ARIZONA COURT OF APPEALS
DIVISION ONE

CINDY VONG and LA VIE LLC, Plaintiffs/Appellants, v. DONNA AUNE, in her official capacity as Executive Director of the ARIZONA STATE BOARD OF COSMETOLOGY, Defendant/Appellee.	Court of Appeals, Division One Case No. 1 CA-CV 10-0587 Maricopa County Superior Court Case No. CV2009-037208

APPELLANTS' OPENING BRIEF

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STATEMENT OF THE CASE AND FACTS

A. Basis for Jurisdiction. This Court has jurisdiction over this appeal under A.R.S. § 12-2101(B).

B. Nature of the Case. This civil rights lawsuit is a collateral attack on the statutory and constitutional authority by which appellee/defendant Donna Aune, in her official capacity as Executive Director of the Arizona Board of Cosmetology ("Board"), has acted to shut down appellant/plaintiff Cindy Vong's Spa Fish business. The action involves two main claims: (1) that the Board lacks jurisdiction to regulate the Spa Fish business; and (2) that if relevant statutes do authorize the Board to regulate the business, the statutes as so applied and appellee's actions in enforcing them violate appellants' rights under the Arizona and United States Constitutions and 42 U.S.C. § 1983.

C. Factual Chronology. Appellant Cindy Vong is an Arizona resident who emigrated from Vietnam in 1983 and subsequently earned American citizenship (Complaint (Index of Record 1), ¶¶ 2, 8). Appellant La Vie LLC is an Arizona limited liability corporation that is owned by Vong and operates La Vie Nails & Spa in Gilbert, a nail salon licensed by the Board of Cosmetology, which also operated, for a limited period of time, the Spa Fish business (*id.* at ¶¶ 3, 9). Vong is licensed by the Board as a nail technician and aesthetician (*id.* at ¶ 9).

In 2008, Vong opened a new business called Spa Fish in a separate part of the nail salon. The spa fish therapy involves customers placing their feet in tanks containing small Garra Rufa fish, which nibble on dead skin. The fish are tiny carp that have no teeth and cannot injure, penetrate the skin of, or transmit diseases to humans. The fish are native to the Middle East and have been used as a treatment for people with skin diseases such as psoriasis. Spa fish therapy provides a relaxing experience for patrons, and is popular in European and Middle- and Far-Eastern countries, as well as in other states in the United States (*id.* at ¶¶ 12, 13).

Vong lawfully imported the fish from China and remodeled the salon for her new business, both at considerable expense (*id.* at ¶14). She developed an extensive set of Spa Fish Therapy Procedures to ensure a safe and hygienic experience for her customers (*id.* at ¶ 15). As conducted by Vong, spa fish therapy posed no health or safety risk to the public (*id.* at 29). Vong also developed a Spa Fish Therapy Notice that she provided to patrons, which explained the process and the fact that the therapy is *not* a pedicure. The notice advised that patrons wishing to have a pedicure could receive one in a separate part of the salon following the spa fish therapy (*id.* at ¶ 16). The Spa Fish business was extremely successful, and no customer filed any type of health, safety, or business complaint (*id.* at ¶ 17).

While Vong was preparing to open Spa Fish, a Board inspector visited the nail salon for a routine inspection. Vong informed the inspector of her plans to open Spa Fish. The inspector told Vong she would obtain and communicate the Board's position. Thereafter, Vong opened Spa Fish in October 2008 (*id.* at ¶ 19).

Later that month, a Board inspector visited the salon and informed Vong that the spa fish therapy was illegal because it involved skin exfoliation using an implement (i.e., Garra Rufa fish) that could not be sanitized as required by Board regulations (*id.* at ¶ 20).

On November 13, 2008, Vong wrote to the Board describing the spa fish therapy and proposing a pilot program to demonstrate that there were no health risks. The Board never responded to the letter (*id.* at ¶ 21). Instead, the Board sent Vong a letter she received in January 2009, informing her it believed spa fish therapy was in violation of various Arizona statutes and that her conduct could constitute a Class I misdemeanor. The letter advised Vong to "immediately refrain from offering or performing fish pedicures in your salon" (*id.* at ¶ 22).

In response to the threat of closure, several Spa Fish customers sent comments to the Board urging it not to shut down the business (*id.* at ¶ 24). No formal procedures were held to determine whether spa fish therapy is a form of pedicure or whether Vong was in violation of any rule or statute. Rather, Vong

and the Board negotiated a Consent Agreement. The purpose of the Agreement was to create a final, appealable agency decision and preserve Plaintiff's legal and constitutional claims for direct legal challenge (*id.* at ¶ 25).

The Consent Agreement was executed on September 21, 2009. The agreement is styled a "final disposition of this matter" (I.R. 10, Exh. A, p. 1). It notes that the Board has jurisdiction over Vong (*id.*). The Agreement recites that it is "*evidence* of a prior violation of the Boards' (sic) *interpretation* of Arizona statutes and rules governing the practice of cosmetology" (*id.* at 2 (emphasis added)).

Attached to the Agreement were the Board's findings of fact, conclusions of law, and order. The only findings of fact were that (1) the Board has authority pursuant to A.R.S. § 32-501 to regulate cosmetology; and (2) a Board inspector observed in Vong's salon a sign advertising "Dr. Fish pedicures" and stations set up to perform the procedure (*id.* at 3). The Board concluded that the activities constituted grounds for disciplinary action pursuant to various statutes and rules (*id.*). The Board ordered that Vong immediately cease operating the business and issued a public reproof (*id.* at 3-4).

Vong has fully complied with the Consent Agreement. She immediately closed the Spa Fish business and, at considerable expense, removed all spa fish

therapy equipment and fish from the salon (Complaint (I.R. 1) at ¶ 26). As a result of closing the Spa Fish business, Vong has suffered substantial loss of income, had to fire three employees, and has been prevented from pursuing a legitimate business (*id.* at ¶ 27).

D. Course of Proceedings. Appellants filed a complaint for declaratory and injunctive relief against the Board and Executive Director on November 30, 2009, in Maricopa County Superior Court. On December 21, 2009, the defendants filed a Motion to Dismiss for lack of subject-matter jurisdiction under Ariz. R. Civ. P. 12(b)(1) and for failure to state a cause of action under Rule 12(b)(6). Among other arguments, they contended that the Board and Director were not subject to suit and that the plaintiffs failed to exhaust their administrative remedies and did not file the action in a timely manner.

At oral argument before Judge Bethany G. Hicks on March 22, 2010, the parties agreed that the Board was not subject to suit. The court agreed with plaintiffs that the Director in her official capacity is a proper defendant (Transcript of Proceedings, p. 17: ¶¶ 17-19). Accordingly, the case has proceeded with the Director as sole defendant and appellee.

The court granted the Motion to Dismiss in a minute entry dated May 11, 2010 (I.R. 20), and denied plaintiffs' Motion for Reconsideration in a minute entry

dated June 15, 2010 (I.R. 23). (The grounds for the trial court's rulings will be discussed in the Argument.) On July 6, 2010, judgment was entered dismissing the complaint (I.R. 24). This timely appeal followed.

STATEMENT OF ISSUE PRESENTED

Is a collateral attack against the Board of Cosmetology's subject-matter jurisdiction over spa fish therapy, coupled with state and federal constitutional challenges to the Board's application of state statutes and regulations to shut down appellants' spa fish therapy business, subject to a 35-day filing period applicable to administrative appeals?

Standard of Review. The matter under review was a motion to dismiss, in which "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 therein." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) (citations omitted). This appeal presents solely questions of law, which are reviewed *de novo*. *T.P. Racing, LLLP v. Ariz. Dep't of Racing*, 223 Ariz. 257, 259, 222 P.3d 280, 283 (App. 2009).

SUMMARY OF THE ARGUMENT

The Complaint in this case, whose factual allegations are taken as true,

paints a picture of classic bureaucratic excess. Appellant Cindy Vong, who fled communist oppression to become an American citizen, studied to become a licensed nail technician and established her own business. After learning about a new service that is popular in other parts of the United States and abroad, she opened a second business called Spa Fish. It allowed her to offer a unique and highly desired service, to hire additional employees, and to build a thriving business in an otherwise dismal economy.

All of this proved intolerable to the Arizona Board of Cosmetology, upon whose approbation Cindy Vong relies for her principal livelihood. When confronted with a business about which it has no institutional competence, and which implicates none of the health and safety concerns the Board is charged with protecting, the Board nonetheless proceeded immediately to shut the enterprise down.

Faced with such bureaucratic intransigence, Cindy Vong concluded that whatever administrative processes might be available to her offered little hope for saving her business or defending her rights as a citizen of Arizona and the United States. Rather than protracting matters before the Board, she agreed to a settlement that meted out punishment yet preserved her right to proceed in a more objective forum where she could raise legal objections to the Board's jurisdiction

and actions.

Vong is in full compliance with the agreement and does not seek to "appeal" it. Indeed, it is somewhat oxymoronic to "appeal" an order to which one has agreed, however grudgingly. The legal action here is much more fundamental: Vong challenges the agency's jurisdiction to regulate fish; and, to the extent it has such jurisdiction, she challenges as a violation of her state and constitutional rights the application of such authority to deprive her of a legitimate livelihood.

It is well-established that she may do so. Under the collateral attack doctrine, Vong may challenge an agency's jurisdiction in a separate legal proceeding. An agency has no jurisdiction to adjudge the constitutionality of statutes. Moreover, claims under 42 U.S.C. § 1983 are not subject to exhaustion of administrative remedies. The court below plainly erred in denying Cindy Vong her day in court.

Argument

THIS ACTION CONJOINS A COLLATERAL ATTACK ON AGENCY JURISDICTION WITH CONSTITUTIONAL CHALLENGES AND SHOULD BE ALLOWED TO PROCEED.

This lawsuit presents two types of challenges to appellee's actions. First, it challenges the Board's subject-matter jurisdiction over appellant's Spa Fish business. Second, and in the alternative, if the Board does possess statutory

jurisdiction over the Spa Fish business, the action challenges on state and federal constitutional grounds the application of those statutes and resulting agency rules to deprive Cindy Vong of her right to pursue a legitimate livelihood. See, e.g., *Cornwell v. Hamilton*, 80 F.Supp.2d 1101 (S.D. Cal. 1999) (striking down application of California cosmetology statutes to regulate African hairstyling). The action in its entirety is proper.

A. The legal basis for the trial court rulings granting the Motion to Dismiss and denying the Motion for Reconsideration is not entirely clear. In its minute entry granting the Motion to Dismiss, the court stated that it was "unclear from the Complaint whether this is an action for declaratory judgment or an attempt to secure review of the Board's administrative action against the Plaintiffs as manifested in the Consent Agreement" (I.R. 20 at 1). If the action was for declaratory judgment, the court ruled, it was an improper "substitute for a timely appeal for judicial review of an administrative order." If it was an administrative appeal, the court found, it was untimely (*id.* at 2).

Because the court appeared to have misapprehended the nature of the action as a collateral attack, and did not analyze the case as such, plaintiffs filed a Motion for Reconsideration. In its minute entry denying the motion, the Court stated that the "Plaintiffs contend, quite correctly, that their claim in this matter constitutes a

collateral attack on the Defendant's jurisdiction and therefore is excepted from the ordinary rule requiring exhaustion of administrative remedies" (I.R. 23 at 1). That would appear to vindicate the plaintiffs' argument that the legal action was proper (I.R. 22 at 1).

But the court went on to state that "implicit in the Court's [earlier] ruling" was that (1) the spa fish therapy "constituted the practice of aesthetics and/or cosmetology," (2) "that Plaintiffs' actions constituted unlawful acts" under the cosmetology statutes, and (3) "that Plaintiffs were subject to regulation by and jurisdiction of the Board of Cosmetology." By this determination, it appeared that the Court had engaged the merits of the jurisdictional challenge and was deciding the case in appellee's favor (I.R. 23 at 2).

But then the Court reverted back to its original ruling, holding (*id.*) as follows:

> Having determined that the Board has jurisdiction over the Plaintiffs (personal jurisdiction) and over the practice of fish spa therapy (subject matter jurisdiction), and that it had jurisdiction to censure or enjoin the Plaintiffs' activities (jurisdiction to take the action in question), the Court had no alternative but to treat this action as one for either a declaratory judgment or an appeal of an administrative order, in which cases it was either improper or untimely.

Hence, the court appears to have concluded that the action is a collateral attack that is exempted from the exhaustion of administrative remedies, and that it

is not. Along the way, the court failed to credit the seminal factual assertion, taken as true, that "spa fish therapy does not constitute the practice of cosmetology, aesthetics, or nail technology" (I.R. 1, ¶ 31). Indeed, the court's ruling on the Board's jurisdiction took no account of the nature of spa fish therapy or any other relevant evidence. Nor did the court address the second and third causes of action, raising state and federal constitutional challenges to appellee's actions, nor provide any legal basis for dismissing those claims. As will appear below, the action should be allowed to proceed.

B. Appellee argued below (I.R. 10 at 2) that plaintiffs failed to exhaust administrative remedies because they "did not file for rehearing or review, as required by A.R.S. § 41-1092.09(B)," and that they "did not file for judicial review under the Administrative Review Act," A.R.S. § 12-901, *et seq.*, which must be filed within 35 days following a final administrative decision. A.R.S. § 12-904(A).[1]

Appellants did not follow those procedures because this action is not a review or appeal of the agency decision. Cindy Vong's purpose in signing the agreement was to conclude the administrative proceedings, accept the punishment,

[1] Appellee calculates (I.R. 10 at 4-5) that the appeal would have been required to be filed by November 2, 2009. The Complaint was filed on November 30.

and preserve her right to address the more fundamental issues of jurisdiction and constitutionality in a forum that was less-hostile to her rights (I.R. 1, ¶ 25).[2]

Her right to do so is recognized expressly in the very statute within which appellee seeks shelter. A.R.S. § 12-902(B) provides that failure to exhaust administrative remedies precludes subsequent judicial review "*except for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter*" (emphasis added).

The collateral attack doctrine has existed in Arizona for nearly 100 years, and one of the earliest explications of it remains the clearest. A collateral attack, the Arizona Supreme Court explained, is where

> the judgment is attacked in a separate action, and not on appeal. It is not an attempt to avoid or correct the former judgment in some manner prescribed by the law, but it is an effort to obtain another and independent judgment which will destroy the effect of the former judgment.

Tube City Mining & Mill Co. v. Otterson, 16 Ariz. 305, 310, 146 P. 203, 205 (1914). In such cases, the Complaint must allege "that such judgment was

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[2] In our Response to the Motion to Dismiss (I.R. 11 at 6 n.2), appellants offered to present evidence on the parties' intent in signing the Consent Agreement, which is permissible in interpreting such an agreement. See, e.g., *In re Gen. Adjudic. of All Rights to Use Water in Gila River Syst. and Source*, 212 Ariz. 64, 72, 127 P.3d 882, 890 (2006). To put it mildly, the agency's conduct in signing an agreement whose purpose was to allow the appellants to proceed to a direct legal challenge, and then to object to the challenge, is disturbing and grounds for estoppel.

rendered without jurisdiction and is void." *Id.*

Count I of the Complaint (I.R. 1 at ¶¶ 30-33) could not be clearer in challenging the Board's jurisdiction. It alleges that the subject-matter, spa fish therapy, does not constitute the practice of cosmetology, aesthetics, or nail technology under applicable statutes and rules. Similarly, although the Board clearly has personal jurisdiction over Vong as a licensed nail technician, it cannot have personal jurisdiction over her as the proprietor of a business that is engaged in an activity over which the Board does not have jurisdiction. Likewise, as will be discussed in Section D, *infra*, the Board does not have jurisdiction to adjudge the constitutionality of statutes, challenges that are presented in Counts II and III (*id.* at ¶¶ 34-39 and 40-44).

Because the action directly challenges the agency's jurisdiction, it is a collateral attack and, contrary to the ruling below, is neither "improper" nor "untimely." Arizona statutory and case law establish beyond dispute that a collateral attack removes a case from the requirement of exhaustion of administrative remedies, including appeal of agency orders. It is not discretionary on the part of the trial court. If the Complaint alleges that an agency order was made without jurisdiction, which is the gravamen of this Complaint, the action should not be dismissed.

Questioning an agency's jurisdiction in a collateral proceeding is a "common exception" to the ordinary rule requiring exhaustion of administrative remedies. *Town of Paradise Valley v. Gulf Leisure Corp.*, 27 Ariz. App. 600, 610, 557 P.2d 532, 542 (1976). The rule and the exception were clearly stated by the Arizona Supreme Court in *Tucson Warehouse & Transfer Co. v. Al's Transfer, Inc.*, 77 Ariz. 323, 325, 271 P.2d 477, 478 (1954):

> [A]ny order which the [agency] has power to make is conclusive unless the statutory procedure for review is followed. On the other hand, a decision of the [agency] which goes beyond its power as prescribed by the Constitution and statutes is vulnerable for lack of jurisdiction and may be questioned in a collateral proceeding.

The reason for the exception is that an agency rule "rendered without jurisdiction is a nullity." *Moeur v. Ashfork Livestock Co.*, 48 Ariz. 298, 304, 61 P.2d 395, 397 (1936); accord, *George v. Ariz. Corp. Comm'n*, 83 Ariz. 387, 392, 322 P.2d 369, 372 (1958) (agency's action was "a bare usurpation of power it did not and could not possess. Its action being void, it follows that the rule prohibiting collateral attack has no application").

Case law reiterating the collateral attack doctrine is abundant, and no cases are to the contrary. See, e.g., *Univar Corp. v. City of Phoenix*, 122 Ariz. 220, 224, 594 P.2d 86, 90 (1979) (recognizing that exhaustion of administrative remedies does not apply where agency's jurisdiction is questioned); *Estate of Bohn v.*

Waddell, 174 Ariz. 239, 848 P.2d 324 (App. 1992); *So. Pac. Transp. Co. v. Ariz. Corp. Comm'n*, 173 Ariz. 630, 633, 845 P.2d 1125, 1128 (App. 1992); *Farmers Ins. Co, v. Ariz. St. Land Dep't.*, 136 Ariz. 369, 373, 666 P.2d 469, 473 (App. 1982).

The decision in *State ex rel. Dandoy v. City of Phoenix*, 133 Ariz. 334, 651 P.2d 862 (App. 1982), illustrates the proper analysis. In that case, the Arizona Department of Health Services, pursuant to its claimed regulatory authority over sanitary landfill operations, issued cease and desist orders against the City of Phoenix. While administrative proceedings were ongoing, the parties agreed to a consent order. The Department subsequently filed a lawsuit seeking an injunction against violations of the consent order, in which the City challenged the consent order.

The Court observed that the City had not sought judicial review of the consent order pursuant to the Administrative Review Act. "However, as expressly provided in A.R.S. § 12-902(B), an exception to this statutorily declared finality exists for the purpose of questioning the jurisdiction of an administrative agency over the persons or subject matter involved in the controversy." *Id.* at 336, 651 P.2d at 864. However, the Court found that the City was challenging "how the statutory jurisdiction given to the Department must be exercised, as opposed to the

existence of that jurisdiction." As a result, "the issue does not relate to subject-matter jurisdiction so as to make absolutely void and subject to collateral attack orders entered by the Department." *Id.*, 133 Ariz. at 338, 651 P.2d at 866. Here, by contrast, the action fits squarely within the collateral attack exception because it challenges the existence of the agency's jurisdiction over the Spa Fish business so as to render the order void.

The Complaint presents a textbook collateral attack. Cindy Vong does not seek review of the Agreement. Rather, she seeks judgment on far more fundamental issues: whether the Board has authority to regulate her Spa Fish business in the first place; and if it does, whether that authority as applied violates her constitutional rights. The action plainly falls within the collateral attack exception to the rule requiring exhaustion of administrative remedies, and should not have been dismissed.

C. The trial court in denying the Motion for Reconsideration indicated that it had made "implicit" determinations that fish spa constitutes "the practice of aesthetics and/or cosmetology," that the spa fish therapy is unlawful, and that the Board has jurisdiction over the plaintiffs and the Spa Fish business (I.R. 23 at 2). Those findings pertain only to Count I of the Complaint, which challenges the Board's jurisdiction.

The court not only made all of those implicit determinations in the absence of factual evidence, but in contravention of factual allegations that for purposes of a Motion to Dismiss must be taken as true. It also did so also despite a paucity of substantive legal argument on the issue. Appellee's arguments regarding jurisdiction were conclusory assertions, comprising slightly more than a page in her Reply to Response to Motion to Dismiss (I.R. 13 at 5-6). That is far from sufficient. An agency "cannot obtain jurisdiction merely by declaring itself to have jurisdiction." *Hunt v. Norton*, 68 Ariz. 1, 5, 198 P.2d 124, 126 (1948).

The decision *Dioguardi v. Superior Court*, 184 Ariz. 414, 909 P.2d 481 (App. 1995) is especially instructive.[3] The plaintiff was a physician whose license was revoked by the Board of Medical Examiners (BOMEX). He failed to file an appeal within the ten-day period prescribed by the agency, and instead filed an action in court challenging the board's authority to issue the ten-day rule. As here, the trial court "mistakenly concluded, pursuant to A.R.S. § 12-902(B), that Dioguardi's failure to file a timely request for rehearing placed the BOMEX decision beyond judicial review." *Id.*, 184 Ariz. at 416, 909 P.2d at 483. The Court observed that the statute itself provides that exhaustion of administrative

[3] The *Dioguardi* ruling was reaffirmed just last year in *Green v. Lisa Frank, Inc.*, 221 Ariz. 138, 211 P.3d 16 (App. 2009).

remedies is unnecessary where the plaintiff is "questioning the jurisdiction of the administrative agency over the person or subject matter." *Id.* Also as here, "[t]o reach its jurisdictional conclusion, the trial court erroneously assumed the answer to the very question before it," *id.*, 184 Ariz. at 417, 909 P.2d at 484 —in that case, the validity of the ten-day rule; here, the existence of jurisdiction over spa fish therapy. It is simply premature for the trial court to have dismissed the case on that basis.

That is especially true where the agency is not specifically authorized to regulate the subject matter at issue, but rather argues that its more generic powers extend to the subject matter by inference. Perhaps not surprisingly, the entirety of the statutory authority for the Board of Cosmetology is silent on the subject of fish generally and spa fish therapy specifically. Like the murky water in which tiny carp presumably reside in their natural habitat, the Board's authority to regulate spa fish therapy is far from clear.

Among the trial court's "implicit" determinations was that spa fish therapy constitutes "the practice of aesthetics and/or cosmetology" (I.R. 23 at 2). At the outset, in the context of a Motion to Dismiss that necessarily is limited to determinations of law, the use of the term "and/or" is troubling. As a matter of law, is spa fish therapy cosmetology, aesthetics, or both?

A perusal of the applicable statute suggests it is neither. Both "aesthetics" (A.R.S. § 32-501(2)) and "cosmetology" (A.R.S. § 32-501(6)), the latter of which encompasses "nail technology" (A.R.S. § 32-501(6)(f)), involve one or a combination of practices "if they are performed for cosmetic purposes." In turn, "cosmetic purposes" means "for the purpose of beautifying, preserving or conferring comeliness, excluding therapeutic massage and manipulations." Is spa fish therapy performed for cosmetic purposes? No such fact appears on the face of the Complaint, to which the trial court's inquiry is limited in a Motion to Dismiss. Is the object of spa fish therapy to confer comeliness? Well, we don't know, because there is no evidence about whether feet are more comely after being nibbled by Garra Rufa fish, or whether that is the object sought by its purveyors or consumers. Absent such a factual determination, it is impossible to conclude that spa fish therapy is a form of aesthetics or cosmetology.

Even assuming that threshold determination could be made in a Motion to Dismiss, the statute also limits aesthetics and cosmetology to specific practices. The closest practice encompassed by aesthetics (A.R.S. § 32-501(2)(a)) or cosmetology (A.R.S. § 32-501(6)(b)) is "[m]assaging, cleansing, stimulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, *either by hand or by mechanical or electrical appliances*" (emphasis

added). A.R.S. § 32-501(7) defines "electrical appliances" as "devices that use electrical current." So far as we know, the Garra Rufa fish do not have hands, they are not a mechanical device, and they do not plug into an electrical socket. Yet all of these things are statutory prerequisites to the Board exercising jurisdiction over the fish or their owners. So on what basis was the trial court able to make a legal determination that spa fish therapy triggers the Board's jurisdiction over "aesthetics and/or cosmetology"?

Though the trial court apparently did not credit it, appellee below argued that spa fish therapy is encompassed within "nail technology," whose practices include (A.R.S. § 32-501(10)(c)) "[m]assaging and cleaning a person's hands, arms, legs and feet." It is difficult to depict spa fish therapy as a form of nail technology, because the Complaint does not suggest that the therapy involves nails at all. Unlike the definitions of "aesthetics" and "cosmetology," which encompass "any one or a combination" of listed practices, "nail technology" lists three types of practices, two of which actually involve nails, and all of which one would expect any nail technician to provide. Even if one considers spa fish therapy as a form of massaging and cleaning hands and feet, plainly it does not encompass the other two activities defined as nail technology. For whatever their intelligence and dexterity, Garra Rufa fish cannot be expected to engage in "[c]utting, trimming,

polishing, coloring, tinting, cleansing or otherwise treating a person's nails" (A.R.S. § 32-501(10)(a)), or "[a]pplying artificial nails" (A.R.S. § 32-501(10)(b)).

The Board attempts to stretch its statutory authority to encompass a practice that simply is not contemplated by the statute. What's worse, it then applied its dubious authority not to regulate the activity but to destroy it. Even worse than that, it seeks to deny Cindy Vong the chance to challenge its authority and assert her constitutional rights.

The foregoing discussion demonstrates that it is simply impossible to determine whether the Board has jurisdiction over spa fish therapy without knowing what spa fish therapy is, which necessarily requires factual determinations that are beyond the ambit of a Motion to Dismiss. As this Court recognized in *Resolution Trust Corp. v. Foust*, 177 Ariz. 507, 509, 869 P.2d 183, 185 (App. 1993), resolution of subject-matter jurisdiction "requires consideration of the factual and procedural posture" of the action. As the Arizona Supreme Court held in *Bonner v. Minico, Inc.*, 159 Ariz. 246, 253, 766 P.2d 598, 605 (1989), the "rule that jurisdictional issues are questions of law for the court has never been applied in an Arizona case in which the resolution of the jurisdictional issue was intertwined with a resolution of the merits of the claim." The Court noted that "these jurisdictional factual issues, like other factual issues, remain

subject to the usual rules of summary judgment" if "the record does not demonstrate a material issue of disputed fact." *Id.* at 254, 766 P.2d at 606.

Plainly the question of subject-matter jurisdiction here is intertwined with factual questions, and just as plainly there are material issues of disputed fact. In the context of a Motion to Dismiss, those factual disputes are resolved in the plaintiffs' favor. The trial court's dismissal of the action based on its implicit finding of agency jurisdiction was improper.

D. The trial court focused exclusively on exhaustion of administrative remedies and jurisdictional issues, and did not provide any specific basis for dismissing the state and federal constitutional challenges to the Board's authority to shut down the Spa Fish business presented in Counts II and III of the Complaint. Those challenges are alternative causes of action to Count I, for they allege that if the Board does possess the statutory authority to shut down the Spa Fish business, the statutes as applied are unconstitutional. They are appropriate causes of action in a collateral attack because the Board does not have the power to determine the constitutionality of statutes.

Arizona courts have held that agencies may apply constitutional doctrines in determining specific disputes. Similarly, plaintiffs may not challenge legal error in a collateral attack, but instead must exhaust administrative remedies. However,

Arizona courts consistently have held that agencies may not declare statutes unconstitutional. Hence, direct actions in court are appropriate to raise challenges to statutes that authorize agencies to take unconstitutional action.

This Court in *Estate of Bohn*, 174 Ariz. at 249, 848 P.2d at 334, explained the difference between "constitutional applicability," in which an agency may engage, and determining constitutionality, which an agency has no power to do. The distinction means that while an agency "does not have the power to declare statutes unconstitutional, [it] has nevertheless applied constitutional doctrines and federal law when resolving claims." Similarly, the Court in *Moulton v. Napolitano*, 205 Ariz. 506, 512, 76 P.3d 637, 643 (App. 2003), noted that ordinarily, constitutional questions are raised at the administrative level if they are pertinent to resolving issues of taxation, government benefits and the like. But it reiterated that no exhaustion is required where the agency's subject-matter jurisdiction is questioned, *id.* at 512-13, 73 P.3d at 643-44, distinguishing between the agency's authority to "apply constitutional doctrines when resolving claims" with its lack of authority "to declare statutes unconstitutional." *Id.* at 514, 73 P.3d at 644 (citations omitted). Here, the action seeks to declare statutes and actions taken pursuant to those statutes unconstitutional, thus placing the action outside of the Board's jurisdiction.

E. Finally, even if the trial court was correct that part or all of the remainder of the action was subject to dismissal for failure to exhaust administrative remedies and/or that judgment should have been entered for appellee because the Board has jurisdiction, Count III of the Complaint should not have been dismissed.

Count III is a federal constitutional challenge to appellees' actions under the due process, equal protection, and privileges or immunities guarantees of the 14th Amendment, filed pursuant to 42 U.S.C. § 1983. As the U.S. Supreme Court held in *Patsy v. Bd. of Regents*, 457 U.S. 496, 516 (1982), "we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."[4] When substantive constitutional violations are alleged in a § 1983 action, the Court subsequently explained, "overlapping state remedies are generally irrelevant" because "the constitutional violation actionable under § 1983 is complete when the wrongful

[4] There are exceptions to this rule, such an action under a statute that does require exhaustion of state administrative remedies, see, e.g., *Booth v. Churner*, 532 U.S. 731, 736 (2001); or for actions alleging violations of procedural due process, which cannot be established until administrative remedies have been exhausted. *Zinermon v. Burch*, 494 U.S. 113, 124-25 (1990) (holding that a patient at a state mental hospital could bring a § 1983 claim against a state hospital despite the existence of state post-deprivation remedies). As the claims here derive not from federal statute but from the Constitution, and are substantive in nature, neither exception is applicable.

action is taken." *Zinermon*, 494 U.S. at 124-25.

In *Cornwell, supra*, which involved a federal constitutional challenge pursuant to § 1983 to the application of the California Barbering and Cosmetology Act to the practice of African hairstyling, the court engaged in a wide-ranging factual inquiry to determine whether the regulatory regime had a rational relationship to the specialized services that were being provided. "On the basis of this evidence, the Court finds that Cornwell's activities are minimal in scope compared to the activities of a cosmetologist. Because her activities are of such a distinguishable nature, she cannot reasonably be classified as a cosmetologist as it is defined and regulated presently." *Id.*, 80 F. Supp. 2d at 1108.

Attempting to distinguish *Cornwell* at oral argument, appellee's counsel asserted that "plaintiffs have failed to show that there is [not] a rational connection between the board's regulatory authority and the discipline" (Transcript of Proceedings, p. 12: ¶¶ 15-17). We are guilty as charged. Cindy Vong did not "show" the absence of rational basis because the action was dismissed before she had an opportunity to do so.

More to the point, however, the Complaint, whose factual allegations are taken as true on a Motion to Dismiss, does allege facts demonstrating the lack of a rational basis. Vong alleges that the Spa Fish business does not constitute the

practice of cosmetology, aesthetics, or nail technology (I.R. 1 at ¶ 31); that spa fish therapy is not a pedicure (*id.* at ¶ 16); that the fish used in the therapy cannot injure, penetrate the skin of, or transmit diseases to humans (*id.* at ¶ 12); and that the therapy was provided in a clean and sanitary manner (*id.* at ¶ 15). She should be allowed to prove those facts and demonstrate that her constitutional rights were violated.

The trial court did not provide any basis whatsoever for dismissing Count III of the Complaint. No such basis exists.

Conclusion

Cindy Vong was wrongfully denied an opportunity to pursue a legitimate enterprise, which is the right of every American. The wrong was compounded when she was deprived of her day in court. Based on the foregoing argument, we urge this honorable Court to reverse the decision of the trial court and reinstate the action, and award Vong fees and costs in connection with this appeal and the proceedings below pursuant to A.R.S. §§ 12-341 and 12-348, 42 U.S.C. § 1988, and the private attorney general doctrine.

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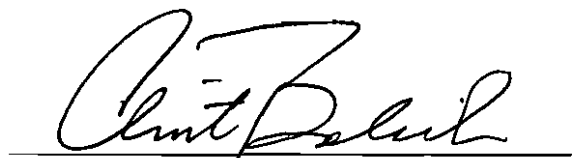

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Certificate of Compliance

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains approximately 5,962 words.

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Carrie Ann Sitren

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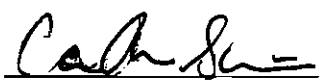

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