

14-1381-cv

*Sensational Smiles, LLC v. Jewel Mullen, Dr., et al.*

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3  
4  
5 August Term, 2014

6  
7 (Argued: April 15, 2015

Decided: July 17, 2015)

8  
9 Docket No. 14-1381-cv

10  
11  
12  
13 SENSATIONAL SMILES, LLC, d/b/a SMILE BRIGHT

14  
15 *Plaintiff-Appellant,*

16  
17 LISA MARTINEZ,

18  
19 *Plaintiff*

20  
21 v.

22  
23 JEWEL MULLEN, DR., in her official capacity as Commissioner of Public Health,  
24 JEANNE P. SRATHEARN, DDS, in her official capacity as a Member of the  
25 Connecticut Dental Commission, ELLIOT BERMAN, DDS, in his official capacity  
26 as a Member of the Connecticut Dental Commission, LANCE E. BANWELL,  
27 DDS, in his official capacity as a Member of the Connecticut Dental Commission,  
28 PETER S. KATZ, DMD, in his official capacity as a Member of the Connecticut  
29 Dental Commission, STEVEN G. REISS, DDS, in his official capacity as a Member  
30 of the Connecticut Dental Commission, MARTIN UNGAR, DMD, in his official  
31 capacity as a Member of the Connecticut Dental Commission, BARBARA B.  
32 ULRICH, in her official capacity as a Member of the Connecticut Dental  
33 Commission,

1  
2  
3 *Defendants-Appellees.*  
4

5  
6  
7 Before: CALABRESI, CABRANES, and DRONEY, *Circuit Judges.*  
8

9 Plaintiff-appellant Sensational Smiles, LLC, d/b/a Smile Bright  
10 (“Sensational Smiles”) appeals from a March 31, 2014 judgment of the United  
11 States District Court for the District of Connecticut (Micheal P. Shea, *Judge*)  
12 granting defendants’ motion for summary judgment. Sensational Smiles is a  
13 company that provides teeth-whitening services that involve shining a low-  
14 powered LED light into a customer’s mouth for 20 minutes. The Connecticut  
15 State Dental Commission has issued a declaratory ruling restricting the use of  
16 such lights to licenced dentists. Sensational Smiles now challenges that ruling,  
17 arguing that the ruling violates the Equal Protection Clause and the Due Process  
18 Clause because it lacks a rational basis. Because we conclude that there are  
19 several rational reasons for limiting the use of teeth-whitening LED lights to  
20 licenced dentists, we affirm.  
21

22 Judge DRONEY concurs in a separate opinion.  
23

24 PAUL M. SHERMAN (Dana Berliner, *on the brief*),  
25 Institute for Justice, Arlington, VA, *for Plaintiff-Appellant.*  
26

27 DANIEL SHAPIRO, Assistant Attorney General, *for*  
28 George Jepsen, Attorney General of Connecticut, *for*  
29 *Defendants-Appellees.*  
30  
31  
32  
33  
34

1 GUIDO CALABRESI, *Circuit Judge*:

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

7 **BACKGROUND**

8 Under Connecticut law, the State Dental Commission (“the  
9 Commission”) is charged with advising and assisting the Commissioner of Public  
10 Health in issuing dental regulations. *See* Conn. Gen. Stat. § 20-103a(a). On June  
11 8, 2011, the Commission issued a declaratory ruling that only licensed dentists  
12 were permitted to provide certain teeth-whitening procedures. On July 11, 2011,  
13 the Connecticut State Department of Public Health sent Sensational Smiles—a  
14 non-dentist teeth-whitening business—a letter requesting that it “voluntarily”  
15 cease the practice of offering teeth- whitening services, and warning that it could  
16 otherwise face legal action.

17 Sensational Smiles sued, challenging several aspects of the

1 declaratory ruling. The parties before the District Court eventually agreed,  
2 however, that just one rule constrained the services offered by Sensational  
3 Smiles—specifically, the rule stating that only a licensed dentist could shine a  
4 light emitting diode (“LED”) lamp at the mouth of a consumer during a teeth-  
5 whitening procedure.<sup>1</sup> Sensational Smiles asserted that this rule violates the  
6 Equal Protection and Due Process Clauses, because no rational relationship exists  
7 between the rule and the government’s legitimate interest in the public’s oral  
8 health. Accordingly, Sensational Smiles sought a declaratory judgment from the  
9 District Court that the rule was unconstitutional as applied, as well as a  
10 permanent injunction barring the rule’s enforcement. The District Court (Michael  
11 P. Shea, *Judge*) rejected Sensational Smiles’ arguments and granted defendants’  
12 motion for summary judgment. Sensational Smiles appealed.

## 13 DISCUSSION

---

<sup>1</sup> 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).

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

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

16          As the Supreme Court has stated on multiple occasions, rational-basis  
17          review “is not a license for courts to judge the wisdom, fairness, or logic of

1 legislative choices.” *Heller*, 509 U.S. at 319. Rather, we are required to uphold the  
2 classification “if there is any reasonably conceivable state of facts that could  
3 provide a rational basis for the classification.” *Id.* at 320 (internal quotation  
4 marks omitted). Accordingly, to prevail, the party challenging the classification  
5 must “negative every conceivable basis which might support it.” *Id.* (citation and  
6 internal quotation marks omitted).

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

---

<sup>2</sup> 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

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

4 Sensational Smiles argues that even if there was some basis for believing  
5 that LED lights could cause harm, there was still no rational basis for restricting  
6 the operation of LED lights to licensed dentists. This is so because dentists are not  
7 trained to use LED lights or to practice teeth whitening, and are not required to  
8 have any knowledge of LED lights in order to get dental licenses. The  
9 Commission, however, might have reasoned that if a teeth-whitening customer  
10 experienced sensitivity or burning from the light, then a dentist would be better  
11 equipped than a non-dentist to decide whether to modify or cease the use of the  
12 light, and/or to treat any oral health issues that might arise during the procedure.  
13 The Commission might also have rationally concluded that, in view of the health  
14 risks posed by LED lights, customers seeking to use them in a teeth-whitening  
15 procedure should first receive an individualized assessment of their oral health

---

cannot be absolutely excluded and has to be taken into consideration, 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).

1 by a dentist. Indeed, the Commission explicitly found that “[t]he decision of  
2 whether to recommend or apply bleaching agents and/or bleaching lights to a  
3 particular person’s teeth requires significant diagnostic expertise and skills, in  
4 part, to allow the provider to distinguish between pathological versus non-  
5 pathological causes of tooth discoloration.” App’x at 201. There were thus  
6 rational grounds for the Dental Commission to restrict the use of these lights to  
7 trained dentists.

8           Sensational Smiles further argues that the rule is irrational because it  
9 allows consumers to shine the LED light into their own mouths, after being  
10 instructed in its use by unlicensed teeth-whitening professionals, but prohibits  
11 those same teeth-whitening professionals from guiding or positioning the light  
12 themselves. The law, however, does not require perfect tailoring of economic  
13 regulations, and the Dental Commission can only define the practice of dentistry;  
14 it has limited control over what people choose to do to their own mouths.  
15 Moreover, and perhaps more importantly, individuals are often prohibited from  
16 doing to (or for) others what they are permitted to do to (or for) themselves.  
17 Thus, while one may not extract another’s teeth for money without a dental  
18 license, individuals can remove their own teeth with pliers at home if they so



1 choose, and a failure to ban the latter practice would not render a ban on the  
2 former irrational. The same is true of legal services, where individuals may  
3 proceed pro se, but may not represent others without a law license.

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

8 This would normally end our inquiry, but appellant, supported by amicus  
9 Professor Todd J. Zywicki, forcefully argues that the true purpose of the  
10 Commission's LED restriction is to protect the monopoly on dental services  
11 enjoyed by licensed dentists in the state of Connecticut. In other words, the  
12 regulation is nothing but naked economic protectionism: "rent seeking . . .  
13 designed to transfer wealth from consumers to a particular interest group."<sup>3</sup>

---

<sup>3</sup>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."").

1 Zywicki Br. at 3. This raises a question of growing importance and also permits  
2 us to emphasize what we do not decide, namely, whether the regulation is valid  
3 under the antitrust laws. *See N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135  
4 S. Ct. 1101 (2015) (holding that dental board was not sufficiently controlled by the  
5 state to claim state antitrust immunity).

6 In recent years, some courts of appeals have held that laws and regulations  
7 whose sole purpose is to shield a particular group from intrastate economic  
8 competition cannot survive rational basis review. *See St. Joseph Abbey v. Castille*,  
9 712 F.3d 215, 222 (5th Cir. 2013) (“[N]either precedent nor broader principles  
10 suggest that mere economic protection of a particular industry is a legitimate  
11 governmental purpose[.]”); *Merrifield v. Lockyer*, 547 F.3d 978, 991, n.15 (9th Cir.  
12 2008) (“[M]ere economic protectionism for the sake of economic protectionism is  
13 irrational with respect to determining if a classification survives rational basis  
14 review.”); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“[P]rotecting a  
15 discrete interest group from economic competition is not a legitimate  
16 governmental purpose.”). The Tenth Circuit, on the other hand, has squarely  
17 held that such a protectionist purpose is legitimate. *See Powers v. Harris*, 379 F.3d  
18 1208, 1221 (10th Cir. 2004) (“[A]bsent a violation of a specific constitutional

1 provision or other federal law, intrastate economic protectionism constitutes a  
2 legitimate state interest.”). We join the Tenth Circuit and conclude that  
3 economic favoritism is rational for purposes of our review of state action under  
4 the Fourteenth Amendment.

5 Our decision is guided by precedent, principle, and practicalities. As an  
6 initial matter, we note that because the legislature need not articulate any reason  
7 for enacting its economic regulations, “it is entirely irrelevant for constitutional  
8 purposes whether the conceived reason for the challenged distinction actually  
9 motivated the legislature.” *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).  
10 Accordingly, even if, as appellants contend, the Commission was in fact  
11 motivated purely by rent-seeking, the rational reasons we have already discussed  
12 in support of the regulation would be enough to uphold it.

13 But even if the only conceivable reason for the LED restriction was to  
14 shield licensed dentists from competition, we would still be compelled by an  
15 unbroken line of precedent to approve the Commission’s action. The simple  
16 truth is that the Supreme Court has long permitted state economic favoritism of  
17 all sorts, so long as that favoritism does not violate specific constitutional  
18 provisions or federal statutes. *See, e.g., Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539

1 U.S. 103, 109 (2003) (upholding state tax scheme that favored riverboat gambling  
2 over racetrack gambling); *Nordlinger v. Hahn*, 505 U.S. 1, 12 (1992) (upholding  
3 state property tax scheme that favored long term owners over new owners); *New*  
4 *Orleans v. Dukes*, 427 U.S. 297 (1976) (upholding New Orleans city ordinance that  
5 banned street vendors, with an exception made for existing vendors in operation  
6 for more than eight years); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483,  
7 (1955) (upholding regulation that prohibited “any person purporting to do eye  
8 examination or visual care to occupy space in [a] retail store”).<sup>4</sup>

9         These decisions are a product of experience and common sense. Much of  
10 what states do is to favor certain groups over others on economic grounds. We  
11 call this politics. Whether the results are wise or terrible is not for us to say, as  
12 favoritism of this sort is certainly rational in the constitutional sense. To give but  
13 one example, Connecticut could well have concluded that higher costs for teeth  
14 whitening (the possible effect of the Commission’s regulation) would subsidize  
15 lower costs for more essential dental services that only licensed dentists can

---

<sup>4</sup> At oral argument, appellant pointed us to the Supreme Court’s decision in *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (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.

1 provide, such as oral surgery or tooth extraction—much as the high cost of a law  
2 or business degree at a given university may allow other students at the same  
3 university to pursue poetry on the (relatively) cheap. Even such an arguably  
4 consumer-friendly rationale is unnecessary, however, as a simple preference for  
5 dentists over teeth-whiteners would suffice. To hold otherwise would be to  
6 interpret the Fourteenth Amendment in a way that is destructive to federalism  
7 and to the power of the sovereign states to regulate their internal economic  
8 affairs. As Justice Holmes wrote over a century ago, “[t]he 14th Amendment  
9 does not enact Mr. Herbert Spencer’s Social Statics.” *Lochner v. New York*, 198 U.S.  
10 45, 75 (1905) (Holmes, J., dissenting). Nor does it endorse Sidney and Beatrice  
11 Webb’s Fabianism. Choosing between competing economic theories is the work  
12 of state legislatures, not of federal courts.

13 We are buttressed in our decision by the difficulty in distinguishing  
14 between a protectionist purpose and a more “legitimate” public purpose in any  
15 particular case. Often, the two will coexist, with no consistent way to determine  
16 acceptable levels of protectionism. *Cf. N. Carolina State Bd. of Dental Examiners*,  
17 135 S. Ct. at 1123 (Alito, J., dissenting). And a court intent on sniffing out  
18 “improper” economic protectionism will have little difficulty in finding it. Thus,

1 even the law at issue in *Lochner*—the paradigm of disfavored judicial review of  
2 economic regulations—might well fail the sort of rational basis scrutiny  
3 advocated by Sensational Smiles and its amicus. *See* Rebecca L. Brown,  
4 Constitutional Tragedies: The Dark Side of Judgment, in Constitutional  
5 Stupidities, Constitutional Tragedies 139, 142 (William N. Eskridge, Jr. & Sanford  
6 Levinson eds., 1998) (“[S]ubsequent analysts . . . have demonstrated that the law  
7 at issue in *Lochner*, despite its guise as a health regulation, was probably a rent-  
8 seeking, competition-reducing measure supported by labor unions and large  
9 bakeries for the purpose of driving small bakeries and their large immigrant  
10 workforce out of business.”).

11       Of course, if economic favoritism by the states violates federal law, then,  
12 like any state action that contravenes stated federal rules, it falls under the  
13 Supremacy Clause. This can happen if—whether motivated by rent-seeking or  
14 by libertarian ideals—state action, though rational, violates the dormant  
15 Commerce Clause, or if a state licensing board that is insufficiently controlled by  
16 the state creates a monopoly in violation of the Sherman Act. *See* 15 U.S.C. § 1 *et*  
17 *seq.*; *N. Carolina State Bd. of Dental Examiners*, 135 S. Ct. at 1114. Accordingly, we  
18 emphasize that we take no position on the applicability of the antitrust laws to

1 the regulation at issue here. That is a separate and distinct inquiry that was not  
2 argued and is not before us. All we hold today is that there are any number of  
3 constitutionally rational grounds for the Commission's rule, and that one of them  
4 is the favoring of licensed dentists at the expense of unlicensed teeth whiteners.

5

6

7

### CONCLUSION

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

9

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

Date: July 17, 2015  
Docket #: 14-1381cv  
Short Title: Martinez v. Mullen

DC Docket #: 11-cv-1787  
DC Court: CT (NEW HAVEN)  
DC Judge: Shea

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.



**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

Date: July 17, 2015  
Docket #: 14-1381cv  
Short Title: Martinez v. Mullen

DC Docket #: 11-cv-1787  
DC Court: CT (NEW HAVEN)  
DC Judge: Shea

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature