

No. 15-507

IN THE
Supreme Court of the United States

SENSATIONAL SMILES LLC,

Petitioner,

v.

JEWEL MULLEN, DR., IN HER OFFICIAL CAPACITY
AS COMMISSIONER OF PUBLIC HEALTH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF OF *AMICUS CURIAE* COUNCIL
FOR COSMETIC TEETH WHITENING
IN SUPPORT OF PETITIONER**

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

The Council for Cosmetic Teeth Whitening (“CCTW”) is a trade association devoted to the professional development of the cosmetic teeth-whitening industry in the United States. CCTW is composed of manufacturers and retailers who provide over-the-counter teeth-whitening products directly to consumers. CCTW develops training materials, provides business and legal guidance for members concerning the regulation and distribution of cosmetic teeth whiteners, and promotes the cosmetic teeth-whitening industry before state and national regulatory agencies.

Founded in 2008, CCTW was formed to represent and defend the cosmetic teeth-whitening industry against one of the strongest lobbies in the United States: the national and state dental associations. CCTW’s first members banded together to prove a fundamental truth—that teeth whitening is a safe, cosmetic process, not an invasive dental procedure. CCTW is the sole organization that advocates for non-dentists in the teeth-whitening industry.

CCTW thus has a strong interest in this case. The anticompetitive actions of the State dental board are not unique to Connecticut. They have been happening all over the country for years. This Court’s review is needed.

1. Pursuant to this Court’s Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief and have received appropriate notice.

SUMMARY OF THE ARGUMENT

This Court is faced with a fundamental question: can a State shut down private businesses solely to protect a favored group from economic competition? The Second Circuit said yes. It concluded that a State could prohibit private enterprise “even if the only conceivable reason for the ... restriction was to shield [others] from competition.” Petition Appendix (“App.”) 10.

Yet this Court has long held that State laws and regulations are unconstitutional unless they are rationally related to a “*legitimate state interest.*” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (emphasis added). Stamping out economic competition in order to reward politically favored groups is not a legitimate state interest.

Amicus CCTW knows full well the harm that this type of political favoritism can inflict. For years, CCTW’s members provided teeth-whitening products and services to their customers in a cheap, convenient, and safe manner. As a result, the teeth-whitening industry boomed, providing good jobs and a quality life for countless small-business owners across the country.

But as CCTW’s members prospered, the dental industry sought to undermine competition from non-dentists, embarking on an aggressive nationwide campaign to use the power of State governments to prevent non-dentists from providing teeth-whitening services. Unfortunately, these efforts were remarkably successful. In the last ten years, States and State dental boards have passed new laws and regulations banning

non-dentists from providing teeth-whitening services. In addition, they have issued cease-and-desist letters to non-dentists and brought enforcement and legal actions against those who continued to provide such services. Numerous teeth-whitening businesses were shuttered as a result.

Many States have relied upon unproven claims of risks relating to teeth whitening as a purported justification for stamping out competition from non-dentists—even though countless studies have demonstrated that teeth whitening is perfectly safe. Perhaps because of the flimsy basis for such claims, the Second Circuit relieved the State from the obligation of offering any justification whatsoever. If this opinion is allowed to stand, States will be able to shut down private businesses solely to protect favored groups from economic competition with no judicial check on the exercise of such great power. That cannot be right.

ARGUMENT

I. Non-Dentists Have Provided Safe And Affordable Teeth-Whitening Services For Years.

In the early 1990s, dentists across the country began offering teeth-whitening services to their patients. Dentists typically whitened teeth by applying peroxide to their patients' teeth through a gel or a strip. Dentists either performed these services in their offices or provided their patients with the whitening products so they could do it themselves at home. *See In the Matter of the N. Carolina Bd. of Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463, at *2 (2011).

Since then, the popularity of teeth whitening has skyrocketed. Simply put: people like having whiter teeth. They like how their smile looks with white teeth and they believe it makes others view them more favorably. Indeed, studies have shown that people with whiter teeth are more likely to be hired, to receive a higher salary, and to be found more attractive. *See New Study Shows Whiter Teeth Can Lead to Greater Success in Work and Love*, PR Newswire (May 30, 2007), <http://goo.gl/TdMJcL>; American Academy of Cosmetic Dentistry, *Whitening Survey, Summer 2012* (2012), *available at* <http://goo.gl/fcri0g>.

But while teeth whitening is immensely popular, many people do not have the luxury of visiting a dentist to obtain these services. Dental visits can be expensive, costing on average more than \$380 for each teeth-whitening service. *See American Academy of Cosmetic Dentistry, Cosmetic Dentistry: State of the Industry 22* (2013), *available at* <http://goo.gl/g8l2yy>. In addition, dental visits are often inconvenient, requiring patients to make long appointments during the middle of a workday and often months in advance.

Given the high demand for whiter teeth, the safeness of teeth whitening, and the dissatisfaction with the services available, non-dentists began offering teeth-whitening services. These providers used techniques similar to those used by dentists to whiten teeth and, like dentists, could whiten their customers' teeth in a single session. But these specialists charged significantly less for their teeth-whitening services, often costing two to six times less than dentists. *See Angela C. Erickson, White Out: How Dental Industry Insiders Thwart Competition From*

Teeth-Whitening Entrepreneurs 1-2 (2013), *available at* <http://goo.gl/7IGp4s>. These providers also offered far more convenience, as they could whiten teeth without an appointment and at places convenient to customers, such as mall kiosks, spas, salons, and retail stores. *Id.* at 2; *Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463, at *2.

As a result, the teeth-whitening industry grew exponentially. *Erickson*, *supra*, at 2. Countless small businesses opened, creating good jobs for numerous individuals. *See infra* 15-17. Not only were these businesses providing a popular service, but they were doing so in a safe manner. According to one study, which analyzed consumer complaints from 17 States between 2007 and 2011, only four complaints were filed against non-dentists providing teeth-whitening services. *Erickson*, *supra*, at 23-24. Moreover, each complaint related only to temporary conditions, such as tooth sensitivity and irritated gums, which are common side effects for peroxide-based teeth whitening regardless of whether dentists or non-dentists provide the service. *Id.* at 25. Those effects are usually minor and typically disappear after a few days. *See* Yiming Li & L. Greenwall, *Safety Issues of Tooth Whitening Using Peroxide-Based Materials*, 215 *Brit. Dental J.* 29, 32-33 (2013); TM Auschill *et al.*, *Efficacy, Side-Effects and Patients' Acceptance of Different Bleaching Techniques (OTC, in-office, at-home)*, 30 *Operative Dentistry* 156, 157, 161-62 (2005).

Indeed, the safety of teeth-whitening products and services is well documented. As the Federal Trade Commission recently concluded, there is “a wealth of evidence ... suggesting that nondentist provided teeth

whitening is a safe cosmetic procedure.” *Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *29; *see also id.* at *28 (finding no “clinical or empirical evidence validating any of the[] concerns” raised about the dangers of teeth whitening). The Food and Drug Administration, too, has found that using “peroxides ... does not raise significant safety concerns for their use as tooth whiteners,” and thus has refused to regulate these products. Letter from Janet Woodcock, M.D., Director, CDER, FDA to Charles Norman, regarding Docket No. FDA-2009-P-0566 (Apr. 22, 2014), at 7, *available at* <http://goo.gl/q6V4Xt>. Citing the American Dental Association’s views on teeth whitening, the FDA recognized that “tooth whiteners with certain concentrations of peroxides appear to be well-tolerated.” *Id.* at 6. Indeed, “[t]he most commonly observed side effects with these peroxide-based bleaching agents are tooth sensitivity and occasional irritation of soft tissues in the mouth,” which “are usually temporary and stop after the treatment.” *Id.* (quoting ADA Statement on the Safety and Effectiveness of Tooth Whitening (April 2012)); *see also* Li & Greenwall, 215 *Brit. Dental J.* at 33 (finding no reports of any permanent damage from peroxide-based teeth whitening).

The record in this case confirms that teeth-whitening services “pose no threat to public safety.” *Martinez v. Mullen*, 11 F. Supp. 3d 149, 161 (D. Conn. 2014). Dr. Martin Giniger, a licensed dentist and an expert in the history, practice, and safety of peroxide-based teeth whitening, reported 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 nondentists,” which are about as dangerous as a “household flashlight.” *Id.* Additional studies confirm Dr. Giniger’s findings. *See, e.g.,* Yan-Fang Ren *et al., Effects of Tooth Whitening and Orange Juice on Surface Properties of Dental Enamel*, 37 *Journal of Dentistry* 424, 430 (2009) (finding that using a teeth whitener did “not significantly change the surface properties of enamel as compared to water” and was “insignificant as compared to daily activities such as orange juice drinking”); *see also* Erickson, *supra*, at 24 nn.156-57 (collecting studies on the efficacy of LED light teeth-whitening processes). Tellingly, Respondents never “challenged Dr. Giniger’s expertise [nor] sought to rebut his opinions.” *Martinez*, 11 F. Supp. 3d at 161.

In short, the entry of non-dentists into the teeth-whitening industry has been an unequivocal boon to consumers. Customers receive a service they desire at an affordable price and at a convenient location. As the FTC has recognized, “[c]onsumers’ preferences with respect to efficacy, cost, and convenience vary,” and there is “competition among providers offering the different methods of teeth whitening.” *Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *4.

II. States Have Targeted Non-Dentists Providing Teeth-Whitening Services In Order To Shield Dentists From Competition.

As the popularity of teeth whitening from non-dentists rose, the dental industry reacted harshly to the perceived loss of business. Through a four-pronged approach of legislation, regulation, enforcement actions, and lawsuits, the industry sought to use the States to regulate the burgeoning teeth-whitening industry into extinction.

First, the dental industry lobbied for new laws to limit teeth-whitening services to dentists. State laws typically prohibit individuals from practicing dentistry without a license. But many of these States' laws did not include teeth whitening within the scope of dentistry. As a result, from 2005 to 2011, eight States enacted new legislation forbidding non-dentists from offering teeth-whitening services. *See* Ala. Code § 34-9-6(12) (2011) (prohibiting non-dentists from using “any method to bleach human teeth”); Ariz. Rev. Stat. Ann. § 32-1202 (2011) (prohibiting non-dentists from “remov[ing] stains, discolorations and concretions”); Iowa Code § 153.13(3) (2009) (prohibiting non-dentists from “instruct[ing] or appl[y]ing tooth whitening materials or procedures at any geographic location”); Ky. Rev. Stat. Ann. § 313.010(11) (2010) (prohibiting non-dentists from “whitening ... natural or manufactured teeth”); Mo. Rev. Stat. § 332.366 (2009) (prohibiting non-dentists from “provid[ing] teeth whitening services to another person by use of products not readily available to the public through over-the-counter purchase”); Nev. Rev. Stat. § 631.215(1)(m) (2005) (prohibiting non-dentists from “[d]ispens[ing] tooth whitening agents or undertak[ing] to whiten or bleach teeth by any means or method” unless it is for personal use); N.H. Rev. Stat. § 317-A:(20)(I)(h) (2010) (prohibiting non-dentists from “[d]ispens[ing] teeth whitening agents or undertak[ing] to whiten or bleach teeth by any means or method” unless it is for personal use); N.D. Cent. Code § 43-28-01(7) (2009) (prohibiting non-dentists from “examin[ing], diagnos[ing], treat[ing], [or] repair[ing] ... [the] discoloration” of teeth).

In every State, these legislative efforts were driven by the dental industry. For example, in 2005, Nevada

passed a law forbidding non-dentists from “[d]ispens[ing] tooth whitening agents or undertak[ing] to whiten or bleach teeth by any means or method.” Nev. Rev. Stat. § 631.215(1)(m) (2005). The dental industry wrote this statute and played an enormous role in ensuring its passage. *See* Erickson, *supra*, at 13. The industry likewise led the charge in the seven other States that passed similar laws. *See id.* at 13-14.

Second, the dental industry lobbied State agencies to enact regulations prohibiting teeth-whitening services by non-dentists. In response, State agencies began issuing new regulations targeting non-dentists who engage in teeth whitening. For example, in 2009, the Kansas Dental Board adopted an administrative regulation prohibiting non-dentists from performing any procedure that “[a]lters the color or physical condition” of teeth or “requires the positioning and adjustment of equipment or appliances for the purpose of altering the color or physical condition of natural, restored, or prosthetic teeth.” Kan. Admin Regs. § 71-11-1 (2009). The dental board adopted this regulation after heavy lobbying from the Kansas Dental Association. *See* Erickson, *supra*, at 15.

At least eight other States and their dental boards have adopted similar regulations since 2005. *See, e.g.*, Connecticut State Dental Commission, Declaratory Ruling (June 8, 2011) (prohibiting non-dentists from performing “teeth whitening services”); Delaware Board of Dentistry and Dental Hygiene, Teeth Whitening Outside Dental Offices (March 2011) (declaring that “the application of teeth whitening products to a consumer by individuals other than dentists or hygienists constitutes the practice of dentistry in violation of the

Dental Practices Act”); Fla. Admin Code. Ann. r. 64B5-16.006(1)(i) (2010) (authorizing dentists to delegate the tasks of applying “bleaching solution, activat[ing] light source, monitor[ing] and remov[ing] in-office bleaching materials” only to dental hygienists under dentists’ direct supervision); L.A. Admin. Code tit. 46, XXXIII § 701(F) (8) (2010)(authorizing only dental hygienists to perform “light enhanced teeth whitening procedures ... under supervision” of dentists); Mass. Board of Registration in Dentistry, Tooth Whitening Services (Jan. 2008) (“[T]ooth whitening services offered to the public are considered to be the practice of dentistry, and, therefore, must be provided by a dentist who is fully licensed to practice in the Commonwealth [of Massachusetts].”); Mont. Admin. R. § 24.138.306 (2010) (declaring that “[t]he board of dentistry interprets the definition of the practice of dentistry ... to include services or procedures that alter the color or physical condition of a tooth or teeth”); N.M. Code. R. § 16.5.39.10(H) (2014) (prohibiting “bleaching or whitening teeth without direct or indirect supervision of a dentist”); R.I. Code R. 31-5-18:1.13 (2014) (defining “dentistry” to include “any service that may change the anatomy, appearance, or arrangement of teeth”); South Dakota State Board of Dentistry, Special Meeting Minutes (Jan. 4, 2010) (passing rule that “teeth-whitening services offered to the public are considered the practice of dentistry”); *see also* Erickson, *supra*, at 7-8 (describing state regulations prohibiting teeth whitening outside a dentist’s office).

Third, the dental industry lobbied dental boards to take aggressive enforcement actions against non-dentists providing teeth-whitening services. *See* Erickson, *supra*, at 15-22. Dental boards are charged with regulating the practice of dentistry and typically issue and renew

licenses and take disciplinary action against dentists practicing without a license. Dental boards are usually funded by dues and fees paid by licensed dentists and dental hygienists in the State. *See Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *3.

According to one study of complaints to State dental boards, only four percent of the complaints about teeth-whitening services performed by non-dentists came from consumers. Erickson, *supra*, at 19. Instead, the vast majority of these complaints came from state dental associations, dentists and hygienists, and state dental boards themselves (which are usually comprised of practicing dentists). *Id.* For example, the Florida Dental Association encouraged its members to file complaints and sent its own letter urging the Florida Attorney General to prosecute teeth-whitening providers. *Id.* The Massachusetts Dental Association, similarly, created a “For Professionals” website dedicated to providing “information on filing complaints about the mall tooth whitening trend.” *Id.*; *see id.* at 18-20 (detailing similar actions in Missouri, Virginia, Wyoming, Montana, North Carolina, Louisiana, Tennessee, Mississippi, Connecticut, Iowa, Kansas, North Dakota, Kentucky, and the District of Columbia). When complaining to dental boards about unlicensed teeth whitening, the complaints often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns. *Id.*; *see also Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *2, *21.

As a result of this lobbying effort, dental boards across the country began issuing cease-and-desist letters to non-dentist teeth-whitening service providers and distributors

of teeth-whitening products and equipment. *See, e.g., Dental Examiners*, 152 F.T.C. 640, 2011 WL 11798463 at *2. Between 2007 and 2011, at least 24 dental boards and the District of Columbia sent nearly 200 letters ordering teeth-whitening businesses to halt their operations. Erickson, *supra*, at 17-18. These letters often carried the threat of significant penalties. For example, the Nebraska Board of Dentistry sent one provider a letter stating “the Nebraska Board of Dentistry orders you to cease and desist providing teeth whitening services ... until such time as you have a valid Nebraska dental license. Failure to obey an order to cease and desist is a Class III felony and punishable by one to twenty years in prison and up to a \$25,000 fine.” *Id.* at 17 (quoting Nebraska Board of Dentistry Letter to K. Rooda (June 20, 2008)). Such letters also could be vague when the Board’s legal authority was suspect. For example, one provider in Florida received a “letter of guidance” stating that “[t]he Department of Health is confident, by receipt of this letter, you will adjust any acts or behavior that may be construed as unlicensed activity.” *Id.* (quoting Letter from T. French, Florida Department of Health, to J. Caudill (Aug. 24, 2009)).

Indeed, just last term, this Court reviewed the North Carolina State Board of Dental Examiners’ anticompetitive attempts to shut down dentists’ teeth-whitening competitors with cease-and-desist letters. *See N. Carolina Bd. of Dental Examiners vs. Federal Trade Commission*. 135 S. Ct. 1101 (2015). In North Carolina, a state dental board composed primarily of practicing dental professionals sent almost 50 cease-and-desist letters to non-dentists from 2006 to 2009. *See id.* at 1108. The board also sent twelve letters to malls claiming teeth-whitening kiosks in the malls were illegal and filed lawsuits against

various teeth-whitening businesses. Erickson, *supra*, at 17. In June 2010, the FTC issued an administrative complaint asserting that the board's "concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition." *N. Carolina Bd. of Dental Examiners*, 135 S. Ct. at 1108-09. The FTC charged that the board's anticompetitive actions led to higher prices and fewer consumer choices. *Id.* at 1109. An administrative law judge sided with the FTC and found "the Board had unreasonably restrained trade in violation of antitrust law." *Id.* After the FTC's actions were challenged, this Court properly ruled that the FTC could move forward with an antitrust suit against the dental board for fixing the market. *Id.* at 1116-17.

Finally, when cease-and-desist letters failed to intimidate, many States brought legal actions to halt the provision of teeth-whitening services by non-dentists. Since 2008, eleven States have instituted legal actions against teeth-whitening businesses. Erickson, *supra*, at 21. For example, in 2012, the Oklahoma State dental board filed for and obtained a temporary restraining order to shut down a teeth-whitening business, Euro Shine USA, at the state fair. *In re State of Oklahoma Board of Dentistry v. Euroshine USA*, No. CJ-2012-1253 (Okla. Dist. Ct. 2012); Sara Plummer, *Teeth Whitening Booth at Tulsa State Fair Shut Down After Dental Board Complaints*, *Tulsa World* (Oct. 3, 2012), <http://goo.gl/WzBsPq>. Other States have taken similar actions. See Erickson, *supra*, at 20-21 (detailing legal actions in New Mexico, North Carolina, Oklahoma, West Virginia, Hawaii, Kansas, Louisiana, Nevada, Wyoming, and New Jersey).

Thus, when met with competition, the dental industry went straight to State governments to lobby them to shut down their competitors. The State's actions, in turn, were blatant protectionism—taken solely to benefit a favored and entrenched group. No court should bless these actions by effectively immunizing them from review.

III. Economic Protectionism Is Not A Rational Basis For Upholding State Action.

Under the rational-basis test, a law or regulation is unconstitutional if it is not “rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The court of appeals found the Connecticut statute at issue here to be constitutional because “economic favoritism is rational for purposes of our review of state action under the Fourteenth Amendment.” App. 9. Thus, according to the court of appeals, Connecticut’s restriction on teeth whitening is constitutional “even if the only conceivable reason for the ... restriction was to shield licensed dentists from competition.” App. 10. Accordingly, the court of appeals held that the State needed *no rationale* suggesting that the regulation was good for consumers, because “a simple preference for dentists over teeth-whiteners would suffice.” App. 11. The court reasoned that “[m]uch of what states do is to favor certain groups over others on economic grounds. We call this politics.” *Id.*

In other words, in the Second Circuit, a State has free rein to shut down businesses in order to give politically connected groups a monopoly over the selling of certain goods and services. States can take these measures and courts will uphold them without *any* justification—other

than legislators' and bureaucrats' desire to reward their friends and punish their enemies.

But the reason for rational-basis review is to prevent governments from taking arbitrary actions that provide no possible benefit to society. The history of teeth whitening in this country proves the point. Through the State actions described above, States and their agencies have succeeded in destroying countless providers of a popular service. Where consumers once had access to cheap and convenient teeth-whitening services, many now must go without.

Not only do consumers suffer, but hard-working small business owners suffer too. Small businesses all over the country have been forced to close their doors as a result of States' arbitrary protectionism. For example, Joyce Wilson, the founder of *Amicus* CCTW, created a successful business selling Britewhite teeth-whitening products. See Campbell Robertson, *A Clash Over Who is Allowed to Give You a Brighter Smile*, N.Y. Times (May 25, 2013), <http://goo.gl/bMbEAX>. But Ms. Wilson was forced to stop selling her teeth-whitening system in North Carolina after the State's dental board sued one of her clients for the illegal practice of dentistry, and she was forced to stop selling the system in her home state of Alabama after that State passed a law outlawing the practice. See Erickson, *supra*, at 25.

Ms. Wilson's struggles are shared by many others. In 2008, Lisa Martinez opened Connecticut White Smiles in a mall in Waterford, Connecticut. *Id.* at 2. That business provided her with a steady income and a flexible schedule that allowed her to spend time caring for her young children. *Id.* But in 2011, the Connecticut

Dental Commission made operating these teeth-whitening businesses a crime that is punishable by up to five years in jail. *Id.* Not wishing to risk jail time, Ms. Martinez closed her business for good. *Id.* She is now a flight attendant and no longer has the flexibility to spend time with her children. *Id.*

Trisha Eck was a stay-at-home mom for years before she opened her own business in Georgia. *See* Jonathan Serrie, *Dental Regulators Work to Shut Down Teeth Whitening Businesses*, Fox News (May 16, 2014), <http://goo.gl/2ygsJF>. Ms. Eck's teeth-whitening studio, Tooth Fairies Teeth Whitening, gave her a modest income and allowed her to run her own business. *Id.* But after the Georgia Board of Dentistry sent her a cease-and-desist order threatening her with fines and prison time for operating an unlicensed dental practice, Ms. Eck was forced to close her business. *Id.*

Christina Collins suffered a similar fate. *See* Institute for Justice, *Georgia Teeth Whitening* (2015), *available at* <http://goo.gl/rzKLM0>. A single mother, Ms. Collins launched Mobile Whites in February 2011 as a business that would allow her to earn an honest living and maintain a relatively flexible work schedule. *Id.* She set up a retail location in Savannah, Georgia in which she instructed customers on how to whiten their own teeth. *Id.* By charging as little as \$59 a session, her service was a bargain and she began to receive a steady stream of business. But in August 2014, an agent of the Georgia Dental Board emailed and phoned her and accused her of engaging in the unlawful practice of dentistry. *Id.* Ms. Collins had never previously encountered the law beyond a traffic ticket. *Id.* Frightened, she voluntarily closed her

business and vacated her retail location in Savannah. *Id.*

These stories are not unique. They are the inevitable consequence of State actions stamping out private activities for no social benefit—other than to protect a favored group from competition. This economic protectionism, divorced from any benefit to consumers, is not a rational reason for upholding State action. This is not mere “politics,” as the court of appeals found. It is cronyism at its worst. True judicial scrutiny is needed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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