*, No. 13-91, in which this Court declined to review the Fifth Circuit's ruling that economic protectionism was not a legitimate basis for granting Louisiana's funeral directors a monopoly on casket sales. The instant case, however, presents a much better vehicle for the Court to address this question, both because the underlying circuit split is now more mature and because the consequence of allowing the decision to stand will be more profound.

At the time this Court denied review in *St. Joseph Abbey*, two federal appellate courts had expressly rejected the Tenth Circuit's holding in *Powers*. *See St. Joseph Abbey*, 712 F.3d at 222-23; *Merrifield*,

547 F.3d at 991 n.15. Indeed, no court after *Powers* – even within the Tenth Circuit – had ever upheld a law on the grounds that it promoted intrastate protectionism. As a result, it appeared in 2013 that the split between the Tenth Circuit and the Fifth, Sixth, and Ninth Circuits was moribund. Because this Court's precedent on the issue was otherwise clear, there seemed to be little cause for this Court to take up the issue.

In the wake of the Second Circuit's decision below, however, this assumption no longer holds. Judge Calabresi's ruling has reanimated this split. Moreover, far from going unnoticed, the Second Circuit has already cited Judge Calabresi's ruling in upholding a law that was allegedly "passed at the behest of the credit-card lobby to encourage consumers to use credit cards as opposed to cash." *Expressions Hair Design v. Schneiderman*, Nos. 13-4533, 13-4537, 2015 U.S. App. LEXIS 17156, at *34-*35 n.9; 2015 WL 5692296, at *10 n.9 (2d Cir. Sept. 29, 2015) (citing the Second Circuit's decision below to support the notion "that even unadulterated 'economic favoritism' is a sufficiently rational basis to justify a state law regulating economic activity").[9]

[9] Although the panel in *Expressions Hair Design* cited approvingly to the decision below, that case involves different legal issues related to the First Amendment protection for various methods of communicating prices to consumers. *See* 2015 U.S. App. LEXIS 17156, at *2-*18; 2015 WL 5692296, at *1-*5. Accordingly, whatever the merits of the plaintiffs' claims

(Continued on following page)

In addition to presenting a more well-developed circuit split than was present in *St. Joseph Abbey*, this case is a better candidate for review by this Court because the consequences of allowing the lower court's decision to stand are far more profound. Even if this Court had been inclined to believe that the ruling in *St. Joseph Abbey* was incorrect – and that naked economic preference was a legitimate basis for regulation – the consequences of allowing the Fifth Circuit's ruling to stand are relatively minor. That is because in most cases the government is capable of articulating a rational basis for regulation other than naked economic preference. Thus, allowing the Fifth Circuit's ruling to stand was unlikely to have a major impact on the law.

In this case, by contrast, allowing the Second Circuit's ruling to stand will have a dramatic impact. As Judge Droney recognized in his concurrence below, the Second Circuit's ruling that economic protectionism is a legitimate government interest essentially eliminates judicial review in the realm of economic regulation. App. 18. All such regulations, by definition, produce economic winners and losers, which under the Second Circuit's approach would make them necessarily constitutional.

---

in *Expressions Hair Design*, that case will not present another vehicle for this Court to consider the issue of whether economic protectionism is a legitimate government interest for purposes of the Fourteenth Amendment.

If the Second Circuit's ruling is allowed to stand, one can expect that industry groups will see it as a green light to pursue economic rents at the expense of their competitors and the public. Indeed, this Court is already well aware of the economic rent-seeking that state dental boards have engaged in with regard to the market for teeth-whitening services. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

This Court should not allow the influence of the decision below to spread any further. This Court should grant certiorari and resolve this important constitutional issue. Sup. Ct. R. 10(c).

II. The Second Circuit's ruling upholding Connecticut's regulation on health-and-safety grounds conflicts with precedent from this Court and other circuit courts regarding the role of evidence in determining whether regulations are "rationally related" to a legitimate government interest.

Given the sweeping breadth of the Second Circuit's holding that pure economic protectionism is a legitimate government interest, it is unclear why the majority felt the need to delve into whether Connecticut's policy also promoted public health and safety, except, perhaps, to insulate its groundbreaking holding on economic protectionism from further judicial scrutiny. But whatever its impetus, the Second Circuit's decision on this issue also split with

the Fifth, Sixth, and Ninth Circuits on another important constitutional question: whether litigants challenging economic regulations may defeat summary judgment by producing evidence that the challenged regulations are not "rationally related" to an asserted government interest.

As explained in Part A, in cases similar to this one, some federal circuits look to record evidence introduced by a rational-basis plaintiff to evaluate whether or not there is a plausible relationship between a regulation and the government's asserted ends. Other courts, including the Second Circuit below, ignore such evidence. This Court should resolve this split of authority and, as explained in Part B, this case presents a suitable vehicle in which to do so.

A. The courts of appeals are split over whether evidence is relevant in determining whether a law is "rationally related" to an asserted interest.

In the decision below, the Second Circuit held that the Dental Board was entitled to summary judgment because its restriction on teeth-whitening lights (in addition to being constitutionally valid economic protectionism) was rationally related to promoting public health and safety. But to reach this conclusion, the Second Circuit ignored the Dental Commission's admission that there was no health-and-safety benefit to prohibiting Smile Bright from

positioning teeth-whitening lights for their customers while at the same time allowing Smile Bright to instruct and supervise customers on the positioning of those lights. App. 88-89. This evidence went directly to the central issue in this case: whether it is arbitrary and irrational to require that Smile Bright be owned and operated by dentists when its activities pose no greater threat to the public than other teeth-whitening businesses that do not face this requirement (namely, those that allow customers to position lights for themselves).

The Second Circuit disregarded this evidence not because it found it insufficiently weighty to defeat summary judgment but because, under the version of the rational-basis test used below, evidence is simply irrelevant. This approach seems to stem from the fact that this Court has repeatedly suggested, albeit in *dicta*, that courts must not look to facts or record evidence to determine the existence of a rational relationship between the government's ends and means. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.").

The legal landscape is complicated, however, by the fact that – despite this *dicta* – this Court has also repeatedly endorsed the idea that plaintiffs can introduce evidence *refuting* the existence of an asserted rational relationship. As far back as *United States v. Carolene Products Co.*, this Court observed

that "the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition." 304 U.S. 144, 153-54 (1938). Even in *Beach Communications* itself, this Court held that the government's basis for action must be "plausible," a test that is only satisfied if it is based on a "reasonably conceivable" state of facts. 508 U.S. at 313-14. Moreover, although *Beach Communications* cited *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court did not find it necessary to disavow that case's assertion that the Court will reject asserted legislative objectives when "an examination of the circumstances forces us to conclude that they 'could not have been a goal of the legislation.'" *Clover Leaf Creamery*, 449 U.S. at 463 n.7.

The mixed signals from this Court have resulted in two irreconcilable lines of cases in the courts of appeals. Some, like the decision below, conduct rational-basis review without regard for record evidence. App. 7. But others take a different path. In *St. Joseph Abbey v. Castille*, for example, the Fifth Circuit affirmed a trial verdict finding no rational basis for Louisiana's restriction of casket sales, beginning its analysis by noting that "although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a

seemingly plausible basis for the law by adducing evidence of irrationality." 712 F.3d at 223.

The Fifth Circuit affirmed the trial court's determination in *St. Joseph Abbey* because the plaintiffs in that case adduced evidence that demonstrated that the challenged law did not *plausibly* advance any of the government's asserted interests. *Id.* The government had claimed, among other things, that the law was a rational means of protecting consumers, because funeral directors would be better able to recommend high-quality caskets or to counsel consumers who were wracked with grief over the death of a loved one. *Id.* But the Fifth Circuit rejected this as a plausible rational-basis for the law because the plaintiffs demonstrated at trial that the extensive training required of funeral directors did not include instruction in either caskets or grief counseling. *Id.* at 224-25.

The Fifth Circuit's legal reasoning in *St. Joseph Abbey* is of a piece with the Sixth Circuit's approach to the similar case of *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). In that case, the Sixth Circuit (again reviewing a lower-court decision after a full fact trial) found that there was no plausible connection between the state's valid interest in protecting public health and safety and the specific policy of restricting casket sales to licensed funeral directors. *Id.* at 226 ("Even if casket selection has an effect on public health and safety, restricting the retailing of caskets to licensed funeral directors bears no rational relationship to managing that effect.").

Evidence was also critical in the Ninth Circuit's invalidation of California's licensing requirements for structural pest-control workers. *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). That law required a license for those who used non-pesticide methods of controlling rats, mice, and pigeons, but exempted those who use similar methods to control other vertebrate pests, such as bats, raccoons, and squirrels. *Id.* at 981-82. The government defended the law on the grounds that pest-control workers who target rats, mice, and pigeons need to be licensed to ensure their familiarity with pesticides that they may encounter during their work. *Id.* at 987-88. But the Ninth Circuit held irrational the distinction between those whom the law exempted and those whom the law required to be licensed, because the court concluded – as a matter of fact – that the exempted pest controllers were *more likely* than the non-exempted pest controllers to encounter dangerous pesticides. *Id.* at 991.

While the Second Circuit's opinion below did not expressly disavow the Fifth, Sixth, and Ninth Circuit's approach on this point,[10] the legal disagreement between the courts is inescapable. Smile Bright's evidence in this case – which includes the Dental Commission's admission that regulating the identity of the person positioning low-power teeth-whitening lights has no relationship to public safety – is insufficient to

[10] It did, however, explicitly split with these cases on other grounds. *See* App. 9.

survive even summary judgment in the Second Circuit. But in the Fifth and Sixth Circuits, evidence of this sort not only allows plaintiffs to proceed to trial, it allows them to actually prevail. That legal dispute leads to different outcomes in factually similar cases.

Importantly, cases like *Craigmiles* and *St. Joseph Abbey* are not mere outliers. District courts in both the Fifth and Sixth Circuits continue to follow these cases and allow plaintiffs in rational-basis cases to refute the existence of purported rational relationships. *See, e.g.*, *Brantley v. Kuntz*, ___ F. Supp. 3d ___, No. A-13-CA-872, 2015 U.S. Dist. LEXIS 680, at *12-*25; 2015 WL 75244, at *5-*9 (W.D. Tex. Jan. 5, 2015) (rejecting asserted rational bases for hair-braiding regulations where plaintiffs produced facts to "refute[ ] every purported rational basis" for the regulations); *Bruner v. Zawacki*, 997 F. Supp. 2d 691, 699-700 (E.D. Ky. 2014) (rejecting asserted rational bases for intrastate-mover regulation based on evidence showing that the law did not serve those interests). In the Second Circuit, as illustrated by the decision below, courts do *not* examine a plaintiff's evidence rebutting an asserted rational basis for a law, even when the government has admitted to the truth of that evidence for purposes of summary judgment. That legal difference was dispositive in this case, and the Court should therefore grant certiorari to resolve this disagreement.

B. This case is a good vehicle in which to resolve this dispute.

This case presents a useful vehicle to resolve this dispute because of its procedural posture: an appeal from a grant of summary judgment to the government. In resolving this case, the Court would be able to answer only the question presented – whether evidence *ever* matters in applying the rational-basis test – and would not be forced to evaluate whether the Dental Board's tactical choice to regulate the positioning of teeth-whitening lights (and nothing else) is actually rational. If evidence *never* matters, the Second Circuit should be affirmed. But if, as this Court said in *Carolene Products*, plaintiffs are entitled to rely on evidence, then Smile Bright has adduced far more than "a mere scintilla" of evidence in their favor, and the Second Circuit should be reversed.

Simply put, there will be no need in this case to weigh evidence or defer to the fact-finding of a lower court: Either the Second Circuit erred by wholly disregarding the record in this case, or it did not. That question, clearly presented and preserved below, has profound implications for litigants across the country, and is ripe for this Court's resolution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

INSTITUTE FOR JUSTICE
PAUL M. SHERMAN*
ROBERT J. MCNAMARA
DANA BERLINER
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
psherman@ij.org

Counsel for Petitioner

**Counsel of Record*

793 F.3d 281
United States Court of Appeals,
Second Circuit.

SENSATIONAL SMILES, LLC, d/b/a Smile Bright,
Plaintiff-Appellant,
Lisa Martinez, Plaintiff
v.
Jewel MULLEN, DR., in her official capacity as Commissioner of Public Health, Jeanne P. Srathearn, DDS, in her official capacity as a Member of the Connecticut Dental Commission, Elliot Berman, DDS, in his 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,
Defendants-Appellees.

Docket No. 14-1381-cv. | Argued: April 15, 2015. | Decided: July 17, 2015.

Attorneys and Law Firms

Paul M. Sherman (Dana Berliner, on the brief), Institute for Justice, Arlington, VA, for Plaintiff-Appellant.

Daniel Shapiro, Assistant Attorney General, for George Jepsen, Attorney General of Connecticut, for Defendants-Appellees.

Before: CALABRESI, CABRANES, and DRONEY, Circuit Judges.

Opinion

Judge DRONEY concurs in a separate opinion.

GUIDO CALABRESI, Circuit Judge:

The question in this case is whether a Connecticut rule restricting the use of certain teeth-whitening procedures to licensed dentists is unconstitutional under the Due Process or Equal Protection Clauses. Because we conclude that there are any number of rational grounds for the rule, we affirm the judgment of the District Court.

BACKGROUND

Under Connecticut law, the State Dental Commission ("the Commission") is charged with advising and assisting the Commissioner of Public Health in issuing dental regulations. *See* Conn. Gen.Stat. § 20-103a(a). On June 8, 2011, the Commission issued a declaratory ruling that only licensed dentists were permitted to provide certain teeth-whitening procedures. On July 11, 2011, the Connecticut State Department of Public Health sent Sensational Smiles – a non-dentist teeth-whitening business – a letter

requesting that it "voluntarily" cease the practice of offering teethwhitening services, and warning that it could otherwise face legal action.

Sensational Smiles sued, challenging several aspects of the declaratory ruling. The parties before the District Court eventually agreed, however, that just one rule constrained the services offered by Sensational Smiles – specifically, the rule stating that only a licensed dentist could shine a light emitting diode ("LED") lamp at the mouth of a consumer during a teeth-whitening procedure.[1] Sensational Smiles asserted that this rule violates the Equal Protection and Due Process Clauses, because no rational relationship exists between the rule and the government's legitimate interest in the public's oral health. Accordingly, Sensational Smiles sought a declaratory judgment from the District Court that the rule was unconstitutional as applied, as well as a permanent injunction barring the rule's enforcement. The District Court (Michael P. Shea, *Judge*) rejected Sensational Smiles' arguments and granted defendants'

[1] According to Sensational Smiles, the LED light was used to "enhance" the teeth whitening process. See Appellant's Br. at 3-4 ("To enhance the whitening process, after the mouthpiece was inserted and the customer was reclined in the chair, a Smile Bright employee would then position a low-powered LED light that was attached to an adjustable arm in front of the customer's mouth. Then the customer would simply relax for 20 minutes and listen to music until the light automatically shut off, indicating the end of the whitening process.") (internal citations omitted).

motion for summary judgment. Sensational Smiles appealed.

DISCUSSION

We review the District Court's grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party. *Delaney v. Bank of America Corporation et al.*, 766 F.3d 163, 167 (2d Cir.2014).

The claims at issue – that the declaratory ruling violated the Constitution's Equal Protection and Due Process Clauses – are both subject to rational-basis review. *See Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate government purposes."); *Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir.2009) ("The law in this Circuit is clear that where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, we will invalidate that statute on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose.") (citations, internal quotation marks, and brackets omitted).

As the Supreme Court has stated on multiple 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, 113 S.Ct. 2637. Rather, we are required to uphold the classification "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320, 113 S.Ct. 2637 (internal quotation marks omitted). Accordingly, to prevail, the party challenging the classification must "negative every conceivable basis which might support it." *Id.* (citation and internal quotation marks omitted).

Reviewing the record de novo, we agree with the District Court that a rational basis, within the meaning of our constitutional law, existed for Connecticut's prohibition on non-dentists pointing LED lights into their customers' mouths. All sides agree that the protection of the public's oral health is a legitimate governmental interest. The parties, however, strongly dispute whether the rule at issue rationally relates to this interest. Here, the Commission received expert testimony indicating that potential health risks are associated with the use of LED lights to enhance the efficacy of teeth-whitening gels.[2] While Sensational

[2] The Commission heard from Dr. Jonathan C. Meiers, DMD, who testified about several scientific articles that appeared in dental journals and that discussed the safety of lights used for teeth whitening. In particular, he testified, and the Commission adopted as a finding of fact, that bleaching lights (though not specifically LED lights) can lead to an increased risk of pulpal irritation, tooth sensitivity, and lip burns. One article referenced by Dr. Meiers dealt specifically with LED lights, and noted that "Thermal pulp damage from LED-systems cannot be absolutely excluded and has to be taken into consideration,

(Continued on following page)

Smiles disputes this evidence, it is not the role of the courts to second-guess the wisdom or logic of the State's decision to credit one form of disputed evidence over another.

Sensational Smiles argues that even if there was some basis for believing that LED lights could cause harm, there was still no rational basis for restricting the operation of LED lights to licensed dentists. This is so because dentists are not trained to use LED lights or to practice teeth whitening, and are not required to have any knowledge of LED lights in order to get dental licenses. The Commission, however, might have reasoned that if a teeth-whitening customer experienced sensitivity or burning from the light, then a dentist would be better equipped than a non-dentist to decide whether to modify or cease the use of the light, and/or to treat any oral health issues that might arise during the procedure. The Commission might also have rationally concluded that, in view of the health risks posed by LED lights, customers seeking to use them in a teeth-whitening procedure should first receive an individualized assessment of their oral health by a dentist. Indeed, the Commission explicitly found that "[t]he decision of whether to recommend or apply bleaching agents and/or bleaching lights to a particular person's teeth

---

especially when high power LED's are used for a longer time period." Wolfgang Buchalla & Thomas Attin, *External bleaching therapy with activation by heat, light or laser – a systematic review*, 23 DENTAL MATERIALS 586, 590-91 (2007).

requires significant diagnostic expertise and skills, in part, to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration." App'x at 201. There were thus rational grounds for the Dental Commission to restrict the use of these lights to trained dentists.

Sensational Smiles further argues that the rule is irrational because it allows consumers to shine the LED light into their own mouths, after being instructed in its use by unlicensed teeth-whitening professionals, but prohibits those same teeth-whitening professionals from guiding or positioning the light themselves. The law, however, does not require perfect tailoring of economic regulations, and the Dental Commission can only define the practice of dentistry; it has limited control over what people choose to do to their own mouths. Moreover, and perhaps more importantly, individuals are often prohibited from doing to (or for) others what they are permitted to do to (or for) themselves. Thus, while one may not extract another's teeth for money without a dental license, individuals can remove their own teeth with pliers at home if they so choose, and a failure to ban the latter practice would not render a ban on the former irrational. The same is true of legal services, where individuals may proceed pro se, but may not represent others without a law license.

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.

This would normally end our inquiry, but appellant, supported by amicus Professor Todd J. Zywicki, forcefully argues that the true purpose of the Commission's LED restriction is to protect the monopoly on dental services enjoyed by licensed dentists in the state of Connecticut. In other words, the regulation is nothing but naked economic protectionism: "rent seeking . . . designed to transfer wealth from consumers to a particular interest group."[3] Zywicki Br. at 3. This raises a question of growing importance and also permits us to emphasize what we do not decide, namely, whether the regulation is valid under the antitrust laws. *See N. Carolina State Bd. of Dental Examiners v. F.T.C.*, ___ U.S. ___, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015) (holding that dental board was not sufficiently controlled by the state to claim state antitrust immunity).

---

[3] In the field of public choice economics, "rent-seeking" means the attempt to increase one's share of existing wealth through political activity. See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Jagdish Bhagwati, *Directly Unproductive, Profit Seeking Activities*, 90 J. POL. ECON. 988 (1982); see *also Dist. Intown Properties Ltd. P'ship v. D.C.*, 198 F.3d 874, 885 (D.C.Cir.1999) ("While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly known as 'rent-seeking.' ").

In recent years, some courts of appeals have held that laws and regulations whose sole purpose is to shield a particular group from intrastate economic competition cannot survive rational basis review. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir.2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose[.]"); *Merrifield v. Lockyer*, 547 F.3d 978, 991, n. 15 (9th Cir.2008) ("[M]ere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir.2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental purpose."). The Tenth Circuit, on the other hand, has squarely held that such a protectionist purpose is legitimate. *See Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir.2004) ("[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest."). We join the Tenth Circuit and conclude that economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment.

Our decision is guided by precedent, principle, and practicalities. As an initial matter, we note that because the legislature need not articulate any reason for enacting its economic regulations, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction

actually motivated the legislature." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Accordingly, 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.

But even if the only conceivable reason for the LED restriction was to shield licensed dentists from competition, we would still be compelled by an unbroken line of precedent to approve the Commission's action. The simple truth is that the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes. *See, e.g.*, *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) (upholding state tax scheme that favored riverboat gambling over racetrack gambling); *Nordlinger v. Hahn*, 505 U.S. 1, 12, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (upholding state property tax scheme that favored long term owners over new owners); *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (upholding New Orleans city ordinance that banned street vendors, with an exception made for existing vendors in operation for more than eight years); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, (1955) (upholding regulation that prohibited "any

person purporting to do eye examination or visual care to occupy space in [a] retail store").[4]

These decisions are a product of experience and common sense. Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense. To give but one example, Connecticut could well have concluded that higher costs for teeth whitening (the possible effect of the Commission's regulation) would subsidize lower costs for more essential dental services that only licensed dentists can provide, such as oral surgery or tooth extraction – much as the high cost of a law or business degree at a given university may allow other students at the same university to pursue poetry on the (relatively) cheap. Even such an arguably consumer-friendly rationale is unnecessary, however, as a simple preference for dentists over teeth-whiteners would suffice. To hold otherwise would be to interpret the Fourteenth Amendment in a way that is destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs. As Justice Holmes wrote over a century

[4] At oral argument, appellant pointed us to the Supreme Court's decision in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985), contending that it stands for the proposition that economic protectionism is not a legitimate government interest. Ward is inapposite, however, because it deals with economic discrimination based on out-of-state residence, not with purely intrastate economic regulation.

ago, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Nor does it endorse Sidney and Beatrice Webb's Fabianism. Choosing between competing economic theories is the work of state legislatures, not of federal courts.

We are buttressed in our decision by the difficulty in distinguishing between a protectionist purpose and a more "legitimate" public purpose in any particular case. Often, the two will coexist, with no consistent way to determine acceptable levels of protectionism. *Cf. N. Carolina State Bd. of Dental Examiners*, 135 S.Ct. at 1123 (Alito, J., dissenting). And a court intent on sniffing out "improper" economic protectionism will have little difficulty in finding it. Thus, even the law at issue in *Lochner* – the paradigm of disfavored judicial review of economic regulations – might well fail the sort of rational basis scrutiny advocated by Sensational Smiles and its amicus. *See* Rebecca L. Brown, Constitutional Tragedies: The Dark Side of Judgment, in Constitutional Stupidities, Constitutional Tragedies 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) ("[S]ubsequent analysts. . . . have demonstrated that the law at issue in *Lochner*, despite its guise as a health regulation, was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business.").

Of course, if economic favoritism by the states violates federal law, then, like any state action that contravenes stated federal rules, it falls under the Supremacy Clause. This can happen if – whether motivated by rent-seeking or by libertarian ideals – state action, though rational, violates the dormant Commerce Clause, or if a state licensing board that is insufficiently controlled by the state creates a monopoly in violation of the Sherman Act. *See* 15 U.S.C. § 1 *et seq.; N. Carolina State Bd. of Dental Examiners*, 135 S.Ct. at 1114. Accordingly, we emphasize that we take no position on the applicability of the antitrust laws to the regulation at issue here. That is a separate and distinct inquiry that was not argued and is not before us. All we hold today is 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.

CONCLUSION

For the foregoing reasons, the judgment of the District Court is AFFIRMED.

DRONEY, Circuit Judge, concurring in part and concurring in the judgment:

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.

In my view, there must be at least some perceived public benefit for legislation or administrative rules to survive rational basis review under the Equal Protection and Due Process Clauses. As the majority acknowledges, only the Tenth Circuit has adopted the view that pure economic protectionism is a legitimate state interest. *See Powers v. Harris*, 379 F.3d 1208, 1221 (10th Cir.2004). Two of the circuits that reached the opposite conclusion expressly rejected the Tenth Circuit's approach. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir.2013); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n. 15 (9th Cir.2008).

I agree with the Fifth Circuit's reasoning in *St. Joseph Abbey*, particularly insofar as it disputes the Tenth Circuit's reliance in *Powers* on the very Supreme Court cases that the majority cites in support of its holding here. *See St. Joseph Abbey*, 712 F.3d at 222 ("[N]one of the Supreme Court cases *Powers* cites stands for that proposition [that intrastate economic protectionism is a legitimate state interest]. Rather, the cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare." (emphasis in original)); *see also Powers*, 379

F.3d at 1226 (Tymkovich, J., concurring) ("Contrary to the majority . . . , whenever courts have upheld legislation that might otherwise appear protectionist . . . , courts have always found that they could also rationally advance a *non-protectionist* public good." (emphasis in original)).

A review of the Supreme Court decisions confirms the Fifth Circuit's conclusion that some perceived public benefit was recognized by the Court in upholding state and local legislation. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Supreme Court reviewed an Oklahoma statute that, *inter alia*, forbade opticians from replacing eyeglass lenses without a prescription from an optometrist or ophthalmologist, even when an optician could easily and safely have done the work. *See id.* at 485-87, 75 S.Ct. 461. In concluding that the legislation passed rational basis review, the Court recognized that the requirement of a prescription could advance the public interest in an eye examination by a doctor before the lens replacement. *See id.* at 487-88, 75 S.Ct. 461.

In *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam), the Court reviewed a New Orleans ordinance that prohibited food vendors from operating pushcarts in the French Quarter. *See id.* at 298, 96 S.Ct. 2513. A grandfather clause exempted existing vendors from the ban if they had been operating continuously in the French Quarter for at least eight years. *See id.* The Supreme Court held that the exemption survived

rational basis review, observing that New Orleans may have concluded that "newer businesses were less likely to have built up substantial reliance interests in continued operation" and that the grandfathered vendors may have "themselves become part of the distinctive character and charm" of the French Quarter. *Id.* at 305, 96 S.Ct. 2513.

The two more recent decisions cited by the majority upheld differential rates of state taxation. *Nordlinger v. Hahn*, 505 U.S. 1, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992), considered a California property tax regime that tied the assessment of property values to the value of the property at the time it was acquired, as opposed to its current value. *See id.* at 5, 112 S.Ct. 2326. This approach benefitted long-term property owners over newer owners. *See id.* at 6, 112 S.Ct. 2326. However, the Court identified the state's "legitimate interest in local neighborhood preservation, continuity, and stability" and the "reliance interests" of existing property owners as rational bases for the law. *Id.* at 12-13, 112 S.Ct. 2326.

In *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003), the Court reviewed an Iowa law that imposed higher taxes on racetrack slot machine revenues than it imposed on riverboat slot machine revenues. *See id.* at 105, 123 S.Ct. 2156. Again finding the differential tax treatment rational, the Court suggested that the state legislature "may have wanted to encourage the economic development of river communities or to promote riverboat history." *Id.* at 109, 123 S.Ct. 2156.

And it again emphasized "reliance interests," observing that the law preserved the historical tax rate for riverboats, whereas racetracks had not previously been permitted to operate slot machines at all. *Id.* at 105, 109, 123 S.Ct. 2156.

It may be that, as a practical matter, economic protectionism can be couched in terms of some sort of alternative, indisputably legitimate state interest. Indeed, the majority suggests as much when it observes that, in this case, the state may have concluded that protectionism "would subsidize lower costs for more essential dental services that only licensed dentists can provide." Maj. Op., *ante*, at ___. But it is quite different to say that protectionism *for its own sake* is sufficient to survive rational basis review, and I do not think the Supreme Court would endorse that approach. *Accord Merrifield*, 547 F.3d at 991 n. 15 ("We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

Nor do I believe that rejecting pure economic protectionism as a legitimate state interest requires us to resurrect *Lochner*. *Accord St. Joseph Abbey*, 712 F.3d at 227 ("We deploy no economic theory of social statics or draw upon a judicial vision of free enterprise. . . . We insist only that Louisiana's regulation not be irrational – the outer-most limits of due process and equal protection – as Justice Harlan put

it, the inquiry is whether '[the] measure bears a rational relation to a constitutionally permissible objective.' Answering that question is well within Article III's confines of judicial review." (second alteration in original) (footnote omitted)); *Craigmiles v. Giles*, 312 F.3d 220, 229 (6th Cir.2002) ("We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review."); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L.Rev. 1689, 1692 (1984) ("The minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era.").

The majority, by contrast, essentially renders rational basis review a nullity in the context of economic regulation. *See Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring) ("The end result of the majority's reasoning is an almost per se rule upholding intrastate protectionist legislation."); *cf. Ranschburg v. Toan*, 709 F.2d 1207, 1211 (8th Cir.1983) ("Although states may have great discretion in the area of social welfare, they do not have unbridled discretion. They must still explain why they chose to favor one group of recipients over another. Thus, it is untenable to

suggest that a state's decision to favor one group of recipients over another by itself qualifies as a legitimate state interest. An intent to discriminate is not a legitimate state interest."). If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth. *Cf. Windsor v. United States*, 699 F.3d 169, 180 (2d Cir.2012) ("[W]hile rational basis review is indulgent and respectful, it is not meant to be 'toothless.' " (citation omitted)), *aff'd*, ___ U.S. ___, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

I acknowledge that the deference afforded by courts to legislative enactments is significantly greater in the context of economic regulation than it is "in matters of personal liberty." *St. Joseph Abbey*, 712 F.3d at 221 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938)); *see also* Allison B. Kingsmill, Note, *Of Butchers, Bakers, and Casket Makers: St. Joseph Abbey v. Castille and the Fifth Circuit's Rejection of Pure Economic Protectionism as a Legitimate State Interest*, 75 La. L.Rev. 933, 936 (2015) ("The [Supreme] Court has not invalidated a single piece of economic legislation on due process or equal protection grounds since [the 1930s], opting for a more deferential, rational basis review of state laws."). But this difference in degree does not compel the conclusion that our deference in the economic sphere must be absolute. Nor will an insistence on some legitimate, non-protectionist state interest result in sweeping judicial entanglement in the legislative process.

For this reason, I am not troubled by the majority's surmise that "even the law at issue in *Lochner* – the paradigm of disfavored judicial review of economic regulations – might well fail the sort of rational basis scrutiny advocated by Sensational Smiles." Maj. Op., *ante*, at ___. First, I doubt that this would actually be the case; even if, as a matter of historical fact, the *Lochner* law was *intended* to be a protectionist measure, such intent is not dispositive of the rational basis inquiry. *See id.* at ___. And, in the highly unlikely event that the evidence showed that the law was entirely untethered to any conceivable legitimate state purpose (including protection of the public health), I do not see why the law should survive. *Lochner* is "the paradigm of disfavored judicial review of economic regulations" because it imposed exacting limits on state action, in stark contrast to the deferential standard applied under modern rational basis review. *See Lochner v. New York*, 198 U.S. 45, 59, 25 S.Ct. 539, 49 L.Ed. 937 (1905) ("There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty."). Our aversion to *Lochner*'s flawed approach is well founded, but we should not respond to that aversion by abandoning the minimum requirements of due process and equal protection.

In short, no matter how broadly we are to define the class of legitimate state interests, I cannot conclude that protectionism for its own sake is among them.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LISA MARTINEZ and SENSATIONAL SMILES, LLC d/b/a SMILE BRIGHT, Plaintiffs, v. JEWEL MULLEN, JEANNE P. STRATHEARN, LANCE E. BANWELL, ELLIOT S. BERMAN, PETER S. KATZ, STEVEN G. REISS, BARBARA B. ULRICH, and MARTIN UNGAR, Defendants.	No. 3:11-cv-01787 (MPS)

MEMORANDUM OF DECISION

This case, which involves the State of Connecticut's regulation of teeth-whitening services provided by non-dentists, illustrates the great deference courts must afford governmental regulation under the doctrine known as "rational basis scrutiny." The governmental regulation at issue here is a rule that only a licensed dentist may shine a "light emitting diode" ("LED") lamp at the mouth of a consumer who seeks to whiten her teeth. Although the State has not submitted any clearly admissible evidence to support this regulation, and although Plaintiff – a teeth-whitening business that does not employ a licensed

dentist – has submitted substantial evidence questioning the purpose and efficacy of the regulation, there is some literature that suggests that shining a LED light at a person's mouth poses some risk to that person's oral health. That is enough to provide "a reasonably conceivable state of facts" for a rule allowing only licensed dentists – who are trained and certified in the area of oral health – to shine a LED light at a consumer's mouth, and thus to turn away Plaintiff's rational basis challenge under the very deferential standards that this Court must apply. *See Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and 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." (emphasis added)).

Plaintiff Sensational Smiles, LLC, d/b/a Smile Bright ("Plaintiff")[1] brings this action under 42 U.S.C. § 1983 against the Defendants, the Commissioner of the State of Connecticut Department of Public Health and the members of Connecticut State Dental Commission (the "Commission" and collectively, "Defendants"), seeking declaratory and injunctive relief against the enforcement of a June 8, 2011

[1] On December 13, 2012, the parties filed a stipulation of dismissal without prejudice with respect to a second plaintiff, Lisa Martinez. (*See* Stipulation of Dismissal [Dkt. # 37].)

Declaratory Ruling of the Commission (the "Declaratory Ruling" or "Ruling"), which classified certain teeth-whitening services as the practice of dentistry within the meaning of Conn. Gen. Stat. Sec. 20-123. Plaintiff is a commercial entity unlicensed as a dentist and formerly engaged in the sale of teeth-whitening products and services, services the Commission classified as the practice of dentistry in its Declaratory Ruling. Plaintiff contends that the Declaratory Ruling violates the Equal Protection and Due Process Clauses as applied to it because there is no rational relationship between what everyone acknowledges is a legitimate government interest – the oral health of the public – and the restrictions set forth in the Declaratory Ruling. Plaintiff seeks a declaratory judgment declaring that those restrictions, as applied to its teeth-whitening services, are unconstitutional, and a permanent injunction barring their enforcement against Plaintiff.

At this point, however, the only restriction at issue is the limitation on the use of LED lights during teeth whitening. Judicial and evidentiary admissions in this litigation have made clear that Plaintiff does not seek to engage in some of the other teeth-whitening activities restricted by the Declaratory Ruling, and that the State concedes that Plaintiff is free to engage in the remaining activities purportedly restricted by the Ruling, as they do not constitute the practice of dentistry. Both sides agree that the remaining issue is narrow and involves who may actually direct a LED light at a consumer's mouth during

the teeth-whitening process, and both sides have moved summary judgment. The Court denies Plaintiff's motion and grants Defendants' motion because, as explained below, Plaintiff has failed "to negative every conceivable basis which might support [the regulation allowing only dentists to shine a LED lamp at a consumer's mouth during teeth-whitening services.]" *Beach Commc'ns*, 508 U.S. at 315 (internal quotation marks and citations omitted).

I. BACKGROUND

A. Procedural History

The Commission is a statutorily-created body[2] that advises and assists the Commissioner of Public Health in issuing dental regulations "to insure proper dental care and the protection of public health, considering the convenience and welfare of the patient, methods recommended by the canon of ethics of the Connecticut State Dental Association and the American Dental Association and accepted health standards as promulgated by local health ordinances and state statutes and regulations." Conn. Gen. Stat. § 20-103a(a). The Commission and the Commissioner of Public Health also are empowered to take disciplinary action against licensed and unlicensed dental

[2] The Commission is comprised of nine members appointed by the Governor, six of whom are practitioners in dentistry and three of whom are members of the public. *See* Conn. Gen. Stat. § 20-103a(a).

practitioners. *See Id.* §§ 20-114; 19a-17; 19a-11. Any unlicensed person who practices dentistry shall be guilty of a class D felony for "each instance of patient contact or consultation" that violates the law. *Id.* § 20-126. The penalties for each violation include imprisonment of 1 to 5 years and a fine of up to $5,000. *Id.* §§ 53a-35a(1)(A)(8); 53a-41.

On September 8, 2010, the Commission initiated a declaratory ruling proceeding to consider whether "teeth whitening practices and/or procedures constitute the practice of dentistry as set forth in § 20-123 of the Connecticut General Statutes . . . and what teeth whitening practices and/or procedures must be performed only by a licensed dentist or persons legally authorized to work under the supervision of a licensed dentist." (Declaratory Ruling at 1 [Dkt. # 1-1].)

On November 16, 2010, the Commission published a Notice of Hearing in the *Connecticut Law Journal*, setting the hearing dates of December 8 and 9, 2010. The Notice of Hearing was also sent to the Connecticut State Dental Association, the Connecticut Dental Hygienist Association, the Connecticut Dental Assistants Association, the American Dental Association, the Connecticut Department of Public Health, the Connecticut Department of Consumer Protection, and the Council for Cosmetic Teeth Whitening. (*Id.*)

The Commission granted requests by the Connecticut State Dental Association, the Connecticut

Dental Hygienist's Association, and Connecticut Dental Assistants Association to be designated as parties to the proceeding, and representatives of these associations appeared at the hearing, which was held on December 8, 2010. (*Id.* at 1-2.) During the hearing, the Commission considered exhibits and pre-filed testimony, which were adopted under oath at the hearing. Also, the witnesses were available for questioning and cross-examination. (Declaratory Ruling at 2.)

B. Declaratory Ruling

On June 8, 2011, the Commission issued the Declaratory Ruling that is the subject of this action. (*Id.* at 6.) After a summary of the procedural history, the Ruling sets forth "Findings of Fact." The factual findings relevant to the present, narrowed dispute over the use of LED lights are as follows:

4. Tooth discoloration can be the result of numerous factors including smoking, coffee, tea or any other type of compound taken orally that can stain teeth.

5. Metabolic disease, trauma to the tooth pulp and certain drugs taken when the teeth were being formed can also cause discoloration.

6. Tooth whitening products contain potent oxidizing elements that, if applied incorrectly, can cause serious burns.

7. Determining the cause of discoloration is a significant factor in determining whether attempting to alter the color of a tooth with chemicals will have any effect on improving the appearance of the teeth.

* * *

13. A custom tray for home use prepared by a licensed dentist attempts to minimize tissue burns by creating a custom fit tray that limits the contact of the oral tissue with the bleaching gel.

14. Many of the publications which have analyzed the effect of light during office bleaching procedures have indicated that there is little or no difference in the effectiveness of the bleaching products with concentrated light. There are however, risks associated with the use of light.

15. There should be adequate eye and skin protection for the patient and the operator of the light if it is being used to enhance the product in a bleaching procedure.

16. Pulpal irritation, tooth sensitivity and lip burns have been reported to occur at a higher rate with the use of bleaching lights.

17. The decision of whether to recommend or apply bleaching agents and/or bleaching lights to a particular person's teeth

> requires significant diagnostic expertise and skills, in part, to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration. The presence of existing tooth colored restorations, failing restorations, caries, ceramic crowns, cracks in teeth and exposed root surfaces all need to be identified and evaluated before such bleaching procedures are attempted.

(*Id.* at 3-4 (internal citations omitted).) These findings were based on the testimony of two dentists, Dr. Jon Davis and Dr. Jonathan C. Meiers. The Commission described Dr. Meiers as "an expert in the field of dentistry" who has "expertise in the field of teeth whitening." (*Id.* at 3.) The Commission found the testimony of both Dr. Davis and Dr. Meiers to be "reliable and credible." (*Id.*)

After making its findings of fact, the Commission discussed which teeth-whitening procedures constitute the practice of dentistry:

> Teeth whitening procedures constitute the practice of dentistry if the procedures involve the diagnosis, evaluation, prevention or treatment of an injury or deformity, disease or condition of the oral cavity (such as discoloration). When such evaluation, diagnosis, prevention or treatment is done by a person other than a licensed dentist, it violates section 20-123 of the Statutes unless a person is merely selling whitening products that are otherwise legal to sell. For example, the

selling of teeth whitening gels of differing strengths by non-licensed persons is not, by itself, the practice of dentistry. It becomes the practice of dentistry when such unlicensed person either uses light in an attempt to enhance the product's effectiveness or a person conducts an analysis of that person's individual needs based upon an examination or other evaluation.

Although any case brought before the Commission will be judged based upon the totality of circumstances, as a general rule actual application of a tooth whitening gel to another person by a person or employee of a company constitutes the practice of dentistry. Evaluating, assessing, or diagnosing discoloration of teeth constitutes the practice of dentistry. Providing personalized instruction to a consumer and instructing a person based on an assessment or supervising the use and application of tooth bleaching or lightening fluids, pastes, gels, solutions, or other agents to that person's teeth to improve or change the color of the teeth constitutes the practice of dentistry. However, the selling of over the counter teeth whitening products of differing strengths does not constitute the practice of dentistry if the seller is not evaluating a particular patient and recommending products based upon an examination or evaluation of a particular patient/customer.

Assessing, fabricating, customizing, selecting, or advising the selection of tooth

> trays used to apply products that lighten or whiten teeth constitutes the practice of dentistry. *Applying a light source or other light assisted bleaching systems, including but not limited to light emitting diode (LED), halogen lamps, plasma arc lamps, metal halide lamps, and lasers that result in the lightening or whitening teeth to enhance the tooth whitening process constitutes the practice of dentistry.*

(*Id.* at 5-6 (emphasis added).)

In its "Conclusion," the Commission stated as follows:

> The Commission adopts the following Declaratory Ruling and has determined that teeth whitening services involve 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 this declaratory ruling.

(*Id.* at 6.)

C. Cease and Desist Letter

On July 11, 2011, the Connecticut State Department of Public Health, through its "Office of Practitioner Licensing and Investigations," sent Plaintiff a letter advising it of the issuance of the Declaratory Ruling, requesting that Plaintiff "voluntarily cease the practice of offering teeth whitening services," and warning it that "[s]hould you choose to continue to offer these treatments at your facility, the Department of Public Health will consider proceeding with legal action in this matter." (July 11, 2011 Letter (hereinafter the "Cease and Desist Letter") [Dkt. #49-4, Ex. 2].)[3] The Cease and Desist Letter did not specify which services offered or performed by Plaintiff constituted the practice of dentistry or which services Plaintiff had to cease and desist from providing. It did, however, request that Plaintiff provide "written verification" that it would "comply with the intent of the Declaratory Ruling. . . ." (*Id.*)

D. Plaintiff and Its Claims

Plaintiff, Sensational Smiles, LLC, d/b/a Smile Bright, is a Connecticut limited liability corporation co-owned by Stephen Barraco – the recipient of the Cease and Desist Letter – and Tasos Kariofyllis. (*See* Compl. at ¶ 6 [Dkt. # 1].) Neither Mr. Barraco nor Mr.

---

[3] The letter is addressed to "Stephen Barraco, Smile Bright Enfield Square Mall." Mr. Barraco is co-owner of Plaintiff, as discussed below.

Kariofyllis is a licensed dentist. (*Id.* at ¶ 56.) Prior to the Declaratory Ruling, Plaintiff sold "custom-branded teeth-whitening products for use in spas and salons. Smile Bright co-owner Stephen Barraco would also take appointments to perform teeth-whitening services at a salon in Hamden, Connecticut." (*Id.* at ¶ 49.) Plaintiff's teeth-whitening 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.* at ¶ 50.)

Plaintiff alleges that, in response to the Declaratory Ruling, it "stopped selling products for use in spas and salons and stopped providing teeth-whitening services because Messrs. Kariofyllis and Barraco were unwilling to risk having to pay tens of thousands of dollars in fines or going to jail." (*Id.* at ¶ 51.) Plaintiff did, however, continue to sell teeth-whitening products for home use, products that Plaintiff alleges are "identical" to the products it sold for use in salons. (*Id.* at ¶ 53.) Defendants have acknowledged that the sale of such products for home use does not constitute the practice of dentistry. (Defs.' Mem. in Supp. of Mot. for Summ. J. at 2 [Dkt. # 48-2].) Plaintiff alleges that it "still has the equipment from its business, including whitening products, chairs, and lights," and it would "immediately begin taking steps to reestablish its business if it were legal to do so." (Compl. at ¶ 54.)

On November 6, 2011, Plaintiff initiated this action seeking declaratory and injunctive relief against the enforcement of the Declaratory Ruling. Plaintiff claims that the Declaratory Ruling is unconstitutional because it violates Plaintiff's "constitutional right to earn an honest living free from government regulations that serve no legitimate governmental interest." (*Id.* at ¶ 1.) More specifically, Plaintiff alleges that the Declaratory Ruling violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution.[4] (*Id.*)

In its equal protection argument, Plaintiff alleges that the Declaratory Ruling is unconstitutional for three reasons: (1) "there is no rational reason for the distinction between persons who sell customers a product that they will apply to their own teeth at home, who are not regulated under the Dental Practice Act, and persons who sell customers an identical product that they will apply to their own teeth in a shopping mall or at a salon, whom Connecticut considers to be engaged in the practice of dentistry" (Compl. at ¶ 73); (2) "there is no rational reason for the distinction between persons who sell customers

[4] Prior to the dismissal of Plaintiff Lisa Martinez, Ms. Martinez also asserted a claim that the Declaratory Ruling violates the Privileges and Immunities Clause of the Fourteenth Amendment to the U.S. Constitution. (Compl. ¶ 84.) Following the stipulated dismissal of Plaintiff Martinez, that claim was withdrawn. (*See* Pl.'s Resp. to Defs.' Mot. for Summ. J. at 8 n.4 [Dkt. # 53].)

teeth-whitening products that the customers will apply to their own teeth, whom Connecticut considers to be engaged in the practice of dentistry, and persons who perform procedures like tongue piercing, who are not regulated under the Dental Practices Act" (*id.* at ¶ 74); and (3) "there is no rational reason for the distinction between Plaintiff['s] provision of in-person instruction to customers on how to apply teeth-whitening products to their own teeth, which Connecticut considers to be the practice of dentistry, and the provision of written instructions online or packaged with identical teeth-whitening products, which is not regulated under the Dental Practice Act" (*id.* at ¶ 75).

Plaintiff also argues that the Declaratory Ruling violates its substantive due process rights because (1) "[t]here is no legitimate governmental interest for the application of the Dental Practice Act to teeth-whitening services like those offered by Plaintiff[ ]" (*id.* at ¶ 79) and (2) even if there were a legitimate governmental interest, "[t]he application of the Dental Practice Act to teeth-whitening services like those offered by Plaintiff[ ] is not rationally related [to that interest]. . . ." (*id.* at ¶ 80). As noted, Plaintiff seeks a declaratory judgment that the Dental Practice Act, as construed by the Commission in the Declaratory Ruling, violates the Due Process and Equal Protection Clauses as applied to Plaintiff's business, and a permanent injunction barring enforcement of the Act

against it.[5] Plaintiff also seeks attorneys' fees, costs, and expenses. (*Id.* at 15, Prayer for Relief.)

E. Narrowing the Issues

Plaintiff has not challenged all aspects of the Declaratory Ruling as its business did not seek to provide some of the services described in the Ruling. For example, Plaintiff did not "attempt[ ] to diagnose the underlying cause of any tooth discoloration" (*id.* at ¶ 8), prepare or make customized trays (*id.* at ¶ 15 ("trays were one-size-fits all")), customize treatment (*id.* at ¶ 4 ("the whitening process was the same [for all customers]")), or apply teeth whitening products to the teeth of the customer (*id.* at ¶ 22 ("application of the teeth-whitening product itself was performed entirely by the customer")). Nonetheless, at the outset of this litigation, and based on a literal reading of the Ruling, Plaintiff believed that the Declaratory Ruling barred several of its services as the unlicensed practice of dentistry, and thus initially challenged several

---

[5] At times, Plaintiff appears to be seeking broader relief on behalf of other, unnamed teeth-whitening businesses. (*See, e.g.*, Compl. at 15, Prayer for Relief (seeking declaratory judgment with respect to "teeth-whitening services like Plaintiffs' " and injunction forbidding future enforcement "against Plaintiffs and persons providing teeth-whitening services like Plaintiffs'.").) Plaintiff did not bring this case as a class action under Rule 23, however, and lacks standing to assert claims or to seek relief on behalf of other teeth-whitening businesses. This Court's ruling is thus limited to the factual circumstances relating to Plaintiff's teeth-whitening business.

elements of the Ruling. (*See* Barraco Decl. at ¶ 29 [Dkt. # 49-8] ("The ruling named several things we did as now being 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.' ").)

During the course of discovery and in briefs filed in this action, however, the Connecticut Attorney General, as counsel for the Commission, has agreed that certain teeth-whitening services that might fall within the literal terms of the Ruling do not constitute the practice of dentistry and are thus not off limits to Plaintiff. These include the following: (1) "merely selling whitening products that are otherwise legal to sell"; (2) "[p]roviding a client with the instructions that are provided by the manufacturer of the product"; (3) "provid[ing] the purchaser of a self-administered teeth-whitening product with a place to use and dispose of the product"; (4) "us[ing] a shade guide to demonstrate to a customer the shade of their teeth either before or after the use of a teeth-whitening product"; and (5) "simply making a LED light available to a client for use by the client with a self-administered teeth-whitening product at the place of purchase". (Defs.' Disc. Resp. Nos. 8-11, 13 [Dkt. # 49-4].)

The Attorney General's stipulations in the course of this litigation have narrowed some of the broad language in the Declaratory Ruling, and might have

saved the parties substantial time and expense had they been made at the outset of the litigation.[6] For example, while the Ruling states that "teeth whitening services involve the practice of dentistry when they include . . . utilizing instruments and apparatus such as enhancing lights," the Attorney General acknowledges that this language does not prohibit the Plaintiff from making a LED light available to a client for use by the client "with a self-administered teeth-whitening product" on Plaintiff's business premises. In other words, Plaintiff may lawfully operate a salon or spa at which a client sits in a chair provided by Plaintiff and points a LED light provided by Plaintiff at her own mouth while applying a teeth-whitening product; it is just that Plaintiff cannot actually point the light at the client's mouth. (Hr'g on Mot. for Summ. J. Tr. at 7-9.) In addition, while the Ruling would broadly prohibit non-dentists from "instructing a customer on teeth whitening procedures or methods," the Attorney General retreated from this position, agreeing in its summary judgment papers and at oral argument that Plaintiff would not violate the statutes related to the practice of dentistry by making recommendations to customers as to how to perform teeth whitening, advising individuals on

[6] Connecticut's Attorney General has "general supervision over all legal matters in which the state is an interested party," is the State's designated legal representative in litigation matters, and is charged by statute with "giv[ing] his opinion upon questions of law" to the state legislature, executive branch agencies, and boards and commissions. Conn. Gen. Stat. § 3-125.

the use of trays, and instructing a customer on teeth-whitening procedures or methods. (Pl.'s L. Civ. R. 56(a)1 Statement ¶ 95 [Dkt. # 49-2]; Defs.' L. Civ. R. 56(a)2 Statement ¶ 95 [Dkt. # 52-1]; Hr'g on Mot. for Summ. J. Tr. at 6.)

These stipulations bind the State in this litigation. Further, because the Court has relied on them in determining which activities are still in issue and which are not, they will likely also bind the State in the future under the doctrine of judicial estoppel should the State contravene them, for example, by attempting to prosecute non-dentists who instruct a customer on teeth-whitening procedures and methods. *See DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010) ("Typically, judicial estoppel will apply if: 1) a party's later position is clearly inconsistent with its earlier position; 2) the party's former position has been adopted in some way by the court in the earlier proceeding; and 3) the party asserting the two positions would derive an unfair advantage against the party seeking estoppel. We further limit judicial estoppel to situations where the risk of inconsistent results with its impact on judicial integrity is certain." (internal quotation marks and citations omitted)). While the Court need not and does not decide whether judicial estoppel will apply to any future prosecution, it does rely on and adopt the Attorney General's clarifications of the Declaratory Ruling and its stipulations as to the meaning of the statutes governing the practice of dentistry.

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. The parties further agree that the Declaratory Ruling bars a non-dentist from pointing the LED light at the customer. (*See* Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 1 [Dkt. # 52] ("In fact, the only activity engaged in by plaintiff which is prohibited by the Declaratory Ruling is the *positioning* of a LED light in front of a patient by an unlicensed individual.") (emphasis in original); Pl.'s Reply in Supp. of Mot. for Summ. J. at 1 [Dkt. # 56] ("Under this new interpretation, the only activity of Plaintiff's that is prohibited is the positioning of an LED light in front of a customer's mouth.") Thus, the only remaining issue is whether the Constitution forbids a State from prohibiting a non-dentist from pointing a LED light at a customer's mouth during teeth whitening.

II. DISCUSSION

A. Legal Standards

1. Summary Judgment

Summary judgment is appropriate only when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving parties bear the burden of demonstrating that no genuine issue exists as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). "A dispute regarding a material fact is genuine

if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). If the moving party carries its burden, "the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." *Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011). In this case, both parties have moved for summary judgment.

2. Substantive Due Process and Equal Protection Challenges

Because this case does not involve a "suspect" or "quasi-suspect" classification, such as discrimination on the basis of race or gender, and because the restriction at issue does not implicate fundamental rights, the analysis of the substantive due process claim tracks the analysis of the equal protection claim. *U.S.A. Baseball v. City of New York*, 509 F. Supp. 2d 285, 296 (S.D.N.Y. 2007) ("The plaintiffs' arguments with respect to the federal Due Process Clause fare no better [than their equal protection arguments]. The same rational-basis standard of review described above applies to substantive due process claims where, as here, the legislative act at issue does not impinge upon a fundamental right." (citing cases)). The Court applies to both claims the highly deferential "rational basis" standard – one the Supreme Court has called a "paradigm of judicial

restraint." *Beach Commc'ns*, 508 U.S. at 314. A classification or restriction survives rational basis review "if there is *any reasonably conceivable state of facts* that could provide a rational basis for the classification." *Id.* at 313 (emphasis added). The great judicial deference reflected in those words flows from the architecture of our constitutional design, which allocates policymaking authority in the economic and social spheres to elected officials:

> [E]qual protection is not a license for courts to judge the wisdom, fairness or logic of legislative choices. In areas of social and 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. Where there are plausible reasons for Congress' action, our inquiry is at an end. . . . The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Id. at 313-14 (internal quotation marks and citations omitted). These principles apply equally to cases like this one that challenge applications of legislative enactments by the executive branch. *See, e.g.*, *Catlin v. Sobol*, 93 F.3d 1112 (2d Cir. 1996) (applying rational

basis scrutiny to Education Commissioner's application of residency requirements in New York Education Law); *Manufactured Hous. Inst. v. E.P.A.*, 467 F.3d 391 (4th Cir. 2006) (rejecting rational basis challenge to Environmental Protection Agency's interpretation of Safe Drinking Water Act).[7]

Perhaps because of its constitutional pedigree, the judicial restraint underlying rational basis review has proven to be extremely indulgent of legislative restrictions, and exceedingly difficult for challengers to overcome. The Second Circuit has explained it this way:

> [I]t is very difficult to overcome the strong presumption of rationality that attaches to a statute. We will not strike down a law as irrational simply because it may not succeed in bringing about the result it seeks to accomplish, because the problem could have been better addressed in some other way, or because the statute's classifications lack razor-sharp precision. Nor will a statute be

[7] As long as general parameters are prescribed, legislatures are free to delegate to executive branch officials the authority to construe and apply statutes. *United States v. Yousef*, 327 F.3d 56, 115-16 (2d Cir. 2003) ("It has long been the rule that Congress may delegate some of its legislative powers to the Executive Branch, so long as that delegation is made under the limitation of a prescribed standard.") (internal quotation marks omitted). There has been no suggestion in this case that the Dental Practice Act fails to prescribe standards and thereby constitutes an impermissible delegation of legislative authority to the Commission.

> overturned on the basis that no empirical evidence supports the assumptions underlying the legislative choice. To succeed on a claim such as this, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the government decisionmaker.

Beatie v. City of New York, 123 F.3d 707, 712-13 (2d Cir. 1997) (rejecting rational basis challenge to application of city's smoke-free air ordinance to cigar smoke, where "[a]t best, plaintiff's evidence suggests a lack of direct empirical support for the assumption that cigar smoke is as harmful as cigarette smoke or his evidence might demonstrate the existence of a scientific dispute over the risks in question."). A plaintiff challenging a statute or rule as lacking a rational basis bears the burden of "discredit[ing] any conceivable basis which could be advanced to support the challenged provision, regardless of whether that basis has a foundation in the record or actually motivated the legislature." *Id.* at 713; *see also Heller v. Doe*, 509 U.S. 312, 320-21 (1993) ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.") (internal quotation marks and citations omitted). It is not enough for the challenger to show that the government was actually mistaken in its factual assumptions or reasoning, that the restriction at issue was supported by "rational speculation"

rather than empirical evidence, that the "rational basis" for the restriction or classification was not the rationale the legislature had in mind, or that the restriction adopted is over-inclusive or under-inclusive. A statute suffering from all of these flaws may still survive rational basis scrutiny. In short, while a few courts have stated that "rational basis review . . . is not meant to be toothless," *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012) (internal quotation marks and citation omitted), the teeth are dull and the bite rare.

B. Plaintiff Has Failed to Show that The Restriction on the Deploying of Lights During Teeth Whitening Lacks A Rational Basis.

While Plaintiff has raised serious questions about the wisdom of the Commission's applying the dental practice statute to forbid non-dentists from deploying lights, including Plaintiff's LED light, during teeth whitening, this is not the rare case in which Plaintiff has borne the heavy burden of demonstrating that there is no "conceivable basis" that "could be advanced to support the challenged provision." To begin with, the parties agree that the protection of the public's health and safety with respect to the teeth and mouth – the interest advanced by the State in defense of the Declaratory Ruling – is a legitimate governmental interest. (Defs.' Mem. in Supp. of Mot. for Summ. J. at 17; Pls.' Mem. in Supp. of Mot. for Summ. J. at 22 [Dkt. # 49-1].); *see also*

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993) (noting "[t]he legitimate governmental interest[ ] in protecting the public health"). Plaintiff nonetheless contends that barring it and other non-dentists from pointing LED lights at a customer's mouth during teeth whitening is not rationally related to the interest of protecting the public's oral health. Plaintiff makes four points in support of this contention. First, Plaintiff argues that the undisputed evidence in the record shows that the use of LED lights during teeth whitening is harmless and, more specifically, that the State has failed to submit any admissible evidence that would rebut Plaintiff's ample evidence that the practice is perfectly safe. Second, Plaintiff asserts that even if there were some health risk, there is no logical connection between the restriction and the mitigation of that risk, because "it is utterly inconceivable that the identity of the person positioning the light could make any difference to the safety of the light." (Plf.'s Opp'n to Defs.' Mot. for Summ. J. at 13.) Third, Plaintiff argues that the restriction is irrational because the costs imposed on non-dentist teeth whiteners is vastly outweighed by any conceivable health benefits that may result from the restriction. Fourth, Plaintiff argues that the financial interest of the six dentists on the Commission in squelching competition from unlicensed, competing providers of teeth-whitening services further undercuts the rationality of the restriction. As shown below, none of these arguments satisfies the heavy burden of showing that there is no conceivable basis for the challenged restriction.

1. A Few Studies Showing That There Might Be Health Risks from the Use of LED Lights – Even if They Are Inadmissible and Even if There Is No Conclusive Evidence On Point – Are Enough to Supply A Rational Basis for the Restriction.

In an attempt to shoulder its burden, Plaintiff submitted a lengthy declaration from Dr. Martin Giniger, who is a licensed dentist and purports to be "an expert in the history, practice, and safety" of peroxide-based teeth whitening. (Giniger Decl. at ¶ 2 [Dkt. # 49-7].) Dr. Giniger's credentials and experience in the field of teeth whitening are extensive. He obtained a MSD in Oral Medicine and a PhD in Biomedical Science, with a concentration in Oral Biology, from the University of Connecticut. (*Id.* at ¶ 4.) He has served as an Assistant Professor, Associate Professor, and Department Head at several accredited schools of dentistry. (*Id.* at ¶ 5.) He also has consulted for several consumer oral care companies on the subject of teeth whitening. (*Id.* at ¶ 8.) Finally, Dr. Giniger served as an expert on teeth whitening for the United States Federal Trade Commission, including testifying in litigation that led to a ruling invalidating restrictions against non-dentist teeth whiteners on antitrust grounds. *See N.C. Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 2014 U.S. LEXIS 1710, 82 U.S.L.W.

3508 (U.S. Mar. 3, (2014).[8] Dr. Giniger opined on several topics in this case, including the safety of teeth whitening in general, whether dental school curriculum includes education on teeth whitening, the safety of LED lights in general, and the safety of the LED lights used by Plaintiff.

With respect to LED lights generally, Dr. Giniger opined that, when used by non-dentists "to enhance chairside teeth whitening," they "pose no threat to public safety." (Giniger Decl. at ¶ 21.) Further, he opined 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)." (*Id.* at ¶ 77.) In addition to conducting his own experiments with LED lights, experiments he claims support his opinions, Dr. Giniger states that "there is no published literature showing that any person has ever been harmed as a result of being exposed to any LED bleaching lamp, nor has there ever been any literature showing harm from exposure to the type of low-powered LED bleaching lights used by non-dentists." (*Id.* at ¶ 75.)

Dr. Giniger also examined the specific LED lights used by Plaintiff. (*See id.* at ¶ 87 (noting the brand, light source, power, wavelength, and infection control).) Dr. Giniger opined that the lights used by Plaintiff "are extremely safe and have no potential for

[8] The parties in this case have raised no antitrust issues, and the Court's ruling expresses no opinion on such issues.

human harm when used as directed" and that they "are equivalent in strength to many home LED flashlights sold in drugstores and retail chains." (*Id.* at ¶ 88.) He also states that there is no indication in the literature that the lights used by Plaintiff are unsafe. (*Id.* at ¶ 89.)

Defendants have not challenged Dr. Giniger's expertise and have not sought to rebut his opinions. Defendants did not designate an expert in this lawsuit, and did not submit any evidence that would be clearly admissible in Court – such as affidavits or deposition testimony – as they would ordinarily be required to do to resist summary judgment. *See Brown v. Eli Lilly & Co.*, 654 F.3d 347, 358 (2d Cir. 2011) ("Where the moving party demonstrates the absence of a genuine issue of material fact, the opposing party must come forward with specific evidence demonstrating the existence of a genuine dispute of material fact." (internal quotation marks and citations omitted)). Defendants did submit documents from the hearing record before the Commission, consisting largely of the "prefiled testimony" of Dr. Meier and various articles from dental journals that were referred to in or attached to his testimony, but Plaintiff contests the admissibility of these materials and the Court's ability to consider them on summary judgment. *See* Fed. R. Civ. P. 56(c)(2), (c)(4). In doing so, Plaintiff misapprehends its burden in a rational basis challenge, which is to "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 (emphasis added). The absence of admissible evidence in the record to support the restriction is not enough to doom it under the highly deferential standard applicable here. Even if the statement from Dr. Meiers and related articles from dental journals that were before the Commission had not been submitted to the Court, the Court would still have to consider them and any other "conceivable bases" for the restriction.

Dr. Meiers, a licensed dentist and a professor of dentistry at the University of Connecticut School of Dental Medicine, provided an unsworn statement to the Commission, which he adopted under oath at the hearing. The statement generally "provide[d] information to support the contention by the Connecticut State Dental Association that prescriptive tooth whitening should only be performed in the dental office by either a dentist or under the appropriate supervision of a dentist." (Prefile Testimony of Jonathan C. Meiers, DMD, MS of The Connecticut State Dental Association, at 2 [Dkt. # 48-4].) With regard to the use of enhancing lights in teeth whitening, Dr. Meiers' statement noted the following:

> There is an increasing interest in the use of lights in the delivery of in office bleaching procedures. There is a belief among practitioners that the use of a light during in office bleaching speeds up and promotes a more pronounced whitening effect by creating an increased oxidizing potential of the bleaching gel. However, most publications which have

> studied the proposed benefit of light enhancement have indicated little to no difference versus non use of the light. Optical sources that have been used in light assisted in office bleaching are light emitting diodes (LED), halogen lamps, plasma arc lamps and lasers.

(*Id.* at 6.) Dr. Meiers did not offer any of his own opinions on the safety of using light to enhance teeth whitening, and there is no indication in his testimony or otherwise that he has expertise in this area. But he did discuss two articles in professional dental journals that "provide information regarding some of the risks associated with various lights used for light-activated bleaching." (*Id.*)

The first article, authored by two German dentists and published in 2007 in a dental journal, "summarize[d] and discuss[ed] the available information concerning the efficacy, effects and side effects of activated bleaching procedures." (*See* Wolfgang Buchalla & Thomas Attin, *External Bleaching Therapy with Activation by Heat, Light or Laser – A Systematic Review*, Dental Materials 23 (2007) (attached as Ex. 7 to Meiers Test.) at 130.) Noting that the application of heat can accelerate the teeth whitening process by increasing the temperature of a bleaching agent, such as hydrogen peroxide, applied to the tooth surface, the article states that "data on mechanisms of action and efficacy of laser, light and heat-activated dental bleaching are still limited." (*Id.* at 131.) The article then examines the different types of light

sources used to enhance teeth whitening, including QTH lamps (i.e., quartz-tungsten-halogen lamps), Plasma arc lamps, metal halide lamps, LED lights, and various types of lasers. With respect to QTH lamps, plasma arc lamps, and LEDs, the article concludes that "thermal damage cannot be excluded with high-power lamps or long irradiation duration." (*Id.* at 132.) With respect to LED light systems in particular, the article raises the following concerns:

> Although LED systems do "not extend as far into the [infra-red] spectral range as QTH or plasma arc lamps do[,] . . . LED systems . . . are not equipped with an additional [infra-red] filter. A remaining concern is that there is still a portion of [infra-red] emission that inevitably also comes with LED's, because the so called 'wings' of the emission spectra of the LED's used extend into the [infra-red] region. Thermal pulp damage from LED-systems cannot be absolutely excluded and has to be taken into consideration, especially when high power LED's are used for a longer time period.

(*Id.* at 134-35.) The article also discusses the risks associated with an increase in "pulpal temperature" that application of lights may cause, noting that "irreversible pulp damage" has been found among test animals when the pulpal temperature is increased beyond a certain threshold, and that heating of the bleaching agent leads to "a distinctly increased penetration of peroxide . . . into the pulp," which may lead to "oxidative stress which could negatively affect

cell metabolism." (*Id.* at 135.) The article concludes on a note of uncertainty:

> Heat and light-activated bleaching techniques may potentially cause pulp irritation. As yet, it is still debatable, whether the activation results in superior tooth brightening as compared to non-activated bleaching therapies. Therefore, application of heat- and light-activated bleaching procedures should be critically weighed up, keeping in mind the physical, physiological and pathophysiological implications mentioned above. If heat or light-activation is applied, it is strongly advised to follow manufacturers' recommendations with limited duration of heat-activation to a short period of time, in order to avoid undesired pulpal responses.

(*Id.* at 138.)

The second article referred to by Dr. Meiers – published in 2009 in a Norwegian scientific journal – also sounds notes of uncertainty and caution about the use of light to enhance teeth whitening. (*See* Ellen M. Bruzell et al., *In Vitro Efficacy and Risk for Adverse Effects of Light-Assisted Tooth Bleaching*, Photochemical & Photobiological Sciences (2009) (attached as Ex. 1 to Meiers Test.) at 12 ("Optical sources such as light emitting diodes (LED), halogen lamps, plasma arc lamps and lasers are most commonly used for tooth bleaching. However, information on adverse effects related to bleaching lamps is scarce."); at 18 ("[L]ight-assisted bleaching procedures carried out by non-health professionals for

purely cosmetic reasons should be discouraged due to potential risk of exposure to optical radiation."). While the article focuses in part on the risks associated with ultraviolet light – which is apparently not a concern with LEDs, which emit blue light (see Meiers Test. at 6) – the article nonetheless notes that "UV and blue light exposure can also give rise to photosensitisation reactions through endogenous (e.g., porphyrins, flavins) and exogenous (e.g., drugs, dental materials, cosmetic products) molecures [sic] inside the oral cavity." (Bruzell, et al., *supra*, at 19.) The article concludes as follows: "The use of optical radiation in tooth bleaching poses a health risk to the client and violates radiation protection regulations. Therefore, we will advise against light-assisted tooth bleaching. When bleaching lamps are still used, adequate eye and skin protection should be used by client and operator." (*Id.*) Dr. Meiers also attached other articles to his prefiled testimony that provide tentative support for the notion that the use of enhancing lights in teeth whitening poses some health risk, or at least presents uncertainties. (*See, e.g.*, American Dental Association, Council on Scientific Affairs, *Tooth Whitening/Bleaching: Treatment Considerations for Dentists and Their Patients* (Sept. 2009) (attached as Ex. 5 to Meiers Test.) at 116 ("Some reports suggest that pulpal temperature can increase with bleaching light use, depending on the light source and exposure time. Pulpal irritation and tooth sensitivity may be higher with use of bleaching lights or heat application, and caution has been advised with their use.") (citing Buchalla & Attin,

supra, and JW Baik, et al., *Effect of Light-Enhanced Bleaching on In Vitro Surface and Intrapulpal Temperature Rise*, J. Esthet. Restor. Dent. (2001) at 13:370-8).); Gerard Kugel et al., *Masters of Esthetic Dentistry* (2009) (attached as Ex. 9 to Meiers Test.) at 346 (in clinical trial, subjects reported tooth sensitivity from use of light plus whitening gel).)

To be sure, these materials hardly support a definitive conclusion that the use of enhancing lights during teeth-whitening – let alone Plaintiff's LED lights – poses a danger to the public's oral health. Their tentative tone pales next to Dr. Giniger's firm views that LED lights are harmless. (*Compare* Dr. Giniger Decl. at ¶ 88 (Plaintiff's LED lights "are extremely safe and have no potential for human harm when used as directed" and "are equivalent in strength to many home LED flashlights sold in drugstores and retail chains.") *with* Buchalla & Attin, *supra*, at 135 ("[t]hermal pulp damage from LED-systems cannot be absolutely excluded and has to be taken into consideration, especially when high power LED's are used for a longer time period.").) But these infirmities are not enough to show that the Commission's restriction on the deployment of LED lights lacks a rational basis, for the same reasons that apparent weaknesses in New York City's evidence supporting its restrictions on cigar smoking were not enough to invalidate those restrictions:

> At best, plaintiff's evidence suggests a lack of direct empirical support for the assumption that cigar smoke is as harmful as cigarette

> smoke or his evidence might demonstrate the existence of scientific dispute over the risks in question. But no matter how plaintiff's proof is viewed it will not serve to rebut the presumption that the statute has a rational basis. In light of lawmakers' freedom to engage in rational speculation unsupported by evidence, it cannot be said to be irrational for the New York City Council to conclude that cigar smoke might be harmful. And that is all the Constitution demands.

Beatie, 123 F.3d at 713.

Especially given the frequent expressions in the medical literature of uncertainty about the risks that might be posed by the use of lights in teeth-whitening, (*see* Buchalla & Attin, *supra*, at 131 ("data on mechanisms of action and efficacy of laser, light and heat-activated dental bleaching are still limited."); Bruzell et al., *supra*, at 12 ("information on adverse effects related to bleaching lamps is scarce."); American Dental Association, Council on Scientific Affairs, *supra*, at 116 (noting that "caution has been advised" with use of lights during teeth whitening)), the Commission might rationally have concluded that restricting the use of LED lights would protect the oral health of the public. At least where neither suspect classifications nor fundamental rights are involved, the Constitution does not prevent government officials from taking prophylactic measures to protect the public in the face of uncertainty. It is thus immaterial that – as Plaintiff emphasizes – the medical literature does not cite any instances in

which anyone has ever been harmed by an LED light. *Beatie*, 123 F.3d at 713 ("[D]ue process does not require a legislative body to await concrete proof of reasonable but unproven assumptions before acting to safeguard the health of its citizens."). Judge Wood reached a similar conclusion in a case challenging a ban on the live performance of professional mixed martial arts. *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012). In upholding the ban against a rational basis challenge, Judge Wood noted that, although there was limited evidence that the sport posed a serious danger to participants, "[a]t the time of the law's enactment, [mixed martial arts] was in its infancy, and medical data about the sport was limited." *Id.* at 428. She nonetheless concluded that "the New York legislature had a sufficient basis to speculate that professional MMA posed a substantial threat to fighters' health and safety," pointing out that a "legislature's decision . . . may be based on rational speculation unsupported by evidence or empirical data." *Id.* (citing *Heller*, 509 U.S. at 320). Here, the medical literature provides a conceivable basis to conclude that shining a LED light at the mouth of a person who seeks to whiten her teeth might pose a health risk.

2. It Is Not Irrational to Limit the Deployment of LED Lights During Teeth Whitening to Licensed Dentists.

Plaintiff also contends that, even if there are some health risks, the restriction does not rationally

mitigate those risks by prohibiting only non-dentists from shining LED lights at a customer's mouth during teeth whitening. Plaintiff points out that dental schools include no required courses in teeth whitening in general or the use of enhancing lights in particular and that the State does not require dentists to show any proficiency in any aspect of teeth whitening, including the positioning of LED lights, as a condition of dental licensure. But once the State can rationally conclude that shining LED lights at a customer's mouth during teeth whitening poses some risk to oral health, it can also rationally conclude that the practice should be restricted to persons who are trained experts in oral health, even if they have no training in the practice itself. The Commission might have reasoned that if a teeth-whitening customer did experience sensitivity from application of a light – as some apparently have, Kugel, et al., *supra*, at 346 – then a dentist would be better equipped than a non-dentist to decide when and how to modify – or cease – the application of light and/or treat the sensitivity or any other health issues that might arise during teeth whitening. *See Lange-Kessler v. Dep't of Educ.*, No. 96-7632, 1997 U.S. App. LEXIS 15275, at *9 (2d Cir. 1997) (rejecting rational basis challenge to requirements that licensed mid-wives have nursing training and affiliate with a physician or hospital because of medical complications that might arise during pregnancy or childbirth: "In light of these risks, the legislature could reasonably have believed that midwives who have completed a nursing program, and who are affiliated with a medical professional, are more fit

than direct-entry midwives to practice midwifery.") (citation omitted). The Commission might also have rationally concluded that in light of the health risks involved with the use of lights, each customer seeking light-enhanced teeth whitening should first undergo individualized assessment of his or her particular oral condition and medical history – the type of evaluation that even Plaintiff acknowledges is properly classified as the practice of dentistry and properly restricted to the purview of dentists.

Plaintiff also points out that the State does not prohibit customers from shining LED lights at their own mouths and argues that this undercuts the rationality of the restriction. This argument fails for two reasons. First, based on the statutory scheme, the Commission arguably would not have jurisdiction to regulate such activity even if it wanted to. The Commission's purview is limited to assisting and advising the Commissioner of Public Health in regulating the practice of dentistry. *See* Conn. Gen. Stat. § 20-103a. Although the statutory definition of the practice of dentistry itself is not *expressly* limited to the performing of oral-related examinations and procedures on others, as opposed to one's self, *see Id.* § 20-123(a), when read in context, it is apparent that the statutory language was intended to prevent untrained, unlicensed persons from harming others, i.e., to protect the oral health of the public. Thus, immediately following the definition, the statute lists a series of activities in which only licensed dentists may engage, and many of these involve holding oneself out

to the public as a provider of services to others. *Id.* § 20-123(b) ("No person other than a person licensed to practice dentistry under this chapter shall: (1) Describe himself or herself by the word "Dentist" or letters "D.D.S." or "D.M.D.", or in other words, letters or title in connection with his or her name which in any way represents such person as engaged in the practice of dentistry; (2) Own or carry on a dental practice or business; . . . (5) Sell or distribute [certain dental materials]; (6) Advertise to the public, . . . ; (7) Give estimates of the cost of dental treatment;. . . ."). Case law interpreting the statute confirms that its purpose is to protect the public by preventing the untrained, the incompetent, or the unscrupulous from tinkering with the mouths of others. *See, e.g.*, *OCA v. Christie*, 415 F. Supp.2d 115, 121 (D. Conn. 2006) ("The general purpose of the statutes regulating the practice of dentistry is to protect the health, safety and welfare of Connecticut citizens and the reputations of dentists licensed within the State by ensuring that practitioners meet certain minimum standards."); *State v. Faatz*, 83 Conn. 300, 305 (1910) ("[The Dental Practice] Act is intended to protect the dental profession from ignorant and incompetent practitioners, as well as to protect the public against the same kind of ignorance and incompetence in men setting themselves up as dentists, or, in other words, 'engaging in the practice of dentistry.' "). There is no suggestion in the statutory language or the case law interpreting it that it was intended to protect persons from themselves, and there is thus no reason to believe that the Commission would have authority to

regulate what an individual does to his own mouth. As Defendant highlights in his brief, shining a light at one's own mouth is no more the practice of dentistry than the suturing of a wound on one's own body is the practice of medicine. (*See* Defs.' Mem. in Opp'n to Pl.'s Mot. for Summ. J. at 21.)

Second, even if the Commission had the authority to prohibit a person from shining a light at his own mouth, the fact that it has not done so here does not undermine the rationality of the restriction. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Jankowski-Burczyk v. I.N.S.*, 291 F.3d 172, 179 (2d Cir. 2002) (quoting *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949)). "Rather, legislatures are afforded 'substantial latitude' to establish classifications that 'roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill.'" *Jones*, 888 F. Supp. 2d at 428 (quoting *Hayden v. Paterson*, 594 F.3d 150, 169 (2d Cir. 2010) (internal quotation marks and citation omitted)). Further, courts allow a legislature to "implement [its] program step by step, . . . adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (internal quotation marks and citations omitted). "Thus, legislatures are deemed to have a rational basis for laws even when the legislature

'act[s] incrementally and . . . pass[es] laws that are over (and under) inclusive.'" *Jones*, 888 F. Supp. 2d at 428 (quoting *Hayden*, 594 F.3d at 171.) Here, the Commission acted rationally in limiting its ruling to the application of light to another person during teeth whitening. The fact that some harm may still result because a customer may apply the light to his own mouth does nothing to undercut the rationality of the restriction.

Further, the cases Plaintiff cites in which courts found that certain occupational licensing schemes failed the rational basis test, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012), and *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999), are distinguishable. In all three cases, the courts reasoned that even assuming that the practice at issue carried some risk to public health, the licensing statute, as applied to the plaintiffs, would do nothing to limit that risk. *See Craigmiles*, 312 F.3d at 223, 225-26 (statute prohibiting anyone but licensed funeral directors from selling caskets found to be unconstitutional as applied to the plaintiffs, independent casket store operators, because the specialized training for licensure was irrelevant to the plaintiffs who "would not handle the bodies, much less engage in any embalming services," and, even assuming that the quality of caskets sold could potentially threaten public health, none of the requirements for licensure would address that risk); *Clayton*, 885 F. Supp. 2d at 1213, 1215-16 (statute requiring

that the plaintiffs, African hair braiders, become licensed cosmetologists before they could practice their trade found to be unconstitutional as applied to the plaintiffs because, although there may be some potential health risk associated with hair braiding, the specialized training that plaintiffs would obtain through a cosmetology license was largely irrelevant to their practice and would do nothing to limit those risks); *Cornwell*, 80 F. Supp. 2d at 1101, 1109-14 (same).

By contrast, here, it was rational for the Commission to conclude that prohibiting all but dentists from shining a light at another person's mouth during teeth whitening would limit the potential for harm to the teeth or mouth. The requirements for dental licensure ensure that dentists have medical training that makes them expert in oral health. Thus, as discussed above, and as the Commission might rationally have concluded, licensed dentists will be better equipped to assess and mitigate the risks associated with light-enhanced teeth whitening, including addressing any medical complications that might arise during the application of light and performing individual assessments of a particular patient's oral condition or medical history to determine whether the use of an enhancing light is appropriate in any given circumstance.

3. The Benefits of the Declaratory Ruling Are Not Wholly Insubstantial In Light of the Costs to Plaintiff

Plaintiff argues that the Declaratory Ruling is irrational because any purported health and safety benefits accruing from the ruling are wholly insubstantial in light of the costs that the ruling imposes on non-dentist teeth whiteners. Plaintiff relies on *Plyler v. Doe*, 457 U.S. 202 (1982) for the proposition that the Supreme Court has invalidated laws whose alleged benefits were "wholly insubstantial in light of the costs." *Id.* at 230. That decision, which concerned the constitutionality of a Texas statute that denied to undocumented school-age children the right to a free public education that it provides to other children residing lawfully within its borders, is entirely inapposite, and the Court's passing reference to "costs" and "benefits" was not the formulation of a legal standard but a rhetorical device used to condemn Texas's policy of denying education to an entire class of children. *See id.* at 205, 227-230.

In any event, this is not a case where the benefits are "wholly insubstantial in light of the costs." Here, although the benefits of the Declaratory Ruling do not appear to be overwhelming – namely, that the restriction on the deployment of LED lights might reduce a potential (but uncertain) health risk – neither do the costs, *i.e.*, the potential harm to Plaintiff. Plaintiff can still provide teeth whitening services. As noted, the Attorney General has clarified that the Declaratory Ruling does not prevent Plaintiff

from, among other things, selling teeth whitening products, providing the purchaser of a teeth whitening product with a place to use and dispose of the product, making recommendations to a customer on how to perform teeth whitening, advising a customer on the use of trays, and instructing a customer on teeth whitening procedures or methods. (*See* Defs.' Disc. Resp. Nos. 8-11, 13; Pl.'s L. Civ. R. 56(a)(1) Statement ¶ 95; Defs.' L. Civ. R. 56(a)(2) Statement ¶ 95; Hr'g on Mot. for Summ. J. Tr. at 4.) The Declaratory Ruling does not even prevent Plaintiff from serving customers who desire light-enhanced teeth whitening: as noted, the Ruling allows 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. The Declaratory Ruling only prohibits Plaintiff from actually positioning the light in front of the customer's mouth. (*See* Defs.' Opp'n to Pl.'s Mot. for Summ. J. at 1; Pl.'s Reply in Supp. of Mot. for Summ. J. at 1.) This minor intrusion on Plaintiff's ability to conduct its business weighs little on any cost-benefit scale (assuming any such scale is even properly part of rational basis review) and is plainly insufficient to invalidate the Declaratory Ruling.

4. The Fact that the Six Dentists on the Commission Have A Financial Interest In Restricting Competition is Irrelevant

Plaintiff argues that the fact that the dentists on the Commission have a strong financial incentive to

restrict competing providers of teeth whitening services is further evidence of the irrationality of the Declaratory Ruling. Plaintiff claims that the evidence in this case indicates that licensed dentists, including the members of the Commission themselves, routinely charge more for teeth whitening services than do businesses like Plaintiff and that the overwhelming majority of complaints received by the Commission concerning non-dentist teeth whitening come from licensed dentists or the Connecticut State Dental Association, which represents the interests of licensed dentists, not consumers. Even assuming that the Commission members have a financial incentive to restrict competition, and that that incentive motivated the Declaratory Ruling, this is irrelevant to the constitutional inquiry as long as there is a rational basis to support the restriction. *See, e.g.*, *Beach Commc'ns*, 508 U.S. at 315 ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."); *R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (under rational basis review it is "constitutionally irrelevant [what] reasoning in fact underlay the legislative decision.") (internal quotation marks and citation omitted); *Beatie*, 123 F.3d at 712 ("a court must look for plausible reasons for legislative action, whether or not such reasons underlay the legislature's action.") (citation omitted); *Craigmiles*, 312 F.3d at 225 ("The question before this court is whether requiring those who sell funeral merchandise to be

licensed funeral directors bears a rational relationship to any legitimate purpose other than protecting the economic interests of licensed funeral directors.")

Here, there is a rational basis for the restriction. As shown, the Commission might reasonably have concluded that allowing licensed dentists to position a LED light in front of a customer's mouth during teeth whitening would further the legitimate government interest in protecting the public's oral health. This fact distinguishes this case from the cases that have found evidence of a financial incentive to be "indicia of irrationality." In those cases, the courts first determined that there was no rational relationship to any legitimate governmental purpose and were left only with illegitimate purposes to justify the restriction. *See, e.g.*, *Craigmiles*, 312 F.3d at 228 ("Finding no rational relationship to any of the articulated purposes of the state, we are left with the more obvious illegitimate purpose to which [the] licensure provision is very well tailored. The licensure requirement imposes a significant barrier to competition in the casket market."); *Cornwell*, 80 F. Supp. 2d at 1117-118 (looking to "[o]ther indicia of irrationality" only after first finding that the licensing examination as structured was not rationally related to the State's professed interests).

III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment [Dkt. # 48] is GRANTED, and

Plaintiff's Motion for Summary Judgment [Dkt. # 49] is DENIED.

IT IS SO ORDERED.

/s/
Michael P. Shea, U.S.D.J.

Dated: Hartford, Connecticut
March 28, 2014

Relevant Statutes

Conn. Gen. Stat. § 19a-17

(Formerly Sec. 19-4s). Disciplinary action by department, boards and commissions.

(a) Each board or commission established under chapters 369 to 376, inclusive, 378 to 381, inclusive, and 383 to 388, inclusive, and the Department of Public Health with respect to professions under its jurisdiction that have no board or commission may take any of the following actions, singly or in combination, based on conduct that occurred prior or subsequent to the issuance of a permit or a license upon finding the existence of good cause:

* * *

(6) Assess a civil penalty of up to twenty-five thousand dollars;

* * *

Conn. Gen. Stat. § 20-103a

State Dental Commission.

(a) The State Dental Commission shall consist of nine members appointed by the Governor, subject to the provisions of *section 4-9a*, six of whom shall be practitioners in dentistry residing in this state who are in good standing in their profession and three of whom shall be public members. No member of said commission shall be an elected or appointed officer of

a professional association of members of his profession or have been such an officer for the year immediately preceding his appointment. The Commissioner of Public Health, with advice and assistance from the Dental Commission, may issue regulations to implement the provisions of this chapter, and to insure proper dental care and the protection of public health, considering the convenience and welfare of the patient, methods recommended by the canon of ethics of the Connecticut State Dental Association and the American Dental Association and accepted health standards as promulgated by local health ordinances and state statutes and regulations.

(b) The Governor shall appoint a chairperson from among such members. Said commission shall meet at least once during each calendar quarter and at such other times as the chairman deems necessary. Special meetings shall be held on the request of a majority of the commission after notice in accordance with the provisions of *section 1-225*. A majority of the members of the commission shall constitute a quorum. Members shall not be compensated for their services. Any member who fails to attend three consecutive meetings or who fails to attend fifty per cent of all meetings held during any calendar year shall be deemed to have resigned from office. Minutes of all meetings shall be recorded by the commission. No member shall participate in the affairs of the commission during the pendency of any disciplinary proceedings by the commission against such member. No member shall serve for more than two full

consecutive terms commencing after July 1, 1980. Said commission shall (1) hear and decide matters concerning suspension or revocation of licensure, (2) adjudicate complaints filed against practitioners and (3) impose sanctions where appropriate.

Conn. Gen. Stat. § 20-106

License.

No person shall engage in the practice of dentistry or dental medicine unless such person has first obtained a license from the Department of Public Health.

Conn. Gen. Stat. § 20-114

Disciplinary action by Dental Commission concerning dentists and dental hygienists.

(a) The Dental Commission may take any of the actions set forth in *section 19a-17* for any of the following causes:

* * *

(4) the employment of any unlicensed person for other than mechanical purposes in the practice of dental medicine or dental surgery subject to the provisions of *section 20-122a*; (5) the violation of any of the provisions of this chapter or of the regulations adopted hereunder or the refusal to comply with any of said provisions or regulations; (6) 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;

* * *

Conn. Gen. Stat. § 20-122

Ownership and operation of offices by unlicensed persons or by corporations. Penalty. Exception.

(a) No 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; but the provisions of this section do not apply to hospitals, community health centers, public or parochial schools, or convalescent homes, or institutions under control of an agency of the state of Connecticut, or the state or municipal board of health, or a municipal board of education; or those educational institutions treating their students, or to industrial institutions or corporations rendering treatment to their employees on a nonprofit basis, provided permission for such treatment has been granted by the State Dental Commission.

Such permission may be revoked for cause after hearing by said commission.

* * *

Conn. Gen. Stat. § 20-123

Scope of practice of dentistry. Activities restricted to licensed dentists. Extended scope of practice for graduates of post-doctoral dental training programs. Penalties. Exceptions.

(a) No person shall engage in the practice of dentistry unless he or she is licensed pursuant to the provisions of this chapter. 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. The practice of dentistry does not include: (1) The treatment of dermatologic diseases or disorders of the skin or face; (2) the performance of microvascular free tissue transfer; (3) the treatment of diseases or disorders of the eye; (4) ocular procedures; (5) the performance of cosmetic surgery or other cosmetic procedures other than those related to the oral cavity, its contents, or the jaws; or (6) nasal or sinus surgery, other than that related to the oral cavity, its contents or the jaws.

(b) No person other than a person licensed to practice dentistry under this chapter shall:

(1) Describe himself or herself by the word "Dentist" or letters "D.D.S." or "D.M.D.", or in other words, letters or title in connection with his or her name which in any way represents such person as engaged in the practice of dentistry;

(2) Own or carry on a dental practice or business;

(3) Replace lost teeth by artificial ones, or attempt to diagnose or correct malpositioned teeth;

(4) Directly or indirectly, by any means or method, furnish, supply, construct, reproduce or repair any prosthetic denture, bridge, appliance or any other structure to be worn in a person's mouth, except upon the written direction of a licensed dentist, or place such appliance or structure in a person's mouth or attempt to adjust such appliance or structure in a person's mouth, or deliver such appliance or structure to any person other than the dentist upon whose direction the work was performed;

(5) Sell or distribute materials, except to a licensed dentist, dental laboratory or dental supply house, with instructions for an individual to construct, repair, reproduce or duplicate any prosthetic denture, bridge, appliance or any other structure to be worn in a person's mouth;

(6) Advertise to the public, by any method, to furnish, supply, construct, reproduce or repair any prosthetic denture, bridge, appliance or other structure to be worn in a person's mouth;

(7) Give estimates of the cost of dental treatment; or

(8) Advertise or permit it to be advertised by sign, card, circular, handbill or newspaper, or otherwise indicate that such person, by contract with others or by himself or herself, will perform any of the functions specified in subdivisions (1) to (7), inclusive, of this subsection.

* * *

(d) Any person who, in practicing dentistry or dental medicine, as defined in this section, employs or permits any other person except a licensed dentist to so practice dentistry or dental medicine shall be subject to the penalties provided in *section 20-126*.

* * *

Conn. Gen. Stat. § 20-126

Penalties.

Any person who violates any provision of this chapter shall be guilty of a class D felony. Any person who continues to practice dentistry, dental medicine or dental surgery, after his license, certificate, registration or authority to so do has been suspended or revoked and while such disability continues, shall be guilty of a class D felony. For the purposes of this section, each instance of patient contact or consultation which is in violation of any provision of this section shall constitute a separate offense. Failure to

renew a license in a timely manner shall not constitute a violation for the purposes of this section.

Conn. Gen. Stat. § 53a-35a

Imprisonment for felony committed on or after July 1, 1981. Definite sentence. Authorized term.

For any felony committed on or after July 1, 1981, the sentence of imprisonment shall be a definite sentence and, unless the section of the general statutes that defines or provides the penalty for the crime specifically provides otherwise, the term shall be fixed by the court as follows:

* * *

(8) For a class D felony, a term not more than five years;

* * *

STATE OF CONNECTICUT

CONNECTICUT STATE DENTAL COMMISSION

RE: Declaratory Ruling: Teeth Whitening

FOR THE COMMISSION:

Jeanne P. Strathearn, D.D.S.
Peter Katz, D.M.D.
Lance Banwell, D.D.S.
Martin Ungar, D.M.D.
Elliot Berman, D.D.S.
Steven Reiss, D.D.S.
Barbara Ulrich, Public Member

DECLARATORY RULING

On September 8, 2010, the Connecticut State Dental Commission ("Commission") on its own motion initiated a declaratory ruling proceeding regarding whether "teeth whitening practices and/or procedures constitute the practice of dentistry as set forth in § 20-123 of the Connecticut General Statutes ("Statutes") and what teeth whitening practices and/or procedures must be performed only by a licensed dentist or persons legally authorized to work under the supervision of a licensed dentist" ("Petition"). Exh. 1. Additionally, the Petition seeks to declare "what substances, if used for teeth whitening purposes, must be used only by a licensed dentist, or persons legally authorized to work under the supervision of a licensed dentist" in the [sic] Connecticut. Exh. 3.

A Notice of Hearing was published on November 16, 2010, in the *Connecticut Law Journal*, scheduling a hearing for December 8 and 9, 2010. Exh. 4. Notice was sent to the Connecticut State Dental Association, the Connecticut Dental Hygienist Association, the Connecticut Dental Assistants Association, the American Dental Association, the Connecticut Department of Public Health, the Connecticut Department of Consumer Protection and the Council for Cosmetic Teeth Whitening. Exh. 17.

On October 15, 2010, the Connecticut State Dental Association ("Dental Association"), the Connecticut Dental Hygienist's Association, Inc. ("Hygienist Association"), and the Connecticut Dental Assistants Association ("Dental Assistant Association") filed petitions for party status. On October 28, 2010, the Dental Association was denied party status, but granted intervenor status, and the Hygienist Association and Dental Assistant Association were designated as parties to the proceeding. Exhs. 5, 6, 7, and 8.

On November 5, 2010, Dental Association filed a second Petition to be Designated a Party. Exh. 11. On November 10, 2010, the Dental Association was granted party status. Exh. 12.

Dr. Jon Davis, D.M.D., appeared on behalf of the Dental Association; Robert Shea, Esq., and Gary Jacobs, R.D.H. C.D.H., appeared on behalf of the

Dental Assistant Association, and Bradford Weeks[1] appeared for the Hygienist Association. Tr. 12/08/10 pp. 4, 46, 55.

The hearing was held on December 8, 2010. The parties provided exhibits and pre-filed testimony, which they adopted under oath during the hearing, and the witnesses were available for questioning and cross-examination. Exhs. 13-15; Tr. 12/08/10 pp. 12, 21, 46, 51, 55.

This Declaratory Ruling is based entirely on the record and sets forth findings of fact and conclusions of law. To the extent that the findings of fact actually represent conclusions of law, they should be so considered, and vice versa. *SAS Inst., Inc. v. S & H Computer Systems, Inc.*, 605 F.Supp. 816 (Md. Tenn. 1985). In addition to considering all of the evidence in this matter, the Commission relied on its own expertise in evaluating the evidence. *Jaffe v. State Dept. of Health*, 135 Conn. 339, 350 (1949), *Jutkowitz v. Department of Health Services, et al*, 220 Conn. 86, 110-111 (1991).

---

[1] Instead of Linda Kowalski who provided the pre-filed testimony for Hygienist Association, Bradford Weeks, an employee of the Kowalski Group, which represents the legislative interests of the Hygienist Association, appeared on behalf of the Hygienist Association. The Commission allowed Mr. Weeks to adopt the testimony of the Hygienist Association without objections from any of the parties. Tr. pp. 46-47.

FINDINGS OF FACT

1. Jon Davis, DMD, provided reliable and credible verbal and pre-filed testimony.

2. Jonathan C. Meiers, DMD, is an expert in the field of dentistry, and he has expertise in the field of teeth whitening. Exh. 14., Transcript, pp.19-45.

3. Dr. Meiers provided reliable and credible verbal and pre-filed testimony.

4. Tooth discoloration can be the result of numerous factors including smoking, coffee, tea or any other type of compound taken orally that can stain teeth. Exh. 13.

5. Metabolic disease, trauma to the tooth pulp and certain drugs taken when the teeth were being formed can also cause discoloration. *Id.*

6. Tooth whitening products contain potent oxidizing elements that, if applied incorrectly, can cause serious burns. *Id.*

7. Determining the cause of discoloration is a significant factor in determining whether attempting to alter the color of a tooth with chemicals will have any effect on improving the appearance of the teeth. Exh. 14.

8. The whitening of teeth generally relies on the use of hydrogen peroxide or carbamide peroxide as the active chemical source. *Id.*

9. Most of the over the counter tooth whitening products contain less than fifteen percent hydrogen peroxide. *Id.*

10. Teeth whitening performed by licensed dentists often uses concentrations of hydrogen peroxide in the range of fifteen to thirty-eight percent. *Id.*

11. Hydrogen peroxide and carbamide peroxide can cause tooth sensitivity and tissue burns. *Id.*

12. Professionally applied treatments attempt to prevent tissue burns by the use of tissue isolation by using a rubber dam and cotton roll or gauze isolation to prevent contact with the hydrogen peroxide. *Id.*

13. A custom tray for home use prepared by a licensed dentist attempts to minimize tissue burns by creating a custom fit tray that limits the contact of the oral tissue with the bleaching gel. *Id.*

14. Many of the publications which have analyzed the effect of light during office bleaching procedures have indicated that there is little or no difference in the effectiveness of the bleaching products with concentrated light. *Id.* There are however, risks associated with the use of light. *Id.*

15. There should be adequate eye and skin protection for the patient and the operator of the light if it is being used to enhance the product in a bleaching procedure. *Id.*

16. Pulpal irritation, tooth sensitivity and lip burns have been reported to occur at a higher rate with the use of bleaching lights. *Id.*

17. The decision of whether to recommend or apply bleaching agents and/or bleaching lights to a particular person's teeth requires significant diagnostic expertise and skills, in part, to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration. The presence of existing tooth colored restorations, failing restorations, caries, ceramic crowns, cracks in teeth and exposed root surfaces all need to be identified and evaluated before such bleaching procedures are attempted. *Id.*

DISCUSSION AND LAW

By law, a declaratory ruling constitutes a statement of agency law, which is binding upon those who participate in the hearing and may also be utilized by the Commission, on a case-by-case basis, in future proceedings before the Commission concerning the practice of dentistry.

Section 20-123 of the Statutes defines the practice of dentistry 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.

This section also lists certain activities that do not constitute the practice of dentistry. The performance of cosmetic surgery or other cosmetic procedures, *other than those related to the oral cavity, its*

contents or the jaw are excluded from the practice of dentistry. Conn. Gen. Stat. § 20-123. However, the Commission finds that teeth whitening, under certain circumstances as detailed in this declaratory ruling, are cosmetic procedures related to the oral cavity and also as detailed herein may involve the diagnosis, evaluation prevention or treatment of a deformity, disease or condition of the oral cavity and its contents. Conn. Gen. Stat. § 20-123, Exhs. 13 and 14.

Teeth whitening procedures constitute the practice of dentistry if the procedures involve the diagnosis, evaluation, prevention or treatment of an injury or deformity, disease or condition of the oral cavity (such as discoloration). When such evaluation, diagnosis, prevention or treatment is done by a person other than a licensed dentist, it violates section 20-123 of the Statutes unless a person is merely selling whitening products that are otherwise legal to sell. For example, the selling of teeth whitening gels of differing strengths by non-licensed persons is not, by itself, the practice of dentistry. It becomes the practice of dentistry when such unlicensed person either uses light in an attempt to enhance the product's effectiveness or a person conducts an analysis of that person's individual needs based upon an examination or other evaluation.

Although any case brought before the Commission will be judged based upon the totality of circumstances, as a general rule actual application of a tooth whitening gel to another person by a person or employee of a company constitutes the practice of

dentistry. Evaluating, assessing, or diagnosing discoloration of teeth constitutes the practice of dentistry. Providing personalized instruction to a consumer and instructing a person based on an assessment or supervising the use and application of tooth bleaching or lightening fluids, pastes, gels, solutions, or other agents to that person's teeth to improve or change the color of the teeth constitutes the practice of dentistry. However, the selling of over the counter teeth whitening products of differing strengths does not constitute the practice of dentistry if the seller is not evaluating a particular patient and recommending products based upon an examination or evaluation of a particular patient/consumer.

Assessing, fabricating, customizing, selecting, or advising the selection of tooth trays used to apply products that lighten or whiten teeth constitutes the practice of dentistry. Applying a light source or other light assisted bleaching systems, including but not limited to light emitting diodes (LED), halogen lamps, plasma arc lamps, metal halide lamps, and lasers that result in lightening or whitening teeth to enhance the tooth whitening process constitutes the practice of dentistry.

Because the inherent risks associated with tooth whitening, it is important that a dentist perform proper examination of the dentition of the patient using appropriate radiographs in order to detect caries, defective restorations or pulpal pathology, which should be treated prior to bleaching. The

Commission finds that all of the witnesses who testified at the hearing to be reliable and credible.

CONCLUSION

The Commission adopts the following Declaratory Ruling and has determined that teeth whitening services involve 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 this declaratory ruling.

June 8, 2011 /s/ Jeanne P. Strathearn
Jeanne P. Strathearn, D.D.S.,
Chairperson
Connecticut State Dental
Commission

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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

Plaintiff,

v.

DR. JEWEL MULLEN, ET AL.,

Defendants.

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

Date: May 16, 2013

LOCAL RULE 56(a)(2) RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED FACTS

As required by Local Civil Rule 56(a)(2), Plaintiff submits the following response to Defendants' statement of undisputed facts.

* * *

Responses to Specific Proposed Findings of Fact

* * *

39. After considering all of the written evidence and oral testimony, the Commission found in its findings of fact that: There are risks associated with the use of light for teeth whitening. Document 1-1, Declaratory Ruling page 5 of 7, FOF ¶ 14.

Response: Plaintiff admits that the Commission made that finding. The finding itself is inadmissible hearsay and was based on the out-of-court opinion testimony of individuals who have not been tendered as experts in this action. Plaintiff affirmatively states the following:

- 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. They generate little heat and no collateral UV B or C radiation, making them no more harmful than a typical consumer flashlight. Decl. of Dr. Martin Giniger in Supp. of Pl.'s Mot. Summ. J. (Giniger Decl.) ¶ 75.
- 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. Giniger Decl. 1175.
- 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). This is significant because it is necessary to cause at least a 5.5°C (9.9°F) increase in the temperature of the tooth pulp to cause the possibility of even transient tooth harm. Giniger Decl. ¶ 76.
- "[I]t would be scientifically and practically impossible for these lights to cause any more

harm than a household flashlight (in other words, no chance)." Giniger Decl. ¶ 77.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

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

Plaintiff,

v.

DR. JEWEL MULLEN, ET AL.,

Defendants.

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

Date: April 8, 2013

LOCAL RULE 56(a)(1) STATEMENT OF UNDISPUTED FACTS

As required by Local Civil Rule 56(a)(1), Plaintiff submits the following statement of material facts as to which Plaintiff contends there is no genuine issue to be tried.

* * *

62. 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. The presence of a non-dentist who is familiar with the use of teeth-whitening products directing the application of those products can only enhance the safety of teeth whitening. Giniger Decl. ¶¶ 86, 106.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

LISA MARTINEZ, ET AL.,
Plaintiffs

v.

JEWEL MULLEN, ET AL.,
Defendants

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

May 16, 2013

LOCAL RULE 56(a)(2) STATEMENT

As required by Local Rule 56(a)2, and in compliance with Local Rule 56(a)3, the defendants submit the following statement in response to plaintiff's Statement of Undisputed Facts.

* * *

62. The defendants have insufficient information to admit or deny, and this claim is wholly unrelated to the lawsuit and the Declaratory Ruling.

* * *
