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

CINDY VONG and LA VIE LLC, Plaintiffs, vs. SUE SANSOM (now DONNA AUNE), in her official capacity as director of the Arizona State Board of Cosmetology, Defendant.	Case No. CV2009-037208 **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND OPENING BRIEF IN SUPPORT** *Hon. George H. Foster, Jr.*

Plaintiffs move for summary judgment pursuant to Ariz. R. Civ. P. 56. The motion is supported by the accompanying Statement of Undisputed Facts ("SOF") and the points and authorities set forth below.

Statement of the Case

Plaintiff Cindy Vong is a naturalized American citizen who emigrated from Viet Nam (SOF 1). She owns LaVie LLC, which since 2006 has operated LaVie Nails & Salon in Gilbert.

The business is a nail salon licensed by the Arizona Board of Cosmetology ("Board") (SOF 2). Cindy Vong is a professional nail technician and aesthetician, licensed by the Board in both professions (SOF 3).

In 2008, Vong began operating Spa Fish as a separate business in the salon. Spa Fish involved patrons placing their feet in a tank in which *Garra rufa* fish, which are small carp that have no teeth, remove dead skin from patrons' feet. Spa Fish provided a relaxing and invigorating experience (SOF 6).

Vong imported the fish from China, purchased equipment, and remodeled the salon, all at considerable expense (SOF 7). The business was popular and profitable (SOF 9). During the time she operated Spa Fish, Vong employed six people (SOF 10).

Vong devised a hygiene protocol for Spa Fish that involved inspecting and washing patrons' feet, placing fish in a clean tank and removing them immediately after treatment, washing the patrons' feet again following treatment, cleaning the tank following each procedure, and continuously recycling water in the community fish tank through a filter system and subjecting it to ultraviolet light to eliminate bacteria. All customers were provided a written notice informing them of those procedures prior to the treatment. Any customer desiring a pedicure could have after enjoying Spa Fish therapy in a different part of the salon (SOF 8).

Prior to the start of the Spa Fish business, a Board inspector visited the salon for a routine inspection. Vong informed the inspector of her plans to open Spa Fish. The inspector

promised to obtain the Board's response. Spa Fish opened in October 2008 (SOF 11).

In November 2008, Vong wrote to the Board describing the hygiene protocol and proposing a pilot program to ensure there were no risks to the public (SOF 12). Although the Board received no health or safety complaints (SOF 20), it sent Vong a letter ordering her to "immediately refrain from offering or performing fish pedicures in your salon" (SOF 13).[1] Several of Vong's Spa Fish customers wrote to the Board urging it not to close the business, to no avail (SOF 14). On September 21, 2009, Vong signed a consent order agreeing to shut down Spa Fish. Doing so entailed great expense, considerable loss of business, and the loss of jobs for half of her staff (SOF 15).

Vong filed a lawsuit in Maricopa County Superior Court on November 30, 2009, alleging three causes of action: (1) that the Board lacks jurisdiction over fish; (2) that the applicable statutes and rules as applied to shut down Spa Fish violated Vong's rights to due process and equal privileges and immunities under the Arizona Constitution[2]; and (3) that the statutes and rules as applied violated Vong's privileges or immunities, due process, and equal protection rights under the 14th Amendment and 42 U.S.C. § 1983. The complaint seeks declaratory and

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[1] Plaintiffs refer to "Spa Fish" as plaintiff Vong's business and to "fish pedicures" as the generic practice.

[2] Ariz. Const. Art. II, § 4 provides, "No person shall be deprived of life, liberty, or property without due process of law." Art. II, § 13 provides, "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

injunctive relief and attorney fees.

In a Minute Entry order on May 11, 2010, the Superior Court dismissed the lawsuit on procedural grounds. After granting expedited review, the Court of Appeals affirmed the dismissal as to Count I, holding that fish pedicures are subject to the Board's jurisdiction pursuant to A.R.S. § 32-501(10)(c) (defining "nail technology" to include "massaging and cleaning a person's hands, arms, legs and feet") (attached as Exhibit 1). It reversed the dismissal on Counts II and III, reinstating Vong's constitutional claims. In so doing, it observed that the Board's interpretation of the statutes and rules "acts as an effective prohibition of the practice statewide." *Vong v. Aune,* mem. dec., No. 1 CA-CV 10-0587 (Ariz. App. Apr. 29, 2011) at 10.

Question Presented

Because we suspect that defendant will seek to introduce extraneous issues, plaintiffs believe it is helpful to frame the sole legal issue before this Court: whether the applicable statute and rule as applied to shut down plaintiffs' Spa Fish business violates plaintiffs' due process and equal protection rights under the Arizona and U.S. Constitutions.

Summary of Argument

We were all taught in law school that when a challenged law is subject to "rational basis" scrutiny, the plaintiffs almost always lose. As applied by the Board to the plaintiffs, the challenged measures here—which, as the Court of Appeals pointed out, do not "specifically

address—or even contemplate—the practice of fish pedicures," *id*. at 10 n.4—fall into that narrow category of laws that are so excessive, arbitrary, and oppressive that they flunk the rational basis test.

They do so in two ways. First, by categorically prohibiting a long-established practice that is in operation in 22 countries (SOF 17), yet has not resulted in a single verified instance of harm or injury (SOF 21, 39), the Board has exceeded its power to regulate for public health and safety and violated plaintiffs' due process right to pursue their chosen business. Second, by singling out this specific practice for prohibition, while permitting and regulating other cosmetology practices that are demonstrably dangerous to the public, the Board has violated plaintiffs' equal protection rights. Accordingly, the Board should be enjoined from applying the statute and rule to prevent plaintiffs from providing Spa Fish therapy.

Argument

I. DUE PROCESS

Unquestionably, the Board has authority to regulate the cosmetology professions[3] to protect health and safety. Given the legal determination that fish pedicures are subject to the Board's jurisdiction as a form of nail technology, the Board could have imposed reasonable regulations on the practice, as it has with other cosmetology practices that it believes present

[3] The Board has jurisdiction over three discrete professions: cosmetology, aestheticians, and nail technology. We use the generic term "cosmetology" to embrace all three professions (SOF 40 & n.3).

risks to the public (see Part II, *infra*). Or, acting on a health or safety complaint from a member of the public, the Board certainly could have taken corrective or preventative action against Vong or her salon, given that both are licensed by the Board.

The Board did neither of those things. Rather, the Board made its decision to extinguish Cindy Vong's flourishing business not based on any actual analysis of what she was doing, but solely on its determination that the fish were a "tool" or "instrument" that could not be disinfected pursuant to its Rule R4-10-112 (Exhibit 2), and therefore must be prohibited (SOF 23, 29).[4] It did so despite conceding that "no rules exist that specifically address—or even contemplate—the practice of fish pedicures." *Vong v. Aune*, mem. dec. at 10 n.4. Nonetheless, its action "acts as an effective prohibition of the practice statewide." *Id.* at 10.

This sledgehammer approach flunks the rational basis test, which requires that economic regulations must bear a rational relationship to a legitimate government purpose. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). The closest federal case on point is *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999).[5] In *Cornwell*, the court considered a challenge by African hairstylists to efforts by the California Board of Cosmetology

[4] R4-10-112(E)(1) specifies, "All tools, instruments, or supplies that come into direct contact with a client and cannot be disinfected (for example, cotton pads, sponges, porous emery boards, and neck strips) shall be disposed of in a waste receptacle immediately after use."

[5] Plaintiffs' counsel previously litigated the *Cornwell* case, as well as *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) and *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989), discussed in Part II, *infra*.

to subject them to licensing as cosmetologists, which required 1600 hours of prescribed instruction and testing mostly in areas having nothing to do with African hairstyling. 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."[6] *Id.* at 1103.

The court applied the rational basis test, observing that "while a perfect fit" between rationale and regulation "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. The court analyzed the required instruction and testing for cosmetology and found that only a small fraction applied to African hairstylists. Because Cornwell's "activities are of such a distinguishable nature, she cannot reasonably be classified as a cosmetologist as it is defined and regulated presently." Even if African hairstyling were considered cosmetology, the Court went on, "the licensing regime would be irrational as applied to her because of her limited range of activities." *Id.* at 1108. Were the state to subject African hairstyling to the cosmetology licensing regime, the court concluded, "the natural result of this situation would be that the craft must die a slow death." *Id.* at 1118.

Here the death of the craft was instantaneous, but no more justifiable. It is true that fish

[6] This argument was presented as an equal protection claim, but the Ninth Circuit later recharacterized it as a substantive due process claim. *Merrifield v. Lockyer*, 547 F.3d 978, 986 (9th Cir. 2008).

cannot be disinfected. That is not the same, however, as saying that fish pedicures cannot be performed safely. Plainly, the applicable statute and rule did not contemplate fish pedicures. It is only the Board's tortured construction of its rule to encompass fish within the definition of "tools" or "instruments" that leads to the conclusion that the practice must be banned.

Indeed, the Board does not take so technical or expansive a view of its rule when it comes to the use of human hands. Like fish, they "come into direct contact with a client" as provided by R4-10-112(E)(1) (see SOF 44 (hands frequently come into direct contact with customers' skin through shampooing, hand massaging, pedicuring, and other services)). Presumably, also like fish, they cannot "be disposed of in a waste receptacle immediately after use." Human hands demonstrably can be a source of disease or infection (see SOF 58). And yet the Board does not require that cosmetologists wear gloves, which could be thrown away, while touching their clients' skin. Nor does it require that they disinfect their hands. Rather, the Board only requires that they wash their hands with hot water and soap. The Board believes that hand washing is adequate to protect public health and safety (SOF 45).

The Board is entitled to make that type of determination. Indeed, we suspect that the Board will urge this Court to defer to its expertise with regard to health and safety determinations. In this case, however, the Board did not exercise expertise. Indeed, its determination to shut down Spa Fish is bereft of any judgment or discretion whatsoever. It simply applied its rule in mechanical fashion to a practice not even contemplated by the rule, not

only at Cindy Vong's great expense and loss of business opportunities, but to the detriment of the many patrons who enjoyed her service and to the staff members who lost their jobs as a result of the Board's action (SOF 14, 15).

Indeed, the only thing the Board did with regard to fish pedicures was to ban them. Otherwise, its conduct is characterized entirely by what it did not do. The Board was not prompted to this action by any health or safety complaint (SOF 20). No member of the staff has ever observed fish pedicures in person (SOF 26). The Board did not observe the Spa Fish business while it was in operation (SOF 27). The Board did not study or commission an outside expert to conduct an analysis of Vong's proposed hygiene protocol for Spa Fish therapy (SOF 28). It did not perform or commission any analysis of health and safety issues relating to fish pedicures prior to closing the business (SOF 29). It did not consider any alternatives to banning fish pedicures (SOF 30). It simply applied its rule in the most technical and expansive possible manner to ban the practice and to order Cindy Vong to close her business. And it did so despite having identified or verified not a single instance in which fish pedicures caused injury or harm (SOF 21). By definition, ignorance cannot generate a rational basis.

Arizona case law does not look kindly upon the imposition of severe or excessive impediments to the pursuit of a livelihood. Although Arizona courts apply a rational basis test, the test often is articulated in different terms than the federal test; and given the plethora of cases in which Arizona courts have invalidated statutes under the rational basis test (see also Part II,

infra), it appears to embrace a more searching judicial inquiry than is employed by federal courts.

In *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941) (cited by the Court of Appeals in *Vong v. Aune*, mem. dec. at 17), 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 declared. "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. St. Bd. of Barber Examiners*, 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 grounds that they bore "no reasonable or substantial relation to public health, safety, or the general welfare." The Court articulated the applicable due process standard: "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.

Here the Board's actions are a grossly disproportionate response to the possible harm. The Board could have issued rules governing health and safety. It could have approved the pilot study that Cindy Vong proposed (SOF 12). Indeed, it could issued a reasonable moratorium on fish pedicures so that it could study health and safety issues. Any of those actions would have been far less destructive of Vong's freedom to pursue her chosen business. Instead, it chose the most drastic weapon in its regulatory arsenal: outright prohibition.

Although Arizona courts do not appear yet to have expressly considered the question, courts in other states have applied greater scrutiny to prohibitions of economic activity than to lesser regulation. As the legendary North Carolina Supreme Court Justice (and later U.S. Senator) Sam Ervin observed, 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); *Exton Quarries, Inc. v. Zoning Bd. of Adj.*, 228 A.2d 169 (Pa. 1967); *Pierce v. La Porte City*, 146 N.W.2d 907 (Iowa 1966); *Hackler v. Ft. Smith*, 377 S.W.2d 875 (Ark. 1964); *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403 (Cal. App. 1979). Such a view is implied by the Arizona Supreme Court in *Edwards*, 72 Ariz. at 114, 231 P.2d at 453, by its requirement of "a clear showing of a

benefit to the public commensurate with the loss of individual rights." For a business owner, there can be no greater loss of individual rights than the closure of the business; hence, the benefit to the public must be equally great.

It is impossible for the Board to make such a showing, much less a clear showing. For *all* of the evidence demonstrates that whatever potential risks may be presented by fish pedicures, they can be addressed by regulations that are far less damaging to individual rights than a complete ban.

In October of last year, the United Kingdom Health Protection agency released the first (and so far only) study on health issues relating to fish pedicures, entitled *Guidance on the Management of the Public Health Risks from Fish Pedicures* (SOF 32). The report notes the fish pedicures involve "immersing the feet in a tank of water containing *Garra rufa* fish (a small toothless species of freshwater carp) that nibble off dead and thickened skin. The use of *Garra rufa* fish is long established in Turkey, India and the Far East where it has a history as a treatment for a variety of skin conditions and, more recently, as a cosmetic treatment for the removal of dead and hardened skin from the feet" (SOF 17).

The report observes that some states have banned fish pedicures "mainly on the grounds that it contravenes regulations applicable to beauty procedures" (SOF 19). Moreover, fish pedicures have "been banned in some countries on safety grounds. However, there is little evidence in scientific literature of the potential health risk to users" (SOF 18). Indeed, a

publication released by the Centers for Disease control, cited by defendant's expert, states that "CDC is not aware of any published reports on illnesses resulting from fish pedicures" (SOF 39).[1]

The Health Protection Agency concluded that "the risk of infection as a result of a fish pedicure is likely to be very low, but cannot be completely excluded. In order to reduce this risk even further, premises providing fish pedicures should implement the measures outlined in the Recommendations." The study went on to list guidelines for fish pedicure premises and facilities, client preparation and follow-up, and equipment and maintenance (SOF 32).

Plaintiffs' experts, Graham M. Jukes and Andrew Griffiths from the Charted Institute of Environmental Health (SOF 33), presented uncontroverted testimony that "fish pedicures do not pose a significant or unacceptable risk to patrons wishing to use such services, as long as good hygiene management practices are routine and those who wish to use the service are effectively informed; provided with relevant information which helps them to make informed choices and; screened by management to ensure that those who might be put at greater risk as a result of their own personal health issues, are prevented from using the service" (SOF 34). Jukes and Griffiths state that the health and safety guidelines they propose reflect "proportionality in regulation" as opposed to an unnecessary prohibition of fish pedicures (SOF 35).

[1] The study recommends that Chin Chin fish should not be used in fish pedicures as that species of fish develops teeth (SOF 32 n. 2). Vong used Chin Chin fish but will abide by all public health and safety standards if allowed to repopen her business (SOF 62).

Cindy Vong is willing and able to comply with all reasonable regulations of her Spa Fish business that the Board might impose, including those set forth in the Health Protection Agency report. Indeed, most of the guidelines already were part of her Spa Fish hygiene protocol (SOF 62). As a Board-licensed nail technician and aesthetician, Vong already is trained in the detection of skin diseases and open wounds, and to stop any procedure if such conditions are detected (SOF 41).

Given the complete absence of documented illnesses or injuries resulting from the long-established practice of fish pedicures, and uncontroverted evidence that health and safety regulations are available and adequate to minimize any risks, a complete ban on fish pedicures does not reflect the "congruity" of regulation required by the due process guarantee. *Cornwell*, 80 F. Supp.2d at 1106; *Edwards*, 72 Ariz. at 114, 231 P.2d at 453.

II. EQUAL PROTECTION

Defendant compounds her constitutional violation by singling out fish pedicures for disadvantageous treatment. It would not be so if the Board prohibited all risky or hazardous activities in beauty salons, or if it forbade all activities (to borrow language from defendant's expert (SOF 37)) from which "risks cannot be completely eliminated." But emphatically it does not. The Board permits, and subjects to various types of regulation, all manner of extremely hazardous activities and products in beauty salons. Fish pedicures stand out from those activities: despite an absence of documented instances of infection or injury, along with a "very

low" risk of harm that can be mitigated through proper procedures (SOF 32, see also SOF 34), fish pedicures nonetheless are prohibited. The juxtaposition between risky activities that are permitted and an activity that is singled out for prohibition for no reason presents a classic equal protection violation even under rational basis scrutiny.

The paradigm case establishing that principle is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court struck down 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 apartment houses, multiple dwellings, fraternity houses, etc. The fact that the uses were different was not sufficient to justify differential treatment. The Court concluded that "the record does not reveal any rational basis for believing" that the home for the mentally retarded "would pose any special threat to the city's legitimate interests." *Id.* at 448. Moreover, the regulatory response was not shown to be reasonably related to that special threat.

The U.S. Supreme Court reiterated that principle in *Romer v. Evans*, 517 U.S. 620 (1996), when it invalidated a Colorado constitutional provision that prohibited government action to prevent discrimination against homosexuals. The Court emphasized that "even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained. The search for the link between classification and objective gives substance to the Equal Protection Clause." *Id*. at 632. Among other things, the Court found, the provision "has the peculiar property of imposing

a broad and undifferentiated disability on a single named group," which renders it "an invalid form of legislation." *Id.*

Here too, the Board's interpretation and application of its rule to prohibit fish pedicures imposes a special burden, not shared by others who are similarly situated, that can be justified only if it addresses a special threat posed by the practice in question. Lower courts have applied this equal protection principle to differential regulation of enterprises.

In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), 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 only those who target rodents and pigeons. The court observed that the scheme "specifically singles out" certain pest controllers for adverse treatment. *Id.* at 991. The state's "own rationale for requiring pest controllers such as Merrifield to take the licensing exam," while exempting other types of pest controllers who engender similar risks, "cannot be said to rest on a rational basis." *Id.* The court concluded that "while a government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id.* (emphasis in original).

Similarly, in *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994), the court invalidated an ordinance that prohibited jitneys while allowing and regulating other types of transportation businesses. Although economic regulations enjoy a presumption of

constitutionality, the court observed that the presumption "is rebuttable on a showing that the legislation or regulation is arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Id.* at 607. 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," and "jitney services would pose no greater threat to public safety than other similarly situated services which are currently operating vehicles on city streets." *Id.* at 608.

And in *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989), the Court invalidated under the rational basis test a Jim Crow-era law that forbade shoeshine stands on public streets while allowing other business uses. Applying *Cleburne*, the court held that it "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." *Id.* at 355 (emphasis in original). Under the circumstances presented in *Brown*, "There must be at least some plausible connection between the 'uniqueness' of a bootblack and the purpose of the law." *Id.* at 356. Even if the court credited hypothetical objectives, "the District's method for achieving this goal irrationally and arbitrarily singles out bootblacks as unique from other vendors." *Id.* at 355.

The application of the rule to prohibit fish pedicures suffers the same fatal constitutional infirmity as in all of these cases, for it subjects to harsher regulatory treatment (indeed, outright

prohibition) one particular type of economic activity while permitting similar types of activities and subjecting them to lesser regulation.

In Arizona, the rational basis test under the equal protection guarantee is applied at least as robustly as the federal standard. Although the due process protection in Ariz. Const. Art. II, § 4 mirrors the federal protection, Art. II, § 13 does not. It provides, "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." This language reflects the concerns expressed in the federal cases cited above about the impropriety of subjecting some but not others to disadvantageous treatment.

Arizona courts have not hesitated to invalidate legislation applying the rational basis test under either Art. II, § 13, or the prohibition against special or local laws (Art. IV, pt. 2, § 19). In *Big D Construction Corp. v. Ct. of App.*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990), the Court held that under the equal protection guarantee, the challenged statute "must not be arbitrary or irrational, and must be reasonably related to furthering a legitimate state purpose." Applying that standard, the Court held that a bid preference statute was unconstitutional. As our Supreme Court held in *State Compensation Fund v. Symington*, 174 Ariz. 188, 194, 848 P.2d 273, 279 (1993) (ruling that certain tax differentials were unconstitutional), "One test for reasonableness of a classification is 'whether there is a substantial difference between those within and those without the class'" (citation omitted). Accord, *Tucson Elec. Power Co. v.*

Apache County, 185 Ariz. 5, 14, 912 P.2d 9, 18 (App. 1995) ("We find no basis to speculate that mines and utilities necessarily 'burden' these districts in a way that no other class of property does").

Banning Spa Fish while allowing and subjecting to reasonable regulation hazardous beauty products and services does not address any special threat in a rational way. In her Rule 30(b)(6) deposition for the Board, defendant Aune stated that the reason for refusing to consider any alternative to banning fish pedicures is that "we believe that the tools haven't been disinfected for a pedicure. And for a consumer protection agency, we wouldn't put anyone in harm" (SOF Exh. 9, p. 34).

Not quite true. Cosmetologists acting in accordance with Board rules place consumers in harm every day. It is simply that the Board considers the use of toxic chemicals and inherently dangerous implements to constitute acceptable risks that can be mitigated by appropriate regulatory standards.

Chemicals used by cosmetologists can present health and safety dangers both to practitioners and customers. Products commonly used by cosmetologists that contain chemicals include shampoos, peroxide treatments, coloring, brow and eyelash tints, permanent waves, bleaching, and nail polish and removers (SOF 46). Chemical peels used by cosmetologists actually remove the top layer of skin (SOF 47). Defendant Aune testified, "Any chemical can leave a burn." The Board has seen instances of burning of skin used by licensed professionals

(SOF 48).

The Board does not test or specify the products used by cosmetologists. Instead, cosmetologists may use any "professional manufactured product" (SOF 49). In most instances it merely instructs cosmetologists to follow manufacturers' instructions (SOF 51).

Some products used by cosmetologists contain carcinogens or other chemicals that can be very dangerous to consumers (SOF 50, 51). The Board does not prohibit the use of such dangerous chemicals. Even if cosmetologists follow manufacturers' instructions and take other precautions, the Board admits that risks of harm remain (SOF 51). Yet the Board believes that its regulations are adequate to protect public health and safety (SOF 52).

Cosmetologists also commonly use implements such as scissors, curling irons, and razors that can cause injury to consumers (SOF 53). Again, the Board does not prohibit such devices, but regulates them, and the Board believes its rules are adequate to protect public health and safety (SOF 54).

Despite such rules, there are numerous documented cases of diseases, infections, and injuries resulting from the practice of cosmetology. Some products used by cosmetologists contain formaldehyde and methacrylates, which can cause occupational asthma, eczema, and allergic reactions including skin rashes and hives. Some solvents and chemicals used by cosmetologists are suspected reproductive toxins (SOF 56). A Cornell University study found that common products used in cosmetology, including shampoos, coloring agents, bleaches,

hairsprays, permanent waves, nail products, and cosmetics present risks from inhalation, skin contact, and skin absorption. Many of those products contain carcinogens and are linked to allergies, cancer, and reproductive effects (SOF 57). A sampling of complaints from the Board illustrates that even with rules in place, serious injuries occur, including second-degree burns, scars, blisters, and patches of lost hair (SOF 59-61).

Again, none of those practices or products are banned. Indeed, in some instances the Board reposes complete or nearly complete faith in product manufacturers. But those practices and products are a necessary part of cosmetologists plying their trade. The Board weighs the risks and establishes the rules it deems appropriate.

That is, except when it comes to fish pedicures, about which it knows little to nothing yet has completely prohibited despite nary a single documented instance of harm. Defendant's expert, Dr. Joseph Giancola,[8] asserts (correctly) that "risks cannot be completely eliminated" from fish pedicures (SOF 37). Nor, of course, can they be eliminated from any of the many practices and products provided by cosmetologists every day. Indeed, it is telling that the CDC

[8] Only 12 days before providing his report, Dr. Giancola confessed that "I have no previous experience or in depth knowledge of fish pedicures" (SOF 36). Plaintiffs are tempted to move to disqualify him. But it is unnecessary to exclude his testimony as he relies on the Health Protection Agency study (SOF 32) and the Centers for Disease Control publication (SOF 39), provides no independent analysis, and does not present any evidence to rebut the findings of plaintiffs' expert report. As plaintiffs' experts testify, Dr. Giancola's "opinion is not backed by any evidence of any occurrence of . . . disease transmission," and "does not take the issue further in terms of scientific or operational evidence to support the prevention of this type of business from operation" (SOF 38).

publication that reports no documented instances of injury or harm from fish pedicures follows that finding by saying, "Nail salon foot baths, however, have caused outbreaks of nontuberculous mycobacterial infections that left infected pedicure customers with boils and scars" (SOF 39). By contrast, Dr. Giancola does not dispute, and therefore the evidence is uncontroverted, that risks from fish pedicures are "very low" and can be reduced even further through appropriate standards (SOF 32, 35). It may be that the fish cannot be disinfected, but they easily can be made safe for feet nibbling; and that of course is both the extent of the Board's police power and the entire point of the cosmetology licensing regime.

Cindy Vong does not ask that her business be left unregulated. By establishing her own hygiene protocol, she recognized the risks presented by fish pedicures, and demonstrated her determination to provide a safe, enjoyable experience to her patrons. It appears that until the Board shut her down, she succeeded in doing exactly that.

Nor do we question the Board's motives. Rather, the Board overstepped the boundaries of its police power by applying a statute and rule in a way they were never intended. Its actions were excessive, arbitrary, and discriminatory. The prohibition is not commensurate with the potential risk, and the practice of fish pedicures presents no special dangers that require an extraordinary regulatory response. For all of the foregoing reasons, the Board's actions violate plaintiffs' rights to due process and equal protection.

Request for Relief

Wherefore, plaintiffs request that this Court declare that defendant's actions in applying A.R.S. § 32-501(10)(c) and R4-10-112 to order the closure of Spa Fish and to prohibit fish pedicures are unconstitutional, and to enjoin their enforcement in such manner.

RESPECTFULLY SUBMITTED this 6th day of January, 2012 by:

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MAILED this 6th day of January, 2012 to:

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