No. 15-507

In the Supreme Court of the United States

SENSATIONAL SMILES, LLC, DBA SMILE BRIGHT,

Petitioner,

v.

JEWEL MULLEN, DR., IN HER OFFICIAL CAPACITY AS COMMISSIONER OF PUBLIC HEALTH, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PUBLIC CHOICE ECONOMICS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The undersigned *amici* are professors and scholars with expertise in the field of public choice theory and regulatory economics. Public choice theory applies the methodology of economics to the subject matter of political science, and in recent decades has been expanded to study the closely related subject areas of law and the legal process. *Amici* have researched, published, and taught in the areas of public choice, industrial organization, and law & economics. *Amici* believe that research in the field of public choice theory will assist this Court in understanding the record in this case and the consequences that would result from accepting pure economic protectionism as a legitimate government interest under the Fourteenth Amendment, as the Second Circuit did below.

Certain of the *amici* have filed briefs explaining the effect of public choice theory in other cases where the

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* state that they timely informed all parties of their intent to file this brief in support of the petition for certiorari. All parties consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. *Amici* note, however, that Petitioner's counsel the Institute for Justice (a public interest organization) has represented certain of *amici* in prior litigation in which public choice theory was relevant, *see, e.g.*, Brief of *Amici Curiae* Scholars of Public Choice Economics In Support of Respondent, *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, No. 13-534 (U.S.); as such, parts of this brief and citations herein may be similar to statements and citations in briefs prepared by Petitioner's counsel in other cases.

theory was relevant. Most recently, *amicus* Professor Todd J. Zywicki, a law professor at George Mason University and an expert in the field of public choice and regulatory economics who served as the Director of the Office of Policy Planning at the Federal Trade Commission from 2003 to 2004, filed an *amicus* brief in the proceedings below in which he explained how public choice economics predicted that dental licensing boards would impose anticompetitive restrictions on teeth whitening, and the structural difficulties in relying on the political process to undo these restrictions. *See* Brief of Professor Zywicki as *Amicus Curiae*, *Sensational Smiles, LLC v. Mullen*, No. 14-1381 (2d Cir. Sept. 19, 2014), ECF No. 46 ("Zywicki 2d Cir. *Amicus* Br.).

The scholars joining this brief include:

- Todd J. Zywicki, George Mason University Foundation Professor of Law at George Mason University School of Law; Executive Director of the Law & Economics Center, Senior Scholar of the Mercatus Center at George Mason University; and Senior Fellow at the F.A. Hayek Program for Advanced Study in Philosophy, Politics and Economics.
- Vernon L. Smith, Nobel Prize winner in Economics, 2002; Professor of Economics and Law, George L. Argyros Endowed Chair in Finance and Economics at Chapman University, Board of Directors and Scholar at the Mercatus Center at George Mason University; Board of Directors at the Political Economy Research Center; President of the International Foundation for Research in Experimental

Economics; and Member of the National Academy of Science.

- Alexander T. Tabarrok, Bartley J. Madden Chair in Economics at the Mercatus Center and Professor of Economics at George Mason University.
- David R. Henderson, Research Fellow at Stanford University's Hoover Institution; and Associate Professor of Economics at the Graduate School of Business and Public Policy, Naval Postgraduate School.
- Daniel B. Klein, Professor of Economics and JIN Chair at the Mercatus Center, George Mason University.
- Daniel J. Smith, Associate Professor of Economics at Troy University; Associate Director, Manuel H. Johnson Center for Political Economy; and Book Review Editor, The Review of Austrian Economics.
- Edward J. Lopez, Professor of Economics and the BB&T Distinguished Professor of Capitalism at Western Carolina University; and Executive Director of The Public Choice Society.
- Randall G. Holcombe, DeVoe Moore Professor of Economics at Florida State University; and Senior Fellow at the James Madison Institute.
- Roger E. Meiners, Goolsby Distinguished Professor of Economics and Law at the University of Texas Arlington; and Senior Fellow at the Property and Environment Research Center in Bozeman, Montana.

- Michael C. Munger, Professor, Political Science Department at Duke University, Economics Department at Duke University, Sanford School of Public Policy at Duke University, and Director of the PPE Program at Duke University.
- Paul H. Rubin, Samuel Candler Dobbs Professor of Economics at Emory University; and Fellow at the Classical Liberal Institute at New York University.
- William F. Shughart II, J. Fish Smith Professor in Public Choice at Utah State University; editor in chief of *Public Choice*; and Research Director and Senior Fellow at The Independent Institute.
- Colleen E. Haight, Associate Professor of Economics at San Jose State University.
- James Huffman, Professor of Law and Dean Emeritus at Lewis and Clark Law School.
- Daniel K. Benjamin, Alumni Distinguished Professor Emeritus at Clemson University and Senior Fellow at the Property and Environment Research Center.

SUMMARY OF THE ARGUMENT

Amici contend that the answer to the first of Petitioner's questions presented—whether pure economic protectionism is a "legitimate government interest"—should be informed by the best available evidence regarding how protectionist regulations[2] arise and their consequences in the real world.

Among economists, there would be virtually no dispute about the proper interpretation of the record in the case below: The sole purpose and effect of the Connecticut State Dental Commission's declaratory ruling (the "Ruling") is to benefit the economic interests of Connecticut dentists by excluding lower-cost competitors from the teeth-whitening marketplace. Indeed, the Ruling is a paradigmatic example of a "rent-seeking" regulation designed to transfer wealth from consumers to a particular interest group.

People typically assume that governmental regulations are "unbiased and conscientious" efforts to advance the "public interest." *See* John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 Antitrust L.J. 1075, 1075 (2005); 1 William F. Shughart II, *Regulation and Antitrust*, *in The Encyclopedia of Public Choice* 263, 263–64 (Charles K. Rowley & Friedrich Schneider eds., 2004); William F. Shughart II & Diana W. Thomas, *Regulatory Rent Seeking*, *in Companion to the Political Economy of Rent Seeking*

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[2] Throughout this brief, *amici* use the term "regulations" in its most general sense to mean government actions or proscriptions of conduct, whether enacted by legislatures in the form of statutes or administrative bodies in the form of regulations, rules, or orders.

169 (Roger G. Congleton & Arye L. Hillman eds., 2015). But among many economists, that assumption is largely regarded as false, as experience has demonstrated that governmental regulations often favor special interest groups to the detriment of the public. The evidence for this conclusion is supplied by "public choice economics," a branch of economics that applies economic theory to study the causes and effects of government actions. Public choice economics has been widely and successfully used to explain and predict the forces that lead to the enactment of anticompetitive regulations, like the Ruling in this case. Public choice economics has been "almost universally accepted" since the mid-1980s as explaining much economic regulation. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 224 n.6 (1986) (citing Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 Am. Econ. Rev. 279 (1984)).

Research from public choice economics has concluded that special interest groups have significant incentives to use the political and regulatory process to further their own financial interests, and that legislators and regulators often have incentives to respond to reward the special interest groups. Thus, special interest groups are expected to mobilize to convince politicians and regulators to implement regulations that benefit the interest groups' members or to block the repeal of these regulations. These problems are particularly acute when self-interested economic actors—such as the licensed dentists in this case—are given the power to influence the rules by

which they are governed. In these situations, public choice theory predicts that they will behave as self-interested private actors and act to benefit their own members, rather than as stewards of the public interest. *Cf. North Carolina State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112 (2015).

A particularly insidious form of regulation favored by special interest groups is one that, in effect, operates to insulate a special interest group from competition—like the Ruling at issue here. Abundant evidence demonstrates that, over the past several decades, interest groups have mobilized to protect themselves from competition by expanding the scope of existing occupational licensing regimes or implementing such regimes in industries where it was previously thought unnecessary. The evidence demonstrates that these exclusionary efforts have been driven overwhelmingly by the special interest groups themselves, rather than by consumer complaints or evidence of consumer harm caused by non-licensed competitors.

These occupational restrictions have resulted in a vast transfer of wealth from consumers to licensed individuals in the form of increased prices for services. The barriers imposed by these restrictions—which often include education, training, and testing requirements—also cause inefficiencies in labor markets by preventing workers who cannot satisfy the licensure requirements from entering jobs that make the best use of their skills. These barriers to entry disproportionately affect lower-skilled and lower-wage workers who often cannot afford the licensure requirements, thus limiting their upward mobility and reinforcing existing wage gaps.

Absent judicial intervention, as the Fifth, Sixth, and Ninth Circuits have done in rejecting blatant economic protectionism as a legitimate government interest, it is often virtually impossible to undo protectionist regulations. These regulations become entrenched. The public that is harmed through the transfer of wealth to special interest groups cannot effectively organize in opposition to these regulations, owing to a number of factors, including that the public is rationally ignorant as to the costs such regulations impose, and that free-rider problems deter individuals from lobbying in opposition. Moreover, the exemption of many regulations from antitrust laws further protects them from scrutiny.

Amici advance no opinion on whether pure economic protectionism is, as a legal matter, a legitimate government interest under the Fourteenth Amendment. *Amici* do, however, respectfully advise the Court that to accept as valid such an interest would effectively enshrine into law regulations that are often just naked transfers of wealth from the public to special interest groups without any mechanism of opposing such laws—either through political or judicial processes. *Amici* therefore agree with Petitioner that "[i]f the Second Circuit's ruling is allowed to stand, one can expect that industry groups will see it as a green light to pursue economic rents at the expense of their competitors and the public." Pet. 26.

ARGUMENT

Public choice economists have generally observed that governmental regulation frequently reflects the dominant influence of politically powerful interest groups, not the interests of voters, consumers, or

would-be competitors. *Amici* describe the basics of public choice economics in Section I and explain how interest groups use government power to further their own economic ends. In Section II, *amici* discuss the negative consequences of these sorts of protectionist activities—most significantly, the proliferation and expansion of regulations designed to insulate special interest groups from competition. And in Section III, *amici* explain why, without judicial intervention, these regulations are likely to become permanently entrenched.

I. PUBLIC CHOICE THEORY PREDICTS THAT SPECIAL INTEREST GROUPS WILL USE THEIR POLITICAL INFLUENCE TO TRANSFER WEALTH FROM THE PUBLIC AT LARGE TO INTEREST GROUPS' MEMBERS

Public choice economics is "the economic study of nonmarket decision making, or simply the application of economics to political science." Dennis C. Mueller, *Public Choice III* 1 (2003). Three of the major figures in the field of public choice have been awarded the Nobel Prize in Economic Science: Kenneth J. Arrow, James M. Buchanan, Jr., and Amartya Sen. Nobelprize.org, The Official Website of the Nobel Prize, *All Prizes in Economic Sciences*, http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/ (last visited Nov. 16, 2015). Among other things, public choice economists have studied causes and effects of governmental regulation. These studies have led to the following conclusion: *governmental regulation frequently fails to reflect the preferences of the majority of voters and instead*

reflects the dominant influence of politically powerful interest groups.

Public choice theory recognizes that politicians and constituents are rational economic actors; that is, constituents compete with one another to demand political favors from the government, and politicians and regulators use the coercive powers of the state to provide such favors in return for continued support. "The interest group most able to translate its demand for a policy preference into political pressure is the one most likely to achieve its desired outcome." James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1100 (2005). Outcomes of the political and regulatory process will therefore not always reflect the preferences of a majority of the voting public, but may instead reflect the comparative advantage of smaller, homogenous special interest groups to organize and exert influence relative to larger, more heterogeneous and diffuse groups such as consumers and the public at large. *See* Richard A. Posner, *Economic Analysis of Law* § 19.3, at 534–36 (6th ed. 2003); Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* 132–67 (2d ed. 1971). In light of special interest groups' "superior efficiency in political organization relative to consumers," it is thus unsurprising that "consumer interests often are subservient to industry interests in the regulatory process." Cooper, *supra*, at 1099-100; Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211, 212 (1976) ("A common, though not universal, conclusion has become that, as between the two main contending interests in regulatory processes, the producer interest tends to

prevail over the consumer interest." (footnote omitted)).

A fundamental and well-known tenet of economics is that rational economic actors will seek to maximize their own wellbeing. Economic actors do not always do so through the creation of new wealth, however. Instead, they sometimes organize into interest groups and seek to use their political influence to have the government transfer *existing* wealth to the interest groups' members. Maxwell L. Stearns & Todd J. Zywicki, *Public Choice Concepts and Applications in Law* 45 (2009). Economics call this process "rent-seeking."[3] *See id.* at 44; James M. Buchanan, *Rent Seeking and Profit Seeking*, *in Toward a Theory of the Rent-Seeking Society* 7-8 (James M. Buchanan et al. eds., 1980).

Successful rent-seeking can result in very obvious forms of wealth redistribution, like direct government subsidies. But wealth transfers can be obtained in less immediately apparent ways as well. It is widely accepted that governmental regulations that effectively restrict competition in or entry into a particular industry cause (1) prices to increase to above the competitive market price and (2) industry participants to reap economic profits as a result, at

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[3] An industry's ability, through an anticompetitive regulation, to raise prices above the price that would be charged in an otherwise open market, generates what economists call "economic rents." James Buchanan has defined "rent" as "that part of the payment to an owner of resources over and above that which those resources could command in any alternative use," or "receipt in excess of opportunity cost." James M. Buchanan, *Rent Seeking and Profit Seeking*, *in Toward a Theory of the Rent-Seeking Society* 3 (James M. Buchanan et al. eds., 1980).

least for a time. Thus, each member of a small interest group stands to make a substantial economic gain from securing protection from competition.

Such protections are actively sought by particular industries, and are "designed and operated primarily for [the industry's] benefit." George J. Stigler, *The theory of economic regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3, 3 (1971). "[T]he justification is always said to be the necessity of protecting the public interest," however the pressure for such regulations "rarely comes from members of the public who have been mulcted or in other ways abused," but rather "from members of the occupation itself." Milton Friedman, *Capitalism & Freedom* 140 (2002). And once an interest group obtains these benefits through rent-seeking regulation, the interest group will mount a powerful opposition to any attempts to repeal the regulation, even if the gains obtained from the regulation are transitory. *See* Gordon Tullock, *The transitional gains trap*, 6 Bell J. Econ. 671, 676–78 (1975) (noting that although rent-seeking regulations very often produce only transitional gains for the beneficiaries of such regulations, eliminating the regulations is virtually impossible in part because eliminating such regulations generally leads to large losses for the entrenched beneficiaries).

Industries governed by professional licensing have significant advantages in securing regulations to protect themselves from competition, for several reasons. *See* Stearns & Zywicki, *supra*, at 49 ("Government-conferred rents . . . are usually created by erecting barriers to entry, such as restrictive licensing or permit regimes."). First, members of professional networks are often already organized in

trade associations or similar groups, thereby reducing the transaction costs of organizing for lobbying efforts. Second, such professional organizations also often have an internal communications infrastructure. Through newsletters, email lists, regular meetings, and the like, members can be educated about relevant issues and proposed government action with relative ease. The time and money that any individual would need to spend to remain informed and motivated to act is greatly reduced, overcoming problems of rational ignorance within the profession. Third, licensed professions are usually largely self-governing, which gives members an opportunity to directly participate in the regulatory process with little public or legislative oversight.

The danger of protectionist regulations is especially acute in licensed industries where the pertinent licensing board is dominated by members of the licensed profession who can directly enact regulations, as in this case. *See* Einer R. Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 690–91 & n.116 (1991); Department of the Treasury Office of Economic Policy, Council of Economic Advisers, Department of Labor, *Occupational Licensing: A Framework for Policymakers* 52 (July 2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf ("CEA Report") ("Though members of a profession have the advantage of expertise in technical matters related to their fields, they are also more likely than public members to favor the interests of their profession over the interests of the public."). Once given the power of self-regulation and the power to control entry into a profession, licensed professionals have every incentive to expand

the scope of their governmental monopoly to further protect their economic interests. Indeed, as the Federal Trade Commission has noted, once "regulatory authority is delegated to a nominally 'independent' board comprising members of the very occupation it regulates," "the proverbial fox is put in charge of the henhouse" and "board members' financial incentives may lead the board to make regulatory choices that favor incumbents at the expense of competition and the public." *See* Testimony of Andrew Gavil before the House Small Business Committee (July 16, 2014), *available at* http://smallbusiness.house.gov/uploadedfiles/7-16-2014_revised_ftc_testimony.pdf ("Gavil Statement").

In sum, special interest groups frequently use their political influence to transfer wealth away from consumers to their own members. A common mechanism for effecting such wealth transfers is through regulations that restrict competition, causing prices paid for the interest group members' goods and services to rise. And these regulations are likely to be especially common in industries governed by professional licensing.

II. THE PROLIFERATION OF BARRIERS TO LABOR PARTICIPATION FROM SPECIAL INTEREST RENT-SEEKING HAS BECOME A SIGNIFICANT NATIONAL PROBLEM

As noted in the preceding section, economists have widely accepted public choice theory as explaining how special interest groups are able to obtain privileges from legislatures and regulators, often in the form of legal protections from competition. Reality matches the theory. Over the past several decades, interest

groups have been incredibly successful in insulating themselves from competition, most notably through introduction of licensing regimes in previously unlicensed industries, and by expanding the scope of restrictions in already licensed industries (as happened in this case). This trend has serious consequences for American society.

The Federal Trade Commission has long been concerned with the harms caused by occupational regulations, particularly when enacted by self-regulating boards. Since the 1970s, the Federal Trade Commission has conducted various economic and policy studies into the effects of occupational restrictions, and has "submitted hundreds of comments and amicus curiae briefs to state and self-regulatory entities on competition policy and antitrust law issues" relating to licensed professionals, including real estate brokers, electricians, accountants, lawyers, dentists and dental hygienists, nurses, eye doctors and opticians, veterinarians, and funeral home directors. Gavil Statement at 9–10, 12. From its experience with occupational regulations, the Federal Trade Commission has "seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits." *Id.* at 1.

The proliferation of occupational restrictions has been staggering. The percentage of the workforce covered by State, local, and Federal licensing laws grew from less than 5 percent in the early 1950s to 29 percent by 2008, meaning that the State licensing rate grew roughly five-fold during this period. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor*

Market, 31 J. Labor Econ. S173, S175–76 (2013). The large increase in the number of licensed workers suggests that licensing has expanded considerably into sectors where licensing was previously thought unnecessary. CEA Report at 21. "[A]mong licensed workers today, fewer than half are in health care, education, and law—traditionally very highly licensed occupations. Instead, large shares of licensed workers today are in sales, management and even craft sectors like construction and repair." *Id.*

The consequences of growing occupational restrictions are profound. By one estimate, licensing restrictions cost up to 2.85 million jobs nationwide and raise consumer expenses by over $203 billion. Morris M. Kleiner, The Hamilton Project, *Reforming Occupational Licensing Policies* 6 (Mar. 2015), http://www.hamiltonproject.org/papers/reforming_occupational_licensing_policies.

In addition to costs, occupational restrictions reinforce the gaps between high-paid and high-skilled workers, and lower-paid and lower-skilled workers. Non-licensed workers who could have worked in more highly paid occupations—were those occupations not restricted—may be forced to enter into lower-paid occupations. CEA Report at 12. The influx of these workers into lower-paid occupations could depress the wages of those occupations due to the increase in the labor supply. *Id.* And these workers' lower wages in turn makes it more difficult for them to afford the costs associated with breaking into more lucrative restricted occupations, which often include education, training,

and testing.[4] *See id.* (noting that lower income workers are less likely to afford the tuition and lost wages associated with the licensing requirements); *see also* Maya N. Federman, David E. Harrington & Kathy J. Krynski, *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 Am. Econ. Rev. 237, 238–40 (2006) (concluding that 100 additional hours of required training reduced the number of Vietnamese manicurists by almost 18 percent in a state). In short, occupational restrictions can create a vicious cycle that disproportionately impacts the poor. *See also* Diana Thomas, *Regressive Effects of Regulation* 22, Working Paper for the Mercatus Center of George Mason University (Nov. 2012) (noting that well-intentioned regulations drive up prices for all consumers, with "disproportionately negative or regressive effects on the poor").

Indeed, according to one study, for a subset of *low- and medium-skilled jobs*, the average license required around 9 months of education and training. Dick Carpenter, Angela C. Erickson, Lisa Knepper & John K. Ross, Institute for Justice, *License to Work: A National Study of Burdens from Occupational Licensing* 14 (2012), http://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf. Thus, given the oftentimes onerous educational, training, and testing requirements associated with licensing, the

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[4] Occupational restrictions also distort markets in other ways. For example, the resources expended by practitioners in seeking to extract rents by imposing new or stricter licensing requirements are themselves an expenditure of resources that do not contribute to societal welfare. Stearns & Zywicki, *supra*, at 58-59.

proliferation of occupational restrictions means that "a large share of American jobs [is] only accessible to those with the time and means to complete what are often lengthy licensing requirements." CEA Report at 6. The proliferation of unneeded occupational restrictions has thus become a significant concern of scholars and commentators from across the political and ideological spectrum—from President Obama's own Council of Economic Advisers[5] to the National Review.[6] As the Chairman of President Obama's Council of Economic Advisers recently noted, "licensing requirements can exacerbate inequality by shifting resources to those who obtained licensed jobs and away from those who cannot and reallocating rents from often lower-income consumers to producers. This is especially problematic when obtaining a license requires paying large upfront costs, including tuition and lost wages from educational requirements, which many low-income workers cannot afford."[7]

Of course, not all occupational restrictions are problematic; many restrictions are genuinely intended to address legitimate health and safety concerns. But other restrictions, like the Ruling at issue here, simply

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5 *See* generally CEA Report.

6 *See, e.g.*, Scott Sumner & Kevin Erdmann, National Review, *Here's What's Driving Inequality* (June 8, 2015), http://www.nationalreview.com/article/419442/heres-whats-driving-inequality-scott-sumner-kevin-erdmann (arguing that excessive occupational licensing contributes to income inequality).

7 Jason Furman, Chairman, Council of Economic Advisers, Remarks at the Brookings Institution on Occupational Licensing and Economic Rents (Nov. 2, 2015), https://www.whitehouse.gov/sites/default/files/page/files/20151102_occupational_licensing_and_economic_rents.pdf.

effect "a naked transfer of wealth." *See St. Joseph Abbey v. Castille*, 712 F.3d 215, 222-23 (5th Cir.), *cert. denied*, 134 S. Ct. 423 (2013). And although these sorts of anti-competitive restrictions are often frequently couched in health and safety terms, they usually do not generate any actual public benefit. *See* Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J. Law Econ. 547, 575–76 (2000) (stating that no evidence exists that tighter dentistry licensing requirements lead to better dental health, though they do lead to higher prices); *see also* CEA Report at 12 (noting that the purported "quality, health and safety benefits of licensing do not always materialize").

Examples of problematic anticompetitive restrictions abound. In Louisiana, all flower arranging must be supervised by a licensed florist, and obtaining the license requires payment for a $150 florist exam that is administered in Baton Rouge quarterly, requiring many applicants to pay for travel and lodging in addition to the cost of exam. *See* Testimony of Timothy Sandfeur before the House Small Business Committee at 6 (Mar. 26, 2014), *available at* http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101756 ("Sandfeur Testimony"). State cosmetology boards across the country—dominated by state-licensed cosmetologists—have responded to competition from African hair-braiders and eyebrow threaders by requiring braiders and threaders to obtain cosmetology licenses, even though these practices do not require sharp instruments or chemicals, and do not pose any significant risk of infection, and even though cosmetology training typically does not teach braiding or threading. *See*

Testimony of Rebecca Haw before the House Small Business Committee at 3–4 (Mar. 26, 2014), *available at* http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101756; *see also* Testimony of Melony Armstrong before the House Small Business Committee at 2 (Mar. 26, 2014), *available at* http://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=101756. And under Florida law, *interior designers* are required to hold a bachelor's degree, a practice that disproportionately affects the poor and members of minority groups. *See* Sandfeur Testimony at 6.

To date, judicial review has been one of the few effective tools available to combat excessive rent-seeking by interest groups in this area. Even though economic regulations are typically analyzed under the so-called "rational basis" test, that level of review has provided at least some measure of protection because purely protectionist regulations often operate in ways that directly undercut the asserted consumer-safety rationales commonly used to justify the regulations. *See*, *e.g.*, *Craigmiles v. Giles*, 312 F.3d 220, 225–26 (6th Cir. 2002) (concluding that restricting casket sales to funeral home directors in order to ensure a supply of quality caskets made no sense given the markups charged by the funeral directors; consumers could purchase higher quality caskets at lower prices from third parties). Judicial approval of "economic protectionism" as a legitimate government interest would effectively eliminate even this limited obstacle, encouraging the proliferation of even more blatant pro-interest group regulations. *Amici* thus agree with Petitioners that the Second Circuit's holding below will have dramatic consequences. *See* Pet. 25–26 ("If the

Second Circuit's ruling is allowed to stand, one can expect that industry groups will see it as a green light to pursue economic rents at the expense of their competitors and the public."). And, as described in the next section, these destructive regulations are likely to become entrenched because the political and regulatory process will typically fail to correct them.

III. ABSENT JUDICIAL REVIEW, RENT-SEEKING REGULATIONS ARE LIKELY TO BECOME ENTRENCHED

The Second Circuit understood the public choice dynamics described above. The contributions of majority opinion writer Circuit Judge Calabresi to the field of law and economics are well known. *See generally* Alain Marciano & Giovanni B. Ramello, *Foreword: Law and Economics: The Legacy of Guido Calabresi*, 77 L. Contem. Probs. i (2014). And the Second Circuit cited the *amicus* brief describing public choice theory filed by Professor Todd J. Zywicki below. *See* App. 8 (quoting Zywicki 2d Cir. *Amicus* Br. 3). The Second Circuit's response to the public choice problems is perhaps appealing on a superficial level—take the matter up with the legislature. *See* Pet. App. 11 ("Much of what states do is to favor certain groups over others on economic grounds. We call this politics."); *see also Powers v. Harris*, 379 F.3d 1208, 1222 (10th Cir. 2004) (explaining that plaintiffs seeking to overturn purely protectionist regulation "must turn to the [state] electorate"), *cert. denied*, 544 U.S. 920 (2005). But the Second Circuit's response ignores the systemic factors that contribute to rent-seeking regulations becoming entrenched once they are put in place.

First, the costs of rent-seeking regulations are usually spread thinly across consumers in the form of marginally higher prices and reductions in consumer choice, giving each individual consumer little incentive to learn about and organize to oppose every anticompetitive or protectionist rule. Each member of the public is therefore "rationally ignorant" about many rent-seeking regulations, much as diffuse small shareholders of large corporations are rationally apathetic about the specific details of how the corporations are run. *See generally* Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (2013). In economic terms, "[r]ational ignorance means that individuals will decline to invest in obtaining information where the marginal costs of gathering that information exceed the expected marginal benefits." Stearns & Zywicki, *supra*, at 56 n.41. In other words, where the time, effort, or financial cost do not make it worthwhile for individuals to determine the degree to which rent-seeking regulations inflate the prices of goods or services, it is rational for individuals to remain ignorant of the regulations. *See id.* at 56 (explaining how consumers are rationally ignorant of price increases caused by steel tariffs in consumer goods that incorporate steel). Thus, individual members of the public often lack the individual incentive to organize and use the political process to repeal an existing rent-seeking regulation.

Second, the possibility of opposition to protectionist regulations by the electorate is also impaired by free-riding, where "[e]ach individual consumer will rationally decline to invest in opposition" because "[e]ach person or firm hopes that other similarly

situated consumers will lobby in his or her place." *Id.* Because the incentive to free ride is universal, "it is rational for the group as a whole to decline to make the necessary investment in opposition to procurement" of the rent-seeking regulation. *Id.* These problems are exacerbated when the full extent of the economic rent captured by anticompetitive regulations is spread over many years and when the goods or services covered by such regulations are infrequently bought—as is the case with many goods and services in the economy, including teeth whitening, caskets, and pest control. In those situations, the burdens that such regulations pose for *individual* consumers are substantially further reduced, although the burdens on consumers as a whole remain large. *See id.*

The collective action problems associated with these regulations apply not only to consumers, but also to workers who would enter the restricted industry absent regulation. These workers often do not know that they could enter these industries absent regulation, and thus make no efforts to oppose restrictive regulations. Moreover, even if any individual worker became aware that he or she was excluded from work because of regulations, that individual would probably lack the political will or power to oppose the regulations, and would face the free rider problems noted above in organizing similarly situated individuals to do so.

Third, the state-immunity doctrine outlined in *Parker v. Brown*, 317 U.S. 341 (1943), helps shield many rent-seeking regulations from judicial scrutiny under the antitrust laws. This Court took an important step in combatting this problem last term in *North Carolina State Board of Dental Examiners v. FTC*,

135 S. Ct. 1101 (2015), when it held that a state agency composed of active market participants must be supervised by the state to receive immunity. Indeed, the Court recognized the fundamental public choice problem described in this brief. *See id.* at 1112 (explaining that when "a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state" (citation omitted)). But *North Carolina State Board of Dental Examiners* is likely to help address only the most blatant forms of rent-seeking regulations, and will leave entirely untouched the common situation in which legislatures or non-self-regulating regulatory bodies implement anticompetitive regulations at the behest of special interest groups. *See Craigmiles*, 312 F.3d at 222 (casket sales); *St. Joseph Abbey*, 713 F.3d at 218 (casket sales); *see also Merrifield v. Lockyear*, 547 F.3d 978, 981–82 (9th Cir. 2008) (describing anticompetitive statutes in the context of pest control).

For these reasons, once rent-seeking regulations are implemented, they are unlikely to be repealed through the ordinary political or regulatory process.

CONCLUSION

For the reasons stated above, whether pure economic protectionism is a legitimate government interest is an issue of critical importance warranting this Court's review. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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