**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF CONNECTICUT**

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

Plaintiff,

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

v.

**Date: May 16, 2013**

DR. JEWEL MULLEN, ET AL.,

Defendants.

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**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION

Although Defendants' memorandum discusses at length their interest in ensuring the competence of dentists generally, it also makes clear that the dispute between the parties in *this* case really has nothing to do with dentistry. Defendants (collectively, "the Commission") appear to concede that virtually every aspect of Plaintiff Smile Bright's business—from the sale of teeth-whitening products to the provision of instructions and material for the self-application of those products at the place of purchase—is not the practice of dentistry. The Commission even concedes that it is not the practice of dentistry for Smile Bright to provide customers with LED whitening lights, as long as the customer, and not anyone employed by Smile Bright, positions that light in front of the customer's mouth. Thus, the only question that is squarely in dispute appears to be: May the government require a person to become a fully licensed dentist before that person may point a blue LED light—which is no more powerful than a household flashlight—at a customer's teeth?

The Commission insists that the answer to that question is "yes." Yet the only admissible evidence that the Commission has offered in support of this counterintuitive and, frankly, implausible claim are the facts that 1) the Dental Commission held a hearing about the regulation of teeth whitening and 2) based on what they heard at that hearing, the Commission concluded that pointing LED lights at people's mouths is the practice of dentistry.

Smile Bright does not dispute that the Commission held that hearing or reached that conclusion. But that is merely the first step of the constitutional inquiry. It is not, as the Commission seem to believe, the only step.

The next step is to determine whether that interpretation of the Dental Practice Act deprives Smile Bright of its constitutional rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In other words, is prohibiting Smile Bright and its

employees from pointing flashlights at people's mouths *rationally related* to any legitimate government interest? And on that question, the Commission has not produced a scintilla of admissible evidence to demonstrate that they are entitled to summary judgment, nor has the Commission come close to discrediting Smile Bright's extensive, unrebutted evidence that, as applied to teeth-whitening services like Smile Bright's, the Commission's declaratory ruling is unconstitutionally arbitrary and irrational. Accordingly, for the reasons explained in more detail below, the Commission's motion for summary judgment should be denied.

## COUNTERSTATEMENT OF FACTS

The Commission's memorandum of law has narrowed the factual issues that this Court needs to consider in resolving this dispute. The Commission's June 8, 2011 declaratory ruling itself is written in broad terms. Much of what it purports to prohibit, 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," appears to describe activities that Smile Bright previously engaged in. *See* Pl.'s Rule 56(a)(1) Statement of Undisputed Facts (Pl.'s SUF) ¶ 95 (Dkt. 49-2). In reliance on the plain language of this declaratory ruling, Smile Bright stopped offering teeth-whitening services rather than risk penalties of up to five years in jail and $25,000 in fines per customer for the unlicensed practice of dentistry. Pl.'s SUF ¶ 97.

In its memorandum, however, the Commission has adopted an interpretation of the declaratory ruling that seems much narrower than the ruling's plain language would suggest. Regardless of whether this is truly the interpretation that the Commission intended when it issued the declaratory ruling, or whether this is merely a convenient litigating position, this interpretation substantially simplifies the task before this court.

As the Commission describes the holding of its declaratory ruling, "provid[ing] customers with prepackaged teeth-whitening products, provid[ing] the customer with the instructions on how to apply it to their own teeth, provid[ing] a chair and provid[ing] an enhancing light" do not constitute the practice of dentistry. Defs.' Mem. of Law in Supp. Mot. for Summ. J. (Defs.' MSJ Mem.) at 19 (Dkt. 48-2).[1] Instead, to be considered the practice of dentistry, a person must also engage in some other, additional conduct. *See, e.g.*, *id.* at 8.

The Commission identifies several types of conduct that it considers to be the practice of dentistry, including diagnosing of the causes of tooth discoloration, the manufacturing of customized mouth trays for teeth whitening, and the application of teeth-whitening products to a customer's teeth. *Id.* Virtually all of these types of additional conduct are irrelevant to this case, however, because Smile Bright has never engaged in them, has no intention of ever engaging in them, and has not challenged the constitutionality of the declaratory ruling as it applies to these types of conduct. *See* Pl.'s SUF ¶¶ 17-35; Complaint at 15 (Dkt. 1) (requesting entry of judgment "as applied to teeth-whitening services like Plaintiff['s]").

Smile Bright has challenged the constitutionality of the declaratory ruling to the extent it classifies teeth-whitening services *like those performed by Smile Bright* as the practice of dentistry. Complaint at 15. Based on the representations in the Commission's motion for summary judgment, there are, at most, two activities that Smile Bright previously engaged in that

[1] Under the doctrine of judicial estoppel, the Commission, having advanced this interpretation of its declaratory ruling, should be estopped in future enforcement proceedings from advancing a contradictory interpretation against Plaintiff or any other similarly situated teeth-whitening entrepreneurs. *See New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001).

would violate the declaratory ruling: Smile Bright employees talked customers through the self-application of the product and positioned LED lights in front of their customers' teeth.[2]

The Commission has conceded that it is not the practice of dentistry to provide customers with written, prepackaged instructions on the use of teeth-whitening products, or to make a light available for use by the customer so long as the customer positions the light. Defs.' MSJ Mem. at 19. Thus, the only facts that this Court needs to consider are those that go to the question of whether the Commission has demonstrated that it is rational to require a person to have eight years of higher education before he may provide a spoken explanation of how to use teeth-whitening products or point an LED light at another person's teeth.

Proceeding from this narrow understanding of the Commission's declaratory ruling, the Commission's statement of undisputed facts can be broken down into two broad categories. The first category includes uncontroversial facts about the jurisdiction of the Department of Health and the Dental Commission, the laws governing the process by which declaratory rulings are issued, and the actual process by which this declaratory ruling was issued. Smile Bright does not dispute these facts.

The second category includes characterizations of the testimony presented at the Dental Commission's hearing regarding the declaratory ruling and the Dental Commission's specific

[2] As to talking customers through the use of the product, it is not entirely clear that the Commission actually believes this is prohibited because the Commission is coy about precisely what type of instruction is and is not permissible. *Compare* Defs.' MSJ Mem. at 4 (stating that it is the practice of dentistry to "mak[e] recommendations of how to perform teeth whitening," to "advis[e] individuals on the use of trays," or to "instruct[] a customer on teeth whitening procedures or methods") *with* Defs.' MSJ Mem. at 19 (stating that it is not the practice of dentistry to "provid[e] the customer with *the* instructions on how to apply it to their own teeth" (emphasis added)). As explained *infra*, to the extent the Commission interprets the Declaratory Ruling to prohibit Smile Bright employees from explaining the use of completely legal, over-the-counter teeth-whitening products, the Commission has not demonstrated that this restriction is rationally related to a legitimate government interest.

findings about the safety of teeth whitening. Smile Bright does not dispute that the Commission heard this testimony or reached the conclusions asserted in Defendants' motion for summary judgment. Smile Bright does, however, vigorously dispute the truth of those conclusions.

As explained in Smile Bright's Rule 56(a)(2) Response to Defendants' Statement of Undisputed Facts, none of Defendants' factual claims regarding the safety of teeth whitening are supported by admissible evidence. Instead, the only "evidence," supporting those claims is inadmissible hearsay and inadmissible expert opinion testimony. Moreover, as demonstrated below, those claims are directly contradicted by the unrebutted testimony of Plaintiff's expert witness, Dr. Martin Giniger.[3]

## I. Teeth Whitening, With or Without a Light, Is Safe.

Dr. Giniger is a licensed dentist, a former professor of dental medicine, and a qualified expert on the safety of teeth whitening. Pl.'s SUF ¶¶ 36-39. As he testified, all of the possible side effects of peroxide-based teeth whitening are mild and invariably temporary. Pl.'s SUF ¶ 40. Despite the fact that millions of people worldwide have whitened their teeth using peroxide-based products, the published literature does not reveal a single instance of anyone suffering permanent or serious harm as a result. Pl.'s SUF ¶ 40. Instead, the most common side effects are temporary tooth and gum sensitivity, which the reported literature finds resolve on their own within days of the whitening. Pl.'s SUF ¶ 40.

There is no evidence that the temporary side effects of teeth whitening are more prevalent or severe with non-dentist-provided teeth whitening as compared to teeth whitening

[3] These disagreements regarding the Commission's unsupported assertions of fact are a basis for denying the Commission's motion, but they should not be taken to suggest that this Court may not grant summary judgment in favor of Plaintiff Smile Bright on its cross-motion for summary judgment. If, in response to Plaintiff's motion, the Commission does not itself produce admissible evidence demonstrating the existence of any genuine issue of material fact, then summary judgment for Plaintiff would be entirely appropriate.

accomplished with drugstore preparations or those found on-line. Pl.'s SUF ¶ 41. Indeed, these side effects may be "most frequent and pronounced with dentist-provided chairside bleaching owing to the greater concentration of hydrogen peroxide and more intense light/heat activation often used in dental offices." Pl.'s SUF ¶ 41. With regard to the products and lights used by Plaintiff Smile Bright, the presence of a person with experience in teeth whitening to supervise the self-application of the product can only enhance the safety of the product. *See* Pl.'s SUF ¶ 62

The literature regarding the effect of teeth whitening on tooth enamel contains no evidence that peroxide-based whitening—"[e]ven in conditions of plainly excessive use"—could cause anything beyond minor and reversible surface change in the enamel. Pl.'s SUF ¶ 42. Even these changes are "no different from those that occur after drinking a glass of orange juice" and are "quickly reversed when teeth are exposed to saliva." Pl.'s SUF ¶ 42. Further, there are "no literature reports that suggest that bleaching in lay-operated bleaching facilities results in any more 'surface changes' than are found with dentist-provided bleaching or bleaching through self-application of products available from drugstores or on-line." Pl.'s SUF ¶ 43.

The LED lights used in teeth whitening are very low energy and emit light over a narrow band of the visible spectrum. Pl.'s SUF ¶ 49. They generate little heat and no collateral UV B or C radiation, making them no more harmful than a typical consumer flashlight. Pl.'s SUF ¶ 49. Moreover 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. Pl.'s SUF ¶ 50.

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). Pl.'s SUF ¶ 51. As Dr. Giniger notes, this is significant because the dental literature shows that 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. Pl.'s SUF ¶ 51. Thus, as Dr. Giniger concluded, it is "scientifically and practically impossible for these lights to cause any more harm than a household flashlight (in other words, no chance)." Pl.'s SUF ¶ 52.

**II. Dental Licensure Is Irrelevant to Teeth Whitening.**

Despite requiring that individuals attend dental school in order to offer certain teeth-whitening services, neither the Department of Public Health nor the Dental Commission requires aspiring dentists to demonstrate any experience with or proficiency in teeth whitening. Pl.'s SUF ¶ 81. Defendants do not require that applicants for dental licensure demonstrate that they studied teeth whitening in dental school. Pl.'s SUF ¶ 82. Nor is teeth whitening covered on any of the tests required for licensure as a dentist in Connecticut. Pl.'s SUF ¶ 82.

Defendants do not write any of the tests accepted for licensure as a dentist in Connecticut and instead rely on tests designed by outside testing groups. Pl.'s SUF ¶ 83. Defendants have stated that they do not know whether those tests cover teeth whitening. Pl.'s SUF ¶ 83. Defendants' own website, however, directs aspiring dentists to the websites of the various testing agencies, all of which provide guides describing the content of their examinations. Pl.'s SUF ¶ 84. None of those exam-preparation guides indicate that teeth whitening is covered on any exam required for licensure as a dentist in Connecticut. Pl.'s SUF ¶ 85.

**ARGUMENT**

The Commission's motion for summary judgment must be denied. As explained in Section I, below, the Commission has not only failed to demonstrate that there are no genuine disputes of material fact, it has not produced even a shred of admissible evidence to satisfy the requirements of Rule 56 or to dispute the extensive testimony of Plaintiff's expert Dr. Martin Giniger. Further, as explained in Section II, the Commission has failed to demonstrate that its

restrictions on non-dentist teeth-whitening services are rationally related to any legitimate government interest.[4]

## I. The Commission Has Failed to Supply Any Admissible Evidence to Satisfy Its Burdens Under Rule 56.

Under the Federal Rules of Civil Procedure a party moving for summary judgment must demonstrate that there are no material facts in dispute and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Commission, however, has submitted no admissible evidence on the central issue in this case: whether granting dentists a monopoly on teeth-whitening services like those previously offered by Smile Bright is rationally related to any legitimate government interest. Smile Bright, by contrast, has presented extensive evidence showing that the Commission's actions are irrational and, therefore, unconstitutional.

Plaintiff's expert witness Dr. Martin Giniger has provided extensive, unrebutted testimony that teeth-whitening services like Smile Bright's are harmless. Pl.'s SUF ¶¶ 40-58. Dr. Giniger has also provided unrebutted testimony that there is no connection between dental education and the Commission's asserted health-and-safety interest, because dental schools do not teach teeth whitening. Pl.'s SUF ¶¶ 64-67. This testimony cannot come as a surprise to the Commission; Dr. Giniger's opinions have been known to them since October of 2012 when, pursuant to Federal Rule of Civil Procedure 26 and this Court's scheduling order of June 11, 2012, Plaintiff disclosed Dr. Giniger's opinions in an expert report.

The Commission has responded to Dr. Giniger's report by ignoring it. It did not depose Dr. Giniger, it did not designate its own expert or submit a rebuttal report, and it has supplied

[4] Plaintiff's Complaint asserts claims under the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment. Due to the voluntary dismissal of individual plaintiff Lisa Martinez, corporate plaintiff Smile Bright is no longer pursuing the Privileges or Immunities claim. *See Orient Ins. Co. v. Daggs*, 172 U.S. 557, 561 (1899) (holding that "[a] corporation is not a citizen, within the meaning of the [Privileges or Immunities Clause]").

this Court with no admissible evidence to discredit Dr. Giniger's conclusions, let alone demonstrate that they are indisputably wrong. Instead, as discussed above, *supra* 4-5, and in Plaintiff's Local Rule 56(a)(2) statement, the only evidence that the government has introduced is inadmissible hearsay and inadmissible expert opinion. This is not sufficient to demonstrate the absence of a genuine issue of material fact; indeed, because it does not amount to even a scintilla of admissible evidence, it is also insufficient to defeat Smile Bright's cross-motion for summary judgment.

Thus, as explained in more detail below, the Commission's motion must be denied. Read in the light most favorable to the nonmoving party, the admissible evidence—all of which has been supplied by Plaintiff Smile Bright—demonstrates that the Commission is not entitled to judgment as a matter of law.

## II. The Commission Has Not Demonstrated That It Is Rational to Require a Person to Have Eight Years of Higher Education Before He May Explain the Use of Teeth-Whitening Products or Point a Harmless LED Light at a Customer's Mouth.

The Commission misunderstands the nature of rational-basis review. As the Second Circuit has recognized, "while rational basis review is indulgent and respectful, it is not meant to be 'toothless.'" *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir. 2012), cert. granted, 133 S. Ct. 786 (2012) (quoting *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981). The Commission's error stems from an apparent belief that it may satisfy rational-basis review merely by invoking the government's interest in protecting public health and safety. As explained below however, the mere invocation of a legitimate government interest is not enough; the challenged regulation must also be rationally related to that interest. The Commission has not and cannot make that showing.

### A. The mere invocation of a legitimate government interest is not enough to satisfy rational-basis scrutiny; the challenged regulation must also be rationally related to that interest.

In order for a government regulation to survive rational-basis scrutiny, it must be rationally related to a legitimate government interest. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620, 632 (1996). This is a two-part test; even if the government articulates a legitimate government interest, a regulation will not be upheld if it is not "rationally related" to that interest. *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) ("[T]he State Board's chosen means must rationally relate to the state interests it articulates . . . .").

Smile Bright does not dispute that the Commission has articulated a legitimate government interest. The promotion of public health and safety is undoubtedly legitimate. The question, however, is whether the restrictions imposed by the Commission's declaratory ruling are rationally related to that interest.

This is not a question that can be answered by appeal to the government's general interest in regulating dentistry, as the Commission attempts to do when it argues that "[i]t is entirely conceivable that the legislature determined that it would pose a risk to public safety to allow persons to engage in the practice of dentistry who do not have specialized training." Defs.' MSJ Mem. at 16. That argument simply begs the question. To be sure, there are many activities that the government could reasonably believe should be engaged in only by dentists. But that fact alone does not mean that the Commission has carte blanche to categorize whatever harmless activities it wishes as "the practice of dentistry" and declare them off limits to anyone who is not a fully licensed dentist.

Here, the Commission has labeled the provision of spoken instructions on how to self-apply teeth-whitening products and the pointing of LED lights at people's mouths as the practice of dentistry. The fact that the Commission has labeled them as such, however, is not dispositive

of this case. If it were, rational-basis review would simply be a game of legislative labeling under which plaintiffs could never prevail.

Rational-basis review, however, is not a labeling game, and plaintiffs do prevail. And they do so because courts applying rational-basis scrutiny look beyond the label that the government attaches to an activity and examine the activity itself to determine whether the regulation of that activity is rational. In *Craigmiles v. Giles*, for example, the Sixth Circuit examined the constitutionality of a Tennessee law the prohibited anyone but licensed funeral directors from selling caskets. 312 F.3d 220, 222 (6th Cir. 2002). The Tennessee law accomplished this by defining the "selling of funeral merchandise" as the practice of "funeral directing." *Id.* Rather than simply concluding that the government had a legitimate interest in regulating "funeral directing"—however the state chose to define that term—the court instead examined whether the government had a rational basis for preventing people other than licensed funeral directors from selling caskets. *Id.* at 225-28. When the court concluded that no such rational basis existed, it struck down the law. *Id.* at 229; *accord St. Joseph Abbey*, 712 F.3d at 223-27.

The Federal District Court for the District of Utah recently performed a similar analysis in *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012), which involved the regulation of African hair braiding. In that case, the state had determined that "African hair braiding [fell] within the scope of practice of cosmetology/barbering as a styling technique." *Id.* at 1214. As the court recognized, however, "the facts of [the] particular case must be considered." *Id.* The plaintiff was "challenging the licensing scheme only to the extent that it applie[d] to African hair braiding; she [was] not seeking the deregulation of cosmetology." *Id.* at 1214-15. Accordingly, the court considered whether the state had a rational basis for regulating African hair braiding as

the practice of cosmetology, concluded that it did not, and held the cosmetology law unconstitutional as applied to that activity. *Id.* at 1215-16.

As explained in Section I, *supra*, the Commission concedes that it is not the practice of dentistry to provide customers with the prepackaged instructions that come with teeth whitening products, Defs.' MSJ Mem. at 19, and nothing in Connecticut law imposes any restrictions on the content of those instructions. The Commission also concedes that it is not the practice of dentistry to provide a customer with an LED light and allow the customer to position that light in front of her own mouth, but argues that it *is* the practice of dentistry for a Smile Bright employee to position the light for the customer. Defs.' MSJ Mem. at 8, 19. Thus, the actual conduct at the center of the controversy in this case is the verbal delivery of instruction on the use of teeth-whitening products and the positioning of LED lights in front of customers' mouths by non-dentists. This Court must determine whether Connecticut's prohibition on this conduct is rational. As explained in the following section, the undisputed facts demonstrate that it is not.

### B. Prohibiting non-dentists from giving instructions on the use of teeth-whitening products or positioning LED whitening lights in front of their customers' mouths is not rationally related to any legitimate government interest.

The Commission's declaratory ruling fails the rational-basis test for at least three reasons. First, as applied to teeth-whitening services like Smile Bright's, there is no logical connection between the declaratory ruling and the promotion of public health and safety. Second, even if one could imagine hypothetical health-and-safety benefits accruing from the declaratory ruling, these benefits are wholly insubstantial in light of the costs the ruling imposes on non-dentist teeth whiteners. Finally, the rationality of the declaratory ruling is further undercut by the obvious and illegitimate financial interest that licensed dentists—including the members of the Commission—have in restricting competing providers of teeth-whitening services.

**1. There is no logical connection between the Commission's declaratory ruling and the promotion of public health and safety.**

Federal courts will find that a regulation lacks a rational basis when there is no logical connection between the government's asserted ends and the means that have been adopted to pursue those ends. *See, e.g.*, *Zobel v. Williams*, 457 U.S. 55, 61-63 (1982) (finding no logical connection between the government's asserted interest in encouraging migration to Alaska and a regulation that granted longtime Alaska residents an economic windfall over residents who arrived more recently). Any logical basis for the prohibition on spoken instructions can be quickly dismissed. The Commission concedes that written instructions are permissible, and the Connecticut Dental Practice Act does not regulate the content of written instructions for teeth-whitening products. There is no conceivable way that a customer is at greater risk if he hears spoken instructions on teeth whitening than if he reads totally unregulated written instructions. And, indeed, Dr. Martin Giniger's unrebutted testimony shows that the presence of a non-dentist who is experienced with the teeth-whitening procedure can only enhance, not detract from, the safety of teeth whitening. Pl.'s SUF ¶ 62.

The prohibition on non-dentists positioning LED lights in front of their customers' mouths is equally illogical. The undisputed testimony of Dr. Martin Giniger demonstrates that the LED lights used in teeth whitening are harmless. Pl.'s SUF ¶¶ 49-52. They are widely available for purchase and use at home, they are no more powerful than a household flashlight, and they are incapable of causing the sort of temperature change that is necessary to cause damage to the tooth pulp. *Id.* The Commission concedes that it is lawful to make such lights available for in-store use, so long as the customer positions the light for herself. *See* Defs.' MSJ Mem. at 19. And it is utterly inconceivable that the identity of the person positioning the light could make any difference to the safety of the light. Not only is that claim implausible, but it is

refuted by Dr. Giniger's testimony that the presence of a non-dentist who is experienced with the teeth-whitening procedure can only enhance, not detract from, the safety of teeth whitening. Pl.'s SUF ¶ 62.

The Commission has produced nothing to the contrary. Indeed, as noted above, they have produced no admissible evidence at all. The one article referred to by a witness at the declaratory hearing—in addition to being inadmissible as hearsay within hearsay—does not identify any evidence that anyone has ever been harmed by an LED light, but talks about the potential risks from whitening lights in general, of which there are a great variety. These include lasers and high-temperature halogen lamps. Plaintiffs do not use these types of lights and so any analysis of their potential dangers is irrelevant to this case. And, in any event, none of this hearsay material suggests that the risks associated with *any type* of whitening light are greater when that light is positioned by someone other than the customer.

Even if the Commission had produced admissible evidence that LED lights carried some minimal risk, the undisputed facts demonstrate that there is no logical connection between the declaratory ruling and the mitigation of those risks. This is because the undisputed facts show that the State of Connecticut does not require dentists to show any proficiency with any aspect of teeth whitening, including the positioning of LED lights, as a condition of dental licensure.

These facts make the declaratory ruling easily distinguishable from *Lange-Kessler v. Department of Education*, 109 F.3d 137 (2d Cir. 1997), on which the Commission heavily relies. *Lange-Kessler* involved a midwife who argued that she should be allowed to deliver babies without going through the required educational courses and without affiliating herself with a licensed physician or hospital. The government, however, presented admissible expert testimony from a licensed doctor demonstrating that severe complications can arise during birth, complications that approved midwifery programs actually train their students to address. *Id.* at

139-40. In this case, by contrast, the facts demonstrate that there are no serious risks associated with teeth whitening—Dr. Giniger testified that there is not a single report of anyone anywhere in the world having ever suffered serious or permanent injury as a result of peroxide-based teeth whitening. Pl.'s SUF ¶ 40. Moreover, unlike the extensive training that doctors and nurses receive in responding to obstetric emergencies, dentists are not required to have any training in teeth whitening. Pl.'s SUF ¶¶ 64-67, 81-85.

Another factor that distinguishes *Lange-Kessler* is that the plaintiff in that case did not dispute that the government had a legitimate interest in regulating midwifery, she simply argued that the state should consider her qualifications to be just as good as those set by statute. *See* 109 F.3d at 140-41. This is similar to *Hill v. Gill*, 703 F. Supp. 1034 (D. R.I. 1989), and *Karan v. Adams*, 807 F. Supp. 900 (D. Conn. 1992), which are the only other cases that the Commission even attempts to analogize on their facts. *Hill* involved a prohibition on convicted felons serving as school bus drivers. The plaintiff in *Hill*, herself a convicted felon, did not challenge the notion that some convicted felons were indeed unsuitable for the task of driving school buses, but rather argued that the state was required to provide her with a procedure by which she could demonstrate that *she personally* was capable of doing so in spite of the general prohibition. 703 F. Supp. at 1037-38. Similarly, in *Karan*, a psychologist who had moved to Connecticut challenged the state's refusal to grant him a license to practice psychology based on the fact that he was unable to demonstrate that his education met the state's standards for licensure. The psychologist did not challenge Connecticut's ability to regulate the practice of psychology or to set educational requirements for psychologists. He instead argued that applying those standards to *him* was irrational because his experience practicing psychology in other states made him just as qualified to practice in Connecticut as someone who met Connecticut's education requirements. 807 F. Supp. at 902, 907.

Thus, in all three cases, the plaintiffs conceded that the government had an interest in establishing qualifications for midwives, bus drivers, or psychologists; they were simply upset that the government would not make an exception to those qualifications for their unique personal circumstances. And the government, quite reasonably, was reluctant to do so because of the administrative cost involved in conducting an individualized evaluation of every midwife, ex-felon, or psychologist who felt aggrieved by the law.

This case is different because Smile Bright *does dispute* that the government has an interest in establishing qualifications for who can point LED lights at people's mouths or explain to them how to apply teeth-whitening products. In other words, Smile Bright does not argue that its employees have unique abilities that must be accommodated within Connecticut's regulatory scheme. Instead they argue that Connecticut has no rational basis for regulating the positioning of LED lights or the provision of teeth-whitening instructions, regardless of who does those things. Thus, unlike *Lange-Kessler*, *Hill*, and *Karan*, Smile Bright is not denying that the government may set bright-line rules for who may engage in the practice of dentistry. Smile Bright is simply arguing that the government has acted irrationally in defining what they do as the practice of dentistry.

Smile Bright's services are materially indistinguishable from the widespread, at-home use of teeth-whitening products, which the Commission acknowledges is not the practice of dentistry.[5] They are also materially indistinguishable from the services of businesses—whom the

[5] The Commission analogizes this exemption for the self-application of "bleaching agents" to the fact that a person may lawfully suture a wound on herself, but may not suture a wound on another person without a medical license. Defs.' MSJ Br. at 18-19. Even if one assumes an equivalence between suturing a wound and using over-the-counter teeth-whitening products, this comparison is inapposite. First, in this case, unlike in the Commission's hypothetical, the customer is applying the product to her own teeth in *both* situations; the only difference is the customer's geographical location when she uses the product. Second, the Commission misses the relevant comparison for equal-protection purposes. Plaintiff does not allege that it is similarly

Commission also acknowledges are not engaged in the practice of dentistry—that offer all of the same services but refrain from providing spoken instructions or positioning the LED lights for their customers. As demonstrated above, these distinctions bears no logical connection to the government's asserted interest in promoting public health and safety. Accordingly, they are unconstitutional.

**2. The declaratory ruling is irrational because Plaintiff demonstrated that the costs imposed on non-dentist teeth whiteners by prohibiting non-dentists from providing spoken instructions or positioning LED lights vastly outweigh any conceivable public benefits.**

As Plaintiff explained in its opening brief, Pl.'s MSJ Br. at 26-28, federal courts evaluating laws under the rational-basis test do not limit their review to determining whether there is some theoretical connection between a law and the government's asserted interests. Federal courts also examine the "fit" between the law and its purported ends, and will invalidate a law when there is an extreme mismatch between a law's demonstrable costs and its hypothetical benefits. The U.S. Supreme Court itself has repeatedly invalidated laws whose alleged benefits were "wholly insubstantial in light of the costs." *Plyler v. Doe*, 457 U.S. 202, 230 (1982).[6]

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situated to the consumer, but rather that it is similarly situated to other businesses that sell teeth-whitening products: those that sell products for use at home and those that sell products for in-store use but do not position the light for their customer or provide verbal instructions. Those businesses are not considered to be engaged in the practice of dentistry, and it is *this distinction* that Plaintiff contends—and has demonstrated—is irrational.

[6] *See also Allegheny Pittsburgh Coal Co. v. County Commission*, 488 U.S. 336, 343-45 (1989) (refusing to allow county to impose gross property-tax disparities merely because doing so was allegedly administratively easier for the county); *James v. Strange*, 407 U.S. 128, 141-42 (1972) (holding that the harm inflicted on debtors by denying indigent defendants exceptions to the enforcement of debt judgments was grossly disproportionate the state funds saved); *Lindsey v. Normet*, 405 U.S. 56, 77-79 (1972) (holding that the cost savings from deterring a few frivolous appeals were insufficient to justify a surety requirement that allowed many frivolous appeals, blocked many meritorious appeals, and conferred a windfall on landlords); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (holding that attempting to reduce the workload of the probate courts by

The Commission's memorandum makes clear that the mismatch between the government's asserted ends and the means it has chosen to pursue those ends is even more extreme than Plaintiff described in its motion for summary judgment. In an alleged effort to protect the dental health of Connecticut residents, the Commission has made it a felony offense, punishable by up to five years in jail or $25,000 in fines, to point an LED light at a customer's mouth or to provide a customer with spoken instructions regarding teeth whitening. This, despite the fact that—by the Commission's own admission—the customer herself could point the light at her own mouth or read the prepackaged instructions herself. The Commission, for its part, has not even bothered to speculate about how prohibiting non-dentists from positioning LED lights while allowing consumers to position those same lights might lead to some health benefit, or how the public is benefited from a prohibition on receiving spoken instruction. Plaintiff's expert Dr. Martin Giniger, however, provided undisputed testimony demonstrating that it is not even conceivable that these restrictions promote public health and, to the contrary, that the presence of someone familiar with the whitening procedure can only enhance the safety for consumers. Pl.'s SUF ¶ 62.

Thus, this Court is confronted with a totally undefined, purely conjectural benefit, which must be weighed against the extreme cost of requiring non-dentists to spend tens of thousands of dollars to acquire eight years of higher education—all or virtually all of which is irrelevant to teeth whitening—before they may provide lawfully provide spoken instructions on teeth whitening or point LED lights at people. Pl.'s SUF ¶¶ 64-66, 96. For most adults, this serves as a *de facto* lifetime prohibition. This is analogous to *Baccus v. Karger*, in which the United States District Court for the Southern District of New York found that the government's asserted

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excluding women from service as administrators in certain cases was unconstitutionally arbitrary).

interest in ensuring the "maturity" of bar applicants was insufficient to justify a New York bar rule that prohibited aspiring lawyers from ever sitting for the bar if they started law school before the age of 18. 692 F. Supp. 290, 299-300 (S.D.N.Y. 1988). And, as Plaintiff noted in its opening brief, the facts of this case are far more extreme than those in other cases in which federal courts have held occupational-licensing laws unconstitutional as applied to a particular plaintiff, even when the government asserted an interest in promoting public health and safety. *See Clayton v. Steinagel*, 885 F. Supp. 2d 1212, 1215-16 (D. Utah 2012) (concluding that it was unconstitutionally irrational to require African hair braiders to take 2,000 of cosmetology training when, at most, 20 to 30 percent of that time was applicable to hair braiding); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1107-18 (S.D. Cal. 1999) (reaching the same conclusion in case with requirement of 1,600 hours of cosmetology training, only 110 of which were even arguably applicable to promoting health and safety in hair braiding).

Simply put, no rational person could believe that eight years of higher education are necessary to safely position an LED light or provide spoken instruction on the use of teeth-whitening products, particularly when the Dental Commission apparently believes that all of those lights and whitening products may safely be used by consumers with no supervision or instruction whatsoever. The rational-basis test gives government considerable leeway, but that leeway is not without limits. *Baccus*, 692 F. Supp. at 294 ("[R]ational review is not a paper tiger."). By any measure, those limits have been exceeded in this case.

**3. The anti-competitive effect of the declaratory ruling is further evidence of its irrationality.**

In assessing the rationality of Connecticut's prohibition on non-dentist teeth whitening, this Court is not required to close its eyes to evidence that the true purpose of Connecticut's declaratory ruling is to protect the financial interests of licensed dentists. The evidence in this

case indicates that licensed dentists, including the members of the Commission themselves, routinely charge much more for teeth-whitening services than do companies like Smile Bright. Pl.'s SUF ¶¶ 99-101. The evidence also indicates that the overwhelming majority of the complaints received by the Dental Commission concerning non-dentist teeth whitening did not come from consumers, but rather from licensed dentists or the Connecticut State Dental Association, which represents the interests of licensed dentists. Pl.'s SUF ¶ 102. The Federal Trade Commission considered similar evidence of anti-competitive effect when it recently concluded that North Carolina's dental board violated federal antitrust law by ordering non-dentists to cease offering teeth-whitening services like those offered by Smile Bright. *In re N.C. Bd. of Dental Exam'rs*, No. 9343, Slip Op. at 1-5 (F.T.C. Dec. 7, 2011), *available at* http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf.

These facts indicate that dentists have a strong financial incentive to restrict competing providers of teeth-whitening services. Federal courts have noted that this sort of incentive is itself an "indicia of irrationality" that may be considered under the rational-basis test. *Cornwell*, 80 F. Supp. 2d at 1117-18; *see also 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."). In light of the utter dearth of evidence to demonstrate that limitations on teeth-whitening services like Smile Bright's serve any legitimate public purpose, it is entirely reasonable for this Court to conclude that the Commission's declaratory ruling, to the extent it applies to businesses like Smile Bright, is nothing more than the sort of "naked economic preference[]" that is impermissible under the Fourteenth Amendment. *St. Joseph Abbey*, 712 F.3d at 223; *see also Craigmiles*, 312 F.3d 229 (holding that laws that "privilege certain businessmen over others at the expense of consumers

[are] not animated by a legitimate governmental purpose and cannot survive even rational basis review.").

## CONCLUSION

Nothing in the Defendants' motion for summary judgment demonstrates that it is rational to prohibit all but licensed dentists from providing spoken instructions on teeth whitening or positioning LED lights in front of other people's mouths. To the contrary, the undisputed facts demonstrate that these prohibitions are utterly irrational. Accordingly, the Defendants' motion for summary judgment should be denied.

Respectfully submitted,

**Institute for Justice**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 16, 2013, a true and correct copy of the foregoing **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was sent via the Court's CM/ECF to the following counsel of record:

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