IN THE COURT OF APPEALS FOR THE STATE OF ARIZONA
DIVISION ONE

CINDY VONG and LA VIE, LLC, Appellants, vs. DONNA AUNE, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, Appellee.	Court of Appeals, Division One Case No. 1 CA-CV 13-0423 Maricopa County Superior Court Case No. CV2009-037208

APPELLANTS' OPENING BRIEF

Clint Bolick (021684)
Christina Sandefur (027983)
Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs-Appellants

Table of Contents

Table of Authorities

Federal Cases

State Cases

Federal Constitutional Provisions

State Constitutional Provisions

Federal Statutes

State Statutes and Rules

Additional Sources

Statement of the Case

This civil rights lawsuit was filed nearly four years ago in Maricopa County Superior Court by Appellants Cindy Vong and La Vie LLC, who challenged the Arizona Board of Cosmetology's closure of their Spa Fish business. The Complaint (Index of Record ("I.R.") 1) alleged that (1) the Board lacks jurisdiction over fish; (2) the applicable statutes and rules as applied to shut down Spa Fish violate Vong's rights to due process and equal privileges and immunities under the Arizona Constitution; and (3) the statutes and rules as applied violate Vong's privileges or immunities, due process, and equal protection rights under the 14th Amendment and 42 U.S.C. § 1983.[1] The Complaint seeks declaratory and injunctive relief and attorney fees.[2]

On May 11, 2010, the trial court dismissed the lawsuit on multiple grounds (I.R. 20). After granting expedited review, this Court affirmed the dismissal as to the jurisdictional challenge, holding that the services provided by Spa Fish are subject to the Board's jurisdiction pursuant to A.R.S. § 32-501(10)(c) (defining "[n]ail technology" to include "[m]assaging and cleaning a person's hands, arms,

[1] The relevant constitutional provisions, statutes, and rules are attached as App. 1-8.

[2] Appellants seek attorney fees and costs in connection with this appeal and the proceedings below pursuant to A.R.S. §§ 12-341, 12-341.01, and 12-348; 42 U.S.C. § 1988; the private attorney general doctrine; and Ariz. R. Civ. App. P. 21.

legs and feet"). It reversed dismissal of Vong's constitutional claims. *Vong v. Aune*, 2011 WL 1867409 (Ariz. App. Apr. 29, 2011) (mem. dec.).

Following discovery, the parties filed cross-motions for summary judgment. The trial court denied both motions and ordered that the case proceed to trial (I.R. 73). A two-day trial was held in January 2013. The court ruled in favor of Defendant/Appellee on March 15, 2013 (I.R. 101), and entered judgment on May 9, 2013 (I.R. 106). This timely appeal followed (I.R. 108).

Statement of Facts

The parties disagree profoundly over the nature of the activity at issue. Appellee views the fish as "implements" that are used to perform nail technology. Appellants view the fish as fish that provide entertainment. The facts demonstrate that only through the Board of Cosmetology's tortured application of law are the fish transformed from tiny aquatic creatures into implements of nail technology.

The little fish that have made such big waves are garra rufa and chin chin, each about one to two inches long (Transcript Jan. 14, 2013 ("Tr. I") at 27). Garra rufa fish have no teeth; chin chin develop teeth (Tr. I at 164). When human feet are placed into their environs, garra rufa fish gently suck dead skin from the feet (Tr. I at 164-65). In Turkey and other parts of the Middle East, "the practice of using Garra Rufa fish is a tried and tested practice for spa treatments," in which

patrons immerse their entire bodies or dangle their feet in natural pools (Tr. I at 175-76).

Appellant Cindy Vong emigrated from Vietnam to the United States in 1983, and became an American citizen in 1989 (Tr. I at 25). She is licensed by the Board both as an aesthetician and a nail technician (Tr. I at 25-26). Were the Board to revoke her licenses, she would be unable to lawfully operate her nail salon (Tr. I at 26).

After observing fish spas in Japan and following extensive research, Cindy Vong decided to open a business called "Spa Fish" (Tr. I at 27). She invested approximately $40,000 to purchase fish[3] and equipment and to remodel her nail salon to accommodate the new business, which she opened in October 2008 (Tr. I at 28-29). She developed a health and safety protocol for the procedure (Tr. I at 36-37).[4] Patrons were required to sign a waiver before proceeding (Tr. I at 29). As a licensed nail technician, Vong is trained to recognize skin diseases (Tr. I at 26). Before commencing the procedure, she would inspect the patrons' skin and wash their feet with antibacterial soap. If any problems were detected, the

[3] The importation of wild fish into the U.S. is governed by both federal and state law. *See, e.g.*, 16 U.S.C. § 1538(d); 50 C.F.R. §§ 13.41-.50, 14.12, and 14.93; and Ariz. Admin. Code R12-4-405 through 407.

[4] The protocol was admitted into evidence as Trial Exhibit 1 (attached as App. 13).

procedure would not be allowed (Tr. I at 30). The patrons' feet were immersed in a tank with fresh water, into which the fish were inserted. After about 30 minutes, the procedure ended and the feet were washed again (*Id.*). At that time, customers could choose to have a pedicure in a separate part of the salon (Tr. I at 31). The fish were then returned to a segregated portion of a community tank containing filtered water (Tr. I at 32).

The fish spa was very successful, with up to 20 customers visiting every day (Tr. I at 34). As Cindy Vong explains it, the patrons would place their feet in the tank, in which the fish would "nibble on the dead skin. It makes very tickle, and people like it" (Tr. I at 26-27). Trial Exhibit 15 (attached as App. 15) is a photograph that depicts the procedure, and Exhibit 16 is a video of a fish spa experience at Cindy Vong's salon.[5] The Court will observe that Cindy Vong's description of the procedure is accurate.

No health or safety complaint was ever filed against Cindy Vong, and the Board is unaware of anyone being harmed by her fish spa (Tr. I at 35 & 81). About a month before Spa Fish opened, the Board conducted a routine inspection of the nail salon, at which time Vong told the inspector of her plans to open a fish spa (Tr. I at 35). Although Vong invited the Board to observe a Spa Fish

[5] The video may be viewed at: http://www.youtube.com/watch?v=TA99-xS7nGE.

treatment, it never did (Tr. I at 38-39). The Board neither performed nor commissioned any independent analysis of health and safety aspects of fish spas or Vong's protocol. Instead, the Board merely concluded that "'Fish Pedicures' did not follow R4-10-122. Therefore, [Vong] was in violation of the Board's rule by performing the service" (I.R. 56, Exh. 8 at 2-3).[6] Vong asked the Board to allow her to conduct a pilot program, but it refused (Tr. I at 38). Faced with the possible revocation of her license, Vong agreed to discontinue Spa Fish (Tr. I at 39).

The Board of Cosmetology is comprised of seven members, four of whom are cosmetologists who may be competitors of the practitioners they license (Tr. I at 73). The Board issues three licenses: cosmetology, aesthetics, and nail technology. All involve the detection of skin diseases (Tr. I at 71).

The Board ordinarily has expertise in the areas it regulates (Tr. I at 78), but it has no expertise in fish spas (Tr. I at 82-83). When the rules regarding disinfection of implements were devised, the Board did not have fish in mind (Tr. I at 89-90). Although the term "fish pedicures" is often used in the context of fish spas, the fish treatments are not pedicures because pedicures are more invasive (Tr. I at 201-02). A normal pedicure includes exfoliation, massage, pushing back

[6] The cited Board Rule (Ariz. Admin. Code R4-10-112 (attached as App. 7)) provides that "tools, instruments, or supplies that come into direct contact with a client" must be disinfected or thrown away after use.

cuticles, callus removal, and toenail trimming (Tr. I at 85-86). Pedicures expose patrons to risk of harm because tools are used to "actually peel back skin or cut skin or to push back cuticles, which could expose the underlying layers of the body" (Transcript Jan. 15, 2013 ("Tr. II") at 18-19). Even when sanitized, bacteria may remain on the tools (Tr. II at 19). Fish, of course, do not trim toenails, nor do they massage feet (Tr. I at 88-89) (unless one considers tickling to be a form of massage). Moreover, a regular pedicure is "far more abrasive" than a fish spa procedure, which is "more like a gentle easing of hard skin" (Tr. I at 165).

Beauty and nail salons that are subject to the Board's jurisdiction use a number of products and tools that could be and sometimes are harmful to customers (Tr. I at 90). The Board's rules reduce but do not eliminate risk. For instance, disinfection of tools only reduces the risk of bacterial infection but does not eliminate it (Tr. I at 91, 93-94). Hands come into contact with patrons' skin and can contain bacteria, but practitioners do not have to disinfect them; they need only wash them with soap and water (Tr. I at 94-96). Despite precautions, HIV and hepatitis have been spread through salons (Tr. I at 103). As Appellee testified, "We can't eliminate anything because there is human people doing the service, so we can't eliminate it" (Tr. I at 114).

Likewise, chemicals used in salons, including nail salons, sometimes come

into contact with human skin and can cause chemical burns, which are sometimes severe and disfiguring (Tr. I at 103-04). Some of the chemicals used in salons contain carcinogens; some contain formaldehyde, which can cause allergic reactions (Tr. I at 104-07). In nail salons, chemical cuticle and callus removers present potential health hazards (Tr. I at 112). Nonetheless, the only way the Board regulates the use of potentially harmful chemicals is to admonish practitioners to use them in accord with manufacturers' instructions (Tr. I at 113; *see also* Tr. II at 147-48).

In contrast to its (often minimal) regulation of tools, products, or activities that have been demonstrated to cause injury or transmit disease, the Board chose to prohibit fish spas altogether, even though it has not verified a single instance in which fish spas have caused injury or harm anywhere in the world (Tr. I at 115). Indeed, the Board considered no alternative course of action other than a complete ban. As Appellee testified, "We believed that there was a chance and potential harm to the consumer and the board didn't consider any actions except prohibited because we believed that there was a chance that the consumer could be harmed" (Tr. I at 84).

Although fish spas are not uncommon in various parts of the world, little published research exists on health and safety issues. In 2011, the United

Kingdom Health Protection Agency[7] published a report entitled *Guidance on the Management of the Public Health Risks from Fish Pedicures*.[8] Appellants' expert is Graham Jukes, chief executive of the Chartered Institute of Environmental Health, a professional educational body for environmental health practitioners in the UK (Tr. I at 141).[9] Jukes was involved in creating the Health Protection Agency report and contributed a foreword (Tr. I at 149).

Jukes testified that the risk of harm from fish spas is "[v]ery low"—if there are no "cuts, grazes, or open sores" (conditions that licensed cosmetologists are trained to detect), there is "minimal public health risk" (Tr. I at 180). "The main danger, if there is a danger at all," Jukes stated, "is any potential ingesting of any of the waters around the fish container itself" (Tr. I at 181). "But as long as there are no cuts, no abrasions, then this is quite a gentle treatment as compared with some of the other treatments" performed in nail salons (*Id.*).

Although the risk of infection is very low, Jukes testified that the risks could be reduced even further by taking certain sanitation and safety precautions (Tr. I at 182-84). Aside from recommending against the use of chin chin fish because they

---

[7] The Health Protection Agency is the U.K. government agency that advises on biological, chemical, and nuclear issues from a scientific background. Its equivalent in the U.S. is the Centers for Disease Control (Tr. I at 148).

[8] http://www.hpa.org.uk.webc/hpawebfile/hpaweb_c/1317131045549.

develop teeth (Tr. I at 184), Jukes expressed the opinion that the Spa Fish protocol created by Cindy Vong could be applied with "low if not minimal risk" to customers (Tr. I at 196). Jukes concluded that fish spas can operate with fewer risks than those presented common activities that are regulated but not banned, such as tattooing, piercing, and hair salons (Tr. I at 197).

Jukes' assessment of minimal health risks is corroborated by real-world experience. The U.K. has thorough reporting procedures for infectious diseases, and despite having hundreds of fish spas, not a single instance of disease transmission has been reported (Tr. I at 179). Likewise, the Centers for Disease Control has identified no instances of disease transmission (Tr. I at 178-79). Germany also has fish spas but has experienced no reports of diseases or illnesses (Tr. I at 180).

Appellee's expert is a dermatologist, Dr. Joseph Giancola. Twelve days prior to producing his report, he stated that "while I have no previous experience or in-depth knowledge of the specifics of fish pedicures, I am willing to do some research and form an opinion on the issue" (Tr. II at 62). He never visited a fish spa, never published on the topic, and never treated a patient who was involved with a fish spa (Tr. II at 63). As the doctor testified, "Most of the information I

[9] Jukes' curriculum vitae is Trial Exhibit 5 (attached as App. 14).

utilized to form an opinion on this matter is well summarized in the guidance on the management of the public health risk from fish pedicures produced and published by the Health Protection Agency in the UK," which was the only comprehensive study on fish spas he could find (Tr. II at 63-64). Scientifically, he testified, it makes no difference that the report is from the U.K., and he expressed no reason to doubt the report's credibility (Tr. II at 64-65). He acknowledged that neither the Health Protection Agency nor the Centers for Disease Control had reported any instances of harm from fish spas (Tr. II at 66).

Dr. Giancola testified on infections among patients working in the field of cleaning aquariums (Tr. II at 47). He testified that there is a risk of infection from fish spas that cannot be eliminated, and opined that the practice should be banned (Tr. II at 53-56). The trial court found that although there have been no reported cases of disease or infection (I.R. 101 at 7, ¶ 52), the Board's action banning fish spas was rational because the "risk is not zero" (*id.* at 8, ¶ 8). With regard to the Board's regulation of the fish as nail technology implements, the court stated, "If the fish are not implements then the Plaintiff fails to explain what they are" (*id.* at 12). Appellants believe the record clearly establishes that the fish are fish.

Issues Presented

1. Did the government violate Appellants' state and federal constitutional rights by subjecting their Spa Fish business to a statute and regulations that clearly were never intended to apply to fish?

2. Did the government violate Appellants' state and federal constitutional rights when it completely banned the Spa Fish business even though there has not been a single documented case of harm from such practices anywhere in the world and despite the findings from the only significant study that the practice is safe and can be made even safer by adhering to certain health and safety protocols?

3. Did the government violate Appellants' state and federal constitutional rights when it applied the harshest possible regulatory tool—an outright ban—to the Spa Fish business, while allowing and subjecting demonstrably dangerous cosmetology services to lesser or no regulation?

Argument

THE BAN ON FISH SPAS VIOLATES APPELLANTS' CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, AND EQUAL PRIVILEGES AND IMMUNITIES.[10]

[10] Appellants' cause of action under the privileges or immunities clause of the 14th Amendment presently is foreclosed by the *Slaughter-House Cases*, 83 U.S. 36 (1872), a decision that recently was sharply criticized by five members of the U.S. Supreme Court. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028-3031 (2010); *see also id.* at 3058-3077 (Thomas, J., concurring). Appellants reserve that issue to present in the proper forum.

A. Standard of Review. "While we accept the superior court's findings of fact unless they are clearly erroneous, we review questions of law *de novo*." *Calisi v. Unified Fin. Svcs., LLC*, 232 Ariz. 103, 107, 302 P.3d 628, 631 (App. 2013).

B. Applicable Constitutional Principles. Appellees' brief no doubt will recite at length the catechism we all learned in law school: that economic regulations are subject to "rational basis" review, which Appellees will portray as literally an anything-goes standard. It is indeed a relaxed standard of judicial review. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993). However, it does not quite require, as Appellee's counsel suggested in the trial court (Tr. II at 164-65), that Appellants must prove that the government's actions were "insane."

For many reasons that will be discussed more fully below, this case does not present a typical economic regulation, and falls instead into the categories of government action that have been struck down under rational basis review. But as a threshold matter, the rationale for rational basis deference does not even apply here. Appellee wields the rational basis test as if it is an end in itself rather than as a means to an end. The end to which the rational basis test is directed is judicial

deference toward legislative decision-making. As the Supreme Court put it in *Beach Communications*, 508 U.S. at 313 (emphasis added), separation of powers compels courts not to judge "the wisdom, fairness, or logic of legislative *choices*." That deference, the Court went on to say, has "added force 'where the legislature must necessarily engage in a process of line-drawing.'" *Id.* at 315 (citation omitted).

The Court's emphasis on "choices" and "line-drawing" implies some type of conscious action on the part of the legislature or the executive agency to which authority is delegated. As the U.S. Supreme Court emphasized in *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938), under the rational basis test, "the existence of facts supporting the legislative judgment is to be presumed . . . unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." Here, unlike the situation in *Beach Communications* and the vast majority of rational basis cases, neither the Legislature nor the Board ever made a deliberate policy decision to ban fish spas. The Legislature, through A.R.S. § 32-501(10)(c), delegated authority to the Board to regulate nail technology. The Board in turn established rules regarding tools used in nail technology. But as this Court observed, "no rules exist that

specifically address—or even contemplate—the practice of fish pedicures." *Vong*, 2011 WL 1867409 at *4 n.4. Appellee, in turn, admitted that it neither performed nor commissioned any analysis regarding the health and safety aspects of fish spas, but merely concluded that "'Fish Pedicures' did not follow R4-10-112. Therefore, the Plaintiff was in violation of the Board's rule by performing the service" (I.R. 56 Exh. 8 at 2-3).

Thus while the Board's determination that Vong violated its rules is entitled to great deference—and indeed is not challenged in this appeal—neither the Legislature nor the Board never made a discrete policy determination regarding fish spas that would be entitled to ordinary judicial deference. The Board's legal determination had the necessary *consequence* of imposing an absolute prohibition of fish spas in Arizona, but no legislative or administrative body ever deliberated over the substance of that prohibition. It is impossible to formulate a "rational basis" for a policy that was never contemplated. Hence there is no danger of the courts substituting their judgment for that of the Legislature or the Board, for no such judgment about fish spas was ever exercised.

Even if this were an ordinary rational case, a large body of case law (especially in Arizona) has invalidated excessive, discriminatory, or arbitrary restrictions on the right to earn an honest living under the rational basis standard.

See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (pest control); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (casket sales); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012) (cosmetology); *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999) (cosmetology); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (jitneys); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (shoeshine stands).

Although Appellee correctly observes that Arizona courts have articulated a "beyond a reasonable doubt" standard in rational basis cases, the Arizona Supreme Court has vigorously protected the right to earn an honest living against unreasonable regulation. In *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941), the Court invalidated on state and federal due process grounds a law requiring licensing of photographers for hire. "The business or profession of making photographs is not inherently dangerous to society but is an entirely innocent occupation," the Court held. "The police power, broad and comprehensive as it is, may not be used to prevent a person from following a business or occupation so innocuous, and the effort to do so is so unreasonable and arbitrary as to amount to a deprivation of a property right—the right to earn a living—without due process." *Id.*, 57 Ariz. at 372, 114 P.2d at 231.

Similarly, in *Edwards v. State Bd. of Barber Exam'rs*, 72 Ariz. 108, 111,

231 P.2d 450, 451 (1951), the Court struck down on due process grounds price-fixing provisions of the Barber Act on the ground that they bore "no reasonable or substantial relation to public health, safety, or the general welfare." The Court defined the applicable due process standard as follows: "In order to sustain legislative interference with the liberties of the individual, there must be an obvious and real connection between the actual provisions of a police regulation and its avowed purpose." *Id.*, 72 Ariz. at 112, 231 P.2d at 452. Moreover, "individual liberties can be sacrificed only upon a clear showing of a benefit to the public commensurate with the loss of individual rights." *Id.*, 72 Ariz. at 114, 231 P.2d at 453.

Obviously, those cases are problematic for Appellee, who suggested below that the court should ignore them because they are old, they may have been implicitly overturned by subsequent cases, or they may have been swept away when the U.S. Supreme Court embraced deferential rational basis scrutiny. The problem with the latter argument is that the U.S. Supreme Court did so in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), whereas *Buehman* and *Edwards* were decided in 1941 and 1951, respectively. No subsequent Arizona decision has subsequently questioned the continuing vitality of those cases; and indeed, this Court cited *Buehman* as the basis for overturning the trial court's dismissal of

Appellants' constitutional claims. *Vong*, 2011 WL 1867409 at *6. Properly understood, *Buehman* and *Edwards* are examples of state courts "construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 495 (1977).

Indeed, Arizona courts have robustly applied the rational basis test both in the context of the equal protection guarantee (Ariz. Const. art. II, § 13) and the prohibition of special laws (Ariz. Const. art. IV, pt. 2, § 19). The courts apply the rational basis test under both provisions. In *Big D Constr. Corp. v. Ct. of App.*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990), the Supreme Court held, "In determining whether a statute meets the rational basis standard, we must first ascertain whether the challenged legislation has a legitimate purpose and then determine if it is reasonable to believe that the classification will promote that purpose." Applying that standard, the Court invalidated a bid preference statute. See also *State Comp. Fund v. Symington*, 174 Ariz. 188, 194, 848 P.2d 273, 279 (1993) (invalidating certain tax differentials under the rational basis standard); *Tucson Elec. Power Co. v. Apache Cty.*, 185 Ariz. 5, 13-15, 912 P.2d 9, 17-19 (App. 1995) (same).

In sum, neither federal nor state courts have hesitated to strike down laws, including those restricting economic opportunities, that are not rationally related to a legitimate government purpose. Here, of course, the statute and rules on their face advance legitimate government purposes, but are applied in a manner that defies rationality.

Appellee's interpretation of the statute and rules to prohibit fish spas implicates three contexts in which courts most frequently have found government actions to flunk the rational basis test: (1) applying rules intended for one context to a different context to which they do not rationally apply, (2) banning an innocent occupation altogether, and (3) subjecting one set of activities to disproportionately harsher treatment than others. The ban on fish spas violates equal protection and due process for each of the following reasons.

C. Applying Rules Regarding Cosmetology Tools to Fish (Due Process and Equal Protection). The Board has created an anomalous (some might say highly irrational) situation: while conceding that "no rules exist that specifically address—or even contemplate—the practice of fish pedicures," *Vong*, 2011 WL 1867409 at *4 n.4, the Board nonetheless has applied its rules to ban the practice. Such a regulatory mismatch, which results in the complete prohibition of a legitimate profession, violates due process and equal protection.

The U.S. Supreme Court has observed that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The closest case on point also involves cosmetology. In *Cornwell, supra*, the federal district court for the Southern District of California struck down the application of the cosmetology licensing regime to the profession of African hairstyling (the braiding and twisting of natural black hair). As here, there was some overlap between what was being regulated and the service that was being performed. But, also as here, "the regulatory scheme treats persons performing different skills as if their professions were one and the same, i.e., it attempts to squeeze two professions into a single, identical mold." *Id.*, 80 F. Supp.2d at 1103.[11]

The court applied the rational basis test, holding that "while a perfect fit is not required, the fit must be reasonable. There must be some congruity between the means employed and the stated end or the test would be a nullity." *Id.* at 1106. After reviewing the evidence, the court found that the plaintiff's "activities are minimal in scope compared to the activities of a cosmetologist," and it therefore concluded that "she cannot reasonably be classified as a cosmetologist as it is

[11] In *Merrifield*, 547 F.3d at 985, the Ninth Circuit stated *Cornwell* should have been decided on due process grounds. We discuss *Merrifield*, which also struck down economic regulations under rational basis scrutiny, in Part E, *infra*.

defined and regulated presently." *Id.* at 1108. The court went on to hold that even if the plaintiff was properly considered a cosmetologist, "the licensing regime would be irrational as applied to her because of her limited range of activities." *Id.* The court concluded that "[t]he vice is not the statute," which rationally required cosmetology licensing, "but the implementing regulations" that subjected African hairstyling to a licensing regime that was far in excess of what was reasonably required to ply the craft of African hairstyling. *Id.* at 1118.

Applying *Cornwell*, the federal district court for the District of Utah also invalidated licensing requirements for African hairstyling, which the state had construed to fall within the definition of cosmetology. The court concluded that the cosmetology licensing regime "is so disconnected from the practice of African hairbraiding, much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [plaintiff's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of her constitutionally protected rights." *Clayton*, 885 F. Supp.2d at 1215-16.

The Board's application here of its rule regarding sanitation of cosmetology implements to fish suffers the same constitutional infirmities. Although there is sufficient overlap between fish spas and nail technology to fit it within the statutory definition of the Board's jurisdiction, applying rules regarding

cosmetology implements to fish is flatly irrational.[12] Moreover, whatever health and safety risks are presented by fish spas, the rules plainly were not aimed at preventing *those risks*.

Perhaps one practical measure of whether a rule flunks rational basis is whether a young child can spot the illogic. Even before they learn how to read, toddlers often master the pictorial game of "which item is not the same?" What youngster couldn't figure out which of these isn't like the others?: scissors, nail clippers, emery board, fish. Appellee acknowledges that the Board did not have fish in mind when it created its rules (Tr. I at 89-90). Nor could it: while the Board has expertise over the other activities it regulates (Tr. I at 78), it has no expertise regarding fish spas (Tr. I at 82-83). It makes no sense to treat fish as if they were inanimate objects. It *would* make sense if the Board devised sanitary rules that actually applied to fish, but unquestionably it did not.

Appellee contends that the Board's rules are categorical: "anything that comes in contact with the client has to be thrown away or disinfected" (Tr. I at 79). The fish come into contact with clients, yet cannot be disinfected or thrown

[12] Reacting to testimony from Appellants' expert that fish spa treatments are not nail treatments, the trial judge stated that when asked "about findings of fact about whether the fish pedicure is a nail treatment . . . my response to that is it's never been an argument that it was" (Tr. I at 201). Unfortunately, the court did not conclude from that fact that it is irrational to treat fish spas as nail treatments.

away; therefore, by the Board's reasoning, they cannot comply with the rule. But the Board's own conduct in an analogous context demonstrates the irrationality of applying the disinfection rules to fish. In addition to cosmetology implements and fish, something else "comes into contact with the client": the practitioner's hands. As Appellee testified (Tr. I at 94-95), practitioners' hands may come into contact with the client in the context of nail technology, such as when massaging the client's feet. They also come into contact during shampooing and scalp massages. Like fish, they might remove dead skin (e.g., dandruff), and may come into contact with undetected open sores. Appellee testified that hands contain bacteria, and bacteria can remain even if hands are washed (Tr. I at 96, 129). And yet, in apparent contradiction with the Board's own rule, hands do not have to be disinfected. All the practitioners have to do is wash their hands with soap and warm or hot water, which is not disinfection (Tr. I at 96).

During trial, Appellee was asked, "Why is that? Why is it hands don't have to be disinfected but tools do?" She responded, "I don't believe you can disinfect a hand" (Tr. I at 97; see also *id.* at 100-01). Recognizing that hands come into direct contact with clients, but that disinfectants should not be used on hands, the Board devised what it considered to be an appropriate alternative (Tr. II at 127). Yet in the context of fish spas, the Board mechanically applied the rule even

though it did not fit the circumstances.

Further testimony illustrates the circular illogic of Appellee's position:

> Q: Can you think of any tool or implement that does not require a practitioner's hand to operate it?
>
> A: No.
>
> Q: But fish . . . are implements nonetheless?
>
> A: Fish come in contact from one client to the other.
>
> Q: Just like hands, right?
>
> A: Without soap and water.
>
> Q: And without disinfection?
>
> A: Right, but the hand is soap and water.
>
> Q: So you have devised rules that the board believes are adequate and appropriate to the use of hands when they contact human skin; is that correct?
>
> A: Yes.

(Tr. I at 102).

It would be irrational to require cosmetologists to disinfect their hands because, by their nature, hands can't be disinfected (or thrown away).[13] Fish, by their nature, can't be disinfected either. It is equally irrational to apply rules to

[13] Presumably, cosmetologists *could* be required to wear sanitary gloves when their hands contact clients, and yet the Board has not imposed that requirement.

fish spas that cannot be followed—particularly when the consequence is to extinguish an entire industry. Fish are not implements. They are fish. The Board has the power to regulate them as such in the context of their use in nail technology, just as it has the power to regulate the use of scissors and hands as such; but instead it has chosen to apply rules designed for one context to a wholly different context. The "fit" between the rule and the object to which it is being applied is not "reasonable"—indeed, it is no fit at all. See *Cornwell*, 80 F. Supp.2d at 1106. The regulatory mismatch violates Cindy Vong's due process and equal protection rights.

D. Complete Prohibition of Fish Spas (Due Process). Americans are risk-takers, and in the pursuit of happiness, opportunities to take risks—often for nothing more than the sake of taking risks—are abundant. Often those activities include interactions with aquatic animals in their native or adapted habitats. People are allowed, for instance, to cavort up-close and personal with Great White sharks, separated only by the bars of a shark cage.[14] Closer to home, children are invited to plunge their hands into aquariums to pet and feed wild stingrays at the

[14] *See, e.g.*, http://incredible-adventures.com/shark_encounter.html. As for the danger from the sharks, the website offers this assurance: "The odds are in your favor."

Phoenix Zoo.[15] But if Appellee has her way, there is one thing Arizonans will never, ever get to experience: the feeling of tiny, toothless carp nibbling at their feet in the regulated environs of a nail salon.

That is because among the vast arsenal of regulatory tools available to the Board, it chose the strongest and harshest: a complete prohibition against fish spas. This is not the typical case in which a plaintiff is attempting to avoid business or occupational licensing or regulation. To the contrary, it is the rare case in which not only the plaintiff's expert, but the plaintiff herself, have presented proposed regulatory protocols. But the Board has not chosen to regulate fish spas. It rejected Cindy Vong's proposal to have a pilot program. It has not even chosen to impose a moratorium to give it time to consider proper regulations. Rather, it immediately and without the benefit of study or forethought imposed the most drastic of all actions, applying its rules to ban fish spas altogether.

It did not reach that result following assessment or deliberation over the health and safety risks relating to fish spas (Tr. I at 197) or the merits of Vong's proposed protocol (Tr. I at 134), nor did it consider any alternatives to prohibition (Tr. I at 84). It took its draconian action even though no health and safety

[15] http://edventures.phoenixzoo.org/kStingrayBay.html.

complaint was filed against the salon (Tr. II at 116-17),[16] and even though the Board has not identified any instances in which fish spas have caused injury or harm (Tr. I at 115).

Indeed, that fact is what makes the ban most remarkable: the most drastic possible regulatory action has been taken against an activity that has not yielded a single documented instance of harm anywhere in the world, despite the scrutiny of the United Kingdom Health Protection Agency and the U.S. Centers for Disease Control (Tr. I at 178-79). Appellants' expert Jukes reports that about 400 fish spas operate in the United Kingdom (Tr. I at 166). Assuming each salon performs only ten treatments per day (fewer than Vong performed), that would amount to 1,440,000 fish spa treatments each year in the U.K. alone (400 spas x 10 treatments x 360 days). Yet despite thorough reporting of infectious diseases in the U.K., there have been no such reports emanating from fish spas (Tr. I at 179). That seems hardly a basis at all for banning the practice, much less a rational basis.

Appellee explains that the Board considered no alternative to prohibition "because we believed that there was a chance the consumer could be harmed" (Tr. I at 84). In its conclusions of law, the trial court found that "the risk is not zero" (I.R. 101 at 8, ¶ 8). But if that is the only predicate necessary for government to

[16] The anonymous complaints alleged licensing violations, not health issues (*id.*).

obliterate an entire profession, there would be no limit whatsoever to its power to do so. After all, as Appellee's expert testified, "I suppose there's risk in almost anything that we do, there's some risk" (Tr. II at 74). In some instances, not only risk but grievous harm: Appellee testified that diseases such as HIV and hepatitis have been spread through beauty salons; and that despite all the precautions that cosmetology boards take, the risk of disease transmission in salons is greater than zero (Tr. I at 103).

The HPA report on which both experts based their testimony identified certain diseases that could be transmitted via fish or fish spas. But overall, the practice entails "minimal public health risk" (Tr. I at 180). As Jukes testified based on the HPA report, there is "a very, very low danger of anything happening and that can be mitigated by the controls that we recommended in this report" (Tr. I at 191). The risks from fish spas are lower than those for common activities that are regulated but not banned, such as tattooing, piercing, and nail salons (Tr. I at 197). The main sources of diseases that can be transmitted from fish or fish spas are ingestion or open sores. Soap and water are sufficient to remove most bacteria, and cosmetologists are trained to detect and exclude people with open sores (Tr. II at 21-22). The same diseases can be transmitted through ordinary nail salon activities, which may entail greater risk because the procedures are more

invasive than fish spa treatments (Tr. II at 18-19). Plainly, fish spas are "not inherently dangerous to society," and therefore the police power "may not be used to prevent a person" from engaging in that business. *Buehman*, 57 Ariz. at 372, 114 P.2d at 231.

By banning rather than regulating fish spas, the Board triggers a long series of judicial precedents that view outright prohibitions of economic activities with great disfavor. A case Appellee relied upon in the trial court recognizes that very distinction. In *Caldwell v. Pima Cty.*, 172 Ariz. 352, 837 P.2d 154 (App. 1992), the Court upheld a zoning provision prohibiting businesses from operating except in completely enclosed buildings. The Court noted that the plaintiff "is not prohibited from operating his business in the zoning district. He is only required to operate it within an enclosed building, the same as every other business. . . ." *Id.*, 172 Ariz. at 355, 837 P.2d at 157. The court distinguished several cases in which "the ordinances in question were held to be void because they completely prohibited peddlers within the municipal boundaries. That prohibition does not exist here." *Id.*, 172 Ariz. at 356, 837 P.2d at 158. By contrast, as this Court held, the Board's policy here "acts as an effective prohibition of the practice statewide." *Vong*, 2011 WL 1867409 at *4.

Courts across the country have taken a far dimmer view of prohibition of

businesses than of regulation. As articulated by the legendary Sam Ervin when he served on the North Carolina Supreme Court, while

> it may adopt such regulations relating thereto as are reasonably necessary to promote the accomplishment of a public good or to prevent the infliction of a public harm, the legislature can neither deny nor unreasonably curtail the common right secured to all . . . to maintain themselves and their families by the pursuit of the usual legitimate and harmless occupations of life.

State v. Ballance, 51 S.E.2d 731, 735 (N.C. 1949). Accord, *Phillips v. Town of Oak Grove*, 968 S.W.2d 600 (Ark. 1998); *Delight Wholesale Co. v. City of Overland Park*, 453 P.2d 82 (Kan. 1969); *Exton Quarries, Inc. v. Zoning Bd. Of Adjustment*, 228 A.2d 169 (Pa. 1967); *Pierce v. LaPorte City*, 146 N.W.2d 907 (Iowa 1966); *Hackler v. Ft. Smith*, 377 S.W.2d 875 (Ark. 1964); *State v. Byrd*, 130 S.E.2d 55 (N.C. 1963); *Trio Distributor Corp. v. Albany*, 143 N.E.2d 329 (N.Y. 1957); *Lakewood Exp. Serv., Inc. v. Bd. of Publ. Util. Comm'rs*, 61 A.2d 730 (N.J. 1948); *Jewel Tea Co. v. Geneva*, 291 N.W. 664 (Neb. 1940); *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403 (Cal. App. 1979); *Frecker v. Dayton*, 85 N.E.2d 419 (Ohio App. 1949).

Moreover, as our Supreme Court held in the context of barber regulations in *Edwards*, 72 Ariz. at 114, 231 P.2d at 453, "individual liberties can be sacrificed only upon a clear showing of a benefit to the public commensurate with the loss of

individual rights." An outright prohibition of a business that does not pose a significant risk to the public is a classic case of regulatory excess. For that reason, the destruction of Cindy Vong's business violates her due process rights.

E. Discriminatory Treatment of Fish Spas (Equal Protection). The establishments regulated by the Board of Cosmetology are full of potentially dangerous risks to customers (Tr. I at 90). Those risks are created by the activities performed and by the tools and chemicals used. In each and every instance, the Board has adopted regulations that reduce but do not entirely eliminate the risk—each and every instance, that is, except for fish spas, which alone were singled out for prohibition.

The trial court excluded a significant amount of evidence that would have demonstrated disparate regulatory treatment of practices within the Board's jurisdiction.[17] (*See* Tr. I at 110-11 (excluding evidence regarding shampoos, which like fish can remove dead skin, finding that while it has some relevance, it is not relevant to feet); Tr. I at 117-22 (excluding evidence demonstrating severe injuries due to permanent wave burns on the grounds that it has "nothing to do with the exfoliation of skin")). For the reasons that follow, that evidence should have been admitted and considered as part of Appellants' equal protection case.

[17] The court did not rule on Appellee's motion in limine to that effect (Tr. I at 13),

Nonetheless, the evidence presented at trial is more than sufficient to demonstrate that prohibiting fish spas while allowing and regulating other practices—some of which are far more risky and harmful—violates the equal protection guarantee.

The court below ruled that discriminatory treatment is not impermissible where the practices "are not similarly situated" (I.R. 101 at 9, ¶ 13). Actually, the practices are similarly situated for purposes of equal protection analysis because they are all regulated by the Board as cosmetology practices, and they illustrate a consistent pattern of regulatory treatment on the part of the Board from which fish spas are singled out for uniquely harsh treatment.

The paradigm case is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court struck down on rational basis scrutiny a municipal ordinance requiring homes for the mentally retarded to obtain a special use permit, while not requiring such a permit for other uses such as apartments, multiple dwellings, fraternity houses, etc. Surely, fraternity houses are different from homes for the mentally retarded, just as fish spas are different from other cosmetology services. But the disparate treatment in *Cleburne* triggered judicial scrutiny to determine whether there was sufficient difference to justify different treatment. The Court concluded that "[t]he record does not reveal any rational

---

but excluded evidence in individual rulings on relevance grounds.

basis for believing" that the home for the mentally retarded "would pose any special threat to the city's legitimate interests." *Id.* at 448. Applying that same framework here, there is nothing in the record to support a reasonable basis for *banning* fish spas while *allowing and regulating* all other cosmetology services that implicate health and safety interests. *Accord*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (no rational basis for "imposing a broad and undifferentiated disability on a single named group").

Courts have applied the *Cleburne/Romer* framework to economic regulations. In *Merrifield*, *supra*, the Ninth Circuit sustained training and examination requirements for pest control businesses that do not use pesticides, but struck down the application of the licensing scheme to those pest controllers who specialize in rodents and pigeons. As here, the scheme "specifically singles out" certain practitioners for adverse treatment. *Id.* at 991. Given that the same health and safety concerns apply to other types of pest controllers, imposing uniquely harsh regulations on some but not others "cannot be said to rest on a rational basis." *Id.* The court concluded that "while a government need not provide a perfectly logically [sic] solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id.* (emphasis in original).

Again, the doctrine applies with great weight where the disparate treatment is prohibition versus regulation. In *Santos v. City of Houston*, the court invalidated an ordinance that prohibited jitneys while allowing and regulating other types of transportation businesses. The law violated equal protection because "jitneys have been excluded from operating on city streets, while numerous other forms of similarly situated business entities providing ground transportation have been operating without restriction," yet "jitney services would pose no greater threat to public safety than other similarly situated services which are currently operating vehicles on city streets." *Id.*, 852 F. Supp. at 608.

And in *Brown v. Barry*, the court invalidated on rational basis scrutiny a Jim Crow-era law that forbade shoeshine stands on public streets, while other types of businesses were permitted. Even assuming a legitimate public purpose, the court ruled that "the District's method for achieving this goal irrationally and arbitrarily singles out bootblacks as unique from other vendors." *Id.*, 710 F. Supp. at 355.

Evidence of disparate regulatory treatment here is abundant. Appellee testified (Tr. I at 84) that fish spas were banned because "we believed there was a chance that the consumer could be harmed." Yet, as Appellee further testified (Tr. I at 90), salons use a number of products and tools that can be harmful and sometimes do cause harm, such as blowdryers that can burn customers. In Part C,

supra, we discussed practitioners' hands, which come into contact with clients (including the removal of dead skin from the scalp and contact with open sores), yet the Board only requires that hands are washed with soap and water, which can still leave bacteria that can transmit diseases (Tr. I at 94-96). Similarly, even after disinfection, some bacteria can remain on cosmetology implements, hence the risk of bacterial infection is reduced but not eliminated—and yet the Board does not consider it necessary to sterilize such tools (Tr. I at 93-94). Chemicals used in nail salons, such as callus remover and nail polish, can come into contact with skin and cause chemical burns (Tr. I at 103-04). Some chemicals used in salons contain carcinogens (Tr. I at 104-06). But the only requirement that the Board imposes on the use of chemicals is that practitioners use them in accord with manufacturer instructions (Tr. I at 113).

Despite all of the Board's precautions, injuries occur; hence the Board's rules reduce but do not completely eliminate risk. As Appellee testified, "We can't eliminate anything because there is human people doing the service, so we can't eliminate it" (Tr. I at 114). Thus, when the Board became aware of health risks associated with foot baths, which are commonly used in the nail salons, it educated itself about the risks and possible mitigation of those risks, but did not ban foot baths. As Appellee testified (Tr. II at 117), "we found a way to do the

disinfection and to train the licensees and nail techs through inspections and education." The Board's rules require disinfection, which reduces but does not eliminate bacteria (*id.*). In each area of practice—except for fish spas—the Board crafts rules that are congruent with the nature of the activity and risk.

In stark contrast, fish spas were banned completely, and Cindy Vong's proposed health and safety protocol was rejected because there is no way to disinfect fish (Tr. I at 134). And yet demonstrably, just as with practitioners' hands, there are other ways---including methods that are common in other cosmetology practices, such as inspection of customers' skin for open sores---to reduce risks that are low to begin with (Tr. I at 180-84). Appellee's expert testified that even with the strictest protocols, the risks from fish spas cannot be eliminated (Tr. II at 55); and the trial court predicated its holding on the finding that the "risk is not zero" (I.R. 101 at 8, ¶ 8). But the point of Appellants' equal protection claim is that the Board has not applied that extreme standard—the complete elimination of risk—to *any* other cosmetology practice; not to shampooing, to foot baths, to implements, to hair dryers, or to the use of potentially dangerous chemicals. Those risks can be reduced to zero only by not allowing the services to be performed at all (Tr. I at 192)—hence, by allowing such services to be provided, the Board routinely tolerates risks.

Nothing in the record indicates any *unique* risk from fish spas that singularly justifies the drastic act of prohibition, as opposed to regulation. Indeed, the Board acknowledges that---unlike the context of foot baths---it did nothing to inform itself on the risks and possible precautions prior to imposing the ban. The disparate treatment of fish spas is made all the more baffling given that the study on which both sides rely found a very low risk that can be further mitigated with appropriate safeguards; and that, in stark contrast to cosmetology salons where serious injuries and transmission of diseases are reported, not a single instance of harm has been reported in fish spas despite their common use. The prohibition of fish spas reflects ignorance and over-reaction, not a rational basis.

Conclusion and Request for Relief

This is a case that lends itself to puns. One might say that it gives new meaning to the "scales" of justice, and that the Board's actions with regard to Cindy Vong are especially "callus." And yet it is an important case that affects the rights and opportunities of all Arizonans. Although fish spas are unfamiliar to many Americans—and surely there are a lot of people who would never place their feet in that tank, not because it is unsafe but because they can't bear to be tickled---it is quite difficult to justify placing it in the rarefied category of forbidden activities. The prohibition owes less to any inherent and unacceptable

risk presented by fish spas or to any reasoned legislative judgment than it does to the odd circumstance of boards of cosmetology trying to squeeze an unfamiliar activity into a regulatory regime to which fish spas simply do not belong. In the meantime, Cindy Vong is prevented from pursuing a vibrant economic opportunity and consumers are prevented from enjoying an unusual yet entertaining and truly innocent service.

By recognizing Cindy Vong's constitutional rights, this Court will not divest the Board—or any public health authorities—of the discretion to subject fish spas to reasonable regulation. But it will vindicate precious rights that Cindy Vong gained when she took her oath of American citizenship.

Appellants respectfully ask this Court to reverse the judgment of the trial court and to remand with instructions to enter judgment in their favor.

DATED: September 3, 2013

Respectfully submitted,

/s/ Clint Bolick
Clint Bolick (021684)
Christina Sandefur (027983)
Attorneys for Plaintiffs