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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

LAUREN BOICE, et al., Plaintiffs, vs. DONNA AUNE, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, et al., Defendants.	Case No.: CV2011-021811 **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT** Oral argument requested *Hon. Michael Herrod*

Introduction

On April 30, 2012, Plaintiffs Lauren Boice and Angels on Earth Home Beauty, LLC ("Angels") filed an Amended Complaint to protect their due process, equal protection and free speech rights to pursue a legitimate business in the face of the Board's irrational and unlawful regulations. The complaint was amended to conform the facts, allegations and relief sought to a change in one of the relevant laws. (Pls.' Mot. Leave ¶¶ 6-7.) Defendants, members of the

Arizona Board of Cosmetology ("the Board"), now seek to dismiss Angels' Amended Complaint in its entirety for failure to establish a case or controversy (Defs.' Mot. 3), and to dismiss Counts I, III, and IV for failure to state a claim. (*Id.* at 6.) For the reasons set forth below, Angels respectfully submit that Defendants' Motion should be denied.

I. Facts

Plaintiff Boice is the founder and owner of Angels on Earth (FAC ¶ 2), a business dedicated to connecting its clients, who include the homebound, elderly and infirm, with independently-licensed cosmetologists who provide salon and spa services. (¶ 3.) Through Angels on Earth, Boice provides a novel and much-needed service of connecting Board-licensed, independent cosmetologists with people who would like salon and spa services, but are homebound due to age or medical condition, including cancer; people who are providing care for someone who is homebound; and people who desire at-home services. (¶ 16.) Customers wishing to book home beauty services such as haircuts, makeup application, nail therapy, facials and massages call Boice, who schedules an appointment with an independent, Board-licensed cosmetologist. (*Id.*) Angels on Earth is not a salon and it had never operated in conjunction with any salon, until the Board forced it to do so under threat of fine and imprisonment. (¶ 3.)

Plaintiff Boice is not a cosmetologist and does not perform cosmetology services for her clients or business – she merely serves as a facilitator between clients and independent cosmetologists, who carry their own liability insurance, their own tools, and abide by Board rules and sanitation requirements. (¶¶ 21-2.) Angels' unique business has been very successful

and continues to expand. (¶ 21.) Beginning in June 2011, the Board cited Angels for violating three cosmetology laws.[1] (¶¶ 24-7.) It then subjected Angels to a host of constantly-changing cosmetology regulations in order to continue operating their dispatch service (¶¶ 24, 29-50), forcing them to, among other things, obtain a salon license (¶ 31), establish a physical salon (¶ 33), post the license and the licenses of independent cosmetologists at that unaffiliated salon (¶¶ 31, 47), advertise their business in that salon's window (¶ 31), register a trade name for the business with the Secretary of State (¶ 37), and maintain an appointment book at the salon location. (¶ 44.) When Angels explained that they are not practicing cosmetology, the Board ignored them and continued to assert its jurisdiction through these mandates. (¶¶ 24, 31, 44, 49.)

On March 27, 2012, one of the relevant Board statutes was amended to provide exemptions for specified clients, but this only exempts a few of the clients and places that Angels serve, not all. 2012 Ariz. Legis. Serv. Ch. 99 (HB 2440); (FAC ¶ 53.) HB 2440 specifically exempts from the salon requirement cosmetology services performed "in a health care facility, hospital, residential care institution, nursing home or residence of a person requiring home care because of an illness, infirmity or disability." *Id.* These amendments do not go far enough and certainly do not moot this case because the law still prohibits Angels from sending cosmetologists to people who desire at-home services but are *not* ill or disabled, or to people who are homebound because they are *caring for* someone who is sick or elderly (FAC ¶

[1] A.R.S. §§ 32-574(A)(6) (prohibiting the practice of cosmetology outside a licensed salon unless sent from a salon)("the salon requirement"), § (A)(9) (prohibiting operating a salon without a license)("the license requirement"), and § (A)(10) (prohibiting violating a cosmetology law or rule). (FAC ¶ 24.)

55); nor does it allow Angels to send cosmetologists to places other than a licensed salon, health care facility, hospital, residential care institute, nursing home or homebound person's residence.[2] (¶ 54.) Furthermore, the amendments do not exempt Angels from the Board's salon requirement *at all*, as the Board still compels Angels to obtain and renew a salon license in order to operate their dispatch service. (¶ 26.) Thus, HB 2440 actually highlights the *irrationality* of the salon requirement by not exempting the totality of services Plaintiff Boice arranges for her clients through Angels on Earth. (¶ 56.) Angels must continue complying with the Board's regulations. (¶¶ 51-2.) The Board's laws and regulations continue to injure Angels and infringe on their ability to expand their business in the future. (¶¶ 51-2, 54-6.)

In their Motion, Defendants derisively refer to the services Angels provide as nothing more than a "wish list" that should go unfulfilled as a result of oppressive government regulation. (Defs.' Mot. 5.) Angels have but one wish – that the Board will respect their constitutional rights. Yet for over a year, Angels have had to endure a regulatory nightmare, including being forced by the Board to comply with cosmetology laws that do not rationally apply to their telephone dispatch business. As if forcing a dispatch service that serves the homebound to operate a salon is not bad enough, the Board now seeks to deprive Angels of their chance to vindicate these rights in a court of law.

II. Applicable Legal Standard

As Defendants helpfully point out, in Arizona, standing "is not a constitutional mandate,"

[2] In fact, the plain language of HB 2440 suggests that while Angels could send a cosmetologist to a sick person's home, they could not send one to a sick person staying with a relative. *Id.*

but rather a "prudential or judicial restraint." *Armory Park Neighborhood Ass'n v. Episcopal Comm. Services in Ariz.*, 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985). Additionally, "motions to dismiss for failure to state a claim are not favored under Arizona law." *Sensing v. Harris*, 217 Ariz. 261, 262, 172 P.3d 856, 857 (App. 2007). "Arizona courts look only to the pleading itself and consider the well-pled allegations contained therein. Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). "[A] complaint need merely set forth 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). "The superior court properly dismisses a complaint only when it can be certain the plaintiff cannot prove facts entitling it to relief." *Coleman v. City of Mesa*, 228 Ariz. 240, 265 P.3d 422, 427 (App. 2011). Angels' Amended Complaint sets forth well-pled factual allegations showing they are entitled to relief and establishing a case or controversy. Defendants' Motion should be denied because Angels have standing, their claims are ripe and not moot, and their Amended Complaint properly states jurisdictional, equal protection, and free speech claims.

III. Angels' First Amended Complaint Establishes a Case or Controversy

a. Angels' Amended Complaint asserts both facial and as-applied challenges

As a preliminary matter, the Board is incorrect in asserting that Angels' Amended Complaint does not raise facial challenges to § 32-574(A). (*See* Defs.' Mot. 5.) Angels' challenge to the license requirement, § (A)(9), is an as-applied challenge to the Board's

application of it to their business, which is not a salon. (FAC p. 16.) Angels' challenge to the salon requirement is *both* as-applied to them *and* on its face under the state and federal due process and equal protection clauses.[3] (*Id.* at pp. 16-17.) The Board's tortured reading of Angels' challenges does not accord with Angels' Request for Relief, which clearly asks this Court to declare the salon requirement facially unconstitutional. (*Id.* at pp. 16-17 (requesting that this Court "Declare that A.R.S. § 32-574(A)(6) is unconstitutional, *and that Defendants' application of* A.R.S. §§ 32-574(A)(6) and 32-574(A)(9) to Plaintiffs' business is unconstitutional.")).[4]

b. **Plaintiffs have standing to bring their claims**

The Board is incorrect in claiming that Angels "have not established a personal injury" (Defs.' Mot. 4), because Angels have alleged that they have been injured, are being injured, and will continue to be injured by the Board's application of cosmetology laws. A year ago, the Board cited Angels for violating three cosmetology laws. (FAC ¶ 24.) That summer, the Board also subjected Angels to myriad regulations (¶¶ 24, 29-50), leaving Angels with ongoing and continuous injuries that the Board has never remedied or even expressed an intent to remedy. (¶¶ 51-2, 54-6.) Instead, the Board continues to brandish its professed authority over Plaintiffs. (*See*

[3] Angels concede that they do not bring a *facial* challenge to the salon requirement under the First Amendment or the Arizona free speech clause.

[4] If this Court nevertheless determines that Angels have not asserted with sufficient clarity their intent to challenge the salon requirement, § (A)(6), on its face, they respectfully request that the Court allow Angels to amend their complaint to clarify the nature of their challenge, rather than dismissing Angels' entire lawsuit. *See* Ariz. R. Civ. P. 15(a).

¶¶ 24, 31, 44 and 49; *see* Defs.' Mot. 6.)

HB 2440 does little if anything to alleviate Angels' injuries, as their services extend to clients and locations still covered by the amendment (FAC ¶ 17), which itself only applies to the salon requirement. H.B. 2440 (amending § 32-574(A)(6) but leaving § (A)(9) unaltered). Moreover, failure to comply with the Board's statutes or regulations carries criminal penalties of up to $2500 and six months in jail.[5] Thus, Angels face a dilemma no law-abiding citizen should face: they can either comply with cosmetology regulations to the detriment of their business (*see* FAC ¶¶ 51-2), or literally become outlaws. Plaintiffs have alleged an ongoing injury.

c. **Plaintiffs' claims are not moot**

Defendants argue that HB 2440 moots Angels' case while completely ignoring that the amendment does not even encompass both of the statutes the Board cited Angels for violating. As Angels have advised Defendants, HB 2440 does not relieve them from the license requirement, and it does not exempt all of their services from the salon requirement. (¶¶ 54-56.) The Board still characterizes Angels' dispatch business as a salon and cosmetology business (*see* ¶¶ 24, 49; Defs.' Mot. 6), which subjects them to cosmetology laws and requires them to renew annually their salon permit in order to operate their telephone business. Angels must also maintain a physical salon if they wish to continue serving particular clients. (FAC ¶ 33.) Angels remain vulnerable to criminal penalties if they do not continue to comply with Board rules. §§ 32-574(C), 13-802(A), 13-707(A)(1). Thus, Angels' injuries have not subsided. If anything, the

[5] Violating the relevant laws is a Class I Misdemeanor, § 32-574(C), which carries penalties of up to $2,500, § 13-802(A), and imprisonment for up to six months. § 13-707(A)(1).

new law's confusing terms and scattershot exemptions have made it more difficult for Angels to determine how to comply. *See* § (A)(6) *as amended by* H.B. 2440(carving out exceptions for, *inter alia*, those who "requir[e] home care" due to "illness, infirmity or disability").

"[T]he mootness doctrine is not mandated by the Arizona Constitution, but is solely a discretionary policy." *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, 460, 27 P.3d 814, 817 (App 2011). Because Angels suffer current injuries, their claims are not moot. But even if moot, Angels' claims would nevertheless be appropriate for review, as Arizona courts will consider cases involving "an issue of great public importance or an issue capable of repetition yet evading review." *Phoenix Newspapers*, 200 Ariz. at 460, 27 P.3d at 817. First, Angels' claims certainly raise issues of great public importance, as a judicial resolution will determine whether the Board can apply cosmetology laws to businesses that do not practice cosmetology. Because Angels' claims "raise[] questions which should be decided for the guidance of public officers in the future administration of law, [they should] not be dismissed as moot, but . . . determined upon [the] merits." *Corbin v. Rodgers*, 53 Ariz. 35, 39, 85 P.2d 59, 61 (1938).

Second, as the Board notes, a case is not moot if the challenged behavior is "capable of repetition yet evading review." (*See* Defs.' Mot. 2); *Phoenix Newspapers*, 200 Ariz. at 460, 27 P.3d at 817. Angels' history with the Board, as set forth in their Amended Complaint, is rife with constantly changing expectations. (FAC ¶¶ 24-56.) Thus, Angels find little solace in a statute that is even more vague and irrational, and a demand that they wait "until and unless the Board takes action" against them. (*See* Defs.' Mot. 5.) Without an opportunity to litigate their

claims, Plaintiffs remain at the Board's mercy and subject to criminal penalties.

d. **Plaintiffs' claims are ripe**

Arizona courts "determine ripeness by evaluating 'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Phelps Dodge Corp. v. Ariz. Elec. Power Co-op, Inc.*, 207 Ariz. 95, 118, 83 P.3d 573, 596 (App. 2004) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). The hardships to Angels cannot be overemphasized. For over a year now, they have endured a bureaucratic nightmare: withstanding myriad regulations that do not rationally pertain to their business (FAC ¶ 24-47, 59-60, 67, 78), facing fluctuating legislation fraught with new and greater uncertainties (¶ 53-56), and finally defending their right to defend themselves in court. Angels' injuries are ripe and they must have a chance to fight for the survival of their business.

While Arizona courts apply the ripeness doctrine "to justify non-intervention by the courts when the complained of administrative action has not become final because of failure to exhaust appropriate administrative remedies," or "in cases involving attacks on *general* orders, rules and regulations of an administrative agency," *Ariz. Downs v. Turf Paradise, Inc.*, 140 Ariz. 438, 445, 682 P.2d 443, 450 (App. 1984), it is *not* appropriate where, as here, the threat of *criminal penalties* of fines and imprisonment looms over Angels. §§ 32-574(C), 13-802(A), 13-707(A)(1). Even if it were true that the Board was not currently enforcing its cosmetology laws against Plaintiffs, Angels have at the very least "alleged an *intention* to engage in a course of conduct *arguably affected with a constitutional interest*, but proscribed by a statute, and [that]

there exists a credible threat of prosecution thereunder." *Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 835 (9th Cir. 2012) (citations omitted). Although the Board would undoubtedly prefer to bar Angels from court "[u]ntil and unless the Board takes action under the amended" statute (Defs.' Mot. 5), under Arizona law, Plaintiffs are not "required to await and undergo a criminal prosecution as the sole means of seeking relief." *Oklevueha Native Am. Church*, 676 F.3d at 835.

IV. Angels' First Amended Complaint States a Claim

a. Angels have stated a claim for lack of jurisdiction

As Defendants recognize, Plaintiff Boice alleges that she merely "*schedules appointments* for home beauty services" (Defs.' Mot. 6); she does not engage in the practice of cosmetology. (FAC ¶ 2, 23, 31, 48.) Angels have made sufficient allegations, beyond mere "[c]onclusory statements" (Defs.' Mot. 6), to challenge the Board's authority to apply cosmetology laws and regulations to their dispatch business. Angels have stated that their business consists solely of connecting clients desiring in-home salon and spa services with independent, Board-licensed cosmetologists. (FAC ¶¶ 3, 16-18, 22-23.) They have alleged that their business is merely a dispatch service (¶ 3, 16, 18, 23, 48), "not a salon," nor a business that practices cosmetology. (¶ 3, 31, 48, 59-60, 76.) This is sufficient to state a claim. *Mobilisa,* 217 Ariz. at 111, 170 P.3d at 720. Defendants' bare diktat that "the Board does indeed have jurisdiction over Plaintiffs" (Defs.' Mot. 6), and that "Plaintiffs' business is . . . 'operated for the purpose of engaging in the practice of cosmetology'" (*id.* at 6), will be tested as the lawsuit

progresses to summary judgment. But on a Motion to Dismiss, where Angels' allegations must be viewed in the most favorable light, *Cullen*, 218 Ariz. at 419, 189 P.3d at 346, Angels have alleged sufficient facts about the nature of their business to state a claim for relief under their jurisdiction claim.

b. **Angels have stated an equal protection claim**

Defendants' effort to reclassify Angels' equal protection claims as due process claims depends on an out-of-context reading of both Angels' Amended Complaint and the constitutional standards. First, Defendants assert, without explanation or citation to authority, that Angels' allegations in Paragraphs 78-79 of the Amended Complaint are "not properly equal protection claims." (Defs.' Mot. 8.) But these paragraphs are not *claims* at all; they are *parts* of a claim. Under both the state equal privileges and immunities clause and the federal equal protection clause, an occupational licensing law is unconstitutional if it cultivates unequal treatment without a rational relationship to a legitimate public interest. *Merrifield v. Lockyer*, 547 F.3d 978, 984 n.9 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136-37, 23 P.3d 675, 681-82 (App. 2001). Count III of the Amended Complaint alleges that the Board's application of the challenged laws irrationally treats Angels' dispatch service as the practice of cosmetology, (FAC ¶ 76), and subjects Angels to regulatory burdens not imposed on other, similarly situated dispatch services. (¶ 77.) Angels contend that these burdens are not rationally related to a legitimate public interest. (¶¶ 78-79.) Read in context, these paragraphs are simply part of a cause of action that, if Angels prove the

allegations, would entitle them to relief. That is all that is required at the Motion to Dismiss stage. *Mobilisa*, 217 Ariz. at 111, 170 P.3d at 720. Defendants may be misled by the fact that the rational basis test applies to both the due process and equal protection realms. *See Merrifield*, 547 F.3d at 984; *Grezaffi*, 200 Ariz. at 136-37, 23 P.3d at 681-82.

Second, Defendants cite *Merrifield* as holding that the Equal Protection Clause does not bar the government from grouping Angels' dispatch service with dissimilar businesses for purposes of regulation. (Defs.' Mot. 7-8.) But Angels' allegation comes within the *Arizona* equal privileges and immunities clause (*see* FAC ¶¶ 74-75, 81), and is not barred by *Merrifield*, which focused exclusively on the federal clause. In fact, Arizona courts have not addressed whether the state Constitution bars the government from "treating things that are different as though they were exactly alike." *Merrifield*, 547 F.3d at 984 (citation omitted). The Board's sole basis for relying on *Merrifield* as an authority on Arizona state law is its claim that federal and state equal protection clauses are interpreted identically. (Defs.' Mot. 3 (citing, *inter alia*, *Hernandez v. Lynch*, 216 Ariz. 469, 471 n.3, 167 P.3d 1264, 1266 n.3 (App. 2007).)) But federal law is unsettled on this question. For instance, *Merrifield* ignored *Anderson v. Celebrezze*, 460 U.S. 780, 801 (1983), which declared that the federal Equal Protection Clause barred such acts, and in *Craigmiles*, 312 F.3d at 225, the Sixth Circuit struck down a licensing law under the Equal Protection Clause because it irrationally grouped casket sellers with funeral directors who practiced fundamentally different trades. Also, *Lynch* and other cases asserting that state and federal equal protection rights are analyzed the same were decided before *Merrifield*, and cannot

therefore be read as incorporating that case's reading of the Fourteenth Amendment into the state Constitution. Thus, "regardless of the [Ninth Circuit's] interpretation of the federal constitution, [Arizona Courts]. . . examine our own state constitution." *Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 460 n.3, 56 P.3d 28, 34 n.3 (Ariz. 2002).

Finally, Defendants claim that Angels have failed to allege facts about how other dispatch services operate. (Defs.' Mot. 8.) But Angels are under no obligation to offer such detail prior to conducting discovery. Angels do allege that other dispatch services exist. (FAC ¶ 77.) But more importantly, Defendants have *themselves* created at least two kinds of cosmetology dispatch services: those who deal with persons suffering from illness, infirmity, or disability, and those who do not. (¶¶ 53-56.) Angels allege that this difference in treatment is not rationally related to a legitimate public interest. The question at the Motion to Dismiss stage is whether, if Angels prove this allegation, they would be entitled to relief. The answer must be yes.

c. **Angels have properly stated a free speech claim**

Angels state a valid free speech claim that, if the factual allegations are proven, would entitle Angels to relief. Contrary to Defendants' assertion, expressive speech is not "wholly incidental" to Angels' business (Defs.' Mot. 9), but is the entirety of that business: Angels operate a dispatch service which consists solely of expressing and exchanging information. (FAC ¶¶ 3, 16, 18, 23, 48.) Defendants balk at Plaintiffs' characterizing cosmetology laws as regulating speech. (Defs.' Mot. 9-10.) While it is correct that on their face, the salon and license requirements do not proscribe speech, it is the Board's contrived application of *cosmetology*

laws to a purely communicative business that burdens Angels' speech and implicates the state and federal constitutions. Angels receive appointments and then contact cosmetologists with the appointment time and location – nothing more. Angels are an information assembly and dissemination service. As the U.S. Supreme Court recently emphasized, such a business is protected by the First Amendment. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2666-67 (2011) (rejecting government's argument "that heightened judicial scrutiny is unwarranted in this case because sales, transfer, and use of . . . information are conduct, not speech," because "the creation and dissemination of information are speech within the meaning of the First Amendment"). *See also New Times, Inc. v. Arizona Bd. of Regents*, 110 Ariz. 367, 374, 519 P.2d 169, 176 (1974) ("commercial nature" of expressive activity "is no justification for narrowing the protection of expression"). And Angels are even more protected by the Arizona Constitution's guarantee of expressive freedom, which is broader than the First Amendment, and which protects businesses engaged in the commercial transmission of information. *State v. Stummer*, 219 Ariz. 137, 143(Ariz. 2008) ("[I]n selling [books], [bookstores] are engaging in protected speech under Article 2, Section 6"). *See also Coleman v. City of Mesa*, 228 Ariz. 240, 265 P.3d 422, 432 (App. 2011) (when a business involves activities of pure speech, that business itself "also constitutes pure speech" and is protected by the constitution).

Defendants' argument that Angels' free speech claim is barred because Angels have been issued a salon license (Defs.' Mot. 9), must fail. In *Hunt v. Los Angeles*, 638 F.3d 703 (9th Cir. 2011), on which the Defendants rely, the granting of a permit rendered the case moot. *Id.* at 718.

But Angels' case is not moot. Angels have not been issued a permanent permit to operate their business, but must renew it every year. Moreover, *Hunt* did not involve – as this case does – potential criminal liability for engaging in an act of speech. It involved a request for a permit to use public property. *Id.* at 707.

Angels are in the business exclusively of assembling and transmitting information about a lawful service. In applying the salon and license requirements to their business, the Board restricts Angels' right to engage in this expressive conduct. Angels has stated a cause of action for which relief may be granted if Angels proves the factual allegations in its complaint; therefore, Defendants' Motion to Dismiss should be denied.

Conclusion and Request for Relief

Given Defendants' irrational regulation of Angels' business, it is understandable that they would prefer to see the lawsuit dismissed and not have to explain why the state is forcing a dispatch service to rent salon space. Angels' injuries are real, numerous and ongoing, and their claims are proper under Arizona law. Plaintiffs must have the opportunity to defend Angels on Earth and their customers whose lives their services enhance. Accordingly, Plaintiffs respectfully request that this honorable Court deny Defendants' Motion to Dismiss.

DATED: June 11, 2012

Respectfully submitted,

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