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' REPLY BRIEF

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Appellee never comes to grips with the nature and extent of what is at issue here. This is not a garden-variety health and safety regulation. It is an outright prohibition of an economic activity that never once has been found to cause any harm, which is the consequence of the rote application of a rule that never was intended to apply to this activity, in the context of an industry that is fraught with risky activities that are regulated but not prohibited, yet in which the regulatory agency never considered any alternative to prohibition. Hence, it is among the rare economic regulations that simply go too far.

Appellants reply below to Appellee's arguments.

A. The Facts. Appellee misstates the rules by asserting (Br. at 7) that Appellant waived its opportunity to contest findings of fact by not asking the trial court to correct them. The cited cases pertain to the sufficiency of the findings to support the judgment, rather than the sufficiency of the evidence to support the findings. On the latter question, Ariz. R. Civ. P. 52(b) is unequivocal: "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the superior court an objection to such findings or has made a motion to amend them or a motion for

judgment."

It is not so much the findings with which we disagree, but rather the evidence the Court completely overlooked. For instance, one can read the entire Findings of Fact and have no clue that the United Kingdom Health Protection Agency—the U.K. equivalent of the U.S. Centers for Disease Control—published a thorough study on health issues presented by fish spas (see Op. Br. at 7-10). Or that both side's experts relied on that study in forming their opinions (*id.*).[1]

And yet for all of Appellee's focus on the Findings of Fact (FOF), Appellee still can't resist embellishing them. Throughout Appellees' brief are sweeping assertions that are not supported by the Findings of Fact nor record, and they are not inconsequential. For instance, Appellee asserts (Br. at 24) that "[t]he trial

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[1] The trial judge revealed his view of Appellants' expert testimony regarding the study when he remarked during the trial, "You have a situation here where you've got the entire UK making recommendation on this practice. The United States operates wholly differently. You have the United States and then we have 50 states and what is not regulated by the United States and not by our Constitution says that's left to the laws of the various jurisdictions. Even this report seems to indicate that some jurisdictions will ban it. Other jurisdictions will allow it. So I get that there is some places that have done studies and find that they believe it is safe" (Tr. I at 187).

The judge missed the point of the testimony. Appellants' expert did not express an opinion about how jurisdictions in the United States should go about regulating fish spas. Rather, his testimony was about whether fish spas present health and safety risks, the extent of those risks, and whether and how they can be mitigated. In that regard, the findings are not specific to the U.K., and indeed the

court found, and substantial evidence clearly demonstrated, a *substantial* health risk involved in fish pedicures" (emphasis added). The only citation is to the trial court's opinion. But there we find no such thing. FOF 49 states, "Plaintiffs' expert, Dr. Graham Jukes, opines that fish pedicures do carry a risk infection or disease that cannot be entirely eliminated through adherence to any set of safety protocols" (I.R. 101 at 7). FOF 50 states, "Defendant's expert, Dr. Joseph Giancola, opines that fish pedicures carry a risk of infectious disease that cannot be completely eliminated through adherence to any set of safety protocols" (*id.*). Finally, FOF 52 states, "There is scientific uncertainty as to the precise nature and probability of risks associated with fish pedicures and although the record bears no evidence of any reported case of disease or infection transmitted by means of a fish pedicure, it cannot be ruled out" (*id.*).

Appellee cites to *no* evidence, much less "substantial evidence," and *no* Finding of Fact, that the health risks from fish spas are "substantial." Indeed, both experts were singing from the same hymn-book, namely the Health Protection Agency study. Appellants' expert, who contributed to the study, testified on the basis of the study that the public health risk is "minimal," that such risk primarily would involve ingesting the water, and that the minimal risk could further be

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study was the primary basis for both sides' expert testimony.

mitigated through appropriate protocols (Tr. I at 149 & 180-84). That evidence is uncontroverted. The experts differed only in their recommendation regarding a proper regulatory response, with Appellee's expert opining that fish spas should be banned because the risk cannot be eliminated (Tr. II at 53-56).

Similarly, Appellee asserts (Br. at 24), this time citing to nothing at all, that "[t]here is no way, short of a prohibition on fish pedicures, to reduce these risks to any extent." We have argued (Op. Br. at 24-30) that such a factual predicate is necessary in order for a complete prohibition of an economic activity to have a rational basis. However, the trial court made no such finding, nor did Appellee ask the Court to do so after it issued its findings. In fact, based on the Health Protection Agency study, Appellants' expert testified, without contradiction, that the minimal public health risks can be mitigated through sanitation and safety precautions (Tr. I at 182-84).

If Appellee has such an open-and-shut case, no factual exaggerations should be necessary. Even crediting fully the trial court's findings and ignoring highly credible, uncontroverted testimony, we are left with the question of whether Appellee as a matter of law can apply a regulation not intended for that purpose to completely prohibit an economic activity because, as the court put it, the "risk is not zero" (I.R. 101 at 8, ¶ 8).

B. Rational Basis Review Under the Arizona State Constitution.

Understandably, Appellee chafes under the robust application of the rational basis standard that has been applied by Arizona courts.[2] Appellee contends (Br. at 15) that Appellants' reliance on *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941) and *Edwards v. St. Bd. of Barber Examiners*, 72 Ariz. 108, 231 P.2d 450 (1951) is misplaced because it "directly contravenes binding federal and state precedent." To the extent Appellee suggests that subsequent state cases have overturned *Buehman* and *Edwards*, that is clearly not the case. Nor is federal precedent "binding" upon the state judiciary's interpretation of the Arizona Constitution. "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions." *Minn. v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Judge (now Justice) Berch put that proposition nicely in a case cited by Appellee: "This court need not blindly follow federal precedent 'just because it has "become so firmly embedded" that it is the standard.'" *Martin v. Reinstein*,

[2] Appellee correctly notes (Br. at 20) that two cases cited by Appellants—*State Comp. Fund v. Symington*, 174 Ariz. 188, 848 P.2d 273 (1993) and *Tucson Elec. Power Co. v. Apache Cty.*, 185 Ariz. 5, 912 P.2d 9 (App. 1995)—were decided not under equal protection or due process analysis but under the Constitution's special law prohibition. However, the first prong of analysis under that clause is whether the law has a rational basis; and in both cases the law flunked that standard, illustrating the robust rational basis standard in Arizona.

195 Ariz. 293, 302, 987 P.2d 779, 788 (App. 1999)(citations omitted).

Although Arizona courts generally adhere to federal rational basis analysis, they have recognized the central importance of the right to pursue a livelihood and that proportionality of regulation is an important component of due process. Our Supreme Court articulated the latter principle in another case cited by Appellee, *Valley Nat'l Bank of Phx. v. Glover*, 62 Ariz. 538, 159 P.2d 292 (1945). "Due process, when applied to substantive rights," the Court stated, "is interpreted to mean that the state is without right to deprive a person of life, liberty or property by an act that has no reasonable relation to any proper governmental purpose, *or which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental powers*." *Id.*, 62 Ariz. at 553, 159 P.2d at 298-99 (emphasis added).

Buehman and *Edwards* embrace both of those principles. "This case does not announce the rule that a state legislature may pass any kind of regulatory law for any kind of business or occupation under the police power," the Court ruled in *Buehman*, 57 Ariz. at 372, 114 P.2d at 231, "but, on the contrary, conditions the exercise of such power with the limitation that it must not be arbitrary or discriminatory." That power, "broad and comprehensive as it is, may not be used to prevent a person from following a business or occupation so innocuous," the Court held, "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.*; see also, *id.*, 57 Ariz. at 378, 114 P.2d at 233 (Lockwood, C.J., dissenting on the grounds that the decision establishes a different standard for Ariz. Const. Art. II, § 4 than the federal standard). Accordingly, as the Court stated in *Edwards*, 72 Ariz. at 112, 231 P.2d at 452 (quoting *Myers v. City of Defiance*, 36 N.E.2d 162, 167 (Ohio App. 1940)),

> "The fundamental rule . . . is that police regulations must be reasonable. It is generally stated that the means adopted must be suitable to the end in view, must be impartial in operation and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation. The benefits to society, reasonably to be expected, must not be out of proportion to the restraint imposed and the detriment inflicted on citizens by such restraint."

To be perfectly clear, it is Appellants' position that Arizona applies a rational basis test for economic regulations just as federal courts do. But rational basis review in Arizona establishes that in addition to having a legitimate purpose, the regulation must evidence some degree of proportionality so that it does not unduly harm the very important underlying right to pursue a livelihood. Otherwise it strays impermissibly from a reasonable relationship into the realm of arbitrariness.

Unless Appellee persuades our Supreme Court otherwise, those principles

remain good law. As this Court observed in overturning the trial court's dismissal of the lawsuit, "the complaint alleges sufficient facts—which if proven—could demonstrate that the Board's absolute prohibition of fish pedicures runs afoul of the equal protection or due process clauses under the rational basis test," and it cited *Buehman* for that holding. *Vong v. Aune*, 2011 WL 1867409 (Ariz. App. Apr. 29, 2011) at *7. For the reasons presented in our Opening Brief and discussed below, the ban on fish spas is an excessive regulatory response to minimal risk, with the consequence of destroying a legitimate business, and therefore is unconstitutional.

C. Federal Precedents. Nor can Appellee find shelter in the federal cases that are closest on point. Appellee implies that so long as the State articulates a public safety rationale—or, under the facts of this case, demonstrates that the risk is "not zero"—then literally anything goes. Without citing a single instance of actual harm, for instance, the State could hypothesize that the health and safety risks from electronic devices are "not zero," and therefore completely ban the sale of iPhones. The rational basis standard as applied by federal courts may not be especially demanding, but nor is it evanescent.

Appellants will not repeat their extensive analysis of federal due process and equal protection law, except to observe that several of the cited decisions

struck down regulations that were justified on health and safety grounds, including cosmetology regulations. See *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008) (pest control); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (caskets); *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). An assertion of health and safety concerns only begins the rational basis inquiry, it does not end it. Indeed, "it is clear that a court would be shrinking from its most basic duty if it abstained from both an analysis of the legislation's articulated objective and the method that the legislature employed to achieve that objective." *Brown v. Barry*, 710 F. Supp. 352, 355 (D.D.C. 1989) (emphasis omitted).

Whenever confronted with an adverse precedent striking down an economic regulation under the rational basis test, Appellee retreats to a familiar refrain: that those cases were decided "under their particular facts" (Br. at 15; see also *id.* at 18 ("the specific facts of each case"), 19 ("unique facts"), 21 ("facts particular to that case" and "unique set of facts")). It is indeed not a unique fact that all cases are decided on their unique facts, as this one surely will be as well. Rather, we look to those cases to determine which are most closely on point and to distill the principles by which this case should be decided.

This case does indeed have unique facts. Not each of those facts is unique;

but in their totality, they present a uniquely striking departure from the constitutional principles that should guide regulation of enterprise. The relevant facts can be summarized as follows:

1. First, 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. Contemplation seems an obvious prerequisite to forming a rational basis in subjecting different classes of activities to regulation. Here an analogy may aid the analysis. Let's say that for purposes of jurisdiction of the Federal Aviation Administration, an airplane is "a motorized vehicle propelled by an engine through the air" above a certain size, and the FAA issues rules saying no airplane can be flown without an FAA-certified pilot. Although drones were not contemplated when the rules were written, they fall within the definition, and therefore drones would be banned by rote application of the rules. It is one thing to ban an activity based on the actual attributes of that activity; it is quite another to ban it based on the attributes of *another* activity. As we demonstrated in our Opening Brief (at 18-25), it violates equal protection and due process to treat different things as if they are alike---especially if the consequence, as here, is dire.

2. Relatedly, fish spas are outside the expertise of the Board of Cosmetology (Op. Br. at 4-5). Hence the ordinary deference to the expertise of

regulatory agencies is not applicable here.

3. Cosmetology, including nail technology, encompasses a wide range of dangerous activities, many of which have caused severe harm to the public. In all other instances, the Board has applied regulations to allow those activities to take place—sometimes with minimal requirements, such as washing hands and reading product manufacturer's labels (Op. Br. at 30-35). For instance, rather than prohibiting foot baths, the Board found that certain precautions could be taken to reduce risks, even though the risks are not eliminated (Op. Br. at 34-35). The disparate treatment could not be clearer: all other cosmetology services are regulated to reduce but not eliminate risk, while fish spas are prohibited, the post hoc rationalization for which is that the risks cannot be eliminated.

4. Finally and relatedly, fish spas are banned altogether even though (a) there has been not one case of demonstrated harm reported anywhere in the world; (b) the Health Protection Agency study whose probative value is acknowledged by both sides finds conclusively that health risks are minimal and can further be mitigated by simple sanitary protocols; and (c) the Board considered no alternative to prohibition. This brings us back full circle: the reason that the Board prohibited fish spas was not based on information or deliberation, but on rote application of rules that are sensible for cosmetology tools but nonsensical for fish. This would

be a very different case if the Legislature had decided to ban fish spas, or even if the Board had deliberately chosen to do so—it would still be difficult to sustain an absolute prohibition in light of the evidence, but at least the Court would be reviewing a conscious decision that is entitled to deference. The normal deliberative processes for administrative line-drawing or rule-making were never engaged, with the effect that the decision not only preceded analysis, the decision precluded analysis.

Appellee seems to argue that because the facts of this case are not identical to the cases in which rational basis was found lacking in the regulation of enterprise, those precedents should not apply. To the contrary, we are aware of no cases in which a rational basis was so completely lacking as this one.

D. Complete Prohibition. As we demonstrated in our Opening Brief (at 24-30), despite the deferential rational basis standard, it is actually difficult to find cases (state or federal) sustaining a complete prohibition of a particular enterprise. Certainly there are some banned economic activities, such as narcotics and prostitution, whose prohibition easily could satisfy rational basis review. But even obviously dangerous professions and businesses—such as demolition, professional sports, bars, bungee jumping, and even cosmetology—typically are permitted and regulated. Hence the difficulty faced when government chooses to

prohibit an enterprise altogether. That difficulty is magnified where the entity does not consciously choose prohibition from among a range of regulatory approaches, but reflexively applies rules designed for other activities in a way that short-circuits the normal regulatory process.

All we find in the record to support prohibiting rather than regulating fish spas is the conclusion of Appellee's expert, who reported 12 days before providing that opinion that he had "no previous experience or in-depth knowledge of the specifics of fish pedicures," and who relied on the same Health Protection Agency report that reached quite the opposite conclusion (Op. Br. at 9-10).

Rather than confronting overwhelming case authority striking down such bans, Appellee attempts to dodge it by relegating the response to a footnote. "In a collateral argument," Appellee asserts (Br. at 26 n.6), "the Appellants argue that rather than a complete ban on fish pedicures, due process requires the Board to regulate fish pedicures using a protocol suggested by them at trial."

This evasion is so transparent that it highlights Appellee's fatal weakness on this point. First of all, the argument that a complete prohibition on fish spas violates due process under the facts of this case is central, not collateral. Second, Appellants have never argued that "due process requires the Board to regulate fish pedicures using a protocol suggested by them at trial."

The regulatory protocol suggested by Appellants' expert—drawing upon the recommendations made by the Health Protection Agency and similar to the protocol suggested by Appellant Cindy Vong herself—serves two principal purposes here. First, it demonstrates that Cindy Vong is not resisting reasonable regulation nor challenging the Board's authority to impose reasonable regulations. Second, it establishes that alternatives to prohibition exist to mitigate the minimal risks associated with fish spas. Implicit in the Health Protection Agency's analysis is that even *without* a uniform or universal regulatory approach, not a single instance of injury or disease associated with fish spas has been reported, underscoring the minimal risks associated with the enterprise.

Appellants want their position to be very clear: to the extent that the Board has jurisdiction over fish spas as a form of nail technology, it has broad discretion to determine how to protect public health and safety. Appellants do not presume to dictate how that authority should be exercised, nor does it ask this Court to do so.

In a sense, the Board has chosen not to regulate at all, but rather to construe its rules to foreclose the possibility of rational, proportionate regulation. It is one thing to treat emery boards and nail clippers as if they are alike; it is quite another to treat fish like emery boards and nail clippers. It is one thing to apply stringent

regulations on fish spas; it is quite another to prohibit them altogether. It is one thing to ban an enterprise after careful deliberation, or to impose a moratorium until such a process can take place; it is quite another to ban an enterprise with no inquiry whatsoever and in contradiction of available evidence. However little protection our law affords to freedom of enterprise, it does not tolerate imposing a death sentence on a legitimate business before considering any evidence.

Conclusion

For the foregoing reasons, Appellants ask that this Court reverse the judgment below with instructions to the trial court to enter judgment for Appellants.

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Respectfully submitted,

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