

**ATTORNEY GENERAL OF THE STATE OF NEW YORK**

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In the Matter of  
Aspen Dental Management, Inc.

Assurance No.: 15-103

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**ASSURANCE OF DISCONTINUANCE  
UNDER EXECUTIVE LAW  
SECTION 63, SUBDIVISION 15**

Pursuant to the provisions of Section 63(12) of the Executive Law and Article 22-A of the General Business Law, Eric T. Schneiderman, Attorney General of the State of New York, caused an inquiry to be made into certain business practices of Aspen Dental Management, Inc. (“ADMI”). Based upon that inquiry, the Office of the Attorney General (“the OAG”) has made the following findings, and ADMI has agreed to modify its business practices and comply with the following provisions of this Assurance of Discontinuance (“Assurance”).

**I. BACKGROUND**

1. ADMI is a general business corporation incorporated in Delaware and with its principal place of business at 281 Sanders Creek Parkway, East Syracuse, New York, 13057. ADMI is engaged in the business of providing “business support services” to independently owned dental practices located in New York State. It also has a “practice support center” located in East Syracuse, New York. The support center contains, among other things, a centralized patient scheduling call center, a training facility for dentists, hygienists, and office managers, and departments providing human resources, accounting, finance, marketing and other business support services to

independently owned dental practices located in New York State that use the Aspen Dental trademark.

2. In New York, seven dental practices, operating a total of 40 “Aspen Dental” offices, have entered into contractual agreements with ADMI for it to provide them with business support services and rights to use the “Aspen Dental” trade name:

- Aspen Dental Associates of Central New York, PLLC, which currently operates nine offices within New York.
- Aspen Dental of Rochester, PLLC, which currently operates seven offices within New York.
- Dental Services of Western New York, PLLC, which currently operates four offices within New York.
- Dental Services of Dunkirk, PLLC, which currently operates one office in New York.
- Aspen Dental Associates of Hudson Valley, PLLC, which currently operates fourteen offices within New York.
- Anand Dental Health Services, PC, which currently operates two offices in New York.
- Judge Dental, PLLC, which currently operates three offices in New York.

## **II. THE OAG’S INVESTIGATIONS AND FINDINGS**

3. After receiving over 300 consumer complaints since 2005 concerning consumers’ experiences at “Aspen Dental” dental offices, the OAG commenced an investigation into ADMI, and has concluded that ADMI is not merely acting as a dental support organization (“DSO”) providing back-end business and administrative support to independent dental practices that choose to retain it for such assistance. Rather, ADMI has facilitated the development of dental practices owned by individual dentists, but

which, in violation of New York law: (a) are subject to extensive involvement of ADMI, (b) share profits with ADMI, and which (c) are marketed under the “Aspen Dental” trade name creating an impression of common ownership, treatment goals and philosophies, policies and procedures, and standards of care.

4. With the knowledge of the Dental Practices, through an array of business activities, including incentivizing and otherwise working with staff to increase sales of dental services and products, implementing revenue-oriented patient scheduling systems, and hiring and oversight of clinical staff, including associate dentists and dental hygienists, ADMI is making many “business” decisions for the Dental Practices that are the responsibility of the Dental Practices and the dentists who own them.

5. ADMI has exercised significant control over the Dental Practices’ finances, and the finances between these entities are not sufficiently independent.

6. For example, until recently, pursuant to agreements with each practice owner (“Practice Owner”), ADMI accepted patient payments and insurance payments in a single consolidated account to which the Practice Owners themselves did not have access. During the pendency of the OAG investigation, each of the Dental Practices began maintaining its own bank account, to which ADMI has access for the purpose of paying the Dental Practices’ employees and other business expenses including fees owed by the Dental Practices to ADMI. Further, ADMI has shared with the Dental Practices the costs associated with employing dentists, including salaries and bonuses, and has advanced funds on a routine basis to the Dental Practices.

#### **A. Complaints Against “Aspen Dental”**

7. Since 2005, the OAG has received over 300 complaints concerning consumers’ experiences at “Aspen Dental” dental offices. The complaints, which often indicate that consumers believe that they are complaining about a particular office

location of the “Aspen Dental” chain, include concerns regarding quality of care, billing practices, misleading advertising, “upselling” of medical services and products the consumers feel are unnecessary, and unclear or incomplete terms for the financing of dental care.

8. In 2013, the OAG commenced an investigation into “Aspen Dental,” and more specifically, the relationship between ADMI and the Dental Practices.

**B. ADMI’s Practice Ownership Model and Business Services Agreements**

9. The primary contractual agreements setting forth the terms of the relationship between ADMI and the Dental Practices are called Business Service Agreements (“BSAs”), which have terms ranging from twenty to forty years, and Practice Development Agreements (“PDAs”).

10. The contracts include, among other things, requirements (i) that the Dental Practices purchase all of their prostheses (dentures) from ADMI and (ii) that they inform ADMI of issues that arise concerning quality of care, including in the event of any disciplinary, medical malpractice or other action initiated against any dentist. When such issues arise, the Dental Practices are called upon to cooperate with and participate in ADMI’s quality assurance and utilization review programs.

11. The contracts between ADMI and the Dental Practices further control the Practice Owner’s ability to practice dentistry and retain patient records for so long as the BSA and/or PDA are in effect and for a period of time after the contracts terminate.

12. If a Dental Practice or ADMI terminates a BSA, or if a Practice Owner wishes to sell a practice, the owner has the choice of practicing outside a “restricted” area or transferring the patients’ records to a “successor” dental practice that has or will have a contract with ADMI.

13. Further, the Dental Practices and Practice Owners are bound by non-competition and non-solicitation agreements with ADMI that effectively prevent the Dental Practices or Practice Owners from owning dental practices that are competitive with *any other* dental practice affiliated with ADMI.

14. In addition to the extensive role ADMI vests in itself through the BSAs and other contractual agreements, ADMI's involvement with the Dental Practices extends even further in practice.

### **C. ADMI's Direct Communications with Dental Practice Staff**

15. ADMI consults with the Practice Owners on how to make their practices more efficient and profitable, and includes in its business support direct training of and communication with clinical and non-clinical staff in the Dental Offices concerning clinical care for patients, including how to increase their offices' revenue through the provision of dental care.

16. For example, ADMI's Director of Hygiene Services sends "Hygiene Service Announcements" to dental hygienists, often encouraging or directing the hygienists to increase the amount of revenue they are generating by selling more products and services to patients and by reaching out to patients that still have credit balances on their accounts so the Dental Office does not have to refund those balances.

17. Examples of ADMI's Hygiene Service Announcements include:

"I am reviewing Hygiene results and am discouraged to see that we fell further behind budget for the year! (-4.3%) I know that all of you are equally as competitive as me...so you can relate to how I hate losing to dentures (+1.4%) My real frustration comes from knowing that if we deliver good comprehensive care- we will close this gap! The current gap is \$52/day per hygienist...less than one Vizilite,<sup>1</sup> less than 2 sites of Arestin,<sup>2</sup> less than one recall patient...you get the idea! Please look at each day's schedule and find the opportunities.

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<sup>1</sup> Vizilite is an enhanced oral cancer screening that uses a chemiluminescent light to identify suspicious lesions. The patient cost is approximately \$65.

<sup>2</sup> Arestin is an antibiotic treatment used for the treatment of periodontal disease.

Did you offer each patient whitening? Did you talk to denture patients about Vizilite? Did you make sure every patient was scheduled for recall? did you offer MI paste as a solution to patients with sensitivity? Fifty two dollars per day...I know we can do this...who is with me??" (Dated June 1, 2011)

18. Similarly, ADMI trains office managers (non-licensed individuals responsible for managing an office's overall operations) on how to communicate with patients regarding their treatment plans and assist them in making decisions about treatment alternatives.<sup>3</sup>

#### **D. ADMI's Policies and Procedures for Dental Practices**

19. ADMI additionally promulgates forms of policies and procedures addressing office and clinical practices, as well as patient consent forms and patient information forms, some of which include clinical information. ADMI has prepared approximately 150 known policies, guidance documents, and forms that are used in, or otherwise concern the operations of, the Dental Practices.

20. These ADMI-created policies, guidance documents, and forms establish an array of clinical practices and protocols. For example, ADMI has prepared a "patient dismissal" form for dentists to complete when "dismissing" patients from their practice and which must be faxed to risk management "to start the dismissal process." The form lists questions the dentist should ask him/herself to determine whether s/he has fulfilled all responsibilities to the patient, and then requests that the reason for dismissal be stated.

21. With the knowledge of and at the request of the Practice Owners, ADMI teaches dentists about "productive scheduling" during its "doctor orientation program." Using this approach, dentists are taught to prioritize "highly productive cases or opportunities," then filling in the gaps with "moderately productive cases," followed by

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<sup>3</sup> All office managers in the Dental Practices were, until January 1, 2014, ADMI employees. During the course of the OAG's investigation, ADMI and some of the Dental Practices decided to have the Dental Practices employ their office managers.

“low production procedures.” Participants are given an exercise to identify high value, medium value, and low value procedures. They are also instructed on ways to increase their productivity, which include prioritizing prosthetic work, such as dentures, and practicing “quadrant dentistry.”

**E. ADMI’s Financial Incentives for Staff to Sell More Dental Services and Products**

22. Under ADMI’s bonus structure for office managers (who at the time were employed by ADMI, not the Dental Practices), managers were eligible for bonuses only if they met certain budget targets for the offices they managed. ADMI would award a bonus calculated as a percentage of the dental office’s gross profits. The express purpose behind the office managers’ bonus system was to create “accountability” for controlling the dental office’s expenses and increasing its profitability. ADMI periodically revised the office manager bonus system and implemented changes in consultation with, but without formal approval from, the Practice Owners.

23. During the timeframe in which ADMI employed the office managers, ADMI’s bonus payment arrangement appears to have constituted an illegal fee-sharing arrangement with a licensed practitioner because the amounts of the office managers’ bonuses were included within the fees paid by the Dental Practices to ADMI.

24. Similarly, dental hygienists receive a monthly bonus based on how much revenue they generate, and while they may legally receive a percentage of profits as Dental Practice employees, this incentive structure was created and implemented without formal approval from, the Practice Owners.

## **F. ADMI's Control and Commingling of Finances**

25. There has been insufficient financial independence or separation between ADMI and the Dental Practices. For example, until very recently, ADMI used a single consolidated banking account for most of the Dental Practices and retained sole control over the account. This account included all monies paid by patients or other payors to the Dental Practices for services rendered. This account would also be used for payment of all Dental Practice expenses, including payment of profits, which for any particular month ADMI would wire from the account to the Practice Owners.

26. ADMI and the Dental Practices did not appropriately structure their fee arrangements, giving ADMI a direct financial interest in the Dental Practices' profitability.

27. ADMI and the Dental Practices have agreements that set forth ADMI's flat fee for the business management services provided, typically for a span of one year. This "flat fee" is then periodically updated or adjusted, such as to reflect a different number of offices supported by ADMI. This annual flat fee to ADMI is in addition to payments the Dental Practices must make to ADMI for expenses ADMI incurs (such as fees related to the central laboratory that fabricates dentures, advertising expenses, and dental supply purchases) that are then allocated or passed through to the Dental Practices ("center expenses").

28. The Dental Practices' financial statements and related documents reflect that in practice, ADMI is not paid a flat fee for its business support services. Rather, ADMI takes no more than an agreed-upon percentage of each office's gross profits each month. This percentage is typically 45% or 50% of an office's gross profits.



## **G. Misleading Use of the “Aspen Dental” Trade Name**

29. Through separate licensing agreements, ADMI licenses the “Aspen Dental” trade name to each of the Dental Practices and then uses that trade name for all signage, advertising, marketing, and communications conducted on behalf of the Dental Practices. Each of the seven distinct and independently owned Dental Practices in New York operate as “Aspen Dental.”

30. Such use of the “Aspen Dental” trade name confuses the fact that these Dental Practices are actually independently owned by licensed dentists who are ultimately responsible for the care provided.

31. As an example, the “Aspen Dental” website does not adequately distinguish between the independently owned Dental Practices, or between the Dental Practices and ADMI. Rather, a website user might incorrectly conclude that there is a single provider of dental care called “Aspen Dental” that has dental offices nation-wide. The Aspen Dental website describes some of the dental services typically offered, a philosophy of dental treatment, information on pricing, financing and refunds, and provides a mechanism for patients to search for offices based on zip code and make appointments at the closest location.<sup>4</sup>

32. Such use of the “Aspen Dental” trade name has the potential to mislead consumers because they may believe that all “Aspen Dental”-branded offices are under common ownership and/or management, and that there is a central “corporate” Aspen Dental office that is ultimately responsible for the care provided at the different dental

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<sup>4</sup> During the course of the OAG’s investigation, ADMI made several revisions to its website and social media accounts to better indicate that there is not a single dental provider called “Aspen Dental.” For example, in or around May 2014, ADMI started listing the names of the Dental Practices that own and operate each of the Dental Offices, and in or around January 2015, the “Aspen Dental” Facebook page referred to the Dental Practices as “Aspen Dental-branded” practices. These interim website and social media revisions do not fully address the concerns raised by the OAG during its investigation.

offices when true accountability for the care provided lies with the owner of that Dental Practice.

33. ADMI has no public-facing presence distinct from “Aspen Dental,” and, with few exceptions, conducts its public-facing activities, including all or nearly all interactions with current and potential patients, through the website and in-person, as “Aspen Dental,” not as ADMI.

34. As a result of the foregoing, ADMI, through its actions and use of the “Aspen Dental” trade name, may be misleading consumers as to the entity legally responsible for patient care and/or creating the appearance that it is a provider of dental care.

### **III. RELEVANT NEW YORK STATE LAW**

#### **A. State Law Governing the Unauthorized Practice of Dentistry and Dental Hygiene**

35. New York law prohibits the practice of a licensed profession, such as dentistry or dental hygiene, by individuals who are not authorized to practice that profession. Education Law § 6602 requires that an individual be licensed (or otherwise authorized) to practice dentistry, and Education Law § 6607 requires that an individual be licensed pursuant to Education Law § 6609 to practice dental hygiene.

36. New York Education Law § 6512 provides that the unauthorized practice of dentistry, dental hygiene, or any other licensed profession, is a Class E felony. Offering to practice in any such profession or holding oneself out as being able to practice is also a Class E felony under Education Law § 6512.

37. New York Business Corporation Law (“BCL”) Article 15 and New York Limited Liability Company Law (“LLC”) Article 12 set forth the only permissible

corporate entities that may practice a profession: Professional Service Corporations (“PCs”) and Professional Service Limited Liability Corporations (“PLLCs”).<sup>5</sup>

38. The BCL and LLC strictly regulate the creation and operation of PCs and PLLCs, providing that a PC/PLLC incorporated to practice dentistry must be entirely owned and controlled by licensed dentists. Pursuant to BCL §§ 1503(a) and 1507 and LLC § 1203, only individuals authorized by law to practice dentistry may form and own a PC/PLLC incorporated to practice dentistry, and, pursuant to BCL §1508(a) and LLC § 1207, only individuals authorized by law to practice dentistry may serve as a director or officer of the PC/ PLLC.

### **B. State Law Governing Sharing of Professional Fees**

39. New York Education Law § 6509-a provides that the license of a person subject to, *inter alia*, the provisions of Article 133 of the Education Law (dentistry) may be revoked, suspended or annulled, or subject to other penalties if that individual: “directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount or gratuity in connection with the furnishing of professional care, or service. . .,” although such fees may be shared with certain other individuals, per Paragraph 41.

40. Similarly, New York Education Law § 6509(9) includes, among the definitions of professional misconduct for any licensed professional: “Committing unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents.”

41. The Board of Regents passed regulations, 8 NYCRR 29.1, providing that “unprofessional conduct” for individuals licensed pursuant to Title VIII of the Education

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<sup>5</sup> This does not include heavily regulated facilities and other entities specifically authorized by law to provide medical care through licensed professionals, such as hospitals established pursuant to Article 28 of the New York State Public Health Law.

Law, which includes dentists and dental hygienists, includes “permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice the same profession, or a legally authorized trainee practicing under the supervision of a licensed practitioner.” The regulation additionally provides: “*This prohibition shall include any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a professional licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice . . .*” (emphasis added).

### **C. State Law Governing Deceptive and Fraudulent Business Practices**

42. New York General Business Law § 349 prohibits “deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service” in New York State.

43. New York Executive Law § 63(12) prohibits fraud in the conduct of any business, trade or commerce.

44. ADMI is a general business corporation that is not licensed to practice dentistry or dental hygiene in New York State.

45. ADMI’s role in the Dental Practices’ operations, however, is so extensive and significant that it may be engaging in the unlicensed corporate practice dentistry and dental hygiene through its interactions with the Dental Practices.

46. Further, ADMI’s sharing in the Dental Practices’ profits (as did some of its employees, until recently), may be in violation of New York State’s prohibitions on professional fee-sharing.

47. Moreover, the Dental Practices’ shared use of ADMI’s “Aspen Dental” trade name may misleadingly convey to consumers that each of the seven Dental

Practices, which are in fact independently owned and incorporated by licensed dentists, are instead part of a single entity called “Aspen Dental,” and further enables ADMI to hold itself out as a dental provider.

**NOW, WHEREAS,** ADMI neither admits nor denies the Attorney General’s findings in Paragraphs 3 through 34 above; and

**WHEREAS,** New York laws prohibiting the corporate practice of medicine and fee-splitting between medical practitioners and others confer important consumer protections; and

**WHEREAS,** ADMI has cooperated with the OAG’s investigation; and

**WHEREAS,** the Attorney General is willing to accept the terms of this Assurance under Executive Law Section 63(15) and to discontinue his investigation; and

**WHEREAS,** the parties each believe that the obligations imposed by this Assurance are prudent and appropriate; and

**WHEREAS,** the Attorney General has determined that this Assurance is in the public interest.

**IT IS HEREBY UNDERSTOOD AND AGREED,** by and between the parties that:

#### **IV. PROSPECTIVE RELIEF**

##### **A. Definitions**

48. “Aspen Dental website” shall mean [www.aspendental.com](http://www.aspendental.com), or any subsequent website maintained by or at the direction of ADMI on behalf of the Dental Practices.

49. “Aspen Dental Management, Inc.” or “ADMI” shall mean Aspen Dental Management, Inc. and any of its subsidiaries, parent companies, predecessors, successors, affiliates, franchises, officers, directors, employees, agents, consultants, and independent

contractors.

50. “Business Support Services” shall mean administrative, financial, and other general business services, provided pursuant to contractual agreements, by ADMI to individuals licensed to practice dentistry and/or professional corporations authorized to practice dentistry.

51. “Clinical Staff” shall mean dentists, dental hygienists, and certified dental assistants working in the Dental Offices.

52. “Dental Practice” shall mean any business incorporated and operating in New York State to practice dentistry and any individual licensed to practice dentistry in New York State, including all predecessors, successors and assigns, that has executed a contract with ADMI for it to provide Business Support Services in New York State.

“Dental Practice” as used in this Assurance of Discontinuance shall only include each of the individual Dental Offices operated by the Dental Practice and each owner of the Dental Practice.

53. “Dental Offices” shall mean the facilities in which the Dental Practices provide dental care to patients in New York State.

54. “Effective Date” shall mean the date on which this Assurance is duly executed by ADMI and by the signatory Attorney General.

55. “Practice Owners” shall mean dentists who have an ownership interest in a Dental Practice.

## **B. Scope of ADMI’s Business Support Services**

### ***1. General Requirements***

56. ADMI shall confer with the Practice Owners as needed, but not less than annually, to assess the services requested by Practice Owners and provided by ADMI to their practices, and except as regards the Business Support Services set forth in any

agreement between ADMI and such practice, (a) determine the nature and scope of ADMI's services to be provided going forward and (b) obtain written authorization to provide those services for such period as is approved by the Practice Owner(s). The parties shall document the Practice Owner's decisions in writing.

57. Any authorizations between ADMI and the Practice Owners and/or Dental Practices, whether pursuant to Paragraph 58 or any other agreements, shall not (a) vest ADMI with general decision-making authority, (b) grant ADMI authority to make business decisions or communications that are prohibited under the terms of this Assurance, or (c) otherwise permit ADMI to exercise control over any aspect of the Dental Practices' operations prohibited under the terms of this Assurance.

## ***2. Communications with Dental Office Staff***

58. Unless specifically authorized by the Practice Owner(s) pursuant to Paragraph 59, ADMI shall not communicate directly with: (a) Clinical Staff concerning the provision of dental care, including but not limited to communications regarding treatment planning, increasing sales of services or products, increasing the amount of revenue generated, meeting budget or metric goals, or patient scheduling priorities; or (b) all other Dental Office staff regarding treatment planning, sales of services or products to patients, the amount of revenue generated, budget or metric goals, or patient scheduling priorities.

59. ADMI may communicate with Dental Office staff (Clinical Staff and all other Dental Office staff) concerning the matters provided in Paragraph 58 if such communications are consistent with a prospective written communication plan that is either prepared by, or reviewed and approved by, the Practice Owner no less frequently than once per month. The written communication plan shall specifically set forth:

- a. The Dental Offices (where applicable) that may be contacted;

- b. The time-frame during which such communications may take place, not to exceed 30 days;
- c. A description of the communications that are authorized with respect to each category of employee (*e.g.*, office managers, dental hygienists, and associate dentists) within the Dental Offices and the triggering conditions, if any, that would authorize such communications (*e.g.*, if only upon missing certain metric goals by a certain percentage, or if in connection with an authorized contest);
- d. Any clarifying parameters or limitations on what may be discussed (*e.g.*, that ADMI may not discuss any aspect of treatment planning with Clinical Staff when advising on ways to generate additional revenue);
- e. The manner in which ADMI plans to initiate such communications, such as whether ADMI staff may directly consult with all Clinical Staff on a one-on-one basis regarding clinical care, and whether the Practice Owner will be included in or notified of any particular sorts of communications; and
- f. Which of the metrics tracked by ADMI for the Dental Practice may be directly reported to Dental Office staff (all authorized communications relating to these results, such as advice or other commentary on how to improve on certain measures, must be specifically identified pursuant to subsection (c)).

60. On a monthly basis, ADMI shall provide the Practice Owner with a summary of communications authorized pursuant to the communications plan set forth



in Paragraph 59 that took place with the Practice Owner's staff from the previous month. Such summaries shall include the name of the staff person contacted, or, if the communications were made to all individuals holding a particular staff position, the position of staff persons contacted, and the recommendations that were made relating to treatment planning, generating revenue or sales, and performance on measured metrics, specifically identifying the metric(s) and any clinical procedures, practices or products discussed.

61. ADMI may not, through its communications with Dental Office staff: (a) exercise any control over clinical decision-making; (b) encourage or suggest the use of specific clinical procedures, practices or products unless the communication plan explicitly identifies, and permits the encouragement or suggested use of, those clinical procedures, practices, or products (along with any triggering conditions, pursuant to Paragraph 59(c)); or (c) discourage the use of specific clinical procedures, practices or products unless the communication plan explicitly identifies, and permits the discouragement of, those clinical procedures, practices or products (along with any triggering conditions).

62. No less frequently than once per year, ADMI shall notify all Dental Office staff in writing that they may consult directly with their Practice Owner if they have any questions or concerns about their communications with ADMI concerning the matters set forth in Paragraph 59.

63. If ADMI becomes aware of any unauthorized communications between its staff and Dental Office staff, it shall immediately notify the Practice Owner of that Dental Practice.

64. ADMI shall not sponsor contests or challenges that award or incentivize the Dental Practices or staff working in Dental Offices to increase revenue, reduce costs,

or sell particular clinical services or dental products. ADMI may develop and implement contests and challenges that award or incentivize the Dental Practices or staff working in Dental Offices to increase revenue, reduce costs, or sell particular clinical services or dental products only at the request or authorization of a Practice Owner, but ADMI shall not itself grant prizes or rewards or incur the costs of granting prizes or rewards. In developing and implementing any such authorized contest and challenge, ADMI remains bound by Paragraphs 58 through 63 and may not make any unauthorized communications, as set forth herein, as a means of encouraging or directing Dental Office staff on how to achieve the stated goals of the contest or challenge.

65. None of the foregoing shall limit the scope of communications between ADMI and a Practice Owner or, at the Practice Owner's request, a managing dentist at their Dental Office(s).

### ***3. Dental Practice Policies, Procedures, and Forms***

66. Within 90 days of the Effective Date, ADMI shall provide the Practice Owners with copies<sup>6</sup> of all written policies, procedures, guidance documents, and forms prepared by ADMI that (i) impact clinical and administrative practices and operations in the Dental Offices, (ii) are made available to patients, or (iii) are otherwise utilized by or govern the staff in the Dental Practices and Dental Offices so the Practice Owners may review and then revise, approve or disapprove (as they so determine) the continued use of such documents in their Dental Practices within 120 days of the Effective Date.

67. Any documents provided to Practice Owners pursuant to Paragraph 66 that are disapproved or not affirmatively approved by a Practice Owner within 120 days of the Effective Date will no longer be made available or otherwise applicable to that owner's Dental Practice. Thereafter, ADMI shall not make any new policies,

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<sup>6</sup> Such copies may be provided by any means, including through electronic portals or links to the documents.

procedures, guidance documents, or forms available to Dental Office staff or otherwise applicable to a Dental Practice without the express approval of the applicable Practice Owner, and ADMI will not train or otherwise instruct the staff working in those Dental Offices to follow any practices and procedures not authorized by a Practice Owner. Nothing in this paragraph shall prevent a Dental Practice from adopting its own policies, procedures, guidance documents, or forms.

68. Within 90 days of the Effective Date, ADMI shall implement and maintain a system to track the ADMI-drafted documents used in each of the different Dental Practices and ensure that documents not approved by the Practice Owners pursuant to Paragraphs 66 and 67 are not utilized by, nor govern the operations of, those Dental Practices.

#### ***4. Hiring and Evaluating Clinical Staff***

69. ADMI will not interview applicants seeking employment as Clinical Staff at the Dental Practices beyond an initial screening interview, unless the Practice Owner or, at the Practice Owner's request, a Clinical Staff member designated by the Practice Owner, also participates in the interview.

70. Unless authorized by the Practice Owner, ADMI shall not extend an offer of employment or contract work to any individuals who will be working as Clinical Staff.

71. ADMI shall not sign on behalf of a Dental Practice any contracts or letters of agreement for employment or contract work.

72. ADMI shall not conduct formal performance reviews or evaluations for Clinical Staff relating to their responsibilities and performance within the scope of their employment. The term "formal performance reviews or evaluations" used in the previous sentence includes evaluations concerning quality of care provided, but shall not include

the collection, reporting, and discussion of metric data to the extent such collection, reporting, or discussion is authorized by the Practice Owner pursuant to Paragraph 69.

73. Paragraphs 69 through 72 shall not prevent ADMI from assisting with recruitment of qualified staff, initial screenings of applicants, facilitating interviews with selected applicants, assisting with employment contract negotiations, assisting with the documentation of performance reviews by Practice Owners or Clinical Staff, or otherwise providing administrative support with respect to a Dental Practice's recruitment or hiring.

#### ***5. Dental Practices' Business Operations***

74. ADMI shall not make any decisions on behalf of the Dental Practices that directly or indirectly impact clinical care. While ADMI may make suggestions for best business practices, all such decisions must be presented to the Practice Owners, and no action will be taken until the Practice Owner or, at the Practice Owner's request, a designated dentist for the impacted Dental Office(s), affirmatively responds with a decision on how to proceed.

75. Notwithstanding Paragraph 74, the following decisions concerning Dental Practice or Dental Office-wide practices shall only be made by the Practice Owner or, at the Practice Owner's request, a senior managing dentist (i.e., the Managing Clinical Director) for the impacted Dental Office:

- a. Budgets for the dental offices;
- b. What treatments and services the Dental Practice and/or Dental Office will offer to patients and the clinical criteria, if any, dictating when those treatments and services may be offered;
- c. Whether any default treatment planning options may be incorporated into billing or any other software or systems provided by ADMI, and if so, which such options may be

- incorporated;
- d. The Dental Practice's and/or Dental Office's standard fees for patient treatments and services;
  - e. Salaries, bonuses and other incentives for staff (clinical and non-clinical) working in the Dental Offices;
  - f. What dental equipment and dental products will be used in the Dental Offices;
  - g. Whether and what financing options will be available to patients;
  - h. Insurance plan participation;
  - i. How much time will be allocated for dental services and procedures in the scheduling system, or the process by which such time allocations will be made (*e.g.*, if associate dentists may determine how much time they need within certain parameters set by the Practice Owner);
  - j. Whether certain types of patients will be prioritized in the scheduling system, and if so, the bases on which they may be prioritized (*e.g.*, payor type, dental services requested, new vs. existing patients); and
  - k. Appropriate staffing levels.

76. None of the foregoing shall prevent ADMI from executing, or assisting with the execution and implementation of, a Practice Owner's business decision once direction for a specific course of action is given by the Practice Owner or designated dentist, consistent with all other limitations set forth herein, including but not limited to those concerning communications in Paragraphs 58 through 65.

77. ADMI shall not prevent the Dental Practices from adopting any practices, procedures, patient fees, or otherwise making business decisions, nor shall ADMI otherwise interfere with the Practice Owners' ability to make and execute such business decisions, on the grounds that such changes would result in inconsistencies across the Dental Practices or would otherwise negatively impact other Dental Practices. The foregoing shall not prohibit ADMI from enforcing the terms of its contracts with the Dental Practices, including any terms imposing affirmative obligations on the Dental Practices, such as those concerning the non-disclosure of trade secrets.

**C. No Limitations on Practice Owners' Practice of Dentistry**

78. ADMI shall not prohibit or restrict Practice Owners or Dental Practices from owning, managing, controlling, or being employed by a dental practice, or otherwise practicing dentistry in any geographic location and for any period of time, provided that such practices may not use the "Aspen Dental" trademark without ADMI's consent. This includes, but is not limited to, restricting a Practice Owner's ability to practice within any distance of another ADMI-supported practice.

79. ADMI shall not in any manner restrict a Practice Owner's or Dental Practice's ability to retain patient charts and records, or to solicit or attempt to solicit its existing patients or those of other ADMI-supported Dental Practices, if the agreements for ADMI to provide Business Support Services are terminated.

80. The foregoing shall not restrict ADMI from imposing reasonable restrictions with respect to the Practice Owners' ability to work for or with a competitive Dental Services Organization ("DSO") or dental practice affiliated with a competitive DSO.

**D. ADMI and the Dental Practices' Finances**

81. ADMI shall not: (i) protect or agree to protect a Dental Practice against

financial losses; (ii) assume or agree to assume any of a Dental Practice's costs of employing Clinical Staff, including salaries and bonuses; (iii) waive or agree to waive any amounts owed to ADMI by the Dental Practices or refund any amounts paid to ADMI by the Dental Practices solely to cover the costs of employing Clinical Staff; or (iv) prevent the Practice Owners from having full and complete control over their revenues, profits, incomes, disbursements, bank accounts, and other financial matters and decisions, subject to Paragraph 84.

82. All new loans extended by ADMI to the Practice Owners or Dental Practices shall be executed through separate contracts setting forth the terms of the loan. Within 90 days of the Effective Date, any existing undocumented loans to the Dental Practices shall be memorialized in a written agreement that sets forth the terms of the loan and the balance owed.

83. Any contractual provisions or agreements with ADMI that prevent the Practice Owners from having full and complete control over their revenues, profits, incomes, disbursements, bank accounts, and other financial matters and decisions are void and unenforceable, except to the extent necessary for ADMI to collect receipts, pay bills and otherwise fulfill its obligations under the existing Business Services Agreements until new Business Services Agreements fully compliant with this Assurance are executed, which shall occur by September 30, 2015. Within 30 days of the Effective Date, except as provided directly below, ADMI shall not maintain a consolidation account for any of the Dental Practices. ADMI may use consolidation accounts only for (a) receipt of dental or medical insurance payments to the Dental Practices and (b) electronic patient payments transmitted directly to ADMI through the Aspen Dental website. ADMI may only deposit and maintain payments for a Dental Practice's services in the consolidation account if the Dental Practice and ADMI enter into an

agreement (which may be the Business Services Agreement) that specifically authorizes ADMI to deposit and maintain payments in the consolidation account and which is in full compliance with all other terms herein concerning the Dental Practices' complete control over their respective revenues and profits. ADMI shall not release funds held in the consolidation account except to an insurance company or directly to the Dental Practice.

84. Except as set forth in Paragraph 83, all payments made and owed to the Dental Practices for dental services rendered in their practices shall be deposited directly into bank accounts in which the Dental Practice: (a) is an account holder; (b) has direct and unlimited access to its funds; and (c) has full control with respect to deposits, withdrawals, and access by third parties, such as ADMI.

**E. Billing for Business Support Services Provided to Dental Practices**

85. ADMI shall not receive compensation or payments of any kind from the Dental Practices that are dependent upon a Dental Practice's profits, revenues, deposits, or any other income or earnings (herein collectively and individually referred to as "revenues and profits"), or otherwise share in the Dental Practices' fees for professional services rendered. This includes, but is not limited to, compensation constituting a specified percentage of a Dental Practice's revenues and profits.

86. The parties acknowledge and agree that the sources of compensation or payments to be made by the Dental Practices to ADMI are the revenues and profits generated by the Dental Practices.

87. All guarantees from ADMI to the Dental Practices that the practice or one or more of its Dental Offices may retain a certain percentage of revenues and profits are void. ADMI shall not make any guarantees to the Dental Practices that they may retain a certain percentage of the revenues and profits generated by the practice or its



offices. ADMI's fee for its Business Support Services and any other charges to the Dental Practices shall not be limited or constrained in a manner that is dependent upon, or constitutes a percentage of, the practice's revenue and profits.

88. The fee charged for ADMI's Business Support Services may be renegotiated as deemed appropriate by the parties, but no more frequently than as permitted herein.

- a. The Business Support Services fee(s) may be negotiated no more frequently than on a quarterly basis (once every three months) for four years starting on the Effective Date (i.e., for a period of four calendar quarters commencing with the calendar quarter which begins after the Effective Date), and no more frequently than on a semi-annual basis (once every six months) thereafter. If ADMI complies with the provisions of Paragraphs 85 through 90 during the four-year period beginning after the Effective Date, it may continue to renegotiate fees thereafter on a quarterly basis.
- b. A fixed fee may be renegotiated by ADMI and the Dental Practices within the quarterly or semi-annual fee period based on: (i) increases or decreases in the number of offices supported, (ii) changes in the number, scope or types of services provided by ADMI, (iii) temporary office closures, such as those resulting from the absence of the dentist(s) or due to force majeure, or (iv) increases or decreases in the number of dentists in the office to the extent such changes can be demonstrated to have a significant impact on the value of the

services provided by ADMI to the Dental Practice during the time period for which the fixed fee is being adjusted. Such adjustments must be reasonable, and will be memorialized in writing setting forth the reasons for the change to the fixed fee and signed by ADMI and the Dental Practice.

89. ADMI shall not waive any portion of the Business Support Services fee owed by the Dental Practices except pursuant to a protocol subject to approval by the New York State Office of the Attorney General (“OAG”) that sets forth the financial bases upon which such waivers may be granted. Such bases shall not include a Dental Practice’s revenues and profits for a particular period of time, such as monthly profits, but are to be based on the entire financial condition of the Dental Practice. All such waivers shall be memorialized in writing setting forth the basis for the waiver and the amount waived.

90. Except as set forth herein, ADMI shall not provide any credits, add-backs, or adjustments to any of the Dental Practices’ expenses (including those deemed “Center Expenses” under any agreements between ADMI and the Dental Practices) for the purpose of adjusting the fees owed by the Dental Practices or to ensure the Dental Practices retain a certain percentage of revenues and profits. Notwithstanding the foregoing, if the Dental Practices are entitled to credits, add-backs or adjustments based on valid circumstances, such as vendor credits or ADMI’s good faith billing errors, and such circumstances are supported by documentation, such credits, add-backs or adjustments may be provided.

91. All fee payments from the Dental Practices to ADMI for its Business Support Services, including but not limited to any fixed fee monthly installment payments, will appear as separate line-items, as operating expenses for the Dental Practices on their

ADMI-prepared: (i) budgets, (ii) profit and loss statements, (iii) Practice Owner summaries, and (iv) additional or subsequent financial statements that reflect the Dental Practices' expenses.

92. The Dental Practices' financial statements prepared by ADMI, including the profit and loss statements, shall reflect how the Dental Practice's Gross Profit is calculated based on the revenue generated and the expenses incurred.

93. All fee payments from the Dental Practices to ADMI for its Business Support Services, including but not limited to any fixed fee monthly installment payments, will be distinct and separate payments and will not be bundled or combined with other payments for monies owed by the Dental Practices to ADMI unless clearly documented and itemized.

94. Any fixed fees for Business Support Services will be paid by the Dental Practices to ADMI in pre-determined, budgeted monthly installments, subject to adjustments authorized by Paragraphs 88 through 90. While the amount of each installment may vary, the sum of the monthly installments will equal the negotiated fixed fee for the quarterly or semiannual period.

## **F. Use of "Aspen Dental" Trade Name**

### ***1. Website Reforms and Disclaimer***

95. Within 90 days of the Effective Date, ADMI shall post an explanation in permanent text (i.e., not a rotating banner) on the Aspen Dental website that: (i) there is no single provider of dental care called "Aspen Dental"; (ii) Aspen Dental Management, Inc. provides administrative and business support services to dental practices that are independently owned and operated by licensed dentists, (iii) ADMI licenses the "Aspen Dental" brand name to the independently owned and operated dental practices that use its business support services; (iv) ADMI does not own or operate the dental practices,

employ or in any way supervise the dentists providing dental care, and that control over the care provided is the sole responsibility of the independent practice and the dentists they employ; and (v) services and office practices may vary across dental practices, and patients should contact the dental offices directly for all questions concerning their dental treatment. This text shall be prominently posted on the webpage(s) explaining what “Aspen Dental” is, including the webpage currently located at <https://www.aspendental.com/about#about-company-overview>, as well as on any other webpage(s) as deemed appropriate by ADMI.

96. Within 90 days of the Effective Date, ADMI shall prominently post an explanation in permanent text at or near the top of each webpage on which consumers can search for Dental Offices, including the “Find A Dental Office” webpage, currently located at <https://www.aspendental.com/find-an-office>, and the “Schedule an Appointment” webpage, currently located at <https://www.aspendental.com/schedule-an-appointment#step-two>, advising that: (1) Aspen Dental-branded dental practices are independently owned and operated by licensed dentists, and (2) dental services and office practices may vary across dental practices.

97. Within 90 days of the Effective Date, ADMI shall post the following text at the bottom of each webpage on the Aspen Dental website, in prominent lettering: “Aspen Dental-branded dental practices are independently owned and operated by licensed dentists. For more information about the relationship between Aspen Dental Management, Inc. and the branded dental practices, click here.” The word “here” shall be hyperlinked to the page containing full disclaimer language required pursuant to Paragraph 95.

98. The Aspen Dental website shall continue to maintain individual webpages for each Dental Office. Such webpages shall display: (a) the unique legal or

assumed name of the Dental Practice that owns and operates that office at the top of the webpage, in prominent lettering, as defined in Paragraph 99; (b) the owner(s) of that Dental Practice; (c) the dentists who provide care at that particular Dental Office; (d) any specific representations, forms, policies, or other information as requested by the Dental Practice, pursuant to Paragraph 101; (e) contact information for that Dental Office; and (f) a list of all Dental Offices owned and operated by that Dental Practice, or a clearly labeled link to another webpage providing this information.

99. “Prominent lettering” shall mean text that is: (a) in a larger font than its surrounding text, and (b) distinguished by font color, font type, font style (i.e., bold or italics), and/or any other special effect that serves to highlight the text in relation to its surrounding text.

100. ADMI shall require Practice Owners to review all statements and information displayed on the webpage(s) for the Dental Office(s) owned by their Dental Practice and advise if they approve that content within 60 days of the Effective Date. ADMI must remove or revise all statements and information not approved by the Practice Owners within 30 days of the Practice’s Owner’s notification. Review and approval must also be obtained from a Practice Owner before any future substantive changes are made to the webpage(s) for that owner’s office(s).

101. ADMI shall permit Practice Owners to customize and control the information conveyed on the webpage(s) for the Dental Office(s) that they own and operate with respect to the dental care provided, including, but not limited to, payment policies, dental services provided, hours of operation, pricing and discounts, and patient forms. Nothing herein shall prohibit ADMI from imposing reasonable limitations on the quantity of information included on the Dental Office webpages or from imposing other reasonable non-substantive limitations concerning their quality, including grammar,

layout and appearance of the webpage(s).

102. Where ADMI is conducting business or otherwise acting on its own behalf instead of as an agent for the Dental Practices through the Aspen Dental website, it shall do so as ADMI and not as “Aspen Dental.” This includes, but is not limited to, recruitment of ADMI employees.

***2. Use of the “Aspen Dental” Trade Name on the Aspen Dental Website, Social Media Accounts, and Marketing and Advertising Materials***

103. Within 90 days of the Effective Date, ADMI shall conduct a review of the entire Aspen Dental website and all social media accounts<sup>7</sup> maintained by or at the direction of ADMI on behalf of the Dental Practices and remove or revise statements that could be understood to suggest, within the context of the Aspen Dental website and the webpage(s) containing those statements, including the changes outlined herein, that “Aspen Dental” is a single entity that provides dental treatment or is itself a provider of dental services. Neither the Aspen Dental website nor the social media accounts shall state or indicate that “Aspen Dental” provides dental treatment or is itself a provider.

104. Within 90 days of the Effective Date, ADMI shall remove or revise all statements on the Aspen Dental website and all social media accounts maintained by or at the direction of ADMI on behalf of the Dental Practices regarding the dental treatment that patients will receive at “Aspen Dental.” The Aspen Dental website, all social media accounts, and any advertising or marketing materials for the Dental Practices shall no longer include statements or representations regarding the dental treatment that patients will receive at “Aspen Dental.” However, the Aspen Dental website, social media accounts, and any advertising or marketing materials may offer descriptions of what a patient visit to an Aspen Dental-branded dental practice may generally involve, as determined by the treating dentist, and the services or treatment plans generally offered

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<sup>7</sup> Such social media accounts include, but are not limited to, Facebook, Twitter, and Instagram.

by the Dental Practices.

105. ADMI's marketing or advertising materials, including but not limited to all print, television and future radio advertisements,<sup>8</sup> shall: (1) convey that Aspen Dental-branded dental practices are independently owned and operated by licensed dentists, and (2) direct consumers to visit the Aspen Dental website for a list of all independent dental practices and their locations. This information shall be incorporated into the advertising and marketing materials in a manner that makes clear, in the context of the advertising considered as a whole, that "Aspen Dental" is not a single entity that provides dental treatment and is not itself a provider.

106. The guidelines set forth in Paragraph 105 do not apply to the extent that a print, television, or radio advertisement is conducted under a Dental Practice's legal name and not under the "Aspen Dental" trade name.

107. None of the foregoing provisions shall prevent the Aspen Dental website, social media accounts, or marketing or advertising materials from containing representations regarding dental treatment in connection with specifically named Dental Practices to the extent a Dental Practice affirmatively decides to make such representations under its own unique name.

### ***3. Dental Office Signage, Forms, and Communications***

108. Nothing herein shall prevent the Dental Practices from continuing to use building signage with the words "Aspen Dental." However, when ADMI's Business Support Services include providing Dental Office signage, ADMI shall post the Dental Practice's legal name on the Dental Office's buildings, on or adjacent to the entrances, so it is easily visible by patients upon entry to the facilities. Where ADMI is not responsible for providing Dental Office signage, it will make commercially reasonable efforts to

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<sup>8</sup> ADMI currently publishes one radio advertisement, which is not covered by this paragraph.

cause the Dental Practice's legal name to be posted on the Dental Offices' building, on or adjacent to the entrances, so it is easily visible by patients upon entrance to the facilities.

109. ADMI may continue to provide Dental Practices with documents and forms containing the "Aspen Dental" trademark. However, any such documents and forms prepared by ADMI that may be presented to patients must also display the Dental Practice's legal name at or near the top of the page in prominent lettering, as defined in Paragraph 99.

110. ADMI shall make good faith efforts to ensure that Dental Practices operating under the "Aspen Dental" trade name provide patients upon their first visit, and thereafter make available to patients upon request, a form containing the information outlined in Paragraph 95, which ADMI shall prepare and make available to the Dental Practices.

111. ADMI shall train, require, and use reasonable best efforts to ensure its employees, when communicating with a Dental Practice's patients, either (a) identify by name the practice on behalf of which they are communicating, or (b) identify themselves as ADMI employees.

#### **G. Enforcement**

112. To oversee compliance of Sections IV.D and IV.E of this Assurance, all financial statements for the Dental Practices prepared by or at the request of ADMI, including monthly profit and loss statements and any other audited or unaudited financial statements, along with all written agreements reflecting changes to the Business Support Services fee, will be submitted to the Monitor, an independent individual or entity selected jointly by the OAG and ADMI and paid for and contracted by ADMI. Except for communications with the OAG, the Monitor shall be obligated to hold any information provided pursuant to this Assurance in strict confidence. The Monitor and ADMI may



agree that all information provided by ADMI is presumed to be confidential and proprietary information.

113. The Monitor shall submit a report to the OAG on an annual basis, for no fewer than four years, assessing ADMI's compliance with Sections IV.D and IV.E of this Assurance. During the first two years after the Effective Date, the Monitor will, in particular, assess whether ADMI has complied with Paragraphs 85 through 90. The Monitor's first report shall be submitted to the OAG twelve months from the Effective Date.

114. ADMI shall disclose to the Monitor how ADMI is compensated by the Dental Practices for its Business Support Services (*e.g.*, whether the Business Support Services fee is an established fixed fee for services provided over a defined period of time, or based on the cost of the services provided). If the Business Support Services fee is a fixed fee, ADMI shall disclose the basis for the fixed fee to the Monitor. While such disclosure may initially be provided in narrative form, ADMI shall cooperate in good faith with the Monitor to provide other documentation or support for the basis of the Business Support Services fee as deemed reasonably necessary by the Monitor to determine the fee does not constitute a percentage of, or is otherwise dependent upon, a Dental Practice's revenues and profits. If ADMI objects to a request by the Monitor as unreasonable, it shall notify the OAG in writing, setting forth the basis of the objection and proposing an alternative method of satisfying the Monitor's request, as appropriate. The OAG shall review and consider ADMI's objection within 30 days and negotiate in good faith with ADMI to resolve ADMI's objection. If notwithstanding the OAG's efforts, ADMI still objects, ADMI nevertheless shall accede to the Monitor's request.

115. ADMI shall make members of its accounting department available to the

Monitor, and will provide all other financial statements (for ADMI or the Dental Practices) prepared by or at the request of ADMI or the Dental Practices, as deemed reasonably necessary by the Monitor. For any line item, the Monitor shall have the right to review all invoices, utilization data, or any other relevant information to determine the basis for those charges as reasonably necessary to assess compliance with Sections C and D of this Assurance.

116. The documents that ADMI sends to the Monitor remain the property of ADMI. The contract between ADMI and the Monitor shall require the Monitor to provide the OAG with copies of any and all documents submitted by ADMI upon the OAG's request, but only after receiving ADMI's consent to provide the requested documents. ADMI's failure to consent within 30 days of the OAG's request or its decision to withhold the documents shall constitute a violation of the Assurance.

117. Within 30 days of the Effective Date, ADMI shall submit to the OAG the names of three individuals and/or entities that do not currently perform any accountancy, consultant, or other work on behalf of ADMI or, to the best of its knowledge, the Dental Practices to serve as a Monitor. The OAG may then reject any or all of the suggested Monitors on the grounds that they are not qualified and/or sufficiently independent to perform the duties required under the Assurance.

118. Within 180 days of the Effective Date, ADMI shall submit to the OAG a letter certifying and setting forth its compliance with this Assurance, signed by ADMI's Chief Executive Officer ("CEO"). One year after the Effective Date, ADMI's CEO shall certify as to ADMI's ongoing compliance with all provisions of the Assurance, and shall so certify annually thereafter, for no fewer than three years from the Effective Date.

119. ADMI's Chief Financial Officer shall certify the accuracy of all financial

statements and documents submitted to the Monitor and/or the OAG.

120. The OAG recognizes there may be changes in the future to New York State laws or regulations affecting the practice of dentistry that would permit ADMI and the Practices to engage in conduct otherwise prohibited by this Agreement. In the event of such a change, ADMI shall advise the OAG in writing on the change in law and its impact on the terms of this Agreement and request any appropriate change to the terms of this Agreement. The OAG shall consider ADMI's request in good faith and respond within 30 days. If the OAG rejects ADMI's request, the OAG agrees that ADMI may commence an action in New York State Supreme Court seeking a judicial declaration of the impact in the change in law or regulation and relief from the specific terms of this Agreement relating to the change in law or regulation.

#### **V. CIVIL PENALTIES**

121. Within 30 days of the Effective Date, ADMI shall pay \$450,000 to the OAG as a civil penalty. Such sum shall be payable by check to "State of New York Department of Law."

#### **VI. LIQUIDATED DAMAGES**

122. If ADMI violates any provision of this Assurance, does not provide information required pursuant to the Assurance, or does not provide timely consent to the release of documents by the Monitor pursuant to Paragraph 116, the OAG may elect to demand that ADMI pay liquidated damages of \$2,000 per day for such non-compliance or failure to provide requested information. Within the first two years after the Effective Date, in the event that either the Monitor or the OAG determine that ADMI has violated any of the provisions contained in Paragraphs 85 through 90, the OAG may elect to demand that ADMI pay liquidated damages of \$50,000 per violation. Before liquidated damages may be imposed, the OAG shall give ADMI written notice that ADMI may be

subject to liquidated damages under this Paragraph. In the event that ADMI does not cure the violation or provide the requested information within ten (10) days of receipt of the OAG's written notice, the OAG may impose liquidated damages pursuant to this Paragraph. The damages period shall commence on the date that ADMI receives the OAG's written notice and end on the date that ADMI cures the violation or provides the requested information.

## **VII. GENERAL PROVISIONS**

123. ADMI's Representations: The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by ADMI and its counsel and the OAG's own factual investigation as set forth in the above Findings. To the extent that any material representations are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

124. Communications: All communications, reports, correspondence, and payments that ADMI submits to the OAG concerning this Assurance or any related issues is to be sent to the attention of the person identified below:

Elizabeth Chesler, Esq.  
Assistant Attorney General  
Health Care Bureau  
Office of the New York State Attorney General  
120 Broadway  
New York, New York 10271

125. Receipt by the OAG of materials referenced in this Assurance, with or without comment, shall not be deemed or construed as approval by the OAG of any of the materials, and ADMI shall not make any representations to the contrary.

126. All notices, correspondence, and requests to ADMI shall be directed as follows:

Daniel J. French  
Gabriel M. Nugent  
Hiscock & Barclay

One Park Place  
300 South State Street  
Syracuse, NY 13202

127. Valid Grounds and Waiver: ADMI hereby accepts the terms and conditions of this Assurance and waives any rights to challenge it in a proceeding under Article 78 of the Civil Practice Law and Rules or in any other action or proceeding.

128. No Deprivation of the Public's Rights: Nothing herein shall be construed to deprive any member or other person or entity of any private right under law or equity.

129. No Blanket Approval by the Attorney General of ADMI's Practices: Acceptance of this Assurance by the OAG shall not be deemed or construed as approval by the OAG of any of ADMI's acts or practices, or those of its agents or assigns, and none of them shall make any representation to the contrary.

130. Monitoring by the OAG: To the extent not already provided under this Assurance, ADMI shall, upon request by the OAG, provide all documentation and information necessary for the OAG to verify compliance with this Assurance. ADMI may request an extension of particular deadlines under this Assurance, but OAG need not grant any such request. This Assurance does not in any way limit the OAG's right to obtain, by subpoena or by any other means permitted by law, documents, testimony, or other information.

131. No Limitation on the Attorney General's Authority: Nothing in this Assurance in any way limits the OAG's ability to investigate or take other action with respect to any noncompliance at any time by ADMI with respect to this Assurance, or ADMI's noncompliance with any applicable law with respect to any matters.

132. No Undercutting of Assurance: ADMI shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph

affects ADMI's (a) testimonial obligations, or (b) right to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party. This Assurance is not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission by ADMI of any: (i) liability, or (ii) finding set forth herein.

133. Under Executive Law Section 63(15), evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law in any action or proceeding thereafter commenced by the OAG.

134. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

135. If a court of competent jurisdiction determines that ADMI has breached this Assurance, ADMI shall pay to the OAG the cost, if any, of such determination and of enforcing this Assurance, including, without limitation, legal fees, expenses, and court costs.

136. None of the parties shall be considered to be the drafter of this Assurance or any provision for the purpose of any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof. This Assurance was drafted with substantial input by all parties and their counsel, and no reliance was placed on any representation other than those contained in this Assurance.

137. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

138. No representation, inducement, promise, understanding, condition, or

warranty not set forth in this Assurance has been made to or relied upon by ADMI in agreeing to this Assurance.

139. This Assurance contains an entire, complete, and integrated statement of each and every term and provision agreed to by and among the parties, and the Assurance is not subject to any condition not provided for herein. This Assurance supersedes any prior agreements or understandings, whether written or oral, between and among the OAG and ADMI regarding the subject matter of this Assurance.

140. This Assurance may not be amended or modified except in an instrument in writing signed on behalf of all the parties to this Assurance.

141. The division of this Assurance into sections and subsections and the use of captions and headings in connection herewith are solely for convenience and shall have no legal effect in construing the provisions of this Assurance.

142. Binding Effect: This Assurance is binding on and inures to the benefit of the parties to this Assurance and their respective successors and assigns, provided that no party, other than the OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without prior written consent of the OAG. “Successors” includes any entity which acquires the assets of ADMI or otherwise assumes some or all of ADMI’s current or future business.


143. Effective Date: This Assurance is effective on the date that it is signed by the Attorney General or his authorized representative (the “Effective Date”), and the document may be executed in counterparts, which shall all be deemed an original for all purposes.

AGREED TO BY THE PARTIES:

Dated:

21<sup>st</sup> of June 15, 2015


Aspen Dental Management, Inc.

By:   
ROBERT A. FONTANA  
Chief Executive Officer

Dated: New York, New York

**ERIC T. SCHNEIDERMAN**  
Attorney General of the State of New York

LISA LANDAU  
Health Care Bureau Chief

By:   
ELIZABETH R. CHESLER  
Assistant Attorney General  
Health Care Bureau





KeyCite Blue Flag – Appeal Notification  
Petition for Certiorari Docketed by [SENSATIONAL SMILES, LLC v. JEWEL MULLEN, COMMISSIONER, CONNECTICUT DEPARTMENT OF PUBLIC HEALTH, ET AL.](#), U.S., October 19, 2015

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

**SENSATIONAL SMILES**, LLC, d/b/a **Smile**  
Bright, Plaintiff–Appellant,  
**Lisa Martinez**, Plaintiff

v.

Jewel MULLEN, DR., in her official capacity as  
Commissioner of Public Health, Jeanne P.  
Srathearn, DDS, in her official capacity as a  
Member of the Connecticut Dental Commission,  
Elliot Berman, DDS, in his official capacity as a  
Member of the Connecticut Dental Commission,  
Lance E. Banwell, DDS, in his official capacity as a  
Member of the Connecticut Dental Commission,  
Peter S. Katz, DMD, in his official capacity as a  
Member of the Connecticut Dental Commission,  
Steven G. Reiss, DDS, in his official capacity as a  
Member of the Connecticut Dental Commission,  
Martin Ungar, DMD, in his official capacity as a  
Member of the Connecticut Dental Commission,  
Barbara B. Ulrich, in her official capacity as a  
Member of the Connecticut Dental Commission,  
Defendants–Appellees.

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

### Synopsis

**Background:** Provider of teeth-whitening services that did not employ a licensed dentist brought § 1983 action against Commissioner of the State of Connecticut Department of Public Health and members of Connecticut State Dental Commission, seeking declaratory and injunctive relief against enforcement of regulation that only licensed dentist may shine light emitting diode (LED) lamp at mouth of consumer to whiten teeth. The United States District Court for the District of Connecticut, [Micheal P. Shea, J.](#), [11 F.Supp.3d 149](#), granted summary judgment in favor of defendants. Provider appealed.

**[Holding:]** The Court of Appeals, [Guido Calabresi](#), Circuit Judge, held that rational basis existed for the

regulation.

Affirmed.

[Droney](#), Circuit Judge, filed opinion concurring in part and concurring in the judgment.

West Headnotes (9)

- [1] **Federal Courts**  
🔑 Summary judgment  
**Federal Courts**  
🔑 Summary judgment

Court of Appeals reviews the District Court’s grant of summary judgment de novo, construing the evidence in the light most favorable to the non-moving party.

[Cases that cite this headnote](#)

- [2] **Constitutional Law**  
🔑 Health care  
**Constitutional Law**  
🔑 Health care professionals

Claims that Connecticut regulation permitting only licensed dentists to shine a light emitting diode (LED) lamp at mouth of consumer to whiten teeth violated equal protection and due process were subject to rational basis review. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

- [3] **Constitutional Law**  
🔑 Statutes and other written regulations and rules  
**Constitutional Law**  
🔑 Reasonableness, rationality, and relationship to object

Rational-basis review of claims for violation of the Constitution's Equal Protection and Due Process Clauses is not a license for courts to judge the wisdom, fairness, or logic of legislative choices; rather, courts are required to uphold a classification if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [U.S.C.A. Const.Amend. 14](#).

[1 Cases that cite this headnote](#)

- [4] **Constitutional Law**  
🔑 Rational Basis Standard; Reasonableness  
**Constitutional Law**  
🔑 Reasonableness, rationality, and relationship to object

To prevail on claims for violation of the Constitution's Equal Protection and Due Process Clauses under rational basis review, the party challenging a classification must negative every conceivable basis which might support it. [U.S.C.A. Const.Amend. 14](#).

[1 Cases that cite this headnote](#)

- [5] **Constitutional Law**  
🔑 Health care  
**Constitutional Law**  
🔑 Health care professionals  
**Health**  
🔑 Regulation of Professional Conduct; Boards and Officers

Rational basis existed for Connecticut's regulation that only licensed dentist may shine light emitting diode (LED) lamp at mouth of consumer to whiten teeth, and, thus, enforcement of regulation against provider of teeth-whitening services that did not employ a licensed dentist did not violate Constitution's Equal Protection and Due Process Clauses, where protection of public's oral health was legitimate governmental interest, and regulation rationally related to that interest in that

Connecticut State Dental Commission received expert testimony indicating that potential health risks were associated with use of LED lights to enhance efficacy of teeth-whitening gels, and dentists were better equipped than non-dentists to treat any oral health issues that might arise during the procedure. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

- [6] **Constitutional Law**  
🔑 Health care  
**Constitutional Law**  
🔑 Health care professionals  
**Health**  
🔑 Regulation of Professional Conduct; Boards and Officers

Even if only reason for Connecticut's regulation that only licensed dentist may shine light emitting diode (LED) lamp at mouth of consumer to whiten teeth was to shield licensed dentists from competition, such economic protectionism was a legitimate state interest, and, thus, enforcement of regulation against provider of teeth-whitening services that did not employ a licensed dentist did not violate Constitution's Equal Protection and Due Process Clauses, where that favoritism was rational and did not violate specific constitutional provisions or federal statutes. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

- [7] **Constitutional Law**  
🔑 Fourteenth Amendment in general

Economic favoritism is rational for purposes of review of state action under the Fourteenth Amendment. [U.S.C.A. Const.Amend. 14](#).

[Cases that cite this headnote](#)

- [8] **Constitutional Law**  
🔑 Economic or social regulation in general  
**Constitutional Law**  
🔑 Economic rights and regulation

Because the legislature need not articulate any reason for enacting its economic regulations, it is entirely irrelevant on rational basis review of claims for violation of the Constitution’s Equal Protection and Due Process Clauses whether the conceived reason for the challenged distinction actually motivated the legislature. *U.S.C.A. Const.Amend. 14*.

[Cases that cite this headnote](#)

- [9] **States**  
🔑 Conflicting or conforming laws or regulations

If economic favoritism by the states violates federal law, then, like any state action that contravenes stated federal rules, it falls under the Supremacy Clause. *U.S.C.A. Const. Art. 6, cl. 2*.

[Cases that cite this headnote](#)

### Attorneys and Law Firms

\*283 Paul M. Sherman (Dana Berliner, on the brief), Institute for Justice, Arlington, VA, for Plaintiff–Appellant.

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

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

### Opinion

Judge DRONEY concurs in a separate opinion.

GUIDO CALABRESI, Circuit Judge:

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

### BACKGROUND

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

**Sensational Smiles** sued, challenging several aspects of the declaratory ruling. The parties before the District Court eventually agreed, however, that just one rule constrained the services offered by **Sensational Smiles**—specifically, the rule stating that only a licensed dentist could shine a light emitting diode (“LED”) lamp at the mouth of a consumer during a teeth-whitening procedure.<sup>1</sup> **Sensational Smiles** asserted \*284 that this rule violates the Equal Protection and Due Process Clauses, because no rational relationship exists between the rule and the government’s legitimate interest in the public’s oral health. Accordingly, **Sensational Smiles** sought a declaratory judgment from the District Court that the rule was unconstitutional as applied, as well as a permanent injunction barring the rule’s enforcement. The District Court (Michael P. Shea, *Judge*) rejected **Sensational Smiles**’ arguments and granted defendants’ motion for summary judgment. **Sensational Smiles** appealed.

### DISCUSSION

<sup>[1]</sup> We review the District Court’s grant of summary judgment de novo, construing the evidence in the light

most favorable to the non-moving party. *Delaney v. Bank of America Corporation et al.*, 766 F.3d 163, 167 (2d Cir.2014).

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

[3] [4] As the Supreme Court has stated on multiple occasions, rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Heller*, 509 U.S. at 319, 113 S.Ct. 2637. Rather, we are required to uphold the classification “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* at 320, 113 S.Ct. 2637 (internal quotation marks omitted). Accordingly, to prevail, the party challenging the classification must “negative every conceivable basis which might support it.” *Id.* (citation and internal quotation marks omitted).

[5] Reviewing the record de novo, we agree with the District Court that a rational basis, within the meaning of our constitutional law, existed for Connecticut’s prohibition on non-dentists pointing LED lights into their customers’ mouths. All sides agree that the protection of the public’s oral health is a legitimate governmental interest. The parties, however, strongly dispute whether the rule at issue rationally relates to this interest. Here, the Commission received expert testimony indicating that potential health risks are associated with the use of LED lights to enhance the efficacy of teeth-whitening gels.<sup>2</sup> While **Sensational Smiles** disputes \*285 this evidence, it is not the role of the courts to second-guess the wisdom or logic of the State’s decision to credit one form of disputed evidence over another.

**Sensational Smiles** argues that even if there was some basis for believing that LED lights could cause harm,

there was still no rational basis for restricting the operation of LED lights to licensed dentists. This is so because dentists are not trained to use LED lights or to practice teeth whitening, and are not required to have any knowledge of LED lights in order to get dental licenses. The Commission, however, might have reasoned that if a teeth-whitening customer experienced sensitivity or burning from the light, then a dentist would be better equipped than a non-dentist to decide whether to modify or cease the use of the light, and/or to treat any oral health issues that might arise during the procedure. The Commission might also have rationally concluded that, in view of the health risks posed by LED lights, customers seeking to use them in a teeth-whitening procedure should first receive an individualized assessment of their oral health by a dentist. Indeed, the Commission explicitly found that “[t]he decision of whether to recommend or apply bleaching agents and/or bleaching lights to a particular person’s teeth requires significant diagnostic expertise and skills, in part, to allow the provider to distinguish between pathological versus non-pathological causes of tooth discoloration.” App’x at 201. There were thus rational grounds for the Dental Commission to restrict the use of these lights to trained dentists.

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

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

[6] This would normally end our inquiry, but appellant,

supported by amicus Professor Todd J. Zywicki, forcefully argues that the true purpose of the Commission's LED restriction is to protect the monopoly on dental services enjoyed by licensed dentists in the state of Connecticut. In other words, the regulation is nothing but naked economic protectionism: "rent seeking ... designed to transfer wealth from consumers to a particular interest \*286 group."<sup>73</sup> Zywicki Br. at 3. This raises a question of growing importance and also permits us to emphasize what we do not decide, namely, whether the regulation is valid under the antitrust laws. See *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, — U.S. —, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015) (holding that dental board was not sufficiently controlled by the state to claim state antitrust immunity).

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

<sup>[8]</sup> Our decision is guided by precedent, principle, and practicalities. As an initial matter, we note that because the legislature need not articulate any reason for enacting its economic regulations, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Accordingly, even if, as appellants contend, the Commission was in fact motivated purely by rent-seeking, the rational reasons we have already discussed in support of the regulation would be enough to uphold it.

But even if the only conceivable reason for the LED

restriction was to shield licensed dentists from competition, we would still be compelled by an unbroken line of precedent to approve the Commission's action. The simple truth is that the Supreme Court has long permitted state economic favoritism of all sorts, so long as that favoritism does not violate specific constitutional provisions or federal statutes. See, e.g., *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 109, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003) (upholding state tax scheme that favored riverboat gambling over racetrack gambling); *Nordlinger v. Hahn*, 505 U.S. 1, 12, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992) (upholding state property tax scheme that favored long term owners over new owners); *New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (upholding New Orleans city ordinance that banned street vendors, with an exception made for existing vendors in operation for more than eight years); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563, (1955) (upholding regulation that prohibited "any person purporting to do eye examination or visual care to occupy space in [a] retail store").<sup>4</sup>

These decisions are a product of experience and common sense. Much of what states do is to favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense. To give but one example, Connecticut could well have concluded that higher costs for teeth whitening (the possible effect of the Commission's regulation) would subsidize lower costs for more essential dental services that only licensed dentists can provide, such as oral surgery or tooth extraction—much as the high cost of a law or business degree at a given university may allow other students at the same university to pursue poetry on the (relatively) cheap. Even such an arguably consumer-friendly rationale is unnecessary, however, as a simple preference for dentists over teeth-whiteners would suffice. To hold otherwise would be to interpret the Fourteenth Amendment in a way that is destructive to federalism and to the power of the sovereign states to regulate their internal economic affairs. As Justice Holmes wrote over a century ago, "[t]he 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting). Nor does it endorse Sidney and Beatrice Webb's Fabianism. Choosing between competing economic theories is the work of state legislatures, not of federal courts.

We are buttressed in our decision by the difficulty in distinguishing between a protectionist purpose and a more

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

<sup>[9]</sup> Of course, if economic favoritism by the states violates federal law, then, like any state action that contravenes stated federal rules, it falls under the Supremacy \*288 Clause. This can happen if—whether motivated by rent-seeking or by libertarian ideals—state action, though rational, violates the dormant Commerce Clause, or if a state licensing board that is insufficiently controlled by the state creates a monopoly in violation of the Sherman Act. *See* 15 U.S.C. § 1 *et seq.*; *N. Carolina State Bd. of Dental Examiners*, 135 S.Ct. at 1114. Accordingly, we emphasize that we take no position on the applicability of the antitrust laws to the regulation at issue here. That is a separate and distinct inquiry that was not argued and is not before us. All we hold today is that there are any number of constitutionally rational grounds for the Commission’s rule, and that one of them is the favoring of licensed dentists at the expense of unlicensed teeth whiteners.

## CONCLUSION

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

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

I join the majority opinion in its conclusion that the

Dental Commission’s declaratory ruling is rationally related to the state’s legitimate interest in protecting the public health. Because this is sufficient to resolve the appeal, I would not reach the question of whether pure economic protectionism is a legitimate state interest for purposes of rational basis review. The majority having chosen to address that issue, I write separately to express my disagreement.

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

I agree with the Fifth Circuit’s reasoning in *St. Joseph Abbey*, particularly insofar as it disputes the Tenth Circuit’s reliance in *Powers* on the very Supreme Court cases that the majority cites in support of its holding here. *See St. Joseph Abbey*, 712 F.3d at 222 (“[N]one of the Supreme Court cases *Powers* cites stands for that proposition [that intrastate economic protectionism is a legitimate state interest]. Rather, the cases indicate that protecting or favoring a particular intrastate industry is not an *illegitimate* interest when protection of the industry can be linked to advancement of the public interest or general welfare.” (emphasis in original)); *see also Powers*, 379 F.3d at 1226 (Tymkovich, J., concurring) (“Contrary to the majority ..., whenever courts have upheld legislation that might otherwise appear protectionist ..., courts have always found that they could also rationally advance a *non-protectionist* public good.” (emphasis in original)).

A review of the Supreme Court decisions confirms the Fifth Circuit’s conclusion that some perceived public benefit was recognized by the Court in upholding state and local legislation. In *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Supreme Court reviewed an Oklahoma statute that, *inter alia*, forbade opticians from replacing eyeglass lenses without a prescription from an optometrist or ophthalmologist, even when an optician could easily and safely have done the work. *See id.* at 485–87, 75 S.Ct. 461. In concluding \*289 that the legislation passed rational basis review, the Court recognized that the requirement of a prescription could advance the public

interest in an eye examination by a doctor before the lens replacement. *See id.* at 487–88, 75 S.Ct. 461.

In *City of New Orleans v. Duke*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (per curiam), the Court reviewed a New Orleans ordinance that prohibited food vendors from operating pushcarts in the French Quarter. *See id.* at 298, 96 S.Ct. 2513. A grandfather clause exempted existing vendors from the ban if they had been operating continuously in the French Quarter for at least eight years. *See id.* The Supreme Court held that the exemption survived rational basis review, observing that New Orleans may have concluded that “newer businesses were less likely to have built up substantial reliance interests in continued operation” and that the grandfathered vendors may have “themselves become part of the distinctive character and charm” of the French Quarter. *Id.* at 305, 96 S.Ct. 2513.

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

In *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003), the Court reviewed an Iowa law that imposed higher taxes on racetrack slot machine revenues than it imposed on riverboat slot machine revenues. *See id.* at 105, 123 S.Ct. 2156. Again finding the differential tax treatment rational, the Court suggested that the state legislature “may have wanted to encourage the economic development of river communities or to promote riverboat history.” *Id.* at 109, 123 S.Ct. 2156. And it again emphasized “reliance interests,” observing that the law preserved the historical tax rate for riverboats, whereas racetracks had not previously been permitted to operate slot machines at all. *Id.* at 105, 109, 123 S.Ct. 2156.

It may be that, as a practical matter, economic protectionism can be couched in terms of some sort of alternative, indisputably legitimate state interest. Indeed, the majority suggests as much when it observes that, in this case, the state may have concluded that protectionism “would subsidize lower costs for more essential dental

services that only licensed dentists can provide.” Maj. Op., *ante*, at 287. But it is quite different to say that protectionism *for its own sake* is sufficient to survive rational basis review, and I do not think the Supreme Court would endorse that approach. *Accord Merrifield*, 547 F.3d at 991 n. 15 (“We do not disagree that there might be instances when economic protectionism might be related to a legitimate governmental interest and survive rational basis review. However, economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.”).

Nor do I believe that rejecting pure economic protectionism as a legitimate state interest requires us to resurrect *Lochner*. *Accord St. Joseph Abbey*, 712 F.3d at 227 (“We deploy no economic theory of \*290 social statics or draw upon a judicial vision of free enterprise.... We insist only that Louisiana’s regulation not be irrational—the outer-most limits of due process and equal protection—as Justice Harlan put it, the inquiry is whether ‘[the] measure bears a rational relation to a constitutionally permissible objective.’ Answering that question is well within Article III’s confines of judicial review.” (second alteration in original) (footnote omitted)); *Craigsmiles v. Giles*, 312 F.3d 220, 229 (6th Cir.2002) (“We are not imposing our view of a well-functioning market on the people of Tennessee. Instead, we invalidate only the General Assembly’s naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers. This measure to privilege certain businessmen over others at the expense of consumers is not animated by a legitimate governmental purpose and cannot survive even rational basis review.”); *see also* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L.Rev. 1689, 1692 (1984) (“The minimum requirement that government decisions be something other than a raw exercise of political power has been embodied in constitutional doctrine under the due process clause before, during, and after the *Lochner* era.”).

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

a legitimate state interest. An intent to discriminate is not a legitimate state interest.”). If even the deferential limits on state action fall away simply because the regulation in question is economic, then it seems that we are not applying any review, but only disingenuously repeating a shibboleth. Cf. *Windsor v. United States*, 699 F.3d 169, 180 (2d Cir.2012) (“[W]hile rational basis review is indulgent and respectful, it is not meant to be ‘toothless.’” (citation omitted)), *aff’d*, — U.S. —, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

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

For this reason, I am not troubled by the majority’s surmise that “even the law at issue in *Lochner*—the paradigm of disfavored judicial review of economic

regulations—might well fail the sort of rational \*291 basis scrutiny advocated by **Sensational Smiles**.” Maj. Op., *ante*, at 287. First, I doubt that this would actually be the case; even if, as a matter of historical fact, the *Lochner* law was *intended* to be a protectionist measure, such intent is not dispositive of the rational basis inquiry. See *id.* at 286. And, in the highly unlikely event that the evidence showed that the law was entirely untethered to any conceivable legitimate state purpose (including protection of the public health), I do not see why the law should survive. *Lochner* is “the paradigm of disfavored judicial review of economic regulations” because it imposed exacting limits on state action, in stark contrast to the deferential standard applied under modern rational basis review. See *Lochner v. New York*, 198 U.S. 45, 59, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (“There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty.”). Our aversion to *Lochner*’s flawed approach is well founded, but we should not respond to that aversion by abandoning the minimum requirements of due process and equal protection.

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

#### All Citations

793 F.3d 281

#### Footnotes

- 1 According to **Sensational Smiles**, the LED light was used to “enhance” the teeth whitening process. See Appellant’s Br. at 3–4 (“To enhance the whitening process, after the mouthpiece was inserted and the customer was reclined in the chair, a **Smile** Bright employee would then position a low-powered LED light that was attached to an adjustable arm in front of the customer’s mouth. Then the customer would simply relax for 20 minutes and listen to music until the light automatically shut off, indicating the end of the whitening process.”) (internal citations omitted).
- 2 The Commission heard from Dr. Jonathan C. Meiers, DMD, who testified about several scientific articles that appeared in dental journals and that discussed the safety of lights used for teeth whitening. In particular, he testified, and the Commission adopted as a finding of fact, that bleaching lights (though not specifically LED lights) can lead to an increased risk of pulpal irritation, tooth sensitivity, and lip burns. One article referenced by Dr. Meiers dealt specifically with LED lights, and noted that “Thermal pulp damage from LED-systems cannot be absolutely excluded and has to be taken into consideration, especially when high power LED’s are used for a longer time period.” Wolfgang Buchalla & Thomas Attin, *External bleaching therapy with activation by heat, light or laser—a systematic review*, 23 DENTAL MATERIALS 586, 590–91 (2007).
- 3 In the field of public choice economics, “rent-seeking” means the attempt to increase one’s share of existing wealth through political activity. See Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974); Jagdish Bhagwati, *Directly Unproductive, Profit Seeking Activities*, 90 J. POL. ECON. 988 (1982); see also *Dist. Intown Properties Ltd. P’ship v. D.C.*, 198 F.3d 874, 885 (D.C.Cir.1999) (“While the resulting proposals are naturally advanced in the name of the public good, many are surely driven by interest-group purposes, commonly



known as 'rent-seeking.' ”).

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

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Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Keith WESTPHAL and Joyce Osborn Wilson.

v.

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 Kay Alexander, RDH, in their official capacities as members of the Alabama Board of Dental Examiners.

1140153. | June 5, 2015.

#### Synopsis

**Background:** Non-dentists, who sought to operate teeth-whitening business, brought suit against members of the Alabama Board of Dental Examiners, in their official capacities, seeking judgment declaring unconstitutional the portion of the Alabama Dental Practice Act that made it unlawful for anyone other than a duly licensed dentist to perform teeth-whitening services and seeking permanent injunction forbidding future enforcement of the prohibition in the Act on teeth-whitening services performed by non-dentists. The Jefferson Circuit Court, No. CV-13-901678, entered summary judgment in favor of Board's members, and non-dentists appealed.

**[Holding:]** The Supreme Court, Main, J., held that provision in Dental Practice Act that includes teeth-whitening services within the scope of the practice of dentistry does not violate due process.

Affirmed.

Parker and Shaw, JJ., concurred in the result.

West Headnotes (12)

- [1] **Appeal and Error**  
🔑 Extent of Review Dependent on Nature of

#### Decision Appealed from

Standard of review applicable to a summary judgment is the same as the standard for granting the motion.

#### Cases that cite this headnote

- [2] **Appeal and Error**  
🔑 Cases Triable in Appellate Court

Supreme Court's review of constitutional challenges to legislative enactments is de novo.

#### Cases that cite this headnote

- [3] **Constitutional Law**  
🔑 Presumptions and Construction as to Constitutionality

Acts of the legislature are presumed constitutional.

#### Cases that cite this headnote

- [4] **Constitutional Law**  
🔑 Presumptions and Construction as to Constitutionality  
**Constitutional Law**  
🔑 Invalidation, annulment, or repeal of statutes

Appellate courts approach the question of the constitutionality of a legislative act with every presumption and intendment in favor of its validity, and seek to sustain rather than strike down the enactment of a coordinate branch of government.

#### Cases that cite this headnote

[5] **Constitutional Law**  
🔑 Burden of Proof

In order to overcome the presumption of constitutionality, the party asserting the unconstitutionality of statute bears the burden to show that statute is not constitutional.

[Cases that cite this headnote](#)

[6] **Health**  
🔑 Dentists and oral surgeons

Teeth whitening falls within the practice of dentistry. Code 1975, § 34-9-6(12).

[Cases that cite this headnote](#)

[7] **States**  
🔑 Police power

In the exercise of state's police power to regulate professions or occupations, the prohibition or test contained in the statute, ordinance, or rule should be enacted, ordained, or adopted with reference to the object to be attained and as not unduly to interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations or professions.

[Cases that cite this headnote](#)

[8] **Constitutional Law**  
🔑 Overbreadth in General

In addressing whether a statute, regulation, or ordinance is unreasonable, appellate courts apply the doctrine of overbreadth.

[Cases that cite this headnote](#)

[9] **Constitutional Law**  
🔑 Statutes in general

Doctrine of overbreadth recognizes that a state legislature may have a legitimate and substantial interest in regulating particular behavior, but that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

[Cases that cite this headnote](#)

[10] **Health**  
🔑 Power to regulate in general

The practice of dentistry, generally speaking, relates to the public health and is, therefore, a legitimate subject of the State's police power.

[Cases that cite this headnote](#)

[11] **Constitutional Law**  
🔑 Health care professionals  
**Health**  
🔑 Validity

Provision in Dental Practice Act that includes teeth-whitening services within the scope of the practice of dentistry, thus limiting the performance of those services to licensed dentists, does not violate due-process protections of the Alabama Constitution; inclusion of teeth-whitening services within the definition of the practice of dentistry in the Dental Practice Act is reasonably related to public health, safety, or general welfare, teeth whitening is not without potential adverse effects, such as peroxide burns of the lips and gums, and pretreatment examination and subsequent assessment of each teeth-whitening consumer's situation by a professional dentist can reduce the risk of the adverse effects of teeth whitening. Code 1975, § 34-9-6; Const. Art. 1,

§ 6.

[Cases that cite this headnote](#)

[12]

**Constitutional Law****🔑 Inquiry Into Legislative Judgment**

In passing on the validity of a statute, it must be remembered that the legislature, except insofar as specifically limited by the state and federal constitutions, is all-powerful in dealing with matters of legislation, and all questions of propriety, wisdom, necessity, utility and expediency in the enactment of laws are exclusively for the legislature, and are matters with which the courts have no concern.

[Cases that cite this headnote](#)**Opinion**

MAIN, Justice.

\*1 Keith Westphal and Joyce Osborn Wilson filed this lawsuit against 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 Kay Alexander, RDH, in their official capacities as members of the Alabama Board of Dental Examiners (hereinafter referred to collectively as “the Dental Board”). Westphal and Wilson sought a judgment declaring unconstitutional the portion of the Alabama Dental Practice Act, § 34–9–1 et seq., Ala.Code 1975, that makes it unlawful for anyone other than a duly licensed dentist to perform teeth-whitening services and sought a permanent injunction forbidding future enforcement of the prohibition in the Act on teeth-whitening services performed by non-dentists. The parties submitted cross-motions for a summary judgment, and the Jefferson Circuit Court entered a summary judgment in favor of the Dental Board and against Westphal and Wilson. Westphal and Wilson appeal. We affirm.

**I. Facts and Procedural History**

Teeth bleaching, commonly known as “teeth whitening,” is a procedure that temporarily lightens the color of a person’s teeth by application of a peroxide-based solution. Traditionally, consumers had the option of “professional grade” teeth-whitening services provided by licensed dentists or “consumer grade” over-the-counter teeth-whitening products sold at local pharmacies. Non-dentist entrepreneurs have also entered the teeth-whitening market, offering teeth-whitening services in salons, spas, or mall kiosks. Generally, non-dentist teeth-whitening providers assist the customer, either directly or indirectly, in applying the whitening solution and typically use a light source to accelerate the whitening effects.

Although the sale of teeth-whitening products directly to consumers is largely unregulated, the advent of non-dentist teeth-whitening services has met with resistance from some state dental boards, which have argued that teeth-whitening services constitute the practice of dentistry and, as such, should be performed only by licensed dentists. See, e.g., *North Carolina State Bd. of Dental Exam’rs v. Federal Trade Comm’n*, — U.S. —, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015); *Martinez v. Mullen*, 11 F.Supp.3d 149 (D.Conn.2014). In *White Smile USA, Inc. v. Board of Dental Examiners of Alabama*, 36 So.3d 9 (Ala.2009), we were confronted with just such a controversy. In that case we determined that the non-dentist teeth-whitening services at issue there constituted the “practice of dentistry” as that phrase was then defined by § 34–9–6, Ala.Code 1975. In 2011 the legislature amended § 34–9–6 to expressly include teeth bleaching or whitening within the practice of dentistry. Thus, Alabama law now prohibits non-dentists from offering teeth-whitening services. The Alabama Board of Dental Examiners is responsible for enforcing Alabama’s Dental Practice Act. § 34–9–40(a). By statute, the Board consists of six dentists and one dental hygienist.

\*2 Westphal and Wilson each desire to operate a teeth-whitening business in Alabama. Neither Westphal nor Wilson, however, is a licensed dentist, and neither has any dental training. Westphal canceled plans to expand his North Carolina-based teeth-whitening business into Alabama when he learned such a business was prohibited by the Dental Practice Act. Wilson stopped offering teeth-whitening services upon receipt of a cease and desist letter from the Dental Board. On April 30, 2013, Westphal and Wilson filed this action against the Dental Board seeking a judgment declaring that the Alabama Dental Practice Act violated various provisions of the Alabama Constitution and also requesting a permanent injunction forbidding enforcement of the Dental Practice

Act to the extent it forbade teeth whitening by anyone other than a dentist. Following completion of discovery, the parties filed cross-motions for a summary judgment on August 8, 2014. In support of their respective motions for a summary judgment, the parties submitted the testimony of Westphal and Wilson as well as reports from their retained experts.

Westphal testified that he has operated Natural White LLC in North Carolina since 2012 and that, if successful in the litigation, he would offer the same services in Alabama that he offers in his North Carolina business. He testified that when customers come to his business they are given an explanation of the products Natural White sells and of the process of teeth whitening. Natural White's services involve the use of a whitening-pen applicator manufactured by BeamingWhite TM. The pen uses a 16% hydrogen-peroxide solution. Natural White uses a "BeamingWhite Teeth Whitening Guide" to instruct its employees in the use of BeamingWhite products. The guide warns that "16% hydrogen [peroxide] is a very strong gel and therefore is **NOT suitable for home use**, where customers will use it without your supervision and may hurt themselves." (Bold typeface and capitalization in original.) The guide further warns that teeth whitening should not be performed on pregnant women or on people who have poor tooth enamel or [decalcification](#), who have periodontal disease, [gingivitis](#), or gums in poor condition, who wear braces, who recently had oral surgery, who have decaying teeth, exposed roots, or open cavities, or who have a history of allergies to peroxide products.

Westphal testified that customers are asked to review and to sign a general customer-information form affirming that they do not have any condition that would contraindicate whitening. Westphal stated that he does not take a medical history or ask his customers about any allergies they might have. Customers are told that not all causes of tooth discoloration will respond to peroxide-based whitening and that they should whiten their teeth only if they have healthy teeth, but Natural White employees never attempt to diagnose the underlying cause of any tooth discoloration or to determine whether a customer's teeth are actually healthy. Westphal testified that, based on the manufacturer's recommendation, Natural White does not offer teeth-whitening services to minors under the age of 14 or to women who indicate that they are pregnant.

\*3 According to Westphal, after the customer has reviewed the information form and consented to the whitening process, he or she sits down in a reclining chair. A Natural White employee puts on disposable

gloves and opens a prepackaged whitening kit. Each kit contains a single-use lip-and-cheek retractor and a 16% hydrogen-peroxide teeth-whitening pen. The customer is instructed on how to put the retractor in place. Natural White employees tell each customer that gum sensitivity sometimes occurs when whitening teeth and offer them the option of self-applying a single-use [Vitamin E](#) stick to their gums before applying the teeth-whitening gel.

When the customer is ready to begin the whitening process, a Natural White employee opens the disposable whitening pen. Westphal testified that in his North Carolina business he uses the whitening pen to apply the whitening gel directly to the customer's teeth approximately 60–80% of the time; the remainder of the time the customer applies it. He testified, however, that he does not intend to apply the gel to customers in Alabama. Rather, customers in Alabama will be instructed to apply the whitening gel to their own teeth. After the gel is applied, the customer is given a pair of tinted glasses and a Natural White employee positions a low-powered LED light in front of his or her mouth. The employee then turns the light on and sets the timer for 15 minutes.

Once the whitening session is complete, a Natural White employee slides the light away, and the customer removes the lip-and-cheek retractor. The customer is given a small cup of water to rinse his or her mouth, and the cup, along with the retractor, is discarded. The customer looks at the mirror to check the results. If the customer chooses to further whiten his or her teeth, Natural White offers up to two additional 15–minute sessions. Westphal testified that, after each customer, a Natural White employee cleans the tinted glasses, the LED light, and the reclining chair with an ammonia-based cleaner. Further, the gloves worn by the Natural White employee are discarded after each use.

Wilson previously operated a teeth-whitening business in Alabama. Wilson began offering teeth-whitening services to customers at her cosmetology salon. In 2006, Wilson sold her salon and formed BEKS Inc., d/b/a BriteWhite Whitening Systems ("BriteWhite"), a company that sells peroxide-based teeth-whitening products and equipment. The BriteWhite whitening system is an LED-based teeth-whitening system that BriteWhite designed and produces. The device consists of a base housing its internal components and an extension that plugs into the base and is fitted with a mouthpiece containing small, integrated LED lights. To market BriteWhite and its products, Wilson traveled to salons and spas to perform teeth-whitening services and to demonstrate use of the system.

In performing teeth-whitening services, Wilson first had customers review and sign a general information form. Wilson never examined the customer's mouth to determine if there was some medical reason not to perform the whitening procedure. Nor did she ever attempt to diagnose the underlying cause of any tooth discoloration or to determine whether a customer's teeth were actually healthy. The customer was instructed to sit in a reclining chair. Wilson or her employee put on single-use disposable gloves and would wrap a single-use plastic barrier sleeve over the mouthpiece of the BriteWhite unit. The whitening gel used by BriteWhite was a 35% carbamide-peroxide teeth-whitening gel, which contained the equivalent of 12% hydrogen peroxide. Wilson testified that she discovered that the most effective method of applying the gel was to have the customer apply it directly to his or her own teeth using a single-use applicator brush and then to insert the mouthpiece. Once the mouthpiece was inserted, the blue LED lights built into the mouthpiece were turned on for a 20-minute cycle. After the session was complete, the customer would remove the mouthpiece and discard the used barrier sleeve. The customer would then rinse his or her mouth with a small cup of water, and the cup was also discarded. Wilson or her employee would use a disinfecting cleaner to clean the equipment and the reclining chair after each session.

\*4 In support of their motion for summary judgment, Westphal and Wilson submitted a report from their expert, Dr. Martin Giniger, a licensed dentist with a Ph.D. in Biomedical Science and extensive experience in the field of peroxide-based teeth whitening. Giniger stated that peroxide-based teeth whitening is generally regarded as safe and effective and that any potential side effects are mild and temporary. Giniger stated that about 50% of people experience temporary [sensitivity of the teeth](#) or minor soft-tissue irritation following teeth whitening. He stated that that sensitivity is believed to be the result of dehydration of the teeth and tissues caused by the bleaching gels when held against the teeth but that those effects are typically mild and invariably transient. He stated that there are no reports that people who undergo non-dentist-provided teeth-bleaching experience a greater or more severe incidence of sensitivity than do those who undergo bleaching provided by dentists or by self-application of over-the-counter products. Furthermore, although Giniger noted that higher concentrations of carbamide peroxide may cause soft-tissue irritation, he stated that reported literature finds that all soft-tissue irritation abates within days of teeth bleaching and that no study has shown adverse long-term effects of teeth whitening on oral soft tissue.

Giniger also noted that hydrogen peroxide and carbamide peroxide have been found to result in minor reversible enamel-surface changes. He states, however, that studies have shown that such changes are “no different from those that occur after drinking a glass of orange juice, and [that] any [decalcification](#) is quickly reversed when teeth are exposed to saliva.” Giniger further stated that there was little evidence of any possible systemic side effects from the use of hydrogen peroxide or carbamide peroxide in teeth whitening. According to Giniger, although studies have shown adverse effects at repeated high exposures, no adverse effects are likely from the small level of hydrogen peroxide used in teeth whitening. Additionally, Giniger testified that other ingredients used in teeth whitening—water, glycerine, Carbopol, sodium hydroxide, sodium acid pyrophosphate, sodium saccharin, flavorings—are also considered safe even if accidentally ingested. Giniger also stated that the LED light systems used for teeth whitening are low-powered, comparable to a consumer flashlight, and not harmful.

Finally, Giniger stated that the risks of non-dentist teeth whitening are the same as those of unregulated teeth-whitening products sold directly to consumers for home use. Certainly, he testified, those risks are much less than the risks associated with tongue piercing, which requires no oversight by a licensed dentist.

The Dental Board submitted expert testimony of Dr. Kenneth Tilashalski, a licensed dentist and a professor at the University of Alabama at Birmingham School of Dentistry. Tilashalski stated that it is recognized in the dental profession that certain preexisting conditions could render a whitening procedure ineffective or even harmful to an individual's oral health. He stated that many oral conditions preclude the use of bleaching agents. He stated that, in determining whether a teeth-whitening treatment is appropriate for a consumer, the practitioner should consider the consumer's [tooth-decay](#) history, [tooth sensitivity](#), oral [mucosal disorders](#), existence of restorations and/or prostheses, and any underlying reason(s) for tooth discoloration. Tilashalski notes that non-dentist practitioners lack the educational foundation in oral health care, anatomy, and physiology to make an informed decision on whether teeth whitening is appropriate for a particular customer.

\*5 Next, Tilashalski stated that teeth-whitening procedures present the potential for sanitation and infection risks. Tilashalski stated that, in any setting involving mucosal membranes, any number of pathogens, microbes, viral particles, and/or bacteria that are subject to contact, droplet, or airborne transmission may be present. He contended that the lack of formal health-care

training by non-dentist teeth-whitening practitioners may lead to poor practices regarding sanitation, causing adverse consequences to both customers and employees.

Tilashalski further contended that the “specialized support and advice” offered by non-dentist teeth-whitening practitioners provides an illusion of professional expertise and supervision without the benefits of a trained dentist. Tilashalski opined that customers who visit non-dentist teeth-whitening practitioners might be less likely to visit a dentist because of a faulty belief that they are periodically being seen by a professional who would notify them of any oral problems requiring treatment.

Tilashalski also noted the variety of products and procedures used by non-dentist practitioners in the teeth-whitening business. Practitioners use a variety of chemical compounds of varying strengths and composition. There are different methods for applying the chemicals to the teeth, and variations exist in the duration and frequency of treatments. According to Tilashalski, the significant variations among the products and procedures used in non-dentist teeth whitening create uncertainty and risk that a product may be used, or used in a way, that is harmful to the consumer.

Finally, Tilashalski noted that numerous studies have demonstrated adverse effects of bleaching compounds on dental restorations, including increased surface roughness, marginal breakdown, decreases in tooth-to-restoration-bonds strength, and the release of metallic ions and possibly increased [exposure to mercury](#).

The Dental Board also presented the testimony of Dr. Michael Maniscalco, a dentist who has practiced in Birmingham since 1981. Maniscalco has performed peroxide-based teeth whitening since 1983. He testified that he always conducts a pre-treatment examination in order to confirm that a patient does not have health problems or injuries that would make teeth whitening inappropriate. He testified that he has personally witnessed peroxide [burns of the lips](#) and gums and cases of extreme sensitivity to the whitening agents.

It is undisputed that teeth-whitening services performed by non-dentists are usually cheaper than teeth-whitening services performed by dentists. Two members of the Board of Dental Examiners, Northcutt and Willis, both charge as much as \$600 for teeth-whitening services. Maniscalco charges between \$450 and \$650 for in-office teeth whitening. Westphal, on the other hand, charges between \$79 and \$129. The Board of Dental Examiners has never received a complaint that any person was harmed by any teeth-whitening procedure performed in

Alabama.

\*6 The Jefferson Circuit Court conducted a hearing on the cross-motions for a summary judgment on September 4, 2014. On October 3, 2014, the circuit court entered an order granting the Dental Board’s motion for a summary judgment and denying Westphal and Wilson’s motion for a summary judgment and entered a judgment in favor of the Dental Board and against Westphal and Wilson on all claims. The circuit court concluded that, given the undisputed facts, the restriction in the Dental Practice Act providing that teeth whitening can be performed only by dentists does not violate the Alabama Constitution. Westphal and Wilson appealed.

## II. Standard of Review

[1] “The standard of review applicable to a summary judgment is the same as the standard for granting the motion...” *McClendon v. Mountain Top Indoor Flea Market, Inc.*, 601 So.2d 957, 958 (Ala.1992). A summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Rule 56, Ala. R. Civ. P.* Westphal and Wilson do not argue that there is any genuine issue of material fact that precludes a summary judgment in this case; they argue that, under the undisputed facts, the Dental Board is not entitled to a judgment as a matter of law and that, therefore, the summary judgment is improper.

[2] [3] [4] [5] “This case concerns a constitutional challenge to Alabama’s statutory prohibition of teeth-whitening services as performed by non-dentists. “This Court’s review of constitutional challenges to legislative enactments is de novo.” *Northington v. Alabama Dep’t of Conservation & Natural Res.*, 33 So.3d 560, 564 (Ala.2009).<sup>1</sup>

“ [A]cts of the legislature are presumed constitutional. *State v. Alabama Mun. Ins. Corp.*, 730 So.2d 107, 110 (Ala.1998). See also *Dobbs v. Shelby County Econ. & Indus. Dev. Auth.*, 749 So.2d 425, 428 (Ala.1999) (“In reviewing the constitutionality of a legislative act, this Court will sustain the act ‘ unless it is clear beyond reasonable doubt that it is violative of the fundamental law.’ ” *White v. Reynolds Metals Co.*, 558 So.2d 373, 383 (Ala.1989) (quoting *Alabama State Fed’n of Labor v. McAdory*, 246 Ala. 1, 9, 18 So.2d 810, 815 (1944))). We approach the question of the constitutionality of a legislative act “ ‘ with every presumption and intendment in favor of its validity, and seek to sustain

rather than strike down the enactment of a coordinate branch of government.” ’ ’ *Monroe v. Harco, Inc.*, 762 So.2d 828, 831 (Ala.2000) (quoting *Moore v. Mobile Infirmary Ass’n*, 592 So.2d 156, 159 (Ala.1991), quoting in turn *McAdory*, 246 Ala. at 9, 18 So.2d at 815).

“ ‘Moreover, in order to overcome the presumption of constitutionality, ... the party asserting the unconstitutionality of the Act ... bears the burden “to show that [the Act] is not constitutional.” *Board of Trustees of Employees’ Retirement Sys. of Montgomery v. Talley*, 291 Ala. 307, 310, 280 So.2d 553, 556 (1973). See also *Thorn v. Jefferson County*, 375 So.2d 780, 787 (Ala.1979) ( “It is the law, of course, that a party attacking a statute has the burden of overcoming the presumption of constitutionality....”).’

\*7 “*State ex rel. King v. Morton*, 955 So.2d 1012, 1017 (Ala.2006).”

*State v. Lupo*, 984 So.2d 395, 397–98 (Ala.2007).

### III. Analysis

<sup>[6]</sup> In *White Smile*, decided before the amendment to the Dental Practice Act that is the subject of this appeal, this Court was presented with the question whether the Dental Practice Act prohibited a teeth-whitening business similar to those sought to be operated by Westphal and Wilson. We summarized the issue as follows:

“Article 34, Chapter 9, Ala.Code 1975, regulates the practice of dentistry in Alabama. Section 34–9–3 requires the licensing of dentists, and § 34–9–43 grants the Board the authority to regulate the professional activities of dentists in Alabama. Section 34–9–6 defines the practice of dentistry, stating:

“ ‘Any person shall be deemed to be practicing dentistry who performs, 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 to any person on his behalf, or to any agency which is a proprietor of a place where dental operations or dental services are performed....’

“(Emphasis added.) Section 34–9–6 then lists 10[, now 12,] other activities that constitute the practice of dentistry under Chapter 9. The ultimate issue in this action is whether the sale of LightWhite with in-store

application ... is the practice of dentistry within the meaning of § 34–9–6.”

36 So.3d at 13. Under similar, but not identical, facts to those currently before us, we concluded in *White Smile* that the teeth-whitening service at issue there constituted the “practice of dentistry” as that term was then defined by § 34–9–6. In 2011, the legislature amended § 34–9–6, removing any further doubt as to whether teeth-whitening services were included within the practice of dentistry. Section 34–9–6 now reads, in part:

“Any person shall be deemed to be practicing dentistry who does any of the following:

“....

“(12) Professes 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.”

Thus, unlike the question before the Court in *White Smile*, the question before us is not whether non-dentist teeth whitening falls within the practice of dentistry—it clearly does under § 34–9–6(12). Rather, the question is whether, by extending dentistry’s occupational-licensing regime to include teeth-whitening services such as those sought to be offered by Westphal and Wilson, the legislature has violated Westphal’s and Wilson’s due-process rights under the Alabama Constitution.

Westphal and Wilson contend that the professional-licensing requirement that prohibits the operation of their teeth-whitening businesses violates the due-process guarantees of Art. I, §§ 6 and 13, *Alabama Constitution of 1901*.<sup>2</sup> Specifically, they contend that the statute that prohibits non-dentists from performing teeth-whitening services is an unreasonable and arbitrary exercise of the police power.

\*8 <sup>[7]</sup> <sup>[8]</sup> <sup>[9]</sup> This Court has long held that “[t]he power of a reasonable regulation of the professions or occupations where the services [are] to be rendered to the public is justified under the police power of government.” *State ex rel. Bond v. State Bd. of Med Exam’rs*, 209 Ala. 9, 10, 95 So. 295, 296 (1923). Nevertheless, “[i]n the exercise of this power, the prohibition or test contained in the statute, ordinance, or rule should be enacted, ordained, or adopted with reference to the object to be attained and as not unduly to interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations or professions.” *Id.* This Court has held that



the right to due process under the Alabama Constitution is violated when a statute, regulation, or ordinance imposes unnecessary and unreasonable restraints upon the pursuit of useful activities. In addressing whether a statute, regulation, or ordinance is unreasonable, this Court applies the doctrine of overbreadth.

“The doctrine of overbreadth recognizes that a state legislature may have a legitimate and substantial interest in regulating particular behavior, but “that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960) [quoting *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967)]. Historically, the overbreadth doctrine has been used by the federal courts to prevent a chilling effect on First Amendment freedoms.... However, the overbreadth doctrine under the Alabama Constitution has been applied in due process cases not involving First Amendment freedoms. See *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So.2d 82 (Ala.1983).’

“[*Friday v. Ethanol Corp.*,] 539 So.2d [208] at 215 [ (Ala.1988) ]. In *Ross Neely Express, Inc. v. Alabama Department of Environmental Management*, 437 So.2d 82 (Ala.1983), this Court stated:

“Statutes and regulations are void for overbreadth if their object is achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms....’

“437 So.2d at 85.

“This Court has also recognized that the right to due process under the Alabama Constitution is violated when a statute, regulation, or ordinance imposes restrictions that are unnecessary and unreasonable upon the pursuit of useful activities in that they do not bear some substantial relation to the public health, safety, or morals, or to the general welfare, the public convenience, or to the general prosperity.’

“*Friday v. Ethanol Corp.*, 539 So.2d at 216 (citing *Ross Neely Express, Inc.*, 437 So.2d at 84–86; *City of Russellville v. Vulcan Materials Co.*, 382 So.2d 525, 527–28 (Ala.1980); *Leary v. Adams*, 226 Ala. 472, 474, 147 So. 391 (1933); *Baldwin County Bd. of Health v. Baldwin County Elec. Membership Corp.*, 355 So.2d 708 (Ala.1978)).

\*9 “ ‘ “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary.” ’ *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (quoting *Berman v. Parker*, 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27 (1954)). If an ordinance is ‘ “fairly debatable, a court will not substitute its judgment for that of the municipal government body acting in a legislative capacity.” ’ *City of Russellville v. Vulcan Materials Co.*, 382 So.2d at 526 (quoting *City of Birmingham v. Norris*, 374 So.2d 854, 856 (Ala.1979))....’

*Scott & Scott, Inc. v. City of Mountain Brook*, 844 So.2d 577, 594–95 (Ala.2002). Further, this Court has explained:

“The validity of a police power regulation ... primarily depends on whether under all the existing circumstances, the regulation is reasonable, and whether it is really designed to accomplish a purpose properly falling within the scope of the police power. *Crabtree v. City of Birmingham*, 292 Ala. 684, 299 So.2d 282 (1974).... Otherwise expressed, the police power may not be employed to prevent evils of a remote or highly problematical character. Nor may its exercise be justified when the restraint imposed upon the exercise of a private right is disproportionate to the amount of evil that will be corrected. *Bolin v. State*, 266 Ala. 256, 96 So.2d 582, conformed to in 39 Ala.App. 161, 96 So.2d 592 (1957).’

“Statutes and regulations are void for overbreadth if their object is achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *Zwickler v. Koota*, 389 U.S. 241 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967).”

*Ross Neely Express, Inc. v. Alabama Dep’t of Envtl. Mgmt.*, 437 So.2d 82, 84–85 (Ala.1983) (quoting *City of Russellville v. Vulcan Materials Co.*, 382 So.2d 525, 527 (Ala.1980)).

In *State v. Lupo*, supra, this Court held that the Alabama Interior Design Consumer Protection Act, which required professional licensing of all persons performing the “practice of interior design,” was unconstitutional. The legislative act at issue in *Lupo* broadly defined the practice of interior design to include such things as selecting paint colors and pillows for a sofa. Applying the doctrine of overbreadth to the facts of that case, we concluded that “the Act ‘ “impose[d] restrictions that

[were] unnecessary and unreasonable upon the pursuit of useful activities” ’ and that those restrictions ‘ [did] not bear some substantial relation to the public health, safety, or morals, or to the general welfare, the public convenience, or to the general prosperity.” ’ ’ 984 So.2d at 406 (quoting *Scott & Scott*, 844 So.2d at 594, quoting in turn *Friday v. Ethanol Corp.*, 539 So.2d 208, 216 (Ala.1988)). Consequently, we held that the Interior Design Consumer Protection Act violated the due-process protections of the Alabama Constitution.

**\*10** <sup>[10]</sup> In this case, there can be no dispute that the practice of dentistry, generally speaking, relates to the public health and is, therefore, a legitimate subject of the State’s police power.<sup>3</sup> Moreover, teeth whitening is unquestionably a dental treatment. In *White Smile* we held that teeth-whitening services similar to those at issue here were “dental services.” 36 So.3d at 14 (“The commonly accepted definition of ‘dental service’ is ... a helpful act or useful labor of or relating to the teeth.”). Indeed, the record shows that peroxide-based teeth bleaching was initially developed and performed by dentists. Teeth-whitening services, then, fall naturally within the sphere of dentistry.<sup>4</sup> The legislature, moreover, has expressly provided that teeth whitening falls within the “practice of dentistry,” and a presumption of constitutionality attaches to this legislative pronouncement. See, e.g., *State ex rel. King v. Morton*, 955 So.2d 1012, 1017 (Ala.2006).

<sup>[11]</sup> In light of this presumption, we cannot say that the inclusion of teeth-whitening services, like those offered by Westphal and Wilson, within the definition of the practice of dentistry in the Dental Practice Act is not reasonably related to public health, safety, or general welfare. Teeth whitening is a form of dental treatment that requires the application of a chemical bleaching agent directly to the customer’s teeth. The evidence in the record indicates that the procedure is relatively safe but that it is not without potential adverse effects. There is evidence indicating that some people have suffered peroxide burns of the lips and gums as a result of exposure to bleaching compounds; others experience, albeit temporarily, mild to moderate tooth sensitivity or irritation of the soft tissue in the mouth.

The materials before us indicate that teeth whitening is inappropriate for people with particular dental conditions, conditions a layman may not be able to recognize or diagnose. Moreover, teeth-whitening compounds may damage dental restorations or prostheses; alternatively, they may have no effect on restorations, resulting in color mismatching of teeth. Teeth whitening may not be effective as to some types of discoloration. Furthermore,

tooth discoloration may be caused by an underlying condition or disease, which a non-dentist likely would not detect. In such cases, teeth whitening might serve to mask an underlying condition and delay necessary treatment. Therefore, it is not unreasonable to conclude that pretreatment examination and subsequent assessment of each teeth-whitening consumer’s situation by a professional dentist could reduce the risk of the adverse effects of teeth whitening, could help consumers avoid ineffective or unnecessary treatments, and could diagnose and treat underlying conditions. Finally, teeth-whitening services involve contact with the mucosal membranes of the mouth, which raises concerns of sanitation and infection—areas in which dentists receive specialized education and training.

**\*11** These concerns and others do not appear trivial. Given the deferential standard of review in a statutory challenge, we cannot say that provision that includes teeth-whitening services within the scope of the practice of dentistry, thus limiting the performance of those services to licensed dentists, violates the due-process protections of the Alabama Constitution.

<sup>[12]</sup> Finally, we note that Westphal and Wilson also raise a number of public-policy arguments in support of their contention that non-dentists should be permitted to offer teeth-whitening services. For example, they argue that limiting teeth-whitening services to licensed dentists, who typically charge more than non-dentists for the services, increases the cost of teeth whitening for consumers. They argue that the primary effect of the prohibition on non-dentist teeth whitening is economic protectionism in favor of dentists. They also note that other activities unregulated by the Board of Dental Examiners, like oral piercing, pose a vastly greater threat to public health and safety than does teeth whitening. Whatever the merits of these arguments,

“[i]n passing on the validity of a statute it must be remembered that the legislature, except insofar as specifically limited by the state and federal constitutions, is all-powerful in dealing with matters of legislation; ... [and] that all questions of propriety, wisdom, necessity, utility and expediency in the enactment of laws are exclusively for the legislature, and are matters with which the courts have no concern.”

*Surtees v. VFJ Ventures, Inc.*, 8 So.3d 950, 983

(Ala.Civ.App.2008) (quoting *Jansen v. State ex rel. Downing*, 273 Ala. 166, 168, 137 So.2d 47, 48 (1962)).

#### IV. Conclusion

For the foregoing reasons, we hold that the requirement in the Dental Practice Act that teeth-whitening services be performed by licensed dentists does not violate the due-process protections of the Alabama Constitution of 1901. Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

#### Footnotes

- 1 The principle quoted from *Northington* expresses the general principle that this Court considers de novo pure questions of law and the application of law to settled facts. *Smith's Sports Cycles, Inc. v. American Suzuki Motor Corp.*, 82 So.3d 682, 684 (Ala.2011).
- 2 Westphal and Wilson also assert that the prohibition of non-dentist teeth-whitening services violates the equal-protection guarantees they contend are contained in §§ 1, 6, and 22, *Alabama Constitution of 1901*. As to the issue whether the Dental Practice Act violates §§ 1, 6, and 22, either separately or collectively, it was incumbent on Westphal and Wilson to make specific arguments regarding how the Act violated those sections. Westphal and Wilson, however, make only one specific reference to §§ 1, 6, and 22 in the introductory portion of their brief and make no specific arguments concerning the purported equal protection conferred by these provisions or how it has been violated—failing even to quote any portion of the constitutional provisions. Moreover, their arguments appear to rely chiefly on the overbreadth doctrine, which we have held falls within the due-process protections of the Alabama Constitution. Given the lack of contextual analysis to support their “equal protection” argument, we decline to address it. See *White Sands Grp., L.L.C. v. PRS II, LLC*, 998 So.2d 1042, 1058 (Ala.2008). Westphal and Wilson do not assert any violation of the Equal Protection Clause of the United States Constitution.
- 3 [Section 34–9–2, Ala.Code 1975](#), provides, in part:

“The Legislature hereby declares that the practice of dentistry and the practice of dental hygiene affect the public health, safety, and welfare and should be subject to regulation. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry and only qualified dental hygienists be permitted to practice dental hygiene in the State of Alabama. All provisions of this chapter relating to the practice of dentistry and dental hygiene shall be liberally construed to carry out these objects and purposes.”
- 4 We express reluctance to opening the door for judicial determinations as to what particular procedures or services within an accepted field of professional practice might be safely carved out for performance by laymen.

MOORE, C.J., and STUART, BOLIN, MURDOCK, WISE, and BRYAN, JJ., concur.

PARKER and SHAW, JJ., concur in the result.

#### All Citations

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