



IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, ALABAMA

KEITH WESTPHAL AND JOYCE OSBORN WILSON,)

Plaintiffs,)

v.)

J. DAVID NORTHCUTT, III., DMD; BOBBY R.)

WELLS, DMD; STEPHEN R. STRICKLIN, DMD;)

THOMAS T. WILLIS, DMD; SAM J. CITRANO, JR.,)

DMD; WILLIAM CHESSEY, DMD; AND SANDRA)

KAY ALEXANDER, RDH, in their official)

capacities as members of the Alabama Board of)

Dental Examiners,)

Defendants.)

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Introduction

1. This civil-rights lawsuit seeks to vindicate the constitutional right to earn an honest living free from unreasonable government regulations. Plaintiffs are teeth-whitening entrepreneurs who wish to sell legal, over-the-counter teeth-whitening products and provide customers with a clean, comfortable environment in which to apply those products to their own teeth. It is perfectly legal to sell these products to customers who will use them at home without supervision or instruction. Nevertheless, under Alabama's Dental Practice Act, if Plaintiffs permit their customers to use these products at a shopping mall or in a salon, Plaintiffs will be engaged in the unlicensed practice of dentistry, a misdemeanor offense punishable by up to one year in jail and a fine of up to \$5,000 for each customer. These actions deprive Plaintiffs of their

right to pursue a lawful occupation, in violation of the Due Process and Equal Protection guarantees afforded by Article I, Sections 1, 6, 13, and 22 of the Alabama Constitution.

Jurisdiction

2. Plaintiffs bring this civil-rights lawsuit pursuant to Article I, Sections 1, 6, 13, and 22 of the Alabama Constitution, and the Declaratory Judgment Act, §§ 6-6-220 *et seq.*, ALA. CODE 1975. Plaintiffs seek declaratory and injunctive relief against the enforcement of the Alabama Dental Practice Act, ALA. CODE §§ 34-9-1, *et seq.*, as applied to teeth-whitening services like those offered by Plaintiffs, and the policies and practices of the Alabama Board of Dental Examiners, to the extent they prohibit non-dentist teeth whitening of the sort practiced by Plaintiffs, because those provisions violate Plaintiffs' constitutional right to earn an honest living.

Venue

3. Defendants, whose actions form the basis of this complaint, are sued in their official capacity as members of the Alabama Board of Dental Examiners, located in Jefferson County, Alabama. Therefore, venue is proper in this court. *See Little v. State*, 44 So. 3d 1070, 1071 (Ala. 2010) (noting that "the general rule is that an action against a State agency or against a State official in his or her official capacity is properly maintained in the county of the official residence of the agency or official").

Parties

4. Plaintiff Keith Westphal is a resident of Mooresville, North Carolina. He is a teeth-whitening entrepreneur and wishes to expand his teeth-whitening business into Alabama, but cannot do so without risking fines and jail time because he is not a licensed dentist.

5. Plaintiff Joyce Osborn Wilson is a resident of Guntersville, Alabama. She wishes to resume operating a teeth-whitening business in Alabama, but cannot do so without risking fines and jail time because she is not a licensed dentist.

6. Defendants J. David Northcutt, III., DMD; Bobby R. Wells, DMD; Stephen R. Stricklin, DMD; Thomas T. Willis, DMD; Sam J. Citrano, Jr., DMD; William Chesser, DMD; and Sandra K. Alexander, RDH, are members of the Alabama Board of Dental Examiners. As members of the Alabama Board of Dental Examiners, they are empowered to issue declaratory rulings interpreting the Dental Practice Act and to impose civil penalties for violations of the Dental Practice Act. They are sued in their official capacities.

Statement of Facts

What is Teeth Whitening?

7. Teeth whitening is a popular cosmetic practice in which the appearance of stains or discoloration on the surface of the tooth enamel are reduced through the use of a whitening agent, typically hydrogen peroxide or the related chemical carbamide peroxide (which breaks down into hydrogen peroxide).

8. Teeth-whitening products are widely available for over-the-counter purchase in varying concentrations from supermarkets, drug stores, and on the Internet.

9. Many peroxide-based teeth whitening products are used in conjunction with LED lights. The lights are available for purchase directly by consumers at retail stores and on the Internet, and some at-home teeth-whitening products are packaged with LED enhancing lights.

10. Because teeth-whitening products are regulated by the FDA as “cosmetics,” no prescription is required for their purchase. Anyone may legally purchase teeth-whitening

products in any commercially available concentration and apply them to their own teeth with no supervision or instruction.

11. As teeth whitening has become more popular, entrepreneurs across the country, including in Alabama, have begun offering teeth-whitening services in shopping malls, spas, and salons.

12. While practices vary among businesses, teeth-whitening entrepreneurs typically sell a prepackaged teeth-whitening product to their customers and provide their customers with instructions on how to apply that product to their own teeth. Sometimes these products come in the form of disposable plastic mouth trays, which are prefilled with a whitening agent. Other times, they may come in the form of tubes containing a whitening product that is dispensed through an integrated brush, allowing customers to brush the product onto the surface of their teeth.

13. These entrepreneurs commonly provide customers with a chair to sit in while they apply the product to their own teeth, just as they would at home. Some also provide customers with an LED “enhancing light,” which either the entrepreneur or the customer may position in front of the customer’s teeth. These lights are available for purchase without a prescription and may legally be used at home without supervision or instruction.

14. These entrepreneurs do not make diagnoses and do not place anything in their customers’ mouths.

15. The risks associated with teeth whitening are minimal, and consist primarily of temporary tooth or gum sensitivity.

16. Teeth whitening is safer than other oral cosmetic procedures that are not regulated as the practice of dentistry, such as tongue piercing, which the American Dental Association advises can lead to infections or cracked teeth.

17. The risks of teeth whitening are the same whether a person applies a teeth-whitening product to their own teeth at home or applies that same product to their own teeth in a salon or at a shopping mall. Indeed, whitening one's teeth under the supervision of another person who is more familiar with the product is likely safer than whitening one's teeth at home without supervision.

18. Teeth-whitening entrepreneurs compete with dentists for customers seeking whitening services.

19. According to a 2008 Gallup poll, 80% of dentists offer teeth-whitening services. *In re N.C. Bd. Of Dental Exam'rs*, No. 9343, 25 (F.T.C. July 14, 2011) (Initial Decision), available at <http://www.ftc.gov/os/adjpro/d9343/110719ncb-decision.pdf>.

20. On information and belief, teeth-whitening entrepreneurs like those described above typically charge much less than dentists charge for cosmetic teeth whitening.

Alabama's Dental Practice Act, the Alabama Board of Dental Examiners, and the Regulation of Teeth Whitening

21. Alabama's Dental Practice Act is set forth in ALA. CODE §§ 34-9-1 through 34-9-90 (hereinafter the "Dental Practice Act").

22. Under the Dental Practice Act, no person may engage in any activity that is considered to be the practice of dentistry unless that person is a fully licensed dentist. ALA. CODE. §§ 34-9-3, 34-9-6.

23. A person is deemed to be "practicing dentistry" if that person "[p]erforms, or attempts or professes to perform, any dental operation or dental service of any kind, gratuitously

or for a salary, fee, money or other remuneration paid, or to be paid, directly or indirectly, to himself or herself, or to any person in his or her behalf, or to any agency which is a proprietor of a place where dental operations or dental services are performed.” ALA. CODE § 34-9-6(1).

24. Alabama law also prohibits non-dentists from forming professional-service corporations that offer any service that constitutes the practice of dentistry, or from employing others to perform such services. ALA. CODE §§ 10A-4-1.01 through -5.08, 34-9-9.

25. The Alabama Board of Dental Examiners is a seven-member body with the authority to adopt rules and regulations to implement the Dental Practice Act and to impose penalties. ALA. CODE §§ 34-9-40.

26. By statute, the Board must consist of “six dentists,” and one “dental hygienist.” ALA. CODE § 39-9-40.

27. In 2007, the Board began interpreting ALA. CODE § 34-9-6(1) to prohibit non-dentists from offering teeth-whitening services.

28. Subsequently, in 2011 the Alabama legislature amended the definition of “practice of dentistry” to include one who “[p]rofesses to the public by any method to bleach human teeth, performs bleaching of the human teeth alone or within his or her business, or instructs the public within his or her business, or through any agent or employee of his or her business, in the use of any tooth bleaching product.” ALA. CODE § 34-9-6(12); 2011 Ala. Acts 571 (HB 451). This change makes it illegal for non-dentists to perform teeth-whitening services and also prevents non-dentists from owning a business that offers teeth-whitening services.

29. Violation of any of these provisions is a misdemeanor offense punishable by up to one year in jail, a fine of up to \$5,000, or both, for each occurrence. ALA. CODE § 34-9-5. The Alabama Board of Dental Examiners may also seek an injunction when “it appears to the board

that any person is violating any of the provisions of [the Dental Practice Act].” ALA. CODE § 34-9-29.

30. There is no evidence that Alabama’s prohibition on non-dentist teeth whitening protects consumers or advances any other legitimate governmental interest. Rather, the primary effect of ALA. CODE § 39-9-6(12) is to protect dentists who offer teeth-whitening services from competition.

31. To become licensed as a dentist in Alabama, one must have completed an undergraduate degree and graduated from dental school, a course of study that typically takes a combined eight years.

32. The average cost of dental school tuition in Alabama for a four-year degree ranges between \$95,000 and \$ 230,000 depending on the state of residency of the student.

33. On information and belief, aspiring dentists in Alabama are not required to show that they have either experience or proficiency with teeth whitening.

34. On information and belief, the Dental Board, in determining whether a dental applicant has satisfied Alabama’s educational requirements, does not consider whether the applicant attended a dental school that teaches teeth whitening.

35. On information and belief, none of the dental schools in North America have any clinical requirement for teeth whitening, meaning that it is possible to graduate from dental school having never performed a teeth-whitening procedure.

36. Alabama’s prohibition on non-dentist teeth whitening harms consumers by reducing competition and driving up prices.

Plaintiffs and Their Businesses

Plaintiff Keith Westphal

37. Plaintiff Keith Westphal is a teeth-whitening entrepreneur who resides in Mooresville, North Carolina.

38. In January 2012, Mr. Westphal began operating Natural White LLC from a retail center in Cornelius, North Carolina, where he offers teeth-whitening services.

39. Mr. Westphal's services consist of selling customers a prepackaged teeth-whitening product; instructing customers on how to apply the product to their own teeth; providing customers with a comfortable chair to sit in while using the product; and providing customers with an enhancing light, which the customers position in front of their own teeth.

40. The products Mr. Westphal sells have a 16% concentration of hydrogen peroxide. There are many commercially available teeth-whitening products with hydrogen-peroxide concentrations of 35% or higher, which anyone may purchase and apply to their own teeth with no supervision or instruction.

41. Mr. Westphal's business in North Carolina provides whitening services that cost between seventy-nine and one-hundred twenty-nine dollars, depending on what specials he is offering.

42. Mr. Westphal wishes to begin offering identical services in Alabama. He has investigated the cost of commercial real estate similar to his existing location in North Carolina and determined that it would be financially feasible for him to open a location in Huntsville, Alabama. He has not taken further steps to doing so because Alabama law prohibits his business.

43. Mr. Westphal would immediately continue taking steps to open a similar business in Alabama if it were legal for him to do so. Based on his experience in North Carolina, Mr.

Westphal estimates that he would open a new location in Alabama within six to eight weeks if it were legal to do so. The remaining steps include negotiating lease terms for a retail location, capital equipment purchases and build-out of his store, interviewing and hiring employees, training his staff, advertising his services, and ordering teeth-whitening supplies to offer Alabama customers.

44. Mr. Westphal is not a licensed dentist and is not eligible to become a licensed dentist without spending many years and tens of thousands of dollars on additional education.

Plaintiff Joyce Osborn Wilson

45. Plaintiff Joyce Osborn Wilson is a teeth-whitening entrepreneur who resides in Jasper, Alabama, and is the current president of the Council for Cosmetic Teeth Whitening, a national trade group that represents the interests of teeth-whitening entrepreneurs.

46. Ms. Wilson has been a licensed cosmetologist in Alabama since 1980 and has been in the teeth-whitening industry since 2004.

47. Ms. Wilson has provided teeth-whitening products to entrepreneurs who offer whitening services, and also provided teeth-whitening services herself and employed others to do so. Before Alabama began enforcing its prohibition on non-dentist teeth whitening, her company, BEKS Inc. d/b/a BriteWhite Whitening System, provided teeth-whitening products to entrepreneurs throughout the state. She employed a sales representative who would travel to salons and perform teeth-whitening services as a method of convincing the salons to purchase teeth-whitening products and equipment from BriteWhite.

48. Like Mr. Westphal, Ms. Wilson's teeth-whitening services were limited to providing customers a prepackaged teeth-whitening product; instructions on how to apply the product to their own teeth; a chair to sit in while using the product; and an enhancing light.

49. Ms. Wilson, who is now 71 years old, started her teeth-whitening business as a way to provide income for her retirement. To finance the start-up of her business, she sold the salon that she had operated in Alabama since 1980.

50. In late 2006, Ms. Wilson received a cease-and-desist letter from a lawyer representing the Dental Board. The letter ordered her company to stop offering teeth-whitening services and threatened legal action if she did not do so. As a result, she released her sales representative and stopped selling her products to spas and salons in Alabama. At the time, Ms. Wilson had plans to take on up to six additional sales representatives, which she abandoned as a result of the cease-and-desist letter.

51. Ms. Wilson's business in Alabama is now limited to selling products directly to consumers, via the Internet, for at-home use. The whitening gels used in these products are exactly the same in strength and composition as the gels she previously used in salons and spas.

52. Ms. Wilson's whitening products are in lawful use in salons and spas across the country, including California, Florida, New York, Ohio, Pennsylvania, and Texas.

53. Ms. Wilson wishes to resume selling teeth-whitening products to entrepreneurs in Alabama, and also wishes to hire sales representatives like those she previously employed to offer teeth-whitening services in salons, spas, and malls in Alabama. If it were not illegal to do so, within four to six weeks she would resume offering the teeth-whitening services and products she formerly offered.

54. Ms. Wilson is not a licensed dentist and, because she does not have a college degree, is not eligible to become a licensed dentist without spending eight years and tens of thousands of dollars on additional education.

Injury to Plaintiffs

Plaintiff Keith Westphal

55. Plaintiff Keith Westphal is unable to expand his teeth-whitening business in Alabama because services like his constitute the unlicensed practice of dentistry under Alabama's Dental Practice Act.

56. Because Mr. Westphal is not a dentist, he is prohibited from performing teeth whitening, from owning a business that offers teeth whitening, or from employing another person to perform teeth whitening.

57. Although he has determined that it would be feasible to open a new location in Huntsville, Alabama, Mr. Westphal has been stopped short of providing teeth-whitening services in this state, and currently only provides teeth-whitening services to his customers in North Carolina.

58. But for Alabama's prohibition on non-dentist teeth whitening, Mr. Westphal would immediately take the steps necessary to secure retail space in Alabama and begin offering teeth-whitening services. Although he has conducted market research and reviewed potential site options in Alabama, he is unable to proceed with rollout of a location in Alabama. As explained more fully below, Mr. Westphal has been denied his right to earn an honest living as protected by the Due Process and Equal Protection guarantees of the Alabama Constitution.

Plaintiff Joyce Osborn Wilson

59. Plaintiff Joyce Osborn Wilson stopped offering teeth-whitening services and ceased selling teeth-whitening products in response to the Alabama Board of Dental Examiner's interpretation of the Dental Practice Act that services like hers constitute the unlicensed practice

of dentistry and the cease-and-desist letter reflecting that interpretation. As noted above, that interpretation was later codified in 2011. ALA. CODE § 39-9-6(12); 2011 Ala. Acts 571 (HB 451).

60. In response to the Alabama Board of Dental Examiner's enforcement of the Dental Practice Act against non-dentist teeth-whitening providers and the cease-and-desist letter, Ms. Wilson also stopped selling her BriteWhite teeth-whitening products for use in spas and salons, because she does not want to risk tens of thousands of dollars in fines or being incarcerated for aiding or abetting violations of the Dental Practice Act.

61. Because Ms. Wilson is not a dentist, she is prohibited from performing teeth whitening, from owning a business that offers teeth whitening, or from employing another person to perform teeth whitening.

62. But for Alabama's prohibition on non-dentist teeth whitening, Ms. Wilson would immediately resume selling teeth-whitening products for use in spas, salons, and malls and would immediately resume offering whitening services. As explained more fully below, Joyce Osborn Wilson has been denied the right to earn an honest living as protected by the Due Process and Equal Protection guarantees afforded by the Alabama Constitution.

Constitutional Violations

Count One **Due Process**

63. Plaintiffs incorporate and reallege the allegations of Paragraphs 1 through 62 as if fully set forth herein.

64. Count One is brought pursuant to the right to Due Process guaranteed under Article I, Sections 6 and 13 of the Alabama Constitution of 1901. The Due Process guarantee protects the right to earn an honest living in the occupation of one's choice, subject only to

regulations that are not overbroad and unreasonable exercises of the state's police power, and bearing a real and substantial connection to a legitimate governmental interest.

65. The application of the Dental Practice Act to teeth-whitening services like those offered by Plaintiffs is an overbroad and unreasonable exercise of the state's police power, one containing no real and substantial connection to a legitimate governmental interest.

66. The burdens that Alabama imposes on those who wish to offer teeth-whitening services—including eight years of higher education at a cost of tens of thousands of dollars—are grossly disproportionate to the minor risks associated with teeth whitening.

67. Prohibiting non-dentists from competing against licensed dentists in the market for teeth-whitening services bears no real and substantial connection to a legitimate governmental interest, and constitutes an overbroad and unreasonable exercise of the state's police power because dental education is irrelevant and unnecessary to the safe offering of teeth-whitening services.

68. Unless Defendants are enjoined from committing the above-described violations of Due Process guaranteed under the Alabama Constitution, Plaintiffs will continue to suffer great and irreparable harm.

Count Two
Equal Protection

69. Plaintiffs incorporate and reallege the allegations of Paragraphs 1 through 68 as if fully set forth herein.

70. Count Two is brought pursuant to the Equal Protection of the laws afforded by the Alabama Constitution of 1901. Article 1, Sections 1, 6, and 22 combine to guarantee equal protection under the laws, which prohibits the government from treating similarly situated persons differently unless the reason for doing so bears a real and substantial relationship to a

legitimate government interest, and the regulations are not overbroad or unreasonable exercises of the state's police power.

71. Alabama's Dental Practice Act provides that only licensed dentists are authorized to provide services that constitute the practice of dentistry. ALA. CODE §§ 34-9-3, 34-9-6. The Act also prohibits non-dentists from, "[p]rofess[ing] to the public by any method to bleach human teeth, perform[ing] bleaching of the human teeth alone or within his or her business, or instruct[ing] the public within his or her business, or through any agent or employee of his or her business, in the use of any tooth bleaching product." ALA. CODE § 34-9-6(12).

72. Plaintiff Keith Westphal is not a licensed dentist and is not eligible to become a licensed dentist. Therefore, he cannot offer teeth-whitening services or operate a business that offers teeth-whitening services.

73. Plaintiff Joyce Osborn Wilson is not a licensed dentist and is not eligible to become a licensed dentist. Therefore, she cannot offer teeth-whitening services or operate a business that offers teeth-whitening services.

74. Products identical to those sold by Plaintiffs are available for purchase in supermarkets, drug stores, and on the Internet. Instructions for use of those products are widely available, either provided with the products themselves or online.

75. Enhancing lights identical to those used by Plaintiffs are available for purchase and home use without a prescription.

76. Plaintiffs have been denied equal protection of the laws because the distinction between persons who sell customers a product for application to their own teeth at home, who are not regulated under the Dental Practice Act, and persons who sell customers an identical product for application to their own teeth in a shopping mall or at a salon, whom Alabama

considers to be engaged in the practice of dentistry, is overbroad and an unreasonable exercise of the state's police power.

77. Plaintiffs have also been denied equal protection of the laws because the distinction between persons who sell customers teeth-whitening products that the customers will apply to their own teeth, whom Alabama considers to be engaged in the practice of dentistry, and persons who perform procedures like tongue piercing, who are not regulated under the Dental Practice Act, bears no real and substantial connection to a legitimate government interest, and constitutes an overbroad regulation and an unreasonable exercise of the state's police power.

78. Plaintiffs have also been denied equal protection of the laws because the distinction between Plaintiffs' provision of in-person instruction to customers on how to apply teeth-whitening products to their own teeth, which Alabama considers to be the practice of dentistry, and the provision of written instructions online or packaged with identical teeth-whitening products, which is not regulated under the Dental Practice Act, is an overbroad regulation and an unreasonable exercise of the state's police power, with no real and substantial connection to a legitimate government interest.

79. Unless Defendants are enjoined from committing the above-described violations of the Equal Protection guarantees under the Alabama Constitution, Plaintiffs will continue to suffer great and irreparable harm.

Prayer for Relief

WHEREFORE, Plaintiffs respectfully request the following relief:

A. Entry of judgment declaring that the Alabama Dental Practice Act, ALA. CODE §§ 34-9-1, *et seq.*, as applied to teeth-whitening services like Plaintiffs', and any policies or practices of the Alabama Board of Dental Examiners, to the extent they prohibit non-dentist teeth

whitening of the sort performed by Plaintiffs, violate Plaintiffs' economic liberty protected by the Due Process and Equal Protection guarantees afforded by the Alabama Constitution;

B. A permanent injunction forbidding future enforcement of the Alabama Dental Practice Act, ALA. CODE §§ 34-9-1, *et seq.*, and any policies or practices of the Alabama Board of Dental Examiners, to the extent they prohibit non-dentist teeth whitening of the sort performed by Plaintiffs, against Plaintiffs and persons providing teeth-whitening services like Plaintiffs; and

C. Such further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted,

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**Motions for Admission Pro Hac Vice To Be Filed*

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