IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTINA COLLINS, Plaintiff, v. TANJA D. BATTLE, in her official capacity as Executive Director of the Georgia Board of Dentistry, et al., Defendants.	:	CIVIL ACTION NO. 1:14-CV-03824-LMM

ORDER

This matter is before the Court on Defendants' Motion to Dismiss [38]. For the reasons explained in this Order, Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART.**

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Christina Collins brings this action for declaratory and injunctive relief against the Executive Director and Members of the Georgia Board of Dentistry ("Dental Board") and the Attorney General of Georgia in their official capacities. Plaintiff seeks a declaratory judgment that the application of Georgia's Dental Practice Act, O.C.G.A. §§ 43-11-1, 41-11-17 and the Georgia Board of Dentistry Regulations, Ga. Comp. R. & Regs. § 150-14-.01 *et seq*., which purport

to prohibit non-dentists from providing teeth-whitening services like those provided by Plaintiff, violate the Equal Protection, Due Process, and Privileges or Immunities Clauses of the Fourteenth Amendment to the U.S. Constitution. Plaintiff seeks a permanent injunction prohibiting future enforcement of the statutes and rules against her and other persons providing similar teeth-whitening services. The following facts are taken from the Plaintiff's Complaint and are assumed to be true only for the purpose of deciding Defendants' Motion to Dismiss.

A. Teeth Whitening

Teeth whitening is a popular cosmetic practice in which the appearance of stains or discolorations on the tooth enamel are reduced through the use of a whitening agent, typically hydrogen peroxide or the related chemical carbamide peroxide, which breaks down into hydrogen peroxide. Complaint, Dkt. No. [1] at 5. Teeth-whitening products are widely available for over-the-counter purchase in varying concentrations from supermarkets, drug stores, and on the internet. *Id.*

Because teeth-whitening products are regulated by the U.S. Food and Drug Administration as "cosmetics," no prescription is required for their purchase. *Id.* Anyone may legally purchase teeth-whitening products in any commercially available concentration and apply them to their own teeth with no supervision or instruction. *Id.* Entrepreneurs have begun offering teeth-whitening services in shopping malls, spas, and salons. *Id.*

B. Plaintiff's Business

Plaintiff is the owner and operator of Mobile Whites, a sole proprietorship. *Id.* at 3. Before she closed her business in August 2014, she operated from a salon in Savannah, Georgia. *Id.*

Plaintiff's services consisted of (1) selling customers disposable teeth-whitening products, including disposable teeth-whitening brush pens; (2) instructing customers how to use these products on their own teeth; (3) providing customers with a chair to sit in while they applied the product; and (4) providing and positioning an LED enhancing light in front of customers' mouths. *Id.* at 6. Plaintiff does not make diagnoses and does not place anything in her customers' mouths. *Id.*

C. Dental Practice Act

1. Unlawful Practice of Dentistry

Under Georgia's Dental Practice Act, any person who engages in any activity considered to be the practice of dentistry "without obtaining a license to practice from the board shall be guilty of a felony" and subject to fines and imprisonment. O.C.G.A. § 43-11-50. The unlawful practice of dentistry is punishable by imprisonment of two to five years, a fine of not less than $500, or both. *Id.* The Dental Practice Act defines acts what constitutes the practice of dentistry to include the supplying or fitting "directly for or to an ultimate user of the product in the State of Georgia, any appliance, cap, covering, prosthesis, or

cosmetic covering, as defined by rules and regulations established by the board . . . ." *Id*. § 43-11-17(a)(6).

2. Application to Teeth Whitening

According to rules and regulations promulgated by the Dental Board, an "appliance" includes any "removable structure" used to "chang[e] the appearance of teeth " or "chang[e] the shape and shade of teeth." Ga. Comp. R. & Regs. 150-14-.01. The Dental Board construes this to mean that "altering the shade of teeth, such as is done by current whitening techniques is the practice of dentistry." Dkt. No. [1-1] at 2 (emphasis in original). According to the Dental Board, unless "a business that provides a 'stand alone' teeth whitening enterprise . . . has a Georgia licensed, direct supervision dentist present for the treatment, it is a violation of the Dental Practice Act and the laws of the State of Georgia." *Id*. As a result, "[s]uch facilities that do not have a dentist performing and supervising the services would be charged with the unlicensed practice of dentistry, which is a felony in this state." *Id*.

3. Obtaining a License to Practice Dentistry

To become a licensed dentist in Georgia, one must have a doctoral degree in dentistry and pass an examination approved by the Dental Board. Compl., Dkt. No. [1] at 8; Ga. Comp. R. & Regs. 150-03-.04. A doctoral degree in dentistry is typically a four-year course of study in addition to a four-year undergraduate degree. Compl., Dkt. No [1] at 8.

The Dental Board does not require dentists to have any experience or demonstrated proficiency with teeth-whitening practices as a condition of licensure, nor does it require dental schools to teach teeth-whitening practices as a condition of accepting graduates of those schools for licensure in Georgia. *Id.* at 10. The practical and written examinations accepted by the Dental Board for licensure as a dentist in Georgia do not cover teeth whitening. *Id.*

D. The Dental Board's Investigation of Plaintiff

The Dental Board opened an investigation of Plaintiff and her business to determine whether her teeth-whitening practice violated the Dental Practice Act. *Id.* at 11. In August 2014, Plaintiff received an email and a telephone call from an agent of the Dental Board, Mr. Ryan McNeal, informing her that the Dental Board deemed her business to be the unlawful practice of dentistry. *Id.*

On or about August 15, 2014, Plaintiff voluntarily closed her business and vacated her salon in Savannah because she feared prosecution for the unlawful practice of dentistry. *Id.* Plaintiff intends to remain closed in Georgia to avoid being subject to fines or imprisonment until such time as the law has changed or the Dental Practice Act is judged unconstitutional as applied to teeth-whitening services such as those provided by her. *Id.*

On or about September 15, 2014, Mr. McNeal told Plaintiff that she must sign a "voluntary cease and desist order" to avoid prosecution. *Id.* Mr. McNeal insisted that Plaintiff meet with him in a parking lot outside Savannah. *Id.* at 12. Plaintiff signed the order in Mr. McNeal's presence. *Id.* She asked for a copy of

the order, but Mr. McNeal refused to provide one to her. *Id.* In October 2014, the Dental Board approved the cease-and-desist order. *Id.* Although Plaintiff did not receive a copy of the order, she understands that it prohibits her from operating her business subject to fines of $500 per transaction and other potential civil and criminal punishment for the unlawful practice of dentistry. *Id.*

Plaintiff still has the equipment from her business and would immediately begin reestablishing her business if it were legal for her to do so. *Id.* at 13.

E. Defendants' Motion

Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants move to dismiss Plaintiff's complaint on the following grounds: (1) the Court should abstain under the *Burford* and *Younger* abstention doctrines; (2) neither injunctive nor declaratory relief is available; and (3) the Complaint fails to state a claim upon which relief can be granted.[1] The Court addresses each of Defendants' arguments in turn.[2]

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[1] Since the filing of Defendants' Motion, Plaintiff admits her Privileges or Immunities Claim is foreclosed by current law, and Defendants admit case law does not support their *Rooker Feldman* and *res judicata* arguments. Therefore, the Court will not address these issues and **GRANTS** Defendants' Motion to Dismiss as to Count III, Plaintiff's Privileges or Immunities claim.

[2] Before Plaintiff filed this case, another almost identical case was filed in the Northern District of Georgia, *Eck v. Battle et al.*, 1:14-CV-962-MHS (N.D. Ga. 2014). In *Eck*, the same defendants filed a very similar motion to dismiss on almost identical claims. In denying the majority of defendants' motion to dimiss, Judge Shoob provided a detailed and accurate discussion of the relevant law. Because this Court finds Judge Shoob's order persuasive, much of the legal analysis provided in this order is identical to that of Judge Shoob's order on these same issues.

II. DEFENDANTS' MOTION TO DISMISS

A. Legal Standard

A complaint may be dismissed under a Rule 12(b)(6) motion to dismiss if the facts as pled do not state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63 (2007) (retiring the prior standard from *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), which provided that in reviewing the sufficiency of a complaint, the complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). In *Iqbal*, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require "detailed factual allegations," it does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 556 U.S. at 678.

In *Twombly*, the Supreme Court emphasized that a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." 550 U.S. at 555. Factual allegations in a complaint need not be detailed, but "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . ." *Id.* (citations and emphasis omitted). A complaint is plausible on its face when it provides the factual content

necessary for "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

B. Abstention

Defendants argue that this case satisfies the requirements for abstention under both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and *Younger v. Harris*, 401 U.S. 37 (1971). The Court concludes that neither *Burford* abstention nor *Younger* abstention is appropriate in this case.

1. *Burford* Abstention

The Supreme Court has summarized *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

The Court finds no basis for *Burford* abstention in this case. The Fifth Circuit's decision in *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950 (5th Cir. 1977), is particularly instructive. In that case, the plaintiffs filed suit in federal court challenging the constitutionality of an amendment to the Florida Banking Code that "prohibit[ed] non-Florida bank holding companies from providing

investment advisory services to any person in Florida." *Id.* at 952-53. The Fifth Circuit found *Burford*-type abstention improper, reasoning as follows:

> Although the challenged statutes are part of a large and perhaps complex regulatory scheme i.e., the Florida Banking Code it must be remembered that appellants focus their attack upon a single statute whose possible invalidation could scarcely be expected to disrupt Florida's entire system of banking regulation. In this context we discern no overriding state interest, special state competence, or threat to Florida's administration of its own affairs that would warrant denying appellants access to their chosen federal forum and relegating their various federal claims to the courts of Florida.

Id. at 955 (footnote omitted).

Similarly, in *Rindley v. Gallagher*, 929 F.2d 1552, 1553, 1557 (11th Cir. 1991), the Eleventh Circuit held that *Burford* abstention was improper in a suit brought by a dentist challenging, *inter alia*, the constitutionality of Florida's procedure for issuing dentists letters of guidance without notice and a hearing. The court observed that "[t]he state of Florida's ability to regulate professionals will not be seriously affected if the letter of guidance procedure is declared unconstitutional." *Id.* at 1557. The court further noted that the state had failed to "explain in what manner the regulatory system would be disrupted should it be determined that notice and hearing are constitutionally required before the issuance of letters of guidance." *Id.* The court concluded that "[n]o overriding state interests or special competence or threat to administrative integrity is implicated by [the plaintiff's] requested invalidation or modification of [the statute] that warrants denying him access to federal court." *Id.*

Likewise, in this case, although Georgia's Dental Practice Act may be a large and perhaps complex regulatory scheme, Plaintiff focuses her attack on two statutes and the rule interpreting that statute whose possible invalidation can scarcely be expected to disrupt Georgia's entire system of dental regulation. The state of Georgia's ability to regulate dentists will not be seriously affected if the application of the Dental Practice Act to teeth-whitening services like Plaintiff's is found to be unconstitutional.

Defendants argue that the case at bar is distinguishable from *BT Investment Managers* because *BT Investment Managers* "involved a plain violation of Federal law and resolution of the constitutional questions there would involve no inquiry into the substantive policy areas of the Florida Banking code." Dkt. No. [45] at 8. But Defendants have not explained how *BT Investment Managers* is distinguishable for the proposition it is cited for here—that invalidating two statutes will not disrupt a much larger regulatory scheme.

Defendants claim that this Court's "accept[ance] [of] Plaintiff's invitation to attempt to define or set the parameters for the practice of dentistry in Georgia would have an impermissibly disruptive effect on the State's policy," but offer no evidence or explanation of *how* the regulatory system or the State's policies would be disrupted if it is determined that such teeth-whitening services cannot constitutionally be defined as the practice of dentistry.[3] Dkt. No. [38-1] at 15.

[3] Defendants, in their Reply, do contend that "[e]xercise of jurisdiction in this kind of case would 'transform the district court into a source of appellate review'

Consequently, the Court discerns no overriding state interest, special state competence, or threat to Georgia's administration of its own affairs that would warrant denying plaintiff access to her chosen federal forum.[4]

2. *Younger* Abstention

The prerequisites for *Younger* abstention are (1) an ongoing state judicial proceeding that (2) implicates important state interests and (3) provides an adequate opportunity for raising federal constitutional questions. *See Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). In this case, the parties dispute whether there is an ongoing state proceeding. Defendants argue that the Cease and Desist Order constitutes an ongoing proceeding because it provides that it "remain in effect until such time as [Plaintiff] is properly licensed with the Board, or until further order." Dkt. No. [38-1] at 9; *see also* Dkt. No. [38-2] at 4. Plaintiff, on the other hand, points out that the terms of the Order state it is "the *final* disposition of any proceedings *presently* before the Board." Dkt. No. [41] at 19; *see also* Dkt. No. [38-2] at 4.

The Court concludes that there is no "ongoing" state proceeding. Under Georgia law, although the Cease and Desist Order remains in effect, any action to

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of all Board decisions regarding what constitutes the practice of dentistry . . . ." Dkt. No. [45] at 10. This still does not explain, however, how invalidating this particular statute will disrupt the entire regulatory scheme.

[4] Defendants offer more detailed information about the "available State administrative hearing and judicial review processes," presumably to show that "timely and adequate state-court review is available" as required for *Burford* abstention. Dkt. No. [45] at 4, 6. As this Court finds that this case does not satisfy either prong of *Burford*, however, the Court's conclusions remain unchanged.

enforce the Order would require the institution of "further proceedings before the board. . . ." O.C.G.A. § 43-1-20.1(b). Unless and until such "further proceedings" are instituted, the Cease and Desist Order represents, as it specifically recites, "the *final* disposition of any proceedings *presently* before the Board." Dkt. No. [38-2] at 4 (emphasis added). Although Plaintiff could have obtained state judicial review of the Cease and Desist Order under the Georgia Administrative Procedure Act, O.C.G.A. § 50-13-19(b), she chose not to seek state court review. Therefore, the state proceedings are now at an end.

Even though the state proceedings have ended, the *Younger* doctrine could still apply under certain circumstances. *See Moore v. City of Asheville*, 396 F.3d 385, 395 (4th Cir. 2005) (holding that "the *Younger* doctrine applies to bar federal court reconsideration of state coercive proceedings even when the state proceedings have ended, as long as the federal proceeding casts aspersion on the state proceedings or annuls their results"). In *Moore*, the plaintiff was cited for violating a city noise ordinance and rather than pursuing his rights of state administrative appeal and judicial review, he filed suit in federal court challenging the constitutionality of the ordinance. Even though the state proceedings had apparently ended, the Fourth Circuit held that *Younger* abstention was required because the complaint "seeks to annul the effects of the prior state administrative proceedings to the extent that Moore seeks a declaratory judgment that the City of Asheville unconstitutionally applied its

ordinances to cite him in the past and demands direct and consequential monetary damages from the City for its actions." *Id.* at 396.

Conversely, the *Moore* court recognized that "*Younger* does not bar a *wholly prospective* federal action even if the plaintiff failed to exhaust his state appellate remedies on a prior conviction." *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 711 (1977)) (emphasis in original). "In *Wooley*, the federal plaintiff had been convicted of violating a state statute and had already served his sentence when he brought suit in federal court, seeking a declaratory judgment that the statute under which he had been convicted was unconstitutional and an injunction" against his future prosecution under the statute. *Moore*, 396 F.3d at 396. Even though the plaintiff in *Wooley* had failed to seek review of his convictions in the state courts, the Supreme Court held that *Younger* did not require the federal court to abstain because the plaintiff sought prospective relief against future prosecution and did not seek to "have his record expunged, or to annul any collateral effects" of his convictions. *Wooley*, 430 U.S. at 711.

This case is more similar to *Wooley* than to *Moore*. Like the plaintiff in *Wooley*, Plaintiff in this case is seeking wholly prospective relief against future enforcement of an allegedly unconstitutional interpretation of state law. Unlike the plaintiff in *Moore*, Plaintiff in this case does not seek to annul the effects of the prior state administrative proceedings. Plaintiff neither seeks a declaration that the Board unconstitutionally applied the law to her in the Cease and Desist

Order, nor demands monetary damages from the Board for its actions. Therefore, *Younger* abstention is not appropriate.

C. **Availability of Injunctive and Declaratory Relief**

1. Injunctive Relief is Not Barred by § 1983

42 U.S.C. § 1983 provides in part that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Defendants contend that this provision bars injunctive relief in this suit because Defendants were judicial officers acting in their judicial capacities in the state administrative proceedings at issue. This Court finds injunctive relief is not barred by § 1983, however, because the Defendants are not "judicial officers" within the meaning of the statute.

"The starting point for interpretation of a statute is the language of the statute itself." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). When looking at statutory language, the Eleventh Circuit has stated that "[w]e interpret words that are not defined in a statute 'with their ordinary and plain meaning . . . .'"[5] *U.S. v. Frank*, 599 F.3d 1221, 1234 (11th Cir. 2010) (quoting *U.S. v. Veal*, 153 F.3d 1233, 1245 (11th Cir. 1998)). As Georgia Board of Dentistry

[5] Black's Law Dictionary defines the phrase "judicial officer" as meaning "1. A judge or a magistrate. 2. Any officer of the court, such as a bailiff or court reporter. 3. A person, usu. an attorney, who serves in an appointive capacity at the pleasure of an appointing judge, and whose actions and decisions are reviewed by that judge." *Judicial Officer*, *Black's Law Dictionary* (10th ed. 2014).

members are not judges or officers of the Court, they are not "judicial officers" under the plain meaning of those terms.

Even if the plain meaning of the text is considered unclear, however, legislative history further suggests that Georgia Board of Dentistry members are not judicial officers within the meaning of § 1983. *U.S. v. Pringle*, 350 F.3d 1172, 1180 n.11 (11th Cir. 2003) ("When a statute is vague or ambiguous, other interpretative tools may be used, including an examination of the act's purpose and of its legislative history."). In 1996, Congress passed the Federal Courts Improvement Act of 1996 ("FCIA"), which amended 42 U.S.C. § 1983 to include the provision which concerns injunctive relief against judicial officers that is at issue here. The Senate Report regarding the FCIA is particularly insightful. When discussing the amendment to § 1983 adding the language about judicial officers, it reads "Subsection 311(c)[6] amends 42 U.S.C. 1983 to bar a *Federal judge* from granting injunctive relief against a *State judge* . . . ." S. Rep. No. 104-366, at 37 (1996) (emphasis added). The Report, when discussing another provision of Section 311, Subsection 311(a), makes explicit that the phrase "judicial officers" refers to judges, stating"[s]ubsection 311(a) codifies the general prohibition against holding *judicial officers (justices, judges, and magistrates)* liable for costs . . . ." *Id*. (emphasis added). This statement is only two sentences before the

[6] Section 311 (c) in the report is the addition of the language at issue here: "except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." S. Rep. No. 104-366, at 13 (1996).

quote discussing Subsection 311(c), so it is strong evidence of Congressional intent as to the meaning of "judicial officers." It would be inconsistent to read "judicial officers" as being limited to "justices, judges, and magistrates" in one part of the Senate Report, but construe it as including others, such as members of the Dental Board, two sentences later. The Senate Report seems to indicate Congress only intended "judicial officers" within § 1983 to encompass judges.

The context and history surrounding the adoption of the bill also suggests Dental Board Members were not intended to be considered "judicial officers." When discussing Section 311[7] of the FCIA as a whole, the Report discusses at length the Supreme Court decision *Pulliam v. Allen*, 466 U.S. 522 (1984), which it describes as "br[eaking] with 400 years of common-law tradition and weaken[ing] judicial immunity protections." S. Rep. No. 104-366, at 36 (1996). In *Pulliam*, a Magistrate was enjoined from "imposing bail on persons arrested for nonjailable offenses . . . and . . . incarcerating those persons if they could not meet the bail . . . ." and the Court had to determine whether she was also subject to attorney's fees. 466 U.S. at 522. In answering that question, the Court first concluded that "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Id.* at 541-542.

[7] Section 311 is composed of: (1) the provision in § 1983 generally barring injunctive relief against judicial officers; *see* 42 U.S.C. § 1983; (2) an amendment to 42 U.S.C. § 1988 generally prohibiting costs and attorney's fees against judicial officers when acting in their judicial capacity; *see* 42 U.S.C. § 1988(b); and (3) a general provision relating to judicial liability for costs when judicial officers are acting within their judicial capacity.

In the wake of *Pulliam*, the Report states that, "thousands of Federal cases have been filed against judges and magistrates," and that "[t]he overwhelming majority of these cases lack merit and are ultimately dismissed." S. Rep. No. 104-366, at 37. The FCIA was a response to the rise of such lawsuits against judges—the portion of the report concerning Section 311 concludes by stating, "Section 311 . . . will go far in eliminating frivolous and harassing lawsuits which threaten the independence and objective decision-making essential to the judicial process." *Id.* Further, this section's discussion centers around judges and magistrates. *See also Phillips v. Conrad*, No. 10-40085-FDS, 2011 WL 309677, at *8 (D. Mass. Jan 28. 2011) (stating "[t]he [Senate] Report thus focuses entirely on the effect of the decision and the statute on the judiciary, and makes no reference to quasi-judicial officers.").[8] The subject matter of *Pulliam* itself also suggests that only judges are judicial officers, since their use of the phrase "judicial officers" follows an extensive discussion of judges and their immunity. Taken together, this all suggests Congress intended a narrow definition of "judicial officers" within § 1983.

The Eleventh Circuit has not explicitly addressed the issue of defining "judicial officer" within the meaning of § 1983; most cases from the Eleventh Circuit and its accompanying district courts, however, have applied the provision to judges, supporting the interpretation that "judicial officers" only includes

[8] The District of Massachusetts ultimately concluded, however, that Parole Board Officers were immune from injunctive relief under § 1983, despite their conclusions about the legislative history above.

judges. *See, e.g., Esensoy v. McMillan*, No. 06-12580, 2007 WL 257342, at *1 n.5 (11th Cir. Jan. 31, 2007) (stating that "judicial immunity protects [Alabama Court of Criminal Appeals Justices] . . . from Appellant's request for injunctive relief" under § 1983); *A.N. & D.N ex rel. Norris v. Williams*, No. 8:05-CV-1929-T-27MSS, 2005 WL 3003730, at *4 (M.D. Fla. Nov. 9, 2005) (finding Florida Circuit Court judge "by virtue of the amendment to § 1983 . . . is immune from this action seeking injunctive relief"). *But see Kuhn v. Thompson*, 304 F. Supp. 2d. 1313 (M.D. Al. 2004) (finding that members of Alabama's Court of the Judiciary, which included various judges as well as non-lawyers and members of the state bar, were not subject to injunctive relief when declaratory relief was available in a § 1983 action).

Defendants assert that "[t]he Supreme Court applies a functional approach to immunity law such that quasi judicial immunity is extended to those administrative or executive officials who perform functions that are closely associated with the judicial process" and urge that this approach "should also be applied when applying this statutory limitation on injunctive relief." Dkt. No. [38-1] at 18. Defendants ask the Court to apply common law immunity principles to statutory interpretation, but offer no cases where a court has applied the common law definition of "judicial officers" to the injunctive relief provision of § 1983.

Defendants cite three cases illustrating this functional approach—*Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Hart v. Hodges*, 587 F.3d 1288 (11th

Cir. 2009); and *Evans v. Ga. Peace Officers Standards & Training Council*, No. 1:05-CV-2579-RLV, 2006 U.S. Dist. LEXIS 19415 (N.D. Ga. Mar. 29, 2006). None of these cases offer any reasons why quasi-judicial officers should be considered judicial officers under § 1983. *Cleavinger* was decided before the language at issue in § 1983 was even added and addresses the extension of common law qualified immunity to members of a prison Discipline Committee. *Hart* discusses the applicability of traditional common-law prosecutorial immunity to § 1983 cases, but does not consider the statutory language of § 1983 regarding injunctions at all. Lastly, in *Evans* the court held "that the members and investigators of the [Peace Officer Standards and Training] Council are absolutely immune via quasi-judicial immunity *from damages*," but did not address the issue of injunctive relief as it was not sought by the plaintiff. 2006 U.S. Dist. LEXIS 19415, at *12 n.7, 26. None of these cases address the issue of injunctive relief against judicial officers, or offer compelling reasons why common law immunity principles should inform the meaning of the statutory language at issue. As such, this Court is not persuaded that a common law functional approach should be applied to bar injunctive relief against Dental Board Members, when such an approach is seemingly contrary to both the plain meaning of "judicial officers" and the legislative history behind the phrase.

D. Declaratory Relief is Available to Plaintiff

Defendants also argue that equitable relief is unavailable because Plaintiff had an adequate remedy at law in the form of state judicial review that she failed

to pursue. Specifically, they explain that "[t]he Georgia APA provides for a full evidentiary hearing on contested matters, for judicial review of the Board's decision in such matters in the Superior court, and for final review in the State Court of Appeals or the State Supreme Court." Dkt. No. [38-1] at 8. This route is foreclosed to Plaintiff, however, by virtue of her signing the Voluntary Cease and Desist Order [38-2] which provides, "Respondent freely, knowingly and voluntarily waives the right to a hearing in this matter." Dkt. No. [38-2] at 4.

Defendants rely on cases holding that plaintiffs may not obtain equitable relief in individual capacity suits challenging judicial officers' rulings in prior actions because the plaintiffs had an adequate legal remedy in the form of an appeal from the rulings. *See Bolin v. Story*, 225 F.3d 1234, 1242-43 (11th Cir. 2000); *Simmons v. Edmondson*, No. 1:06-CV-1541-WSD, 2006 U.S. Dist. LEXIS 75127, at *5-*7 (N.D. Ga. Oct. 16, 2006). But this is not an individual capacity suit challenging Defendants' ruling in the prior administrative proceedings. This is an official capacity suit seeking prospective relief against Defendants' future application to Plaintiff's teeth-whitening business of an allegedly unconstitutional interpretation of state law. The fact that Plaintiff had available state judicial remedies in the prior administrative proceedings that she chose not to pursue does not bar her from seeking such relief in this Court. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982) (exhaustion of state administrative remedies is not required as prerequisite to bringing § 1983 action).

E. Viability of Constitutional Claims

Defendants contend that Plaintiff's Complaint fails to state a claim for violation of the Fourteenth Amendment's Equal Protection Clause and Due Process Clause. For the reasons discussed below, the Court concludes that Plaintiff's Complaint adequately alleges both equal protection and due process violations.

1. Equal Protection

"The Equal Protection Clause requires that the government treat similarly situated persons in a similar manner." *Gary v. City of Warner Robins*, 311 F.3d 1334, 1337 (11th Cir. 2002). "When legislation classifies persons in such a way that they receive different treatment under the law, the degree of scrutiny the court applies depends upon the basis for the classification." *Id*. "If a fundamental right or a suspect class is involved, the court reviews the classification under strict scrutiny." *Id*. "If an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims relating to it are judged under the rational basis test; specifically, the ordinance must be rationally related to the achievement of a legitimate government purpose." *Id*. (quoting *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000)). In this case, Plaintiff does not allege that a fundamental right or a suspect class is involved. Therefore, her equal protection claim is subject to the rational basis test.

Defendants contend that Plaintiff fails to state a rational basis equal protection claim because "Plaintiff and her business have not been subjected to

unequal treatment and instead are subject to the same restrictions on the practice of dentistry as apply to all persons in Georgia." Dkt. No. [38-1] at 27. According to Defendants, "the relevant comparison is between trained and licensed dentists, on the one hand, and on the other hand untrained and unlicensed individuals who would hold themselves out to the public as capable of providing and [who] in fact provide dental services." *Id.* at 24. "The State rationally could determine," Defendants argue, "that the public health is best served by requiring that dental services be provided by persons who are trained and licensed to provide such services." *Id.*

In support of this proposition, Defendants urge the Court to take judicial notice of three documents, "the Connecticut Declaratory Ruling, the Iowa position statement, and the EU Commission finding on concentrations of hydrogen peroxide," which they claim "identify several conceivable basis [sic] that would support the Board's regulation." Dkt. No. [38-1] at 26. Defendants also cite two cases that "uphold similar state regulatory action and that identify several [conceivable] basis [sic]" for the Board's restriction—*Martinez v. Mullen*, 11 F. Supp. 3d 149 (D. Conn. 2014), *aff'd* 2003 US. App. LEXIS 12359 (2d Cir. July 17, 2015), and *Westphal v. Northcutt*, No. 01-CV-2013-901678.oo (Ala. Cir. Ct. Oct. 3, 2014), *aff'd*, 2015 WL 3537484 (Ala. June 5, 2015). Dkt. No. [38-1] at 25. Defendants also urge the Court to take judicial notice of statements on Plaintiff's website in evaluating the appropriate comparator for her claim.

Federal Rule of Evidence 201(b) provides that, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). Rule 201(c) provides that "[t]he court . . . must take judicial notice if a party requests it and the court is supplied with the necessary information." The Eleventh Circuit has offered examples of "the kind of things about which courts ordinarily take judicial notice" such as "(1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance, what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958." *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997).

Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001), is particularly insightful about the ways in which a Court may take judicial notice of information. There, the Ninth Circuit found a district court, in granting a motion to dismiss, erred by taking judicial notice of disputed facts, specifically by "incorrectly t[aking] judicial notice of the validity of [the plaintiff's extradition] waiver, which was as yet unproved" instead of the mere "*fact* that a Waiver of Extradition was signed by [the plaintiff] . . . ." *Id*. at 689-90.

Lee also illustrates the interplay between Federal Rule of Evidence 201 and the Court's task in ruling on a motion to dismiss, where "[t]he allegations in the complaint are taken as true and construed in the light most favorable to the plaintiffs." *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir.

2008). In *Lee*, the Ninth Circuit further found that "in concluding that [the plaintiff's] waiver of extradition was valid . . . the district court failed to draw all reasonable inferences from plaintiffs' allegations . . ." relating to the plaintiff's mental illness and disability. 250 F.3d at 690. In other words, taking judicial notice of a disputed fact was also in error because of the court's task on ruling on a motion to dismiss.

Accordingly, the Court may take judicial notice of the existence of the documents Defendants cite. This judicial notice only extends, however, to the fact that these reports exist; it does not extend to the Court taking judicial notice of there *being* any health risks from teeth-whitening. Plaintiff asserts in the complaint that "[t]he risks associated with teeth whitening are minimal, and consist primarily of temporary tooth or gum sensitivity." Compl., Dkt. No. [1] at 6. Therefore taking judicial notice of any risks associated with teeth whitening, beyond the "minimal" risks alleged in the complaint, would not only be in violation of Federal Rule of Evidence 201, as this fact is clearly disputed, but would also go against the Court's mandate to take all facts alleged in the complaint as true, as per the Court's task on a motion to dismiss.

Defendants also highlight how Plaintiff's website: (1) claims "'[w]e are highly trained in Cosmetic Teeth Whitening,' (2) refers to the services provided as 'professional teeth whitening,' and (3) further states that the business uses 'state-of-the-art Blue LED technology' as part of the services." Dkt. No. [38-1] at 22.

The Court may take judicial notice of the fact that these statements exist, but may not consider them so far as they contradict any statement by Plaintiff in the Complaint, or take them as true statements. Accordingly, the Court will analyze Defendants' arguments relating to Plaintiff's equal protection claim without taking judicial notice of the specific facts that Defendants request.

A. Plaintiff is Similarly Situated to Non-Dentists Selling Teeth-Whitening Products for Home Use

Defendants argue that in evaluating Plaintiff's equal protection claim "the relevant comparison is between trained and licensed dentists . . . and . . . untrained and unlicensed individuals who would hold themselves out to the public as capable of providing and in fact provide dental services." Dkt. No. [38-1] at 24. However, Defendants' argument about the appropriate comparator misconstrues Plaintiff's claim. Plaintiff does not contend that the law irrationally discriminates between those who are and those who are not licensed to practice dentistry. Instead, Plaintiff alleges that the law, as interpreted by the Dental Board, irrationally discriminates between two classes of non-dentists: those who sell teeth-whitening products for customers to apply to their own teeth at home, who are not regulated under the Dental Practice Act; and those like Plaintiff, who sell the same teeth-whitening products for customers to apply to their own teeth in a shopping mall or at a salon, who are considered to be engaged in the practice of dentistry. Compl., Dkt. No [1] ¶¶ 67-68.

Defendants argue that Plaintiff is not similarly situated to persons who sell teeth-whitening products for home use because Plaintiff does not merely sell teeth-whitening products but also provides teeth-whitening services. While Plaintiff does describe herself as providing teeth-whitening services in the complaint, the only services Plaintiff provides consist of "selling customers a prepackaged teeth-whitening product; instructing customers on how to apply the product to their own teeth; providing customers with a comfortable chair to sit in while using the product; and providing customers with an enhancing light." Compl., Dkt. No. [1] ¶ 47.

Plaintiff further alleges that "[p]roducts identical to those previously sold by [Plaintiff] are available for purchase in supermarkets, drug stores, and online," that "[i]nstructions for use of those products are . . . either provided with the products themselves or online," and that "[e]nhancing lights identical to those used by [Plaintiff] are available for purchase and home use without a prescription." *Id.* ¶¶ 63-64. These allegations are sufficient to show that Plaintiff and sellers of teeth-whitening products for home use are "*prima facie* identical in all relevant respects." *Campbell v. Rainbow City*, 434 F.3d 1306, 1314 (11th Cir. 2006) (quoting *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)). Both sell the same products, both provide instructions on how to use the products, and customers of both may choose to use an enhancing light. The only difference between the two is where the product is used, which Plaintiff contends is not rationally related to the state's legitimate

interest in protecting public health. The statements from Plaintiff's website do not change this analysis, as the Court may only take notice that such assertions are present, not the truth of such assertions. Accordingly, the Complaint states a viable equal protection claim at this stage of the case.[9]

B. Plaintiff has Sufficiently Pled There is No Rational Basis for the Dental Board's Regulation

Defendants emphasize that for an equal protection claim, Plaintiff has the burden to "'negative every conceivable basis' which might support the Board's restriction . . . ." Dkt. No. [38-1] at 25. Defendants contend that "[b]ecause on its face the complaint shows that there are health risks attendant to the provision of tooth whitening services, the State's regulation is not irrational." Dkt. No. [38-1] at 27. In conjunction with this argument, Defendants urge the Court to take judicial notice of multiple reports finding there are risks associated with teeth-whitening.

As discussed above, the Court may only take judicial notice of the existence of these documents; doing so, however, does not prove that Plaintiff has not pled a viable equal protection claim. Defendants offer the reports to demonstrate there

[9] Defendants cite *White Smile USA, Inc. v. Board of Dental Examiners*, 36 So. 3d 9 (Ala. 2009), as further evidence that the appropriate comparator for Plaintiff is a dentist providing teeth-whitening services. Based on the record before it, however, this Court does not find *White Smile* persuasive. There are clear differences between *White Smile* and the case at bar, such as the teeth-whitening product at issue in *White Smile* was not available for home use. This is a Motion to Dismiss, and as currently pled in the complaint, Plaintiff has plausibly pled that she is treated differently from other non-dentists who sell teeth-whitening products.

is a rational basis for distinguishing between dentists and non-dentists regarding the provision of teeth-whitening services. Here, however, Plaintiff pleads there is an unfair distinction drawn between those who sell the products for application in the consumer's home and those who sell the products for application in a store; Defendants point to nothing about these documents that indicates a rational basis for this distinction. The risks, which the Court must take as minimal in conjunction with Plaintiff's assertion in the Complaint, seemingly are equally present whether someone applies the products in their home or at a store, and Defendants offer no evidence to the contrary.

Defendants also cite two cases that "uphold similar state regulatory action and that identify several [conceivable] basis [sic]" for the Board's restriction—*Martinez v. Mullen*, 11 F. Supp. 3d 149 (D. Conn. 2014), *aff'd* 2015 U.S. App. LEXIS 12359 (2d Cir. July 17, 2015), and *Westphal v. Northcutt*, No. 01-CV-2013-901678.oo (Ala. Cir. Ct. Oct. 3, 2014), *aff'd*, 2015 WL 3537484 (Ala. June 5, 2015). This Court does not find these cases persuasive. First, as Plaintiff points out, "*both* these cases were decided based on a full evidentiary record at summary judgment—not on motions to dismiss." Dkt. No. [41] at 28. This means that these courts reached their decisions based on evidence unavailable to this Court on a Motion to Dismiss.

The court in *Martinez* does evaluate an equal protection claim, but only addresses a regulation prohibiting non-dentists from shining LED lights into another person's mouth, and more significantly, that court determined the

appropriate comparator for their equal protection analysis was a dentist. Defendants also point to the District of Connecticut's consideration of a declaratory ruling by the Connecticut State Dental Commission, but that consideration was mere dicta, and the part of the ruling that the court focuses on again concerns the LED light.

In fact, *Martinez* only addresses the issue of shining an LED light into another person's mouth because "the Connecticut Attorney General, as counsel for the Commission, has agreed that certain teeth-whitening services that might fall within the literal terms of the Ruling do not constitute the practice of dentistry . . . ." such as selling teeth-whitening products and "[p]roviding a client with the instructions that are provided by the manufacturer of the product . . . ." 11 F. Supp. 3d. at 156-157. The court in *Martinez* did find there was a rational basis for "prohibiting all but dentists from shining a light at another person's mouth during teeth whitening" in an attempt to "limit the potential for harm to the teeth or mouth." *Id.* at 167. Positioning an LED light in front of a customer's mouth is only a small component of Plaintiff's business, however, and the Court does not find this persuasive evidence of a rational basis for distinguishing between two groups of non-dentists selling teeth-whitening products.

Nor does *Westphal* change this Court's analysis. Defendants cite *Westphal* as holding that the "commercial whitening of teeth is an activity that involves health and safety concerns that are appropriate for governmental regulation" and as noting a variety of health risks associated with teeth-whitening. Dkt. No. [38-1]

at 25. While the opinion does discuss risks associated with the same 16% concentration of hydrogen peroxide present in some products sold by Plaintiff, the opinion adds nothing as to why this risk provides a rational basis for distinguishing between those who sell teeth-whitening products for home use and those who sell teeth-whitening products for application in a store or salon. Like *Martinez*, this case mostly discusses the risks in comparison to dentist administering the product and does little to address the comparison at issue in this case between two kinds of people who sell teeth-whitening products.

The only relevant information offered by the opinion relating to the distinction between two groups of non-dentists at issue here is that "[c]ommercially available at-home kits do not present the same sanitary and infection concerns as the multiple use BriteWhite mouthpieces and the use of random on-sale cleaning products on other consumer equipment rather than medical–strength disinfectant cleaning products." *Westphal*, Case No. CV 13-901678-EAF; Dkt. No. [38-6] at 12. Plaintiff, however, states in her Complaint that she "sells only disposable teeth-whitening products," mitigating the concerns expressed in *Westphal*. Compl., Dkt. No. [1] at 6. Further, Plaintiff pleads in her Complaint that "[f]or identical, self-administered products, the risks of teeth whitening are the same whether a person applies the product to her own teeth at home, in a salon, or at a shopping mall." *Id*. Construing the facts most favorably to the Plaintiff, this Court finds that even in light of *Westphal*, Plaintiff has adequately pled an equal protection claim.

2. Due Process

The Supreme Court has indicated that "the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment . . . subject to reasonable government regulation." *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999). The line of cases establishing this liberty interest "all deal with a complete prohibition of the right to engage in a calling" and not merely a "brief interruption" in one's ability to pursue an occupation. *Id.* at 292. Plaintiff's complaint sufficiently alleges that the requirement to obtain a license to practice dentistry, which requires years of schooling costing tens of thousands of dollars, effectively prohibits her from engaging in her chosen occupation of teeth whitening. Compl. ¶¶ 25-27, 54.

Plaintiff's substantive due process claim is subject to the same rational basis test as her equal protection claim. *See Gary*, 311 F.3d at 1338 n.10 ("[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim."); *see also Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring) ("Regulations on the entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession.") (quoting *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 239 (1957)). As discussed above, Plaintiff's complaint adequately alleges that requiring those who sell teeth-whitening products for use in a

commercial setting, rather than at a customer's home, to have a license to practice dentistry is not rationally related to any legitimate state purpose. Accordingly, the complaint states a viable substantive due process claim.

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss [38]. Defendants' Motion is **GRANTED** as to Plaintiff's claim under the Privileges or Immunities Clause, and that claim is hereby **DISMISSED**. Defendants' Motion is **DENIED** as to Plaintiff's equal protection and due process claims.

IT IS SO ORDERED this 28th day of July, 2015.

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE