Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
Tina Hays
Filing ID 1335333
6/25/2012 1:34:00 PM

Thomas C. Horne (#002951)
Attorney General
Michael Tryon (#003109)
Evan Hiller (#028214)
Bridget Fitzgibbons Harrington (#011478)
Assistant Attorneys General
1275 W. Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-8355
Fax: (602) 364-2214
Michael.Tryon@azag.gov
Evan.Hiller@azag.gov
*Attorneys for Defendants*

**ARIZONA SUPERIOR COURT**
**COUNTY OF MARICOPA**

| | |
|---|---|
| LAUREN BOICE and ANGELS ON EARTH HOME BEAUTY, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>DONNA AUNE, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, et. al.,<br><br>Defendants. | No. CV2011-021811<br><br>**DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**<br><br>(Oral argument requested)<br><br>(Assigned to Hon. Michael Harrod) |

Defendants Donna Aune, Gary Begley, Karla Clodfelter, Sandra Hecksel, Cheryl Chelius, Joe Verdugo, Larry Bulechek, and Jessica Stall ("Defendants" or the "Board"), by and through counsel undersigned, hereby file their Reply to Plaintiffs' Response to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (the "Response"). Defendants respectfully request that this Court grant Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint (the "Motion").

## MEMORANDUM OF LAW

### I. Plaintiffs Raise No Valid Facial Challenges

Plaintiffs concede that they raise no facial challenges to A.R.S. § 32-574(A)(9) and no facial First Amendment challenges. Plaintiffs do not properly allege any of their Equal Protection or Due Process challenges as facial challenges, and do not request valid

relief on the face of the statute regardless. Thus, Plaintiffs' only adequately stated claims are as-applied challenges.

Plaintiffs are challenging two Arizona statutes: A.R.S. § 32-574(A)(6), which Plaintiffs term the "salon requirement," and A.R.S. § 32-574(A)(9), which Plaintiffs term the "license requirement." In their Response, Plaintiffs concede that they bring no facial challenges against A.R.S. § 32-574(A)(9). *See* Response ("Resp.") at 5-6 ("Angels' challenge to the license requirement, § (A)(9), is an as-applied challenge . . . ."). Plaintiffs also concede that they bring no facial challenges at all under the First Amendment or the Arizona free speech clause. *See* Resp. at 6 n.3.

Plaintiffs rely solely upon the language of their Request for Relief to establish that they have alleged facial challenges to the salon requirement. *See* Resp. at 6. However, allegations solely contained in the prayer for relief are not considered in determining the sufficiency of the complaint. *Citizens' Comm'n for the Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192, 507 P.2d 113, 117 (1973). Plaintiffs have alleged no factual or legal basis for a facial challenge to the validity of the salon requirement, because they have not alleged that the salon requirement is unconstitutional in every circumstance, only that it is unconstitutional as applied to Plaintiffs.

Even if Plaintiffs did properly raise a facial challenge to the salon requirement under Equal Protection or Due Process, it is not a claim for which relief could be granted. Plaintiffs request that this Court "[p]ermanently enjoin Defendants and their agents and employees from enforcing A.R.S. § 32-574(A)(6), and § 32-574(A)(9) as-applied to Plaintiffs." Plaintiffs' First Amended Complaint ("FAC") at 17. To the extent that Plaintiffs are seeking an injunction against the salon requirement on its face, and not as applied, this is relief to which Plaintiffs are not entitled. "An injunction shall not be granted . . . to prevent enforcement of a public statute by officers of the law for the public benefit." A.R.S. § 12-1802(4). Accordingly, Plaintiffs have not stated a facial challenge for which relief can be granted.

## II. Plaintiffs Lack Standing to Bring Their Claims

Plaintiffs lack standing because they do not suffer any current injuries. In their Response, Plaintiffs allege they are injured by "being forced by the Board to comply with cosmetology laws," and must either comply or become "outlaws." Resp. at 4, 7. H.B. 2440 amended A.R.S. § 32-574(A)(6) to exempt all of the conduct for which Plaintiffs were cited. Motion ("Mot.") at 4. To the extent that Plaintiffs now assert they wish to engage in conduct that might violate the salon or licensing requirements, as amended, Plaintiffs do not bring valid facial claims, *see* Part I, *supra*, and cannot bring as-applied claims regarding statutes that have not yet been enforced. *See* Part IV, *infra*. Plaintiffs have cited no authority for the proposition that compliance with a licensing regime is, in and of itself, a constitutional injury.

## III. Plaintiffs' Claims Are Moot

Plaintiffs' claims are moot because they do not suffer current injuries, *see* Part II, *supra*, because this litigation is not "an issue of great public importance," and because board regulation is not "capable of repetition yet evading review."

"The 'issue of great public importance' exception to mootness usually involves an issue that will have broad public impact beyond resolution of the specific case." *Cardoso v. Soldo*, --- P.3d ----, 2012 WL 1931068 at ¶ 6 (App. May 29, 2012). It cannot seriously be contended that a judicial resolution determining whether the Board can apply cosmetology regulations and licensing requirements to so-called dispatch services will have a *broad* public impact. Resp. at 8. While Plaintiffs have alleged in conclusory fashion that other dispatch services exist, Resp. at 13, they have not identified any such businesses or alleged that there are many individuals eager to establish them if the Board's rules are clarified. Neither have Plaintiffs alleged that their clients are unable to receive services altogether as a result of this legal uncertainty. *Cf.* FAC ¶ 51 (claiming the Board's "regulations shut down [Plaintiffs] for approximately one month"). Thus, Plaintiffs do not avoid the mootness doctrine on "public importance" grounds.

Neither do Plaintiffs trigger the second exception to the mootness doctrine. The "capable of repetition yet evading review" exception to mootness "is applicable when, because of time constraints, an issue that is capable of recurring cannot be decided by the appellate court." *Cardoso* at ¶ 7. Plaintiffs have not alleged any facts leading to a reasonable inference that Plaintiffs' claims would in the future evade review because they are mooted by the passage of time. *But see*, *e.g.*, *Roe v. Wade*, 410 U.S. 113, 125 (1973) ("If [the end of pregnancy] makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied.").

## IV. Plaintiffs' Claims Are Not Ripe

Despite Plaintiffs' arguments, application of the ripeness doctrine is appropriate in this matter. In essence, Plaintiffs seek to mount an as-applied challenge to a statute that was recently amended and has not yet been enforced, based upon its application to behavior in which Plaintiffs did not engage when the statute was enforced in the past and in which they alleged an intention to engage only after the statute's amendment. This is precisely the kind of speculative dispute that the Court of Appeals rejected in *Velasco v. Mallory*, 5 Ariz. App. 406, 410-11, 427 P.2d 540, 544-45 (App. 1967) ("We will not render advisory opinions anticipative of troubles which do not exist; may never exist; and the precise form of which, should they ever arise, we cannot predict.").

Nonetheless, Plaintiffs contend that the lack of fitness of this issue for judicial decision must be balanced against the hardship to the parties. Resp. at 9. Plaintiffs appear to have conceded that the question of fitness for judicial determination favors Defendants. *See id*. (raising only hardship arguments in advocating the ripeness of Plaintiffs' claims). However, the validity of Plaintiffs' hardship arguments can be readily inferred from their description of motion practice *in a civil claim that they initiated* as a "bureaucratic nightmare." *See* Resp. at 9 ("For over a year now, [Plaintiffs] have endured a bureaucratic nightmare [including] defending their right to defend themselves in court."). Plaintiffs' conflation of Defendants' assertion of

permissible legal defenses with constitutional injury is a perfect example of the degree to which Plaintiffs mischaracterize and inflate their supposed hardships. Plaintiffs allege only the ongoing hardship of honoring the terms of a salon license for which Plaintiffs applied. If Plaintiffs' claims are addressed now, rather than requiring resolution only if Plaintiffs' salon license is not renewed or if the Board cites Plaintiff for choosing not to renew her salon license (both highly speculative events), both parties bear the significant hardship of litigation and discovery.

Finally, Plaintiffs argue that they have "alleged an intention to engage" in conduct giving rise to a credible threat of prosecution and that "under Arizona law, Plaintiffs are not 'required to await and undergo a criminal prosecution as the sole means of seeking relief.' " Resp. at 9-10 (citing *Oklevueha Native Am. Church v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012)). This case is simply inapposite. *Oklevueha* is a federal case and does not constitute "Arizona law" on the issue of ripeness. Additionally, the portion of *Oklevueha* cited by Plaintiffs is from a portion of the opinion entitled "Constitutional Ripeness" analyzing the U.S. Constitution's "case and controversy" provision, distinct from a later section entitled "Prudential Ripeness." *See id.* at 833-37 (constitutional ripeness) and 837-40 (prudential ripeness). Arizona's constitution does not contain a "case or controversy" provision. *Big D Const. Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63, 789 P.2d 1064-65 (1990). Thus, Plaintiffs' criminal prosecution argument has no legal weight. Even if this legal argument had any merit, Plaintiffs rely solely on the existence of statutes potentially prohibiting Plaintiffs' conduct, *see* Resp. at 9, and have alleged no past criminal prosecution or realistic threat of criminal prosecution for violations of A.R.S. § 32-574 in their First Amended Complaint.

Because Plaintiffs do not establish that their claims are fit for judicial determination, do not establish that the balance of hardships mandates judicial action, and cite neither a compelling legal authority for their criminal prosecution theory nor a realistic threat of prosecution, Plaintiffs' claims should be dismissed as unripe.

## V. Plaintiffs Still Fail to State a Claim for Lack of Jurisdiction

Plaintiffs correctly cite *Cullen v. Auto-Owners Insurance Co.*, 218 Ariz. 417, 189 P.3d 344 (2008), for the proposition that Arizona courts assume the truth of a complaint's factual allegations, indulge all reasonable inferences therefrom, and grant dismissal only if "a plaintiff is not entitled to relief, as a matter of law, on any interpretation" of those facts. *Id*. at 419. However, Plaintiffs are incorrect that this standard requires the resolution of Plaintiffs' jurisdiction claims on summary judgment, because no reasonable inference in Plaintiffs' favor can be drawn from the factual allegations contained in Plaintiffs' First Amended Complaint.

Plaintiffs first argue that they "have stated that their business consists solely of connecting clients desiring in-home salon and spa services with independent, Board-licensed cosmetologists." Resp. at 10. However, Plaintiffs' clients pay Plaintiffs directly in exchange for receiving home beauty services such as haircuts, makeup application, nail therapy, facials, and massages. FAC ¶¶ 16, 19. These are also factual allegations which must be taken as true by this Court. The only reasonable inference that can be entertained on those facts is that Plaintiffs provide services that fall within the jurisdiction of the Board.

Plaintiffs further rely upon their allegations that "their business is merely a dispatch service, 'not a salon,' nor a business that practices cosmetology," Resp. at 10, as being "sufficient to state a claim." *Id*. These are legal conclusions, not factual allegations, and are not entitled to any deference from this Court. *Cullen*, 218 Ariz. at 419, 189 P.3d at 346. Because the only reasonable inference that can be drawn from the *factual* allegations of Plaintiffs' First Amended Complaint is that Plaintiffs fall within the Board's jurisdiction, Plaintiffs' jurisdictional arguments should be dismissed.

## VI. Plaintiffs Still Fail to State an Equal Protection Claim

Plaintiffs have not brought a valid facial challenge to the salon requirement under Equal Protection. *See* Part I, *supra*. Plaintiffs continue to misunderstand precisely what

must be rationally related to a legitimate governmental purpose. Under Equal Protection, it is the *classification* imposed by a law that must be rationally related to a legitimate governmental purpose, not the regulatory *burden*. *See*, *e.g.*, *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 ("[A] statutory classification . . . must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."). Plaintiffs' claims regarding the rationality of burdens are therefore irrelevant.

Plaintiffs' First Amended Complaint can be read as alleging two Equal Protection theories: that the Board irrationally treats Plaintiffs' business the same as unlike (cosmetology) businesses, and that the Board irrationally treats Plaintiffs' business differently from similar (dispatch) businesses. The Response is not adequate to save either claim from dismissal.

Plaintiffs' claim for being treated like dissimilar cosmetology businesses is foreclosed by *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008). Plaintiffs first seek to claim that federal law is unsettled on this issue. Resp. at 12. The Sixth Circuit case cited by Plaintiffs is irrelevant as Arizona falls within the Ninth Circuit. Plaintiffs' invocation of *Anderson v. Celebrezze*, 460 U.S. 780 (1983), is similarly misplaced. *Anderson* is not an equal protection case, but rather a voting and associational rights case. It has no bearing on the validity of *Merrifield* or on Plaintiffs' claims.

Plaintiffs then argue that *Merrifield* does not apply because it focuses solely on the federal Equal Protection clause. Resp. at 12. Plaintiffs provide no legal authority for their bizarre conclusion that *Merrifield* does not apply in Arizona because cases establishing the state and federal equal protection clauses are interpreted identically predate it. *Simat Corp. v. Arizona Health Care Cost Containment System*, 203 Ariz. 454, 56 P.3d 28 (2002) has no bearing here, because the *Simat* court separately analyzed a case implicating Arizona's separate and unique constitutional right of privacy. *Id*. at 457, 56 P.3d at 31 ("Unlike the federal constitution, our constitution confers an explicit right of privacy on our citizens."). *Merrifield* applies, so Plaintiffs' claim for similar

treatment with dissimilar businesses should be dismissed.

Plaintiffs claim for dissimilar treatment is not adequately pled. Plaintiffs argue that they have alleged that other dispatch services exist. Resp. at 13. They further claim that they have no obligation to offer any detail on how those dispatch services operate or are treated differently prior to conducting discovery. *Id.* This is not true; Arizona's notice pleading standard requires a "short and plain statement showing the plaintiff is entitled to relief in order to survive a motion to dismiss." *Mobilisa, Inc. v. Doe*, 217 Ariz. 103, 111, 170 P.3d 712, 720 (App. 2007). Plaintiffs have provided *no* statement of the supposedly differential treatment that lies at the heart of their Equal Protection claim. There is simply no factual allegation from which a reasonable inference can be drawn about the treatment and operations of other dispatch services. Plaintiffs further allege that through H.B. 2440, two new separate classifications of cosmetology dispatch services have been formed. Resp. at 13. This is a facial claim regarding new statutory language that has not yet been applied. As discussed in Parts I and IV, *supra*, Plaintiffs have raised no valid facial claims and this issue is not ripe for consideration. Accordingly, Plaintiffs' Equal Protection claims should be dismissed.

## VII. Plaintiffs Still Fail to State a Free Speech Claim

Plaintiffs concede that they have brought only as-applied free speech claims under the U.S. and Arizona constitutions. Resp. at 6 n.3. Plaintiffs' as-applied claims should be dismissed because their business is not purely communicative and because their prior restraint claims are foreclosed by *Hunt v. City of Los Angeles*.

Plaintiffs claim that expressive speech is not incidental to their business, but is instead the "entirety" of their business. Resp. at 13. This claim that expressive speech is the "entirety" of Plaintiffs' business is patently absurd. Plaintiffs' business is the provision of at-home cosmetology services for money. Communications may be utilized to effectuate the transactions at the heart of Plaintiffs' business, but that does not transform the nature of the business itself. Nonetheless, Plaintiffs erroneously allege that

their business is nothing more than an "information and dissemination" service. Resp. at 14. If that were true, psychologists would also be so categorized – after all, their activities consist almost exclusively of listening and speaking to clients. Unsurprisingly, psychologists are subject to extensive regulation by the State. *See*, *e.g.*, *Cohen v. State*, 121 Ariz. 6, 10, 588 P.2d 299, 303 (1980) (upholding legislation requiring the certification of psychologists). The simple fact is that Plaintiffs' income derives strictly and solely from cosmetology services rendered to their clients. FAC ¶ 19.

Plaintiffs rely heavily on *Sorrell v. IMS Health., Inc*, 131 S.Ct. 2653 (2011), for their arguments that regulating Plaintiffs' "information and dissemination" service violates their free speech rights. Resp. at 14. That reliance is misplaced, because *Sorrell* has little bearing on this litigation. The *Sorrell* plaintiffs were data miners who purchased information about doctors' prescribing habits from pharmacies and leased that information to pharmaceutical manufacturers interested in marketing their products to those doctors. *Sorrell.,* 131 S.Ct. at 2659-60. There is no resemblance between Plaintiffs' so-called "dispatch" service, which derives revenue by furnishing cosmetology services, and the data miners' pure information and dissemination service, which derives revenue from the purchase and sale of data. An actual parallel to *Sorrell* within the cosmetology field would be a business that collects information on at-home services offered by various independent cosmetologists and salons and publishes a magazine or pay website breaking down prices, available services, and customer satisfaction. By directly involving themselves in the services-for-money exchange between clients and cosmetologists, Plaintiffs do not operate a pure information and dissemination service.

Plaintiffs also attempt to analogize their business with a tattoo parlor that was denied a use permit and brought a First Amendment free speech claim. *Coleman v. City of Mesa,* 228 Ariz. 240, 265 P.3d 422 (App. 2011), *review granted* (Feb. 15, 2012). Plaintiffs' reliance on *Coleman* is misplaced, not least of all because the Arizona Supreme Court has granted review of the decision. Unlike the *Coleman* plaintiffs,

Plaintiffs were never denied a permit, but were instead *granted* a salon license. FAC ¶ 35. The *Coleman* court also held that the sole purpose of a tattoo is to communicate thoughts, emotions, or ideas. 265 P.3d at 422. The cosmetology services that Plaintiffs provide include haircuts, makeup application, nail therapy, facials and massages. FAC ¶ 16. Plaintiffs cannot seriously contend nor would it be reasonable to infer that a facial or a massage is intended to communicate a thought, idea, or emotion. Accordingly, Plaintiffs' free speech claims should be dismissed.

Turning to prior restraint, Plaintiffs fail to distinguish *Hunt v. City of Los Angeles*, 638 F.3d 703 (9th Cir. 2011), which they do not dispute as binding and applicable precedent. Resp. at 14-15. First, Plaintiffs claim that *Hunt* is distinct from this matter because Plaintiffs "have not been issued a permanent permit to operate their business, but must renew it every year." Resp. at 15. First, Plaintiffs provide no citation showing that the permit at issue in *Hunt* was permanent. Second, Plaintiffs provide no authority for the proposition that the necessity of license renewal undercuts this holding.

Second, Plaintiffs claim that *Hunt* is distinct from this matter because "*Hunt* did not involve – as this case does – potential criminal liability for engaging in an act of speech." Resp. at 15. Plaintiffs have misread two critical details of *Hunt*. First, the Court treated Hunt as having raised commercial speech claims subject to the prior restraint doctrine, holding that his claims failed because he had been granted the permit. *Hunt*, 638 F.3d at 718 n.7. Second, Hunt claimed to have been arrested *twenty-four times* subject to the challenged ordinances. *See Hunt v. City of Los Angeles,* 601 F. Supp. 2d 1158, 1163 (C.D. Cal. 2009), *aff'd in part, remanded in part*, 638 F.3d 703 n.3 (9th Cir. 2011). Because Plaintiffs cannot distinguish *Hunt*, their prior restraint claims should be dismissed.

## VIII. Conclusion

For the foregoing reasons, Defendants respectfully submit that the Motion to Dismiss should be granted.

DATED this 25th Day of June, 2012.

By: */s/* Evan Hiller
Michael Tryon
Evan Hiller
Bridget Fitzgibbons Harrington
*Attorneys for the Defendants*

ORIGINAL e-filed with the Clerk of the Court and

COPY mailed and e-mailed this 25th day of June, 2012, to:

Clint Bolick
Diane S. Cohen
Christina Sandefur
Sharf-Norton Center for Constitutional Litigation
GOLDWATER INSTITUTE
500 E. Coronado Road
Phoenix, AZ 85004

By: */s/* Connie Lopez