No. _____

In The
Supreme Court of the United States

CINDY VONG and LA VIE, LLC,

Petitioners,

v.

DONNA AUNE, in her official capacity as Executive Director of the Arizona Board of Cosmetology,

Respondent.

On Petition For A Writ Of Certiorari To The Arizona Court Of Appeals, Division One

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the context of "fish spas," an activity that has never once been shown to cause harm anywhere in the world,

A. Does the rational basis test under the Fourteenth Amendment require a greater justification for completely prohibiting the activity rather than merely regulating it to ameliorate any possible health or safety risks?

B. Does the rational basis test allow the government to treat very different economic activities as if they were the same? and

C. Under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), does the rational basis test allow the government to completely prohibit an economic activity while allowing and subjecting to modest regulation demonstrably dangerous activities within the same profession absent some justification for the differential treatment?

2. Should the Court's decision in *The Slaughter-House Cases*, 83 U.S. 36 (1873), be reconsidered in light of its adverse jurisprudential and real-world consequences and widespread criticism from legal scholars and members of this Court?

CORPORATE DISCLOSURE STATEMENT

La Vie, LLC, pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, hereby submits the following corporate disclosure statement.

La Vie, LLC is an Arizona limited liability corporation with its principal place of business in Gilbert, Arizona. No parent corporation or any publicly held corporation owns 10% or more of La Vie, LLC's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Cindy Vong and La Vie, LLC, respectfully petition for a writ of certiorari to review the judgment of the Arizona Court of Appeals, Division 1.

DECISIONS BELOW

The decision of the Arizona Court of Appeals was issued on May 27, 2014, and is reported at *Vong v. Aune* (*Vong II*), 328 P.3d 1057 (Ariz. App., May 27, 2014). The Arizona Supreme Court denied a petition to review that decision on November 6, 2014 (App. 71). The trial court opinion is set forth in App. 25-47.

JURISDICTION

The Complaint in this action (App. 90-99) raises claims under the due process, equal protection, and privileges or immunities clauses of the Fourteenth Amendment to the United States Constitution (App. 73) and 42 U.S.C. §§ 1983 and 1988. Further discussion of the basis for federal jurisdiction is set forth in the Statement of the Case, *infra*.

A petition to review the Arizona Court of Appeals' decision at issue here was denied by the Arizona Supreme Court on November 6, 2014 (App. 71). This Petition was timely filed within 90 days of that

ruling. Accordingly, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND ADMINISTRATIVE PROVISIONS INVOLVED

The constitutional provision involved in this case is section 1 of the Fourteenth Amendment, which states, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (App. 73). The statute involved is A.R.S. § 32-501(10)(c) (App. 76). The regulation involved is Ariz. Admin. Code R4-10-112 (App. 78-89).

STATEMENT OF THE CASE

A. *Federal claims*. This Petition seeks review of a state court decision in a case in which federal constitutional claims were raised at the outset and were considered at every stage of the proceedings. The lawsuit challenges the Arizona Board of Cosmetology's prohibition of "fish spas." The Complaint (App. 90) raised three causes of action: (1) that the Board's actions exceeded its jurisdiction (App. 96, ¶¶ 30-33); (2) that the ban violates state constitutional guarantees of due process and equal privileges or immunities (App. 97, ¶¶ 34-39); and (3) that the ban violates

federal constitutional guarantees of due process, equal protection, and privileges or immunities, as well as 42 U.S.C. § 1983 (App. 91 and 98, ¶¶ 6 and 40-44), which are the basis for jurisdiction here. The state trial court dismissed the Complaint (Rec. 20). The Court of Appeals affirmed as to the issue of the Board of Cosmetology's jurisdiction, but reversed as to the state and federal constitutional challenges and reinstated those claims. *Vong v. Aune (Vong I*), 2011 WL 1867409 (Ariz. App., Apr. 29, 2011) (App. 53-70). Thereafter, both the state and federal constitutional claims were fully litigated, and both the trial court (App. 25-47) and Court of Appeals (App. 53-70) ruled on the federal causes of action. Those claims are therefore properly before this Court.

B. *Statement of facts*. This is a fishy case. Specifically, it involves tiny garra rufa and chin fish that like to gently nibble dead skin from patrons who dangle their feet in the fishes' environs. The experience is known as a "fish spa" or "fish pedicure," and apparently is fun and enjoyable.[1]

The fish in this case were employed by Petitioner Cindy Vong, who emigrated from Vietnam in 1983 and became an American citizen in 1989 (TR1 at 25). She owns a nail salon and is licensed by the Board of

[1] The Court can view the procedure at Rec. 102, Trial Ex. 16, which also can be found at https://www.youtube.com/watch?v=TA99-xS7nGE. As Petitioner testified and is obvious in the video, "It makes very tickle, and people like it" (01/14/2013 Trial Transcript ("TR1") at 27).

Cosmetology as a nail technician and aesthetician. *Id.* at 25-26. Were the Board to revoke her licenses, she would not be able to operate her salon. *Id.* at 26.

After observing fish spas in Japan and engaging in extensive research, Vong decided to open a business called "Spa Fish" in part of her salon. *Id.* at 27. She invested approximately $40,000 to purchase fish and equipment and to remodel the salon, which she opened in October 2008. *Id.* at 28-29.

Vong developed a health and safety protocol for the procedure. *Id.* at 36-37. Before commencing the procedure, she would inspect the patrons' skin, as she is trained to do as a nail technician and wash their feet with antibacterial soap. *Id*. at 26, 29. If any problems were detected, the procedure was not allowed. *Id.* at 29-30. The patrons' feet were immersed in a clean tank with fresh water, into which the fish were inserted. After about 30 minutes, the procedure ended and the feet were washed again. *Id.* at 30-31. The fish were then returned to a different tank containing filtered water. *Id.* at 32.

Spa Fish was a huge success, with up to 20 patrons visiting every day. *Id.* at 34. No health or safety complaint was ever filed against the business, and the Board is unaware of anyone being harmed. *Id.* at 35, 81.

About a month before Spa Fish opened, the Board conducted a routine inspection of Vong's nail salon, at which time Vong informed the inspector of

her plans to open Spa Fish. *Id.* at 35. Although she invited the Board to observe a treatment, it never did. *Id.* at 38-39, 82. Nor did it perform or commission any analysis of the health or safety risks or Vong's protocol. (Rec. 56, Exh. 8 at 2-3). Instead, it decided that the procedure fell within the requirements of one of its rules, R4-10-112 (App. 80), which provides that "tools, instruments, or supplies that come into direct contact with a client" must be disinfected or thrown away after use. The Board concluded that " 'Fish Pedicures' did not follow R4-10-112. Therefore, [Vong] was in violation of the Board's rule by performing the service" (Rec. 56, Exh. 8 at 2-3). Faced with possible revocation of her licenses and loss of her livelihood, Vong agreed to shut down Spa Fish (TR1 at 39). The Arizona Court of Appeals found that the Board's policy relating to fish spas "acts as an effective prohibition of the practice statewide." *Vong I*, 2011 WL 1867409 at *4 (App. 63).

The Board is comprised of seven members, four of whom are cosmetologists who may be competitors of the practitioners they license and regulate (TR1 at 73). Ordinarily, the Board has expertise in areas it regulates (*id*. at 78), but it has no expertise regarding fish or fish spas. *Id.* at 82-83. Indeed, when the Board devised its rules regarding disinfection of "tools," unsurprisingly, it did not have fish in mind. *Id.* at 89-90. Although the term "fish pedicures" is often used in the context of fish spas, they are not pedicures in the technical sense. A normal pedicure includes exfoliation, massage, pushing back cuticles, callus removal,

and toenail trimming. *Id.* at 85-86. Fish, of course, cannot do most of those things. *Id.* at 88-89. A regular pedicure is "far more invasive" than a fish spa procedure, which is "more like a gentle easing of hard skin." *Id.* at 165. Pedicures expose patrons to risk of harm because tools are used to "actually peel back skin or cut skin or to push back cuticles, which could expose the underlying layers of the body" (01/15/2013 Trial Transcript ("TR2") at 18-19). Even when sanitized, potentially harmful bacteria may remain on the tools. *Id.* at 19.

Beauty and nail salons under the Board's jurisdiction use a number of tools and products that can be and sometimes are harmful to customers (TR1 at 90). The Board's rules reduce but do not eliminate risk. For instance, disinfection of tools reduces but does not eliminate risk of infection. *Id.* at 91, 93-94. Cosmetologists' hands touch patrons' skin and can contain bacteria, but disinfection is not required before such contact. *Id.* at 94-96. Despite precautions, HIV and hepatitis have been spread through salons. *Id.* at 103. As Respondent acknowledged, "We can't eliminate anything because there is human people doing the service, so we can't eliminate it." *Id.* at 114.

Likewise, chemicals used in licensed salons sometimes come into contact with human skin and can cause chemical burns, which are sometimes severe and disfiguring. *Id.* at 103-04. Some of the chemicals used in salons are carcinogenic; others contain formaldehyde, which can cause allergic reactions. *Id.* at 104-07. In nail salons, chemical cuticle and callus

removers present potential health hazards. *Id.* at 112. Nonetheless, the only way the Board regulates the use of potentially harmful chemicals is to admonish practitioners to use them in accord with manufacturers' instructions. *Id.* at 113; *see also* TR2 at 147-48.

In contrast to its often minimal regulation of tools, products, or procedures that have been demonstrated to cause injury or transmit disease, the Board's application of its tool disinfection rule to fish "acts as an effective prohibition of the practice statewide." *Vong I*, 2011 WL 1867409 (App. 63). The ban was imposed notwithstanding that the Board has not identified a single instance of harm from fish spas anywhere in the world (TR1 at 115). Moreover, as Respondent testified, "the board didn't consider any actions except prohibited because we believed that there was a chance that the consumer could be harmed." *Id.* at 84.

Fish spas are common around the world. In Turkey and other parts of the Middle East, "the practice of using Garra Rufa fish is a tried and tested practice for spa treatments," with patrons immersing their entire bodies or dangling their feet in natural pools. *Id.* at 175-76. The United Kingdom has hundreds of fish spas,[2] and Germany has them as well. *Id.* at 179-80.

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[2] Petitioners' expert estimates that about 400 fish spas operate in the U.K. *Id*. at 166. Assuming each salon performs only ten treatments per day (half of what Vong performed), that

(Continued on following page)

In 2011, the United Kingdom Health Protection Agency, which is the British equivalent to our Centers for Disease Control (*id.* at 148), published a report entitled *Guidance on the Management of the Public Health Risks from Fish Pedicures*.[3] Petitioners' expert participated in creating the Report (*id.* at 149); and as Respondent's expert testified, "Most of the information I utilized to form an opinion on this matter" was contained in the Report as well (TR2 at 63-64).

As summarized by Petitioners' expert, the Report found that there is "minimal public health risk" from fish spas – a "very low" risk provided the patron has no "cuts or grazes or open sores," conditions that licensed cosmetologists are trained to detect (TR1 at 180). "The main danger, if there is a danger at all," he testified, "is any potential ingesting of any of the waters around the fish container itself." *Id.* at 181. Although the risks are very low, they can be mitigated further by reasonable health and safety precautions (*id.* at 182-84), such as those implemented by Cindy Vong. *Id.* at 196.

The finding of minimal health risks is borne out by real-world experience. The U.K. has not identified a single instance of disease transmission from fish spas through its extensive reporting process. *Id.*

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would amount to 1.4 million fish spa treatments every year in the U.K. alone (400 spas x 10 treatments x 360 days).

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

179-80. Likewise, the Centers for Disease Control has not identified any instances of disease transmission from fish spas anywhere in the world. *Id.* at 178-79.

C. *Decisions below*. In the courts below, Petitioners argued (*see* Court of Appeals Opening Brief) that the complete prohibition of fish spas flunks the rational basis standard applicable to economic regulations under the Fourteenth Amendment because (1) the ban was not the product of legislative choice, but rather of the rote application of a rule that has the practical effect of banning the activity, and thus does not trigger deference to legislative line-drawing; (2) the statute and rule that led to the prohibition never contemplated the activity to which it was applied; (3) a complete prohibition of fish spas is grossly disproportionate to the risk, particularly in light of less-burdensome regulatory alternatives; (4) treating fish as if they are cosmetology implements is an irrational regulatory mismatch; and (5) a complete prohibition is inappropriate in a context in which demonstrably harmful activities are permitted and made subject to proportionate regulation.

The trial court analyzed the prohibition of fish spas under rational basis review (App. 36, ¶ 3), under which "Plaintiffs bear the burden of demonstrating, beyond a reasonable doubt, that there is no conceivable rational link between the Board's prohibition of fish pedicures and a legitimate state interest." *Id.* ¶ 4. Although the court acknowledged that there have been no reported cases of disease or infection (App. 35, ¶ 52), the Board's action banning fish was rational

because the "risk is not zero" (App. 37, ¶ 8). With regard to the Board's regulation of the fish as nail technology implements, the court stated, "If the fish are not implements then the Plaintiff fails to explain what they are" (App. 45). The court of appeals affirmed (App. 1).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS AND OTHER FEDERAL AND STATE COURTS ARE DIVIDED OVER COMPLETE PROHIBITIONS OF ECONOMIC ACTIVITIES.

Americans are risk-takers; and in the pursuit of happiness, opportunities to take risks – often for nothing more than the sake of taking risks – are abundant. Often those activities include interactions with aquatic creatures in their native or adapted habitats. People are allowed, for instance, to cavort up-close and personal with Great White sharks, separated only by the bars of a cage.[4] Closer to home, children are invited to plunge their hands into aquariums to pet and feed wild stingrays at the Phoenix Zoo.[5] Of course, families often frolic in murky lakes where fish and other creatures live. But if Respondent has

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

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

her way, there is one thing people will never, ever get to experience: the feeling of tiny, toothless garra rufa fish nibbling at their feet in the regulated environs of a nail salon.

That is because among the vast arsenal of regulatory tools available to the Board, it chose the strongest and harshest: a complete prohibition against fish spas. While acknowledging that there are no known instances of harm from fish spas anywhere in the world, the trial court's predicate for upholding the ban was that the "risk is not zero" (App. 37, ¶ 8). Nor is it, of course, for any activity, even breathing. Is a finding that a risk from an activity is not zero sufficient grounds for banning it? Or does the due process guarantee require some degree of proportionality between the risks and the severity of the regulation? That is an important question on which federal and state courts have reached different results, and existing precedents of this Court do not provide a clear answer.

Resolution of the question has significant real-world ramifications. In many instances, disruptive technologies are upsetting settled economic interests. Frequently, the regulatory response, and the response sought by many who fear change and competition, is to ban the upstarts. The most famous examples are Uber and Lyft, Internet-based ride-sharing companies that are facing backlash from existing transportation

firms.[6] Similarly, the Federal Aviation Administration has shut down the "Uber of the skies," an Internet-based company called Flytenow, that connects private pilots with passengers who would like to hitch rides and share expenses.[7] States are banning the automobile company Tesla from selling cars directly to consumers.[8] And Airbnb, through which private residences are made available for short-term rentals, is facing regulatory threats to its existence.[9] In an era in which more goods and services are available to consumers than ever before, it is important to businesses, consumers, and regulators alike to have the constitutional limits (if any) on regulatory authority clearly articulated.

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[6] *See, e.g.*, Brian X. Chen, "A Feisty Start-Up is Met With Regulatory Snarl," *New York Times* (Dec. 2, 2012) (describing a recent conference of transportation regulators and car service operators who "proposed guidelines that would effectively force Uber . . . to cease operations in the United States"). http://www.nytimes.com/2012/12/03/technology/app-maker-uber-hits-regulatory-snarl.html?pagewanted=all&_r=0

[7] *See, e.g.*, Caitlin McGarry, "FAA says Lyft-like Platforms for Private Planes Are Illegal," *TechHive* (Aug. 15, 2014). http://techhive.com/article/2465828/faa-says-lyft-like-platforms-for-private-planes-are-illegal.html.

[8] *See, e.g.*, Wayne Cunningham, "New Jersey Joins Arizona and Texas in Tesla Sales Ban," *CNET* (March 11, 2014). http://cnet.com/news/new-jersey-joins-arizona-and-texas-in-tesla-sales-ban/.

[9] *See, e.g.*, Ellen Huet, "New York Slams Airbnb, Says Most of Its Rentals Are Illegal," *Forbes* (Oct. 16, 2014). http://forbes.com/sites/ellenhuet/2014/10/16/new-york-slams-airbnb-says-most-of-its-rentals-are-illegal/.

As any law student knows, the rational basis test under the due process and equal protection clauses is a graveyard filled with tombstones of failed challenges to economic regulations. *See, e.g.*, *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). It is perhaps therefore surprising that it is relatively difficult to find court decisions *rejecting* challenges to prohibitions of economic activities as opposed to regulations short of prohibition.

The starkest conflict is among decisions of the U.S. Courts of Appeals for the Fifth, Sixth, and Tenth Circuits regarding state bans of direct sales of caskets to consumers. In each case, sales of caskets were restricted to licensed funeral homes, which was justified, *inter alia*, on public health and safety grounds. Each of the courts applied rational basis scrutiny, but the outcomes differed. In *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), the court struck down Tennessee's restriction of casket sales to licensed funeral homes. In *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), the court upheld a nearly identical Oklahoma statute, holding that economic protectionism is a legitimate state interest for purposes of the rational basis test. More recently, in *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), the court struck down a Louisiana ban on direct casket sales. The court ruled, *id.* at 226, "The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." Other federal courts

have struck down outright bans of economic activities under rational basis review as well. *See, e.g.*, *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (overturning ban on jitneys); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (striking down ban on street-corner shoeshine stands).

Most prohibitions of economic activities have been challenged in state courts, many of which have applied federal due process or equal protection to invalidate them, even in the context of public health and safety. The Pennsylvania Supreme Court, in striking down an ordinance prohibiting the quarrying of limestone, aptly summarized the applicable principle:

> The constitutionality of zoning ordinances which totally prohibit legitimate businesses . . . should be regarded with particular circumspection; for unlike the constitutionality of most restrictions on property rights imposed by other ordinances, the constitutionality of total prohibitions of legitimate businesses cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community.

Exton Quarries, Inc. v. Zoning Bd. of Adjustment of W. Whiteland Twp., 228 A.2d 169, 179 (Pa. 1967). Likewise, in invalidating an ordinance prohibiting floating or swimming in a 20-mile section of a navigable river, the court in *People ex rel. Younger v. County of El Dorado*, 96 Cal. App. 3d 403, 407 (Cal.

App. 1979), applied the same principle under the federal constitution:

> While obviously effective to eliminate pollution and sanitation problems, the ordinance goes too far. The county contends use prohibition is the only way to eliminate pollution and sanitation problems. But the logical extension of this hypothesis is the prohibition of all industry, agriculture, and even human habitation. . . . Reasonable regulation is in order; use prohibition is not.

Accord, *Delight Wholesale Co. v. City of Overland Park*, 453 P.2d 82, 87 (Kan. 1969) ("We are forced to conclude that the businesses of huckstering and peddling may be controlled by reasonable regulations, and the absolute prohibition of such legitimate enterprises is arbitrary and unreasonable"); *Pierce v. LaPorte City*, 146 N.W.2d 907, 910 (Iowa 1966) (striking down ordinance "leaving the life or death of the business to the uncontrolled discretion" of an administrative body); *Lakewood Express Serv. v. Board of Pub. Util. Comm'rs*, 61 A.2d 730 (N.J. 1948) (striking down prohibition of sedan services); *Frecker v. City of Dayton*, 85 N.E.2d 419, 424 (Ohio App. 1949), *aff'd*, 90 N.E.2d 851 (Ohio 1950) (invalidating an ordinance forbidding selling ice cream in public parks, streets, and sidewalks because the record "shows conclusively that the city, prior to the adoption of this ordinance, made not the slightest attempt to adopt measures calculated to regulate, so as to prevent, whatever abuses or objections attended plaintiffs' pursuit of

their business"); *but cf.*, *Caldwell v. Pima County*, 837 P.2d 154, 158 (Ariz. App. 1991) (sustaining a requirement requiring businesses to operate within enclosed buildings, distinguishing them from ordinances "held to be void because they completely prohibited peddlers within the municipal boundaries").[10]

The decisions below swim against a strong current of jurisprudence holding that complete prohibitions of economic activities often go too far. The Court should accept review in this case to determine the standard of review applicable to government actions that extinguish a particular form of enterprise.

II. THE CIRCUITS AND OTHER FEDERAL COURTS ARE DIVIDED OVER WHETHER THIS COURT'S DECISION IN *CITY OF CLEBURNE v. CLEBURNE LIVING CENTER* APPLIES TO ECONOMIC REGULATIONS.

The equal protection cause of action in this case encompasses two distinct but related components: may the Board subject most cosmetology practices to modest regulations while singling out one particular activity for complete prohibition (referred to below as differential regulatory treatment); and is it permissible for the Board to regulate fish as nail technology implements and to subject fish spas to regulations

[10] All of the cited decisions were based in whole or in part on the federal constitution.

that plainly were not designed or even contemplated to apply to them in the first place (referred to below as regulatory mismatch)?

The paradigm case with respect to differential regulatory treatment in the rational basis context is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court struck down on rational basis grounds a municipal ordinance requiring homes for the mentally retarded to obtain a special use permit, while not requiring such a permit for other uses such as apartments, multiple dwellings, fraternity houses, etc. Surely, fraternity houses are different from homes for the mentally retarded, just as fish spas are different from other services that are defined as cosmetology. The Court in *Cleburne* determined that the disparate treatment triggered judicial scrutiny to determine whether there was sufficient difference to justify it. 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. *Accord*, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (no rational basis for "imposing a broad and undifferentiated disability on a single named group"); *see also*, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality) (striking down under the due process clause an ordinance limiting housing occupancy to members of a nuclear family, declaring that a court "must examine carefully the importance of the governmental interests

advanced and the extent to which they are served by the challenged regulation").

In this case, no apparent justification exists for singling out fish spas for a regulatory death sentence while at the same time permitting and subjecting to modest regulation a wide range of activities that have been shown to pose serious health and safety risks. So questions logically arise that this Court has never addressed: is there one rational basis test or more than one? Does *Cleburne* apply to economic regulations or only to a hitherto undefined subspecies of rational basis cases?

The circuit courts in the casket cases disagreed over that question. *Compare Craigmiles*, 312 F.3d at 227 (applying *Cleburne* to strike down Tennessee's ban on direct casket sales) *with Powers*, 379 F.3d at 1223-24 (criticizing the Sixth Circuit's reading of *Cleburne* as "a marked departure from 'traditional'" rational basis review, querying whether *Cleburne* and *Romer* "signal the birth of a new category of equal protection review," and observing that this Court "has never applied *Cleburne*-style rational-basis review to economic issues"). As a result, lower courts are required to choose whether to follow *Craigmiles* or *Powers*; and the choice predicts the outcome. *Compare Meadows v. Odom*, 360 F. Supp.2d 811, 822 (M.D. La. 2005), *vacated on other grounds*, 198 Fed.Appx. 348 (5th Cir. 2006) (unpublished) (choosing to follow *Powers* rather than *Craigmiles* in sustaining a licensing requirement for retail florists) *with Bruner v. Zawacki*, 997 F. Supp.2d 691, 697-701 (E.D.

Ky. 2014) (applying *Cleburne*, *Romer*, *Merrifield*, *Craigmiles*, and *St. Joseph Abbey* – and distinguishing *Powers* – in striking down state requirements for moving services).

Other federal courts have applied the *Cleburne*/*Romer* framework to strike down differential economic regulations. In *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008), the Ninth Circuit held that while states can impose training and examination requirements for pest control businesses that do not use pesticides, it cannot use licensing laws to divide up the trade in ways that "specifically single[ ] out" certain practitioners for adverse treatment. *Id.* at 991. Given that the same health and safety concerns apply to other types of pest controllers, imposing uniquely harsh regulations on some but not others "cannot be said to rest on a rational basis." *Id.* The court concluded that "while a government need not provide a perfectly logically [sic] solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality." *Id.* (emphasis in original).

The *Cleburne*/*Romer* framework would seem to apply with great weight where the differential regulatory treatment is prohibition versus regulation. In *Santos*, *supra* – a decision that speaks directly to the Uber and Lyft context – the court invalidated an ordinance that prohibited jitneys while allowing and regulating other types of transportation businesses. The law violated equal protection because "jitneys have been excluded from operating on city streets,

while numerous other forms of similarly situated business entities providing ground transportation have been operating without restriction"; yet, "jitney services would pose no greater threat to public safety than other similarly situated services which are currently operating vehicles on city streets." *Id.*, 852 F. Supp. at 608.

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

Federal courts also have applied *Cleburne* to invalidate regulatory mismatches. As this Court has observed, "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). As the Arizona Court of Appeals observed, "no rules exist that specifically address – or even contemplate – the practice of fish pedicures." *Vong I*, 2011 WL 1867409 (App. 62, n.4). The absurd application of rules intended for such things as emery boards, nail clippers, scissors, and the like to fish leads to predictably absurd results. Yet the courts below accepted the regulatory mismatch as a basis for extinguishing an occupation.

Perhaps not coincidentally, other regulatory mismatch cases have arisen in the context of cosmetology licensing, but with different outcomes than here. In *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999), the court invalidated the state's effort to impose the entire 1,600-hour cosmetology licensing regime upon the specialized practice of African hairstyling (the braiding and twisting of natural black hair). As here, there was some overlap between the services being regulated, but "the regulatory scheme treats persons performing different skills as if their professions were one and the same, i.e., it attempts to squeeze two professions into a single, identical mold." *Id.* at 1103. After reviewing the evidence, the court found that the plaintiff's "activities are minimal in scope compared to the activities of a cosmetologist," and it therefore concluded that "she cannot reasonably be classified as a cosmetologist as it is defined and regulated presently." *Id.* at 1108.

Applying *Cornwell*, another district court invalidated Utah's application of cosmetology licensing requirements to African hairstyling, concluding that the regime "is so disconnected from the practice of African hairbraiding, much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [plaintiff's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of her constitutionally protected rights." *Clayton v. Steinagel*, 885 F. Supp.2d 1212, 1215-16 (D. Utah 2012).

By contrast with these decisions finding an irrational regulatory mismatch, the court of appeals below failed to apply the *Cleburne* framework or to determine whether it was rational to apply the nail technology regulatory framework to fish spas. As a result of the divergent and contradictory constitutional approaches, Ms. Vong's fish spa thus found itself on the opposite side of the scales of justice. The Court should grant review to define the appropriate level of judicial scrutiny in such circumstances.

III. IN LIGHT OF THE JURISPRUDENTIAL CHAOS IT HAS WROUGHT AND ITS ADVERSE REAL-WORLD CONSEQUENCES, THE COURT SHOULD RE-EXAMINE *SLAUGHTER-HOUSE*.

For decades, law students have been taught in bar-review courses that the only thing they need to know about the Fourteenth Amendment's privileges or immunities clause is that it is never the correct answer to a question on the exam.

What an odd fate for a provision that appears first among the Fourteenth Amendment's trilogy of guarantees, and the only one that by its clear language encompasses substantive protections.

The clause's virtual nonexistence as a substantive constraint on state power owes, of course, entirely to *The Slaughter-House Cases*, 83 U.S. 36 (1872). "Unique among constitutional provisions," observes Prof. Edward Corwin, "the privileges and

immunities clause of the Fourteenth Amendment enjoys the distinction of having been rendered a 'practical nullity' by a single decision of the Supreme Court rendered within five years after its ratification."[11]

In *Slaughter-House*, the Court by a 5-4 majority – as rare then as it is common today – upheld a Louisiana slaughterhouse monopoly that put a large number of butchers out of business, holding that the privileges or immunities clause protected only a handful of rights that pertain to federal citizenship, such as access to navigable waters, habeas corpus, and other rights expressly set forth in the original Constitution. By contrast, the dissenters argued that the provision was intended to protect common law rights against usurpation by state governments. If the Fourteenth Amendment "has no reference to privileges and immunities of this character," observed Justice Steven Field, "it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage." *Slaughter-House*, 83 U.S. at 96 (Field, J., dissenting).

Indeed, Congress intended far more than that. Following the Civil War, southern states attempted to prevent the economic emancipation of former slaves by passing "black codes," a series of measures described by Major General Carl Schurz in 1865 as

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[11] Quoted in Philip B. Kurland, "The Privileges or Immunities Clause: 'Its Hour Come Round at Last'?" 1972 *Wash. U. L. Q.* 405, 413 (1972).

"heavily taxing or otherwise impeding those trades and employments in which colored people are most likely to engage."[12] Such measures motivated Congress to protect economic liberties. Rep. Martin Thayer of Pennsylvania asked, "what kind of freedom is that by which the man placed in a state of freedom is subject to the tyranny of laws which deprive him of rights . . . [such as] the liberty to engage in the ordinary pursuits of life?"[13] The resulting enactment was the Civil Rights Act of 1866, which established, *inter alia*, that all citizens "have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws . . . for the security of person and property, as is enjoyed by white citizens. . . ." Civil Rights Act of 1866, 14 Stat. 27-30 (Apr. 9, 1866).

Most historians and legal scholars agree that "the Privileges or Immunities Clause was meant to protect, in some fashion, the freedoms enumerated in the Civil Rights Act of 1866. Property and contract rights . . . were [among] the principal concerns of the Act."[14] Indeed, both the majority and dissenters in *Slaughter-House* agreed that economic liberties were encompassed by the meaning of "privileges or

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[12] Reproduced in Alfred Avins, ed., *The Reconstruction Amendments' Debates* (1974) at 90.

[13] Cong. Globe, 39th Cong., 1st Sess., 1866, H. pp. 1151-52.

[14] Kenyon Bunch, "The Original Understanding of the Privileges and Immunities Clause," 10 *Seton Hall Const. L.J.* 321, 332 (2000).

immunities" – the disagreement was whether they were intended through the Fourteenth Amendment to be protected against state action. Given the evil intended to be corrected – the evisceration of economic liberties by state laws – the holding that the Fourteenth Amendment leaves protection of such liberties to the whims of the states stretches credulity.

As Harvard Law Professor Laurence Tribe states, "there is considerable consensus among constitutional thinkers that the Supreme Court made a scandalously wrong decision" in *Slaughter-House*.[15] Yale Law Professor Akhil Amar observes that *Slaughter-House* "basically read the [privileges or immunities] clause – the central clause of section 1! – out of the Amendment. Virtually no serious modern scholar – left, right, or center – thinks this is a plausible reading of the Amendment."[16]

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[15] Quoted in Ronald M. Labbé and Jonathan Lurie, *The Slaughterhouse Cases: Regulation, Reconstruction, and the Fourteenth Amendment* (2005), p. 2.

[16] Akhil Reed Amar, "Foreword: The Document and the Doctrine," 114 *Harv. L. Rev.* 26, 123 n.327 (2000). Recent scholarly criticism of *Slaughter-House* includes B. Jessie Hill, "Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the 'Pragmatic Moment'," 91 *Tex. L. Rev.* 1815 (2013); Michael Anthony Lawrence, "The Potentially Expansive Reach of *McDonald v. Chicago*: Enabling the Privileges or Immunities Clause," 2010 *Cardozo L. Rev.* 139 (2010); Randy E. Barnett, "The Proper Scope of the Police Power," 79 *Notre Dame L. Rev.* 429 (2004); Timothy Sandefur, "The Right to Earn a Living," 6 *Chap. L. Rev.* 207 (2003); Kimberly C. Shankman and Roger Pilon, "Reviving the Privileges or Immunities Clause to

(Continued on following page)

Those concerns are far from academic. The late Yale Law Professor Charles Black described the opinion as "probably the worst holding, in its effects on human rights, ever uttered by the Supreme Court."[17] The damage was immediate, and not just to the displaced butchers: applying *Slaughter-House*, the Court sustained the exclusion of Myra Bradwell from the Illinois bar, on the grounds that as a woman she lacked the capacity to sign binding contracts. *Bradwell v. State*, 83 U.S. 130 (1872). Had the Court in *Slaughter-House* construed the privileges or immunities clause to encompass the right to contract protected by the Civil Rights Act of 1866 and applied it to the states, such opportunities could not have been denied to women.

Slaughter-House unleashed southern states to enact Jim Crow laws that systematically denied to blacks the economic and political rights that were guaranteed by the Civil Rights Act of 1866. When those laws were challenged in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the privileges or immunities clause

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Redress the Balance Among States, Individuals, and the Federal Government," 3 *Tex. Rev. L. & Pol.* 1 (1998); Trisha Olson, "The Natural Law Foundation of the Privileges or Immunities Clause of the Fourteenth Amendment," 48 *Ark. L. Rev.* 347 (1995); Richard L. Aynes, "Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the *Slaughter-House Cases*," 70 *Chi.-Kent L. Rev.* 627 (1994); John Harrison, "Reconstructing the Privileges or Immunities Clause," 101 *Yale L.J.* 1385 (1992).

[17] Quoted in Labbé and Lurie, *supra*, p. 2.

and its protection of economic liberty and freedom of contract were off the table, forcing the plaintiffs to unsuccessfully advance the equal protection clause.[18] In turn, that decision sanctioned the wholesale subjugation of African-Americans for the next 58 years.

Slaughter-House also delayed the incorporation of the Bill of Rights to the states, which belatedly and unevenly was largely accomplished through the due process clause.[19] *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 753-64 (2010).

The question of whether *Slaughter-House* should be overruled was raised in oral argument in *McDonald*. Justice Sotomayor asked, "What injustice . . . has been caused by [*Slaughter-House*] that we have to remedy?" Official Transcript of Oral Argument in *McDonald v. City of Chicago*, No. 08-1521 (Mar. 2, 2010), at 4. Likewise, Justice Scalia queried whether it was necessary to overturn *Slaughter-House* in order to incorporate the Bill of Rights against the states. *Id.* at 6-7. Ultimately, of course, a majority of the Court incorporated the Second Amendment to the states through the due process clause.

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[18] The road from *Slaughter-House* to *Plessy* is ably chronicled in Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (1987).

[19] That the framers of the Fourteenth Amendment intended to incorporate the Bill of Rights through the privileges or immunities clause, an intention that was undone by *Slaughter-House*, is well-argued in Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (1986).

Not so easily the protection of freedom of enterprise, which also has been grafted (in the most minimal fashion) onto the due process and equal protection clauses, but was intended to be a core protection of the privileges or immunities clause. By its decision in *Slaughter-House*, "the right of free labor, one of the most sacred and imprescriptible rights of man, is violated." 83 U.S. at 110 (Field, J., dissenting).

The *Slaughter-House* dissenters set forth a modest standard for judicial scrutiny of economic regulations that resembles the rational basis standard applied by this Court in *Cleburne* and *Moore*, or as described by Prof. Gerald Gunther as rational basis with "bite."[20] Such a standard does not inject the judiciary into policy decisions or second-guess legislative prerogatives, but simply determines whether the intended aims are legitimate as a matter of law and match up with the means chosen to effectuate them. Indeed, were the Court here to apply that standard to invalidate the ban on fish spas in the present case, it would still leave Respondent free to regulate fish spas, establish a reasonable moratorium in which to determine an appropriate regulatory response, or even to ban them if reasonable inquiry warranted it.

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[20] Gerald Gunther, "The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A model for a Newer Equal Protection," 86 *Harv. L. Rev.* 1, 12 (1972).

Justice Bradley set forth the two-part test that should be applicable under the privileges or immunities clause: is the asserted right among those intended to be protected; and if so, is the challenged law "a reasonable regulation . . . which the legislature has a right to impose." *Slaughter-House*, 83 U.S. at 112 (Bradley, J., dissenting). Writing for all four dissenters, Justice Field had no difficulty concluding that the challenged law's cattle landing and inspection requirements were legitimate exercises of the police power. Moreover, he acknowledged that grants of monopolies were permissible for "franchises of a public character," such as roads and bridges. *Id.* at 88 (Field, J., dissenting). But exclusive franchises in ordinary trades were antithetical to individual rights in common law. *Id.* at 101-04. The dissenters concluded that the award of an exclusive franchise, which extinguished a profession in which "a thousand persons were daily employed," exceeded the police power and violated the privileges or immunities guarantee. *Id.* at 88-89.

Adopting such a standard under the privileges or immunities clause would escape the confusion of varying rational basis standards under the due process and equal protection clauses described in sections I and II, *supra*. Indeed, the Court adopted a "categorical" rule under the privileges or immunities clause regarding the right to travel in *Saenz v. Roe*, 526 U.S. 489, 504 (1999); *but see id.* at 527-28 (Thomas, J., dissenting) (given that "the demise of the Privileges or Immunities Clause has contributed in no

small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to re-evaluating its meaning in an appropriate case").

In *McDonald*, 561 U.S. at 754, the Court acknowledged that the "constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system," and that "many legal scholars dispute the correctness of the narrow *Slaughter-House* interpretation" of the privileges or immunities clause. *Id.* at 756 (plurality). However, because "petitioners are unable to identify the Clause's full scope," *id.* at 758 (plurality), and the Court could simply extend the incorporation doctrine under the due process clause, "[w]e see no need to reconsider" *Slaughter-House* in that case. *Id.*, *but see id.* at 854 (III) (Thomas, J., concurring in part) (the "mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application").

By granting review on this question, the Court would allow for the first time a full exposition of whether *Slaughter-House* should be reconsidered; and if so, the appropriate limits on the powers of states, their subdivisions, and their unelected administrators in restricting the liberties that Congress sought to protect through the privileges or immunities clause.

Cindy Vong deserves the chance to make her case to protect those precious liberties on her own behalf and for other entrepreneurs facing arbitrary barriers.

Like many immigrants, the Vong family escaped tyranny to seek the freedom and opportunities our nation and its Constitution promise. But upon earning citizenship and pursuing her chosen livelihood, she found her path blocked by an unmovable bureaucratic obstacle – not one that was the product of reflective deliberation that balanced public health and safety against Vong's freedom of enterprise, but by the rote and reflexive application of an administrative rule that all concede was never intended for that purpose. Her case presents precisely the type of injustice that our courts are entrusted to redress.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,

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IN THE
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*.

No. 1 CA-CV 13-0423
FILED 05-27-2014

Appeal from the Superior Court in Maricopa County
No. CV 2009-037208
The Honorable George H. Foster, Jr., Judge

AFFIRMED

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OPINION

Acting Presiding Judge Margaret H. Downie delivered the opinion of the court, in which Judge Michael J. Brown and Judge Maurice Portley joined.

DOWNIE, Judge:

¶1 Cindy Vong and La Vie, LLC (collectively, "Vong") appeal from a judgment in favor of Donna Aune in her capacity as Executive Director of the Arizona State Board of Cosmetology ("Board"). We conclude the Board did not violate Vong's constitutional rights by applying existing infection control and sanitization standards to so-called "fish pedicures."[1] We therefore affirm the superior court's judgment.

FACTS AND PROCEDURAL HISTORY

¶2 The Board regulates cosmetology, nail technology, and aesthetics in Arizona. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 32-501 to -576. The Board is statutorily required to perform certain duties, including: (1) adopting "necessary and proper" rules, including sanitary and safety standards for the practice of nail technology; and (2) administering and enforcing

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[1] Vong refers to the procedure as a "spa fish treatment," but, as we did in *Vong v. Aune* ("*Vong I*"), 1 CA-CV 10-0587, 2011 WL 1867409 (Ariz. App. Apr. 29, 2011) (mem. decision), we call it a "fish pedicure."

statutory requirements and rules. A.R.S. § 32-504(A)(1)-(2). Vong is an aesthetician and nail technician licensed by the Board. She owns and manages La Vie Nails & Spa.

¶3 During a routine inspection of Vong's salon in September 2008, Vong asked Board investigator Linda Stroh about offering fish pedicures. A few days later, Board personnel left a telephone message for Vong with a salon employee, advising that such treatments would violate Board rules. Vong began performing fish pedicures, claiming she never received the message.

¶4 The fish pedicures Vong offered started with a salon employee washing the customer's feet with antibacterial soap and inspecting for diseases or cuts, which would disqualify the patron from the treatment. The customer's feet were then placed in a tank containing water and garra rufa or chin chin fish that removed skin from the feet. At the end of the procedure, the patron's feet were again washed with antibacterial soap. Fish used in the pedicure were returned to a communal tank divided into two sections by a net separating fish used during the day from unused fish.

¶5 Stroh returned to Vong's salon in October 2008 and observed the fish pedicure set-up. Stroh and Aune also visited the salon in November 2008, examining the fish pedicure equipment and learning more about the treatments. In a letter sent to Vong sometime thereafter, the Board's executive director stated:

> [Fish pedicures are] a clear violation of the Board's Rule A.A.C. R 4-10-112 on Infection Control and Safety Standards. Any tool or piece of equipment used in a pedicure must be stored in a dry storage and disinfected in a very specific way and it is impossible to disinfect the fish coming in contact with your clients' skin in the required manner. . . . You are jeopardizing you[r] clients' health by performing this type of pedicure.

The letter directed Vong to immediately stop performing fish pedicures and sought a response within ten days. In her ensuing response, Vong questioned the Board's jurisdiction and challenged its reliance on rules "written at a time when the use of fish in the manner I have proposed, was not known or contemplated."

¶6 At a January 2009 meeting, the Board voted to offer Vong a consent agreement. Vong appeared at a March 2009 Board meeting and made a presentation in support of her fish pedicures. The Board, though, decided to proceed with the contemplated consent agreement.

¶7 In September 2009, Vong signed a consent agreement that required her to stop performing fish pedicures. The agreement recited the salon's history of offering the pedicures, which Vong agreed constituted grounds for disciplinary action "pursuant to A.R.S. § 32-572(A)(6) and § 32-574(A)(10) (violation of statute or rule) by violating A.R.S. § 32-501(6) and (9) (scope of practice) and A.R.S. § 32-541 and A.A.C.

R4-10-112(A)(5)(B)(1)(2)(C)(1)(2)(E)(1)(7)(G)(1)(2)(P)(3)(4)(T)(2)(3) (infection control and safety standards)." The Board issued a "public reproof" to Vong and declared "that the performing of fish pedicures in the State of Arizona violate[s] the Board's statutes and rules."

¶8 Vong filed suit in superior court in November 2009. Count one of her complaint challenged the Board's jurisdiction to regulate fish pedicures, alleging the treatment did not constitute the practice of cosmetology, aesthetics, or nail technology. Count two alleged state constitutional violations, and count three asserted federal constitutional claims. Vong sought declaratory and injunctive relief, as well as attorneys' fees and costs.

¶9 The superior court granted the Board's motion to dismiss Vong's complaint. On appeal from that judgment, this Court held that: (1) the consent agreement did not bar Vong's civil complaint; (2) the Board was authorized to regulate fish pedicures as a form of "nail technology" under A.R.S. § 32-501(10)(c); and (3) Vong's constitutional claims were improperly dismissed. *Vong v. Aune* ("*Vong I*"), 1 CA-CV 10-0587, 2011 WL 1867409 (Ariz. App. Apr. 29, 2011) (mem. decision).

¶10 On remand, the superior court conducted a bench trial to adjudicate Vong's constitutional claims. The court issued detailed findings of fact and conclusions of law, concluding that the Board had not violated Vong's constitutional rights. Vong timely

appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), -2101(A)(1).

DISCUSSION

¶11 *Vong I* held that the fish pedicures Vong performed were a type of "nail technology," as that term is defined by statute. 2011 WL 1867409, at *6, ¶ 22. Vong concedes she is "generally subject to the Board's sanitary and safety requirements for salons." *Id*. at *5, ¶ 18; *see also* A.R.S. § 32-541(B) ("The safety and sanitary requirements specified by the board in its rules shall be requirements while a salon is operating."). She argues, though, that "applying rules regarding cosmetology implements to fish is flatly irrational." Her position is that fish are not tools, "so I don't think it is necessary to disinfect them."

¶12 In prohibiting fish pedicures, the Board relied in part on Arizona Administrative Code Rule ("Rule") 4-10-112, entitled, "Infection Control and Safety Standards." That rule includes the following provisions:

> **E.** Tools, instruments and supplies.
>
> 1. 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;

. . . .

> 7. All supplies, equipment, tools, and instruments shall be kept clean, disinfected, free from defects, and in good repair. . . .

Additionally, subparagraph (O) prohibits use of a "devise [sic], tool, or chemical that is designed or used to pierce the dermis" if it is not sanitized in accordance with the rule. Rule 4-10-112(O)(1)(a), (2).

¶13 *Vong I* held that using fish to remove skin is "a means of cleaning feet" subject to Board regulation. 2011 WL 1867409, at *6, ¶¶ 22-23. As such, the fish are not properly characterized as a form of "entertainment," as Vong asserts. The fish are the means by which this particular type of nail technology is performed. In that respect, the Board rationally classifies the fish as tools, instruments, or equipment, as those terms are used in Rule 4-10-112(E).[2]

¶14 Vong does not challenge the facial validity of Rule 4-10-112(E). She argues instead that the rule is unconstitutional as applied to fish pedicures, though she concedes "the Board could have imposed

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[2] Merriam-Webster's Collegiate Dictionary defines "tool" as "something (as an instrument or apparatus) used in performing an operation or necessary in the practice of a vocation or profession." Merriam-Webster's Collegiate Dictionary 1239 (10th ed. 2001). "Instrument" is defined as "a means whereby something is achieved, performed, or furthered" or "one used by another as a means or aid." *Id*. at 605. "Equipment" is defined as "the set of . . . physical resources serving to equip a person or thing" or "the implements used in an . . . activity." *Id*. at 392.

reasonable regulations" on such treatments. Vong's constitutional claims are based on the privileges and immunities,[3] due process, and equal protection clauses.

¶15 The parties agree that rational basis review applies to Vong's constitutional claims. Rational basis review is "the most relaxed and tolerant form of judicial scrutiny." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). It has been aptly described as "a paradigm of judicial restraint." *Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc*., 508 U.S. 307, 314 (1993).

"The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Id*.; *see also James v. Strange*, 407 U.S. 128, 133 (1972) ("Misguided laws may nonetheless be constitutional.").

¶16 We review constitutional claims and questions of law *de novo*. *Ramirez v. Health Partners of S. Ariz*., 193 Ariz. 325, 327-28, ¶ 6, 972 P.2d 658, 660-61 (App. 1998). We give great deference, though, to the superior court's factual findings. *See United Calif.*

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[3] Vong concedes that her claims premised on the privileges and immunities clause are foreclosed by United States Supreme Court precedent. *See Slaughter-House Cases*, 83 U.S. 36 (1872). We therefore do not address those claims further.

Bank v. Prudential Ins. Co. of Am., 140 Ariz. 238, 302, 681 P.2d 390, 454 (App. 1983). Where conflicting evidence or competing inferences exist, we will not substitute our opinion for the findings of the trial court. *Id*. "This rule is founded upon the theory that the trial court, having seen and heard the witnesses and the evidence, is in a better position to determine credibility and weight than the appellate court. For this reason, where there is conflict in the evidence, the lower court's findings will be accepted." *Id*. (citation omitted).

¶17 Under rational basis review, an enactment will be upheld if it is rationally related to furthering some legitimate governmental interest and the means employed are reasonably related to achieving the regulation's purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993); *State v. Watson*, 198 Ariz. 48, 51, ¶ 7, 6 P.3d 752, 755 (App. 2000). As the challenger, Vong has the burden of proving that the regulations, as applied, lack any conceivable rational basis. *See Heller*, 509 U.S. at 320; *Watson*, 198 Ariz. at 51, ¶ 7, 6 P.3d at 755. The Board has "no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller*, 509 U.S. at 320. Furthermore, we accord "significant deference to the judgment of the legislative body regarding both the propriety of governmental involvement in the area covered by the legislation and the reasonableness of the means chosen to achieve the legislative goals." *Watson*, 198 Ariz. at 51, ¶ 7, 6 P.3d at 755.

¶18 Prohibitions on economic pursuits may lack a rational basis if they are unrelated to legitimate police powers. Courts have found a legitimate purpose lacking where a regulation fails to protect the public from harm, *see St. Joseph Abbey v. Castille*, 712 F.3d 215, 226-27 (5th Cir. 2013) (requiring all casket makers to be licensed did not protect public, as state law did not require a casket for burial); where the law merely protects those already licensed, *see Buehman v. Bechtel*, 57 Ariz. 363, 376, 114 P.2d 227, 232 (1941) (holding licensing requirement for photography unconstitutional based on protectionism purpose and absence of harm to public from sale of photographs); or when subjecting a profession to regulation will not advance public health or safety, *see Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1110, 1114, 1118-19 (S.D. Cal. 1999) (mandated curriculum for hair braiders "is not a rational exercise of licensure" because less than ten percent of cosmetology training applies to that craft.); *Edwards v. State Bd. of Barber Exam'rs*, 72 Ariz. 108, 231 P.2d 450, 453 (1951) ("[W]e are unable to find any relationship, either in logic or common sense, between the public health and safety and price-fixing in the barbering profession.").

¶19 The Board has expertise in matters relating to safety, sanitation, and infection control in the nail technology industry. Courts typically give deference to agencies charged with carrying out specific legislation. *Blake v. City of Phx.*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988). An agency's interpretation

of a statute or regulation it implements is ordinarily entitled to great weight, *see Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 45-46, 951 P.2d 1235, 1237-38 (App. 1997), though its interpretations are not infallible, *U.S. Parking Sys. v. City of Phx.*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989).

¶20 In addition to the Board's base level of expertise, the record in this case reflects that the Board made a considered, deliberative decision about whether and how to regulate fish pedicures. Board personnel reviewed Vong's procedures, explanations, and video; personally observed her fish pedicure set-up and equipment; met with Vong on several occasions; considered letters from Vong's patrons; and conducted independent research, including attending a national conference discussing fish pedicures.[4] The Board also evaluated how other jurisdictions regulate fish pedicures and offered evidence at trial reflecting that numerous other states prohibit them based on health and safety concerns. It is also relevant to our analysis that the Board's actions have not prevented Vong from pursuing her chosen profession. Vong testified at trial that she operates a profitable salon without fish pedicures, and her Board license permits her to offer a wide array of other services.

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[4] Nothing in our opinion should be read to suggest that an executive branch agency *must* undertake such actions to withstand rational basis review.

I. Due Process

¶21 We consider Vong's state and federal due process claims together because the respective due process clauses "contain nearly identical language and protect the same interests." *State v. Casey*, 205 Ariz. 359, 362, ¶ 11, 71 P.3d 351, 354 (2003), *superseded by statute on other grounds*, 2006 Ariz. Sess. Laws, ch. 199, § 2 (2d Reg. Sess.). Deprivation of economic or professional pursuits has long been analyzed under a due process rubric, though the degree of judicial deference has expanded over time. *See generally Lochner v. New York*, 198 U.S. 45 (1905) (analyzing the "right to purchase or to sell labor" under the due process clause); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) ("liberty," as a part of due process, includes right to earn and pursue a livelihood) (subsequent histories omitted); *see also Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (discussing the expansion in judicial deference under due process analysis). Due process challenges may be procedural or substantive. *See Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 72 (2009). Vong is not contesting the process she received, but rather the Board's application of regulations that have the effect of prohibiting fish pedicures. We therefore review her claims on substantive due process grounds.

¶22 In general, a legislative enactment has a legitimate purpose when the government acts within its police powers by regulating to protect the public health, morals, and welfare. *Berman v. Parker*, 348

U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."); *Cohen v. State*, 121 Ariz. 6, 10, 588 P.2d 299, 303 (1978) ("[I]t is well established that the right to pursue a profession is subject to the paramount right of the state under its police powers to regulate business and professions in order to protect the public health, morals and welfare."). Vong acknowledges that, on its face, Rule 4-10-112 advances "legitimate government purposes." She maintains, though, that applying the rule to fish pedicures is "a regulatory mismatch, which results in the complete prohibition of a legitimate profession," in violation of her due process rights. We disagree.

¶23 After considering the evidence presented at trial, the superior court found that the Board "has a legitimate interest in safeguarding the health and safety of consumers who are provided services in the professions it regulates" and that the sanitization regulations at issue "are intended to advance this legitimate interest in health and safety." The record supports these findings.

¶24 Trial witnesses testified about the risk of disease posed by fish pedicures. The primary concern is disease transfer from fish to human or human to human. Witnesses testified that nail technology implements must be disinfected because "they come in contact with one client and then another" and

create a risk of "cross-contamination" between patrons. Additionally, the Board deemed Vong's practices unsafe. As the superior court noted, "Board personnel who observed Vong's . . . operation and viewed her trash can holding tanks concluded that the fish pedicures offered by Vong were not safe or hygienic."

¶25 The fish Vong used for pedicures removed skin from feet. Vong's expert testified that the fish "actually are not feeding on skin. They're actually feeding on material behind the dead skin. And so they are nosing it or pushing it with their mouth parts." He described it as a "sucking, abrading action." Although the goal is to limit the fish to dead skin, evidence established that the fish may puncture live skin, causing bleeding. This concern is particularly acute with chin chin fish, which have teeth. But Vong's expert testified that "toothless" garra rufa fish can also cause bleeding. There was also evidence that communicable diseases capable of passing through blood and water in a cross-contamination situation may be serious and include HIV and hepatitis.

¶26 The trial evidence also established a risk of cross-contamination from fish tank water. Vong kept both used and unused fish in a communal tank, separating them with a net that did not prevent the exchange of water between the two sides. She filtered the water, but the tank itself was not drained and disinfected, tested for bacteria, or treated with chemicals. Some of the communal tank water would transfer to individual customer tanks. Evidence was

presented that untreated water carries a risk of spreading disease – a risk that has led to an M. fortuitum outbreak from salon foot baths.[5] The superior court also noted a lack of evidence that the UV light Vong used "killed any and all bacteria or viruses that might be transmitted by the fish to the water."

¶127 Trial evidence additionally established risks associated with the fish themselves. Board personnel found dead fish floating in the communal tank at Vong's salon, and Vong conceded she has no training in handling fish or in recognizing diseased fish. The Board's expert testified that fish "can carry both bacteria and viruses that are known pathogens to humans." In 2011, a disease outbreak among 6000 imported fish occurred in the United Kingdom, where the "fish hemorrhaged around the gills, the mouth, and the abdomen," leading to government intervention. After inspecting a shipment of fish, analysts found "a variety of human pathogens capable of causing invasive soft-tissue infections." In Canada, it was believed that fish to be used in pedicures were the source of E. coli bacteria.

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[5] A trial exhibit explains that "M. fortuitum" is a bacterium commonly found in water that can "cause a red rash that turns into boils and severe skin ulcers." The exhibit, a document issued by the Arizona Department of Health Services, states that M. fortuitum "can enter the skin through tiny cuts or scrapes, like those caused by shaving."

¶28 In a section of its ruling entitled "Risks of Fish Pedicures," the superior court found, in pertinent part:

- Fish pedicures can cause skin breaks and bleeding.
- Water is a vector through which humans can contract a number of skin diseases and infections.
- Garra rufa fish imported into the United Kingdom have been found to carry a variety of bacteria, some of which are transmissible to humans.
- Plaintiff's expert, Dr. Graham Jukes, opines that fish pedicures do carry a risk of infection or disease that cannot be entirely eliminated through adherence to any set of safety protocols.
- 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.
- Communicable diseases that might be contracted through fish pedicures include HIV and Hepatitis.

Each of these findings is supported by the evidence.

¶29 Under rational basis review, the Board need not prove the existence of substantial health risks; it is sufficient that the evidence establishes such risks rationally could exist. *See Heller*, 509 U.S.

at 320; *Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000) (A law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis" for it.); *Ariz. Downs v. Ariz. Horsemen's Found.*, 130 Ariz. 550, 556, 637 P.2d 1053, 1059 (1981) (Evidence is sufficient under rational basis review if "any set of facts" could "rationally justify" the enactment.). The evidence presented at trial met that standard. Although the cited risks occur rarely, when the risks become reality, the deleterious effects can be quite serious. It is also significant that Arizona is one of many states that prohibit fish pedicures based on health and safety concerns. *Cf. Cornwell*, 80 F. Supp. 2d at 1113 (considering other states' requirements in ascertaining "the rationality of [California's] required curriculum").

¶30 The superior court found, as a factual matter, that the Board's sanitation rules, including Rule 4-10-112, "are designed to protect clients from indirect or direct exposure to bacteria or infection." It further found that the Board "considered how to apply its regulations to this particular case in the manner in which it normally determines how to apply regulations." Based on the evidence before it, the superior court properly made these findings and appropriately concluded that Vong failed to carry her burden of proving a due process violation. Substantial evidence supports the court's determination that the Board rationally believes "fish pedicures carry a risk of transmitting infectious disease." The record further

supports the conclusion that prohibiting fish pedicures based on the inability to comply with sanitization regulations furthers the Board's "legitimate interest in public health and safety."

II. Equal Protection

¶31 As with the due process claims, we consider Vong's state and federal equal protection challenges together. The guarantees in the two constitutions "are essentially the same in effect." *Trust v. County of Yuma*, 205 Ariz. 272, 277, ¶ 25, 69 P.3d 510, 515 (App. 2003); *see also Valley Nat'l Bank of Phx. v. Glover*, 62 Ariz. 538, 554, 159 P.2d 292, 299 (1945) ("The equal protection clauses of the 14th Amendment and the state constitution have for all practical purposes the same effect."). Although conceptually similar, "[t]he due process clause protects liberty and property interests while the equal protection clause protects against discriminatory classifications." *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 348, 842 P.2d 1355, 1361 (App. 1992).

¶32 "The equal protection clauses of the state and federal constitutions generally require that all persons subject to state legislation shall be treated alike under similar circumstances." *Wigglesworth v. Mauldin*, 195 Ariz. 432, 438, ¶ 19, 990 P.2d 26, 32 (App. 1999) (internal quotation marks omitted).

> To establish an equal protection violation, a party must establish two facts. First, the party must show that it was treated differently

> than other people in [a] "similarly situated" class. Second, when . . . that disparate treatment does not trammel[ ] fundamental personal rights or implicate[ ] a suspect classification, the party needs to show that the classification bears no rational relation to a legitimate state interest.

Aegis of Ariz., L.L.C. v. Town of Marana, 206 Ariz. 557, 570-71, ¶ 54, 81 P.3d 1016, 1029-30 (App. 2003) (internal quotation marks and citation omitted). The equal protection clause does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Beach Comm'ns*, 508 U.S. at 313. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321.

¶33 Vong argued in the superior court that "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 [her] equal protection rights." She similarly contends on appeal that cosmetology is "full of potentially dangerous risks to customers," but the Board "has adopted regulations that reduce but do not entirely eliminate the risk . . . except for fish spas, which alone were singled out for prohibition."

¶34 The relevant class for equal protection purposes is Board licensees engaged in nail technology. We held in *Vong I* that fish pedicures constitute

neither "cosmetology" nor "aesthetics." 2011 WL 1867409, at *5-6, ¶¶ 20-21. Vong's discussion of how licensees in these other fields may be regulated is largely unpersuasive.[6] *See, e.g., Trust*, 205 Ariz. at 277, ¶ 25, 69 P.3d at 515 (Equal protection requires that all persons "be treated alike under similar circumstances."). But even if the relevant class consisted of *all* Board licensees,

> reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (citations omitted).

¶35 "A law is general, and thus permissible, if it confers rights and privileges or imposes restrictions upon all members of a given class, when the classification has a reasonable basis." *Phx. Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 80, 927 P.2d 340, 346 (App. 1996). The Board imposes Rule 4-10-112 on all licensees

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[6] Vong's focus on the role of human hands in nail technology is similarly unpersuasive. Although hands need not be disinfected, Board regulations require licensees to wash their hands with soap and warm water before providing services to customers. A.A.C. R4-10-112(H)(1). Even this less restrictive requirement cannot be applied to fish.

engaged in nail technology. As discussed *supra*, both facially and as applied to fish pedicures, the regulation has reasonable and legitimate purposes rooted in public health and safety. Even if a given classification "results in some inequality, it is not unconstitutional if it rests on some reasonable basis." *Church*, 173 Ariz. at 351, 842 P.2d at 1364.

¶36 Vong contends the Board should adopt rules specifically designed for fish pedicures or employ less restrictive means of regulating them. The Board, though, is not required to do so. "A perfect fit is not required; a statute that has a rational basis will not be overturned 'merely because it is not made with mathematical nicety, or because in practice it results in some inequality.'" *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 566, 789 P.2d 1061, 1066 (1990) (internal quotation marks omitted); *see also Metropolis Theatre Co. v. City of Chi.*, 228 U.S. 61, 69-70 (1913) ("The problems of government are practical ones and may justify, if they do not require, rough accommodations, – illogical, it may be, and unscientific."). In other words, a legislative body "may hit at an abuse which it has found, even though it has failed to strike at another." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 151 (1938); *see also Ariz. Downs*, 130 Ariz. at 556, 637 P.2d at 1059 ("[T]he law need not be in every respect logically consistent with its aims to be constitutional.").

¶37 Based on the evidence presented at trial, the superior court properly concluded that Vong failed to prove she was treated differently from others

similarly situated or that the Board's action lacked a rational relationship to legitimate state interests. *See Aegis of Ariz.*, 206 Ariz. at 570-71, ¶ 54, 81 P.3d at 1029-30.

III. Attorneys' Fees and Costs

¶38 We deny Vong's request for attorneys' fees and costs incurred on appeal because she is not the prevailing party. Aune requests fees and costs pursuant to ARCAP 25 (sanctions for frivolous appeals or appeals taken solely for delay). Although we disagree with Vong's substantive claims, her appeal is not frivolous, and we deny fees based on ARCAP 25. Aune also cites ARCAP 21(c), but the version of Rule 21 in effect at the time of Aune's request required parties to "specifically state the statute, rule, decisional law, contract, or other provision authorizing an award of attorneys' fees." ARCAP 21(c) (2013). Aune has not done so, and we therefore deny her fee request. Aune is, however, entitled to recover her appellate costs upon compliance with ARCAP 21.

CONCLUSION

¶39 For the reasons stated, we affirm the judgment of the superior court.

[SEAL]

Ruth A. Willingham • Clerk of the Court
FILED: gsh

ARIZONA SUPERIOR COURT

COUNTY OF MARICOPA

CINDY VONG and LA VIE, LLC, Plaintiffs, v. DONNA AUNE, in her official capacity as Executive Director of the Arizona State Board of Cosmetology, Defendant.	No. CV2009-037208 **JUDGMENT** (Filed May 09, 2013) (Assigned to Hon. George H. Foster, Jr.)

This matter having come on regularly for trial to the Court on January 14 and 15, 2013, and the parties having presented their evidence and rested, and the Court having previously entered its Findings of Fact and Conclusions of Law, and having heard and considered the objections thereto, having being [sic] fully advised in the premises.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. This action and Plaintiffs' Complaint is dismissed with prejudice as against Defendant Donna Aune. All of the Plaintiffs' requested relief is denied and Plaintiffs shall take nothing thereby as against this Defendant.

2. Defendant Donna Aune shall recover judgment against Plaintiffs, in the amount of $797.85, as and for Defendant's costs incurred herein, pursuant to Fed.R.Civ.P. 54(d)(1).

3. Pursuant to Fed.R.Civ.P. 54(b), this Court determines that there is no just reason for delay in the entry of this Judgment and the Clerk is hereby directed to enter the same forthwith as a final judgment.

DONE IN OPEN COURT this 6th day of May 2013

/s/ George H. Foster, Jr.
GEORGE H. FOSTER, JR.
SUPERIOR COURT JUDGE

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2009-037208 03/15/2013

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT
A. Melchert
Deputy

CINDY VONG, et al.

v.

SUE SANSOM, et al.

CLINT BOLICK

SUE SANSOM
1721 E BROADWAY RD
TEMPE AZ 85282

EVAN HILLER

UNDER ADVISEMENT RULING

The Court conducted a two day bench trial in this case to consider the claims in the complaint filed by the Plaintiff and the defense set forth in the answer filed by the Defendants. Following the conclusion of the trial the Court took the matter under advisement. This is the decision based on the matters presented in trial including the evidence and the arguments of counsel.

As more specifically indicated in the findings of fact below, the Plaintiff has filed a complaint because the Defendant issued on [sic] order prohibiting the Plaintiff from conducting fish pedicures. The Plaintiff claims the prohibition violates Plaintiff's rights to

due process and equal protection under the state and federal constitutions.

The Plaintiffs request relief in the form of a declaratory judgment that the Defendant does not have jurisdiction over its business operations and that the Defendant's actions violate state and federal constitutional rights. The complaint also seeks relief in the form of a preliminary and permanent injunction forbidding the Defendants from subjecting Plaintiff's business to regulation and from preventing the operation of the business. The complaint also seeks attorney's fees and costs and other relief as the Court deems just and proper.

The Court finds, based on the findings of fact and conclusions of law below, that the Plaintiff is not entitled to its requested relief.

First, the Arizona Court of Appeals has found that the Plaintiff's business of performing fish pedicures is within the jurisdiction of the Defendant. *Vona v. Aune*, 2011 WL 1867409 (Ariz. App). Div. 1).

Second, this Court finds that the Defendant's actions have not prohibited the Plaintiff from operating its business; it has only prohibited the Plaintiff from performing fish pedicures ancillary to its business. The Plaintiff is not prohibited from otherwise conducting pedicures incompliance [sic] with the applicable regulations. In this regard, the Defendant has not violated the Plaintiff's right to due process or equal protection.

Third, because the Defendant does have jurisdiction and the actions taken by it do not violate the Plaintiff's rights she is not entitled to injunctive relief and she is not entitled to any award of attorneys' fees and costs. No other relief is appropriate.

Under Rule 52, A.R.Civ.P., when injunctive relief is requested the Court is required to make specific findings of fact and conclusions of law. Each party has submitted proposed findings of fact and conclusions of law which the Court has reviewed. The Court has adopted the finds [sic] and conclusions as follows.

FINDINGS OF FACT

Parties

1. Cindy Vong ("Vong") is a professional nail technician and aesthetician licensed by Arizona State Board of Cosmetology (the "Board").

2. Vong is the managing member of La Vie, L.L.C., an Arizona limited liability company.

3. Plaintiff Vong is the manager of VNK, L.L.C., an Arizona limited liability company. La Vie Nails ("La Vie") is a trade name owned by VNK, L.L.C.

4. The Board is a state agency and is empowered to regulate the cosmetology, aesthetics, and nail technology professions.

5. Defendant Donna Aune is the Executive Director of the Board.

6. Vong imported the Garra Rufa and Chin Chin fish from China, purchased equipment, and remodeled the salon in order to provide the Spa Fish service (Vong Decl., ¶ 5).

7. Garra Rufa is a species of carp that does not have teeth.

8. Chin Chin are small fish that do develop sharp teeth.

9. In October 2008, Vong began providing fish pedicures at La Vie under the name "Spa Fish." Spa Fish is a trade name owned by La Vie.

10. Vong's fish pedicures involved patrons placing their feet in tanks of water in which Garra Rufa and Chin Chin fish removed skin from the patrons' feet.

11. The fish used in Vong's pedicures were housed in two large plastic trash cans lined with plastic sheeting and connected by plastic tubing.

12. At the beginning of business each day, Vong designated the tank with fewer fish in it as the "used" tank. Fish were taken from the other tank to perform pedicures and were placed in the "used" tank afterwards.

13. The two tanks of pedicure fish were connected by pipes or tubes and thus shared one water supply, which Vong ran through a UV filter.

The Board's Investigation and Closure of Vong's Fish Pedicure Business

14. Vong prepared a hygiene protocol. The protocol required the customers' feet to be washed with antibacterial soap. The fish were to be placed in a clean tank immediately before the treatment and removed immediately afterward. The tank was to be cleaned and sanitized, dried in open air, and refilled with clean water before the next use. After treatment, the customers' feet again were to be washed with antibacterial soap. The fish were kept in a community tank whose water was to be continuously recycled through a filter system and subjected to ultraviolet light to kill bacteria.

15. There is no evidence to prove the ultraviolet light killed any and all bacteria or viruses that might be transmitted by the fish to the water. All customers were to be informed of those procedures through a written notice. Any customer who desired a pedicure could have one afterward in a different part of the salon.

16. Vong charged $30 for a 20-minute Spa Fish treatment.

17. At the time Vong operated Spa Fish, her salon employed six persons.

18. On September 8, 2008, during a routine salon inspection of the La Vie salon, Vong asked Board investigator Linda Stroh about performing fish pedicures. Linda Stroh informed

Vong that such procedures were not permitted under Board rules because they did not comply with its sanitation requirements. When Vong requested a formal answer from the Board, Linda Stroh promised to convey the Board's formal posture.

19. On or about September 10, 2008, following consultation with Sue Sansom, then the Executive Director of the Board, Linda Stroh telephoned La Vie to inform Vong that the Board would not permit fish pedicures because they did not comply with the Board's sanitation requirements. Because Vong was not available, Linda Stroh left this message with one of La Vie's employees.

20. Despite being twice warned that fish pedicures do not comply with Board Rules, Vong did not object to this determination by the Board before she began offering fish pedicure procedures in October 2008.

21. On or about October 29, 2008, pursuant to an anonymous complaint that Plaintiffs were offering fish pedicures, Board investigator Linda Stroh returned to La Vie and informed Phong "John" V. Nguyen, the licensee in charge, that fish pedicures were not permitted under Board rules. Linda Stroh also left a request for a written response from the salon within 10 working days.

22. On or about November 7, 2008, the Board received a letter from Vong, dated October 30, 2008, on La Vie Nails & Spa letterhead. In the letter, Vong denied the Board's jurisdiction

over fish pedicures, denied any "commingling" of services between "Spa Fish" and La Vie, and enclosed copies of her "Spa Fish Policies and Procedures" and "Spa Fish Therapy Patron Notice."

23. On or about November 10, 2008, Donna Aune and Linda Stroh met with Vong at her salon. At this meeting, Donna Aune explained to Vong that fish pedicures are not permitted in Arizona salons, further explaining that fish pedicures are prohibited because they are not sanitary. Vong asked that she be allowed to continue offering the procedures as a "pilot program," and was told that the Board does not permit "pilot" or test programs.

24. During the November 10, 2008 meeting at La Vie, Donna Aune and Linda Stroh observed the layout of the salon, examined the fish pedicure equipment, and received a verbal explanation of the procedures.

25. On or about November 13, 2008, Vong wrote to the Board, describing the procedures for her "Spa Fish" pedicures and proposing a pilot program to determine if any risks were presented to the public. Vong's letter further characterized Spa Fish and La Vie as separate businesses, and disputed the applicability of Board regulations.

The Board's Decision to Prohibit Fish Pedicures

26. On or about January 3, 2009, Vong received a letter from the Board, reiterating that fish pedicures constitute a violation of the Board's statutes and rules.

27. At a monthly Board meeting in January 2009, the Board voted to offer a consent decree to Vong. Under the terms of the decree, Ms. Vong would pay $750 and remove all live fish from La Vie.

28. At a monthly Board meeting in March 2009, Vong made a presentation to the Board, advocating that the Board permit her to perform fish pedicures. Following the presentation, the Board voted to offer the consent decree to Vong without further alteration.

29. In September 21, 2009, Vong signed a consent order agreeing to stop offering fish pedicures.

30. Vong has ceased performing fish pedicures, but initiated this litigation challenging the Board's prohibition.

31. The Board interprets its own sanitation regulations as prohibiting fish pedicures.

32. The Board considered how to apply its regulations to this particular case in the manner in which it normally determines how to apply regulations.

33. The Board does not normally retain outside experts to provide analysis prior to making

determinations, and did not need outside expert analysis in making its determination that fish pedicures violated its sanitation regulations.

34. The Board's rules on sanitation, set forth in A.C.C. Rule 4-10-112, are designed to protect clients from indirect or direct exposure to bacteria or infection.

35. The Board has a legitimate interest in safeguarding the health and safety of consumers who are provided services in the professions it regulates.

36. The Board's sanitation regulations are intended to advance this legitimate interest in health and safety.

37. The Board's sanitation regulations require that any implement that may remove dead or living tissue from a client be disinfected or thrown away after use.

38. The Board has determined that the use of implements that have not been disinfected, and which come into contact with human skin, creates health and safety risks.

39. The Board has determined that this requirement that implements be disinfected or discarded applies to fish when they are used as the means of exfoliation in pedicure procedures.

40. The Board has determined that its enabling statutes or regulations do not allow it to authorize individuals to violate those statutes

or regulations as part of a "pilot" or test program.

41. The Board's decision to prohibit fish pedicures is based upon its belief that because the fish cannot be disinfected and because they remove skin and can cause bleeding, fish pedicures create a risk that customers will be exposed to harmful bacteria and serious diseases.

42. Vong has no special training or knowledge in identifying diseased or disease-carrying fish.

43. Board personnel who observed Vong's "Spa Fish" operation and viewed her trash can holding tanks concluded that the fish pedicures offered by Vong were not safe or hygienic.

Risks of Fish Pedicures

44. In fish pedicure procedures as offered by Plaintiffs, dozens of small fish remove tissue from the feet of clients with their mouths.

45. Fish pedicures can cause skin breaks and bleeding.

46. Water is a vector through which humans can contract a number of skin diseases and infections.

47. Garra rufa fish imported into the United Kingdom have been found to carry a variety of bacteria, some of which are transmissible to humans.

48. No credible evidence is offered indicating that fish pedicures provide any medical or health benefits. Instead, Plaintiffs espouse entertainment and relaxation as the only benefits of fish pedicures.

49. Plaintiffs' expert, Dr. Graham Jukes, opines that fish pedicures do carry a risk of infection or disease that cannot be entirely eliminated through adherence to any set of safety protocols.

50. 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.

51. Communicable diseases that might be contracted through fish pedicures include HIV and Hepatitis.

52. 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.

Differential Treatment

53. Fish pedicures are most closely analogous to other procedures regulated by the Board that involve the exfoliation of the skin by use of an implement or instrument.

54. The implement disinfection requirement is applied in exactly the same way to fish pedicures and other exfoliation procedures. Exfoliation procedures with disinfected implements are permitted, while those using implements that are not properly disinfected are prohibited.

55. Fish pedicures carry the risk of communicable disease, which is not a risk associated with chemical procedures.

CONCLUSIONS OF LAW

1. Fish pedicures are a nail technology procedure within the jurisdiction of the Board.

2. Plaintiffs' claims do not involve the loss of a fundamental right, and therefore are analyzed under rational basis review.

3. Plaintiffs' equal protection claims do not involve a suspect class, and therefore are analyzed under rational basis review.

4. Under rational basis review, Plaintiffs bear the burden of demonstrating, beyond a reasonable doubt, that there is no conceivable rational link between the Board's prohibition of fish pedicures and a legitimate state interest.

5. Plaintiffs have not met this burden.

6. Rational basis review does not require that the challenged regulation actually advance

the legitimate interest it was promulgated to address.

7. It is not the role of this Court to rule upon the wisdom of the Board's decisions, only upon whether there is any conceivable set of circumstances under which the Board's decision would rationally be thought to advance a legitimate state interest.

8. There is factual uncertainty as to the degree of risk associated with permitting Board licensees to offer fish pedicures, but the evidence clearly demonstrates that this risk is not zero.

9. The Board is the governmental agency entrusted by the Arizona Legislature with regulating the professions of aesthetics, cosmetology, and nail techniques. The Board's determination of the appropriate degree of risk in regulating those professions should be disturbed only if the Board has acted arbitrarily or irrationally.

10. The Board believes that fish pedicures carry a risk of transmitting infectious disease. This belief is not irrational.

11. There is a rational link between the Board's legitimate interest in public health and safety and the prohibition of fish pedicures, since fish pedicures cannot transmit infectious disease if they are not performed.

12. To the extent that fish pedicures are prohibited because the fish cannot be disinfected, fish pedicures are treated similarly to other

nail technology, aesthetics, and cosmetology procedures that involve the use of implements.

13. To the extent that fish pedicures are prohibited while cosmetology and aesthetics procedures involving the use of chemicals are permitted, these procedures are not similarly situated. Even if they were similarly situated, there is a rational basis for treating fish pedicures differently because fish pedicures are more closely akin to procedures involving implements and because they carry a risk of communicable disease that is not present in procedures involving chemicals.

14. The Board's decision does not violate any provision of the Arizona Constitution or United States Constitution.

15. Defendants are entitled to judgment in their favor on all counts of the Plaintiffs' Complaint.

16. Donna Aune is the prevailing party in this matter and is entitled to her reasonable attorney's fees, expert fees, and costs incurred in this action under A.R.S. § 12-341 and 42 U.S.C. § 1988.

FURTHER DISCUSSION

State and Federal Claims Considered Together.

The Plaintiffs' state and federal Constitutional Claims can be considered together because the federal and state due process clauses contain nearly

identical language and protect the e [sic] same interests. *State v Casey*, 205 Ariz. 359. Similarly Arizona courts have made clear that equal protection under the Arizona Constitution is substantially the same in effect as the Equal Protection Clause in the United States Constitution. *Chavez v. Brewer* 214 P.3d 397.

The Court has determined that the actions of the Defendant do not implicate a fundamental right and the Court will test the actions of the Defendant based on a rational basis analysis. As stated by our Supreme Court:

> If a fundamental individual right is not implicated, the legislation is subject to a more relaxed review, usually to determine whether there is a "rational basis" for the legislation. This type of review involves significant deference to the judgment of the legislative body regarding both the propriety of governmental involvement in the area covered by the legislation and the reasonableness of the means chosen to achieve the legislative goals. *See*, *e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (declining to find a fundamental right to assisted suicide and applying rational basis review); *see also* Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 Rutgers L.J. 537, 575-77 (1990) (discussing the various types of deferential, or "low-level," review methods employed by the Supreme Court in different substantive due process contexts). To successfully attack legislation

subject to this type of review, the challenger must prove that the legislation lacks any conceivable rational basis. *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).FN1

FN1. Review methodology under substantive due process is similar to that employed under the equal protection doctrine; that is, there are differing levels of scrutiny depending upon the nature of the right involved, and the justification required for the legislation is greater or lesser depending upon the intensity of the scrutiny applied. *Nowak & Rotunda*, *supra*, § 11.4, at 383, § 11.7, at 404. Whether a piece of legislation is reviewed under the equal protection doctrine or the substantive due process doctrine depends upon its mechanics. If the legislation affects all persons, substantive due process applies. *Id.* § 11.4, at 383. If the legislation creates a classification and affects only members of the class, review under equal protection is appropriate. *Id.*

¶ 8 What is a fundamental right? A fundamental right has been defined as one that is "'deeply rooted in this Nation's history and tradition,'" or is so weighty as to be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'" ***52** *Bowers v. Hardwick*, 478 U.S. 186, 191-92, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986)****756** (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)), and

> *Palko v. Connecticut*, 302 U.S. 319, 325, 326, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (overruled *on other grounds by Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)).

State v Watson, 198 Ariz. 48, 51, 6 P.3d 752, 755 (2000).

The Plaintiffs have not alleged nor have they submitted evidence or law indicating the matters raised herein involve the interference with any fundamental rights. The facts indicate the Plaintiff wants to operate her spa wherein she practices nail technology by means which include, but is not limited to, fish pedicures. The prohibition in this case is not as to pedicures generally and the prohibition is not as to nail technology generally. The only prohibition is to the use of fish to remove dead skin from the feet of customers. Simply put, there is no fundamental Constitutional right to conducting pedicures by using fish as the implement of removal. Indeed, under the law the Plaintiff does not even have a fundamental right to pursue any particular profession, *Caldwell v Pima County*, 172 Ariz. 352 837 P.2d 154 (App. 1991)

The Plaintiffs advance the argument that the Board has violated her Constitutional rights by failing to establish regulations for the operation of fish spas. The Plaintiffs fail however to cite any authority that the Board has any obligation to do so. It is noted that ARS §§ 32-504.A.1 and 9 provide generally that the Board is mandated to "adopt rules which are necessary and proper for the administration of this

chapter, including sanitary and safety requirements for salons and schools and sanitary and safety standards for the practice of cosmetology, aesthetics and nail technology" and "provide standards and requirements for the provision of salon services through mobile units and in customer locations. But the Plaintiffs have failed to show that the Board's implementation of the rules in this case is not a proper exercise of the Board's authority to the aims of the safety regulations. Moreover, nothing in the record indicates the prohibition was made arbitrarily or outside the Board's jurisdiction.

The Plaintiffs present no authority that the Board must make regulations for each and every type of business that falls within the Board's jurisdiction. There are no specific regulations per se for manicurists or pedicurists or people who give facials. Rather, the rules are drafted in such a manner such that all those who come under the Board's jurisdiction adhere to standards which promote health and safety in the course of that activity. In this regard, the regulations requiring the implements that remove skin be disinfected are imposed equally. See, § R4-10-112, Arizona Administrative Code.

The evidence presented by the Plaintiffs suggests that the regulations must be designed to eliminate all risk of injury in the practice of cosmetology and nail technology. Alternatively, the argument is that because the regulation under the Administrative Code does not eliminate all risk, even with the sanitization of hands and the cleaning and disinfecting

of instruments, and that there is always some risk involved, that the Board should somehow not require this particular implement, a fish, to be disinfected. Why? Because, the Plaintiffs argue, the fish are not implements.

No matter what label one gives the thing that removes flesh from the human body, the rules adopted by the Board requires that "thing" to be disinfected towards the end of providing a reasonable level of health and safety. Even the Plaintiffs agree that placing other "implements on par with fish, that is eliminate the requirement that they be sanitized and disinfected, would be an unreasonable risk to the health and safety of the public."

The Plaintiffs have been unable to provide any evidence to the Court that requiring the disinfecting of the thing that removes skins from the human body is not rationally related to a legitimate government end, health and safety. This Court finds that goal and the Board's enforcement of the rules as it applies to fish pedicures to be rationally related to that legitimate government interest.

The Plaintiffs assert that the Board should explore and implement less restrictive means to regulate the practice of fish pedicures. Again, Plaintiffs cite no authority which requires the Defendant to do so or which indicates that the failure to do so is a violation of due process or equal protection. The Board on the other hand has a legitimate concern regarding the health and safety of the public. The

Board simply requires that the instrument that is used to remove skin from feet be cleaned/disinfected/sterilized for the benefit of the health of the public.

The Plaintiffs on the other hand want the unbridled ability to use fish as that implement by arguing studies show the risk of infection is low. Yet, the Plaintiffs never cite any authority that the Board or any regulatory agency is required under the law to create a set of regulations for that practice by the Plaintiffs, or that the Defendant is bound under the law to do so for any practice that may somehow fall within the parameters of its jurisdiction. The Plaintiffs' claim that this failure is a denial of due process and equal protection is not supported by the law or the record.

The Equal Protection and Due Process Clauses protect against government action that is arbitrary, irrational, or not reasonably related to furthering a legitimate state purpose. *See*, *e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). See also, *Coleman v. City of Mesa*, 230 Ariz. 352, ___ P.3d ___ (2012).

"In order to prove a substantive due process claim, [a plaintiff] must plead and prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'" *Lebbos*, 883 F.2d at 818 (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). The same standard applies with regard

to the Equal Protection claim. *See City of Cleburne*, 473 U.S. at 439-40, 105 S.Ct. 3249.

The Plaintiffs argue the Defendant has presented no evidence that fish pedicures as performed in other countries or jurisdictions have resulted in any reported cases of infection or disease transmitted from the fish or the water. It also contends that the fish are not "implements" as that term is defined in the applicable regulations further lending credence to the notion that the Defendant's classification of the fish as implements and their prohibition is not rational. This Court cannot agree. If the fish are not implements then the Plaintiff fails to explain what they are. Further, the Defendant is under no obligation to produce evidence that no other persons have reported any illness from fish pedicures. As stated in *Heller v Doe by Doe*, 509 U.S. 312, 113 S.Ct. 2637 (1993):

> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. "[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, *supra*, 508 U.S., at 315, 113 S.Ct. at 2098. See also, *e.g.*, *Vance v. Bradley*, *supra*, 440 U.S., at 111, 99 S.Ct., at 949; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 812, 96 S.Ct. 2488, 2499, 49 L.Ed.2d 220 (1976); *Locomotive Firemen v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 139, 89 S.Ct. 323, 328, 21 L.Ed.2d 289 (1968). A statute is presumed constitutional, see

> supra, at 2642, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the ****321*** record. Finally, courts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it "'is not made with mathematical nicety or because in practice it results in some inequality.'" *Dandridge v. Williams*, *supra*, 397 U.S., at 485, 90 S.Ct., at 1161, quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). "The problems of government are practical ones and may justify, if they do not require, rough accommodations – illogical, it may be, and unscientific." *Metropolis Theatre Co. v. Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913).

Id. 509 U.S. 312 at 321, 113 S.Ct. 2637 at 2643. This Court has found that the actions of the Defendants were not arbitrary, irrational or unreasonable. Further, requiring the implements that remove dead skin from feet be disinfected has a rational and substantial relationship to promoting the public health, safety and welfare. The prohibition against using fish to remove such skin where the evidence is uncontroverted that the fish cannot be disinfected is a

restriction that is entirely consistent with that legitimate government end.

For all the above reasons the Court finds in favor of the Defendant and relief is denied to the Plaintiffs.

The Court further finds that the parties pretrial raised the issue whether this matter was properly a declaratory judgment matter or an appeal from an administrative decision. The matter was tried to the Court seeking declaratory relief and any issue regarding the matter of an administrative appeal has been waived.

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
COUNTY OF MARICOPA,

Hon. George H. Foster, Jr.

IN THE MATTER OF

CINDY VONG and
LA VIE, LLC.,
Plaintiffs

v

DONNA AUNE, in her official capacity as Executive Director of ASBC.,
Defendant

RULING on
MOTIONS FOR
SUMMARY
JUDGMENT
Case No CV2009-037208

(Filed Jun. 13, 2012)

The Court took under advisement the matter of the motions for summary judgment filed by the Plaintiffs and the Defendant respectively. The Court has considered the motions, responses, replies and the arguments of counsel. Based on the matters presented the Court finds as follows.

This matter comes to the Court on remand from the Court of Appeals which made certain legal findings necessary to the determination of this cause. It found:

1. We conclude that fish pedicures fall within the plain meaning of *A.R.S. § 32-501*(10)(c), which defines "nail technology."

2. We have determined merely that the Board has jurisdiction over the practice [of fish pedicures].

3. Here, 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.

4. We affirm the dismissal of Vong's jurisdictional challenge. We reverse the dismissal of her constitutional claims and remand for further proceedings consistent with this decision. We deny her request for attorney's fees and costs because neither party has yet prevailed.

Vong v Aune, 2011 WL 1867409, Ariz.App. 1, 2011.

Summary judgment is appropriate when there are no issues of material fact and the movant is entitled to judgment as a matter of law. *Orme School v. Reeves,* 166 Ariz. 301, 802 P.2d 1000 (1990).

The facts in this matter at first blush are not in dispute. But each brief identifies material facts that are not supported by the record, or more importantly, not in admissible form.

The Defendant's Motion argues that the fish pedicure procedure failed to comply with the Board's normal rules "*and with the consensus of experts on the necessary safeguards for the procedure*." Defendant's Motion, p.6, lls., 14 through 16 (emphasis added). The evidence of a consensus of experts is not presented, or the matters presented have not been proven to the Court's satisfaction as experts, or not supported by affidavit, and is only found in documents whose

foundation has not been established or constitute hearsay.

Notwithstanding the lack of presentation of proper evidence, the Defendant concludes that the prohibition is rationally related to the State's compelling interest.

On the other hand, the Plaintiffs argue a number of things. First, they state that the Defendant failed to undertake studies to determine the proper way to regulate the practice of fish pedicures. The Plaintiffs cite no case law on point indicating that the Defendant has the burden to do so. The Plaintiffs argue that the Defendant bans fish pedicures while simultaneously allowing and regulating more dangerous cosmetology practice. Yet there is no evidence of what the more dangerous practices are and whether under the circumstances the regulations for those practices are relevant to this inquiry. In the face of this inadequacy, the Plaintiffs argue the Board has violated its right to equal protection. In the absence of admissible evidence, the Court cannot agree.

The regulations in question seek to protect the public by making sure the tool, for want of a better word, that is used to remove dead flesh from the feet of the Plaintiffs' customers can be properly sanitized. The Defendant's position is that is the point of the regulation. That because the Plaintiff is unable to show that the fish can be disinfected the use of those fish is

prohibited.[1] The Court cannot say on this record that the position is irrational, or better stated, not rationally related to a compelling state interest.

The Court is mindful of the admonition of *Orme School, supra.,* which held:

> We hold, therefore, that although the trial judge must evaluate the evidence to some extent in ruling on a motion for summary judgment, the trial judge is to apply the same standards as used for a directed verdict. Either motion should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. Thus, assuming discovery is complete,[FN10] the judge should grant summary judgment if, on the state of the record, he would have to grant a motion for directed verdict at the trial.

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[1] It would seem that being able to disinfect fish may be equally important where the fish, which are not "controlled" by any person, may remove live tissue. The evidentiary record is silent on this issue or at least the parties have not directed the Court to a discussion of it which they are required to do. *Mast v. Standard Oil Co. of California*, 140 Ariz. 1 680 P.2d 137 (1984), (stating that it is neither the trial nor the appellate court's function to "perform counsel's work by searching the record to attempt to discover facts which establish or defeat the [summary judgment] motion.").

Even though the parties have submitted numerous documents to support their respective positions, they fail to fully address the question presented.

IT IS ORDERED denying the Motions for Summary Judgment submitted by the Plaintiffs and the Defendant as there exist genuine issues of material fact as to whether the Defendant's regulation of the Plaintiffs' activity is rationally related to a compelling State interest.

6/12/12 /s/ George H. Foster
DATE **Hon. GEORGE H. FOSTER, JR**

2011 WL 1867409

Court of Appeals of Arizona, Division 1, Department E.

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.

No. 1 CA-CV 10-0587. | April 29, 2011.

Appeal from the Superior Court in Maricopa County; Cause No. CV2009-037208; The Honorable Bethany G. Hicks, Judge; The Honorable George H. Foster, Jr., Judge. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Attorneys and Law Firms

Scharf-Norton Center for Constitutional Litigation By Clint Bolick and Carrie Ann Sitren, Phoenix, Attorneys for Appellants.

Thomas C. Horne, Arizona Attorney General By Lori S. Davis, Assistant Attorney General And Bridget Fitzgibbons Harrington, Assistant Attorney General, Phoenix, Attorneys for Appellee.

MEMORANDUM DECISION

SWANN, Judge.

¶ 1 Cindy Vong and La Vie LLC (collectively, "Vong") sought declaratory and injunctive relief from a decision by the Arizona Board of Cosmetology ("Board") that ended Vong's ability to offer so-called "fish pedicures" to her salon customers. Vong entered into a consent order with the Board, and then brought a civil action attacking the Board's jurisdiction to regulate fish pedicures. The trial court dismissed the action, and Vong appeals. We conclude that fish pedicures fall within the statutory definition of "nail technology," and that the Board therefore has jurisdiction over the practice. Because Vong's collateral attack on the Board's jurisdiction fails as a matter of law, we affirm the trial court's dismissal of her complaint on state law grounds. But Vong had also raised constitutional challenges to the Board's actions, which the trial court dismissed without discussion. We conclude that Vong has stated colorable claims for relief under 42 U.S.C. § 1983 and the Arizona constitution, and we reverse the dismissal of those claims.

FACTS AND PROCEDURAL HISTORY

¶ 2 In 2008, Vong, a licensed nail technician and aesthetician, advertised and offered "Dr. Fish pedicures" at her licensed nail salon. Vong imported fish from China and remodeled her salon to provide

the service, which used the fish to remove dead skin from customers' feet.

¶ 3 In October and November 2008, an inspector from the Board inspected Vong's business. After the inspection, the Board informed Vong that fish pedicures violated Arizona law and the Board's infection control and safety standards, because the procedure involved skin exfoliation and the fish constituted tools or equipment that could not be stored or sanitized in the prescribed manner. It informed Vong that its rules prohibited the presence of animals, except fish in an aquarium or service animals, in a salon. The letter advised Vong to "immediately refrain from offering or performing fish pedicures."

¶ 4 In February 2009, Vong and the Board participated in an "informal interview" to discuss the situation. In September 2009, the Board and Vong entered into a Consent Agreement "as a final disposition" of the matter. The agreement specified, *inter alia,* that it served as "evidence of a prior violation of the Board's interpretation of Arizona statutes and rules governing the practice of cosmetology" and that it was subject to Board approval, becoming "effective only when accepted by the Board and signed by the Executive Director." Vong also agreed that the Board could impose sanctions and that "sufficient evidence exists for the Board to make the Findings of Fact and Conclusions of Law" contained in an attached order. The second part of the agreement, signed by the Board's executive director, set forth the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Arizona Board of Cosmetology is the duly constituted authority pursuant to A.R.S. § 32-501 *et seq*. for the regulation and control relating to the practice of cosmetology in the State of Arizona.

2. On or about October 28, 2008, the Board Investigator conducted an inspection of [the salon] and observed that salon had a large sign advertising "Dr Fish pedicures", salon had stations set up to perform fish pedicures and salon had the fish in two large aquatic tanks. On or about December 16, 2008, the Board Investigator called [the salon] inquiring about fish pedicures and was told specifically that the salon was continuing to offer the service.

CONCLUSIONS OF LAW

The conduct and circumstances described in paragraph 2 of the Findings of Fact constitute grounds for disciplinary action pursuant to A.R.S. § 32-572(A)(6) and § 32-574(A)(10) (violation of statute or rule) by violating A.R.S. § 32-501(6) and (9) (scope of practice) and A.R.S. § 32-541 and A.A.C. R4-10-112(A)(5)(B)(1)(2)(C)(1)(2)(E)(1)(7)(G)(1)(2)(P)(3)(4)(T)(2)(3) (infection control and safety standards).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the parties agree to the following provisions.

> 1. **IT IS HEREBY ORDERED** that [Vong] shall **IMMEDIATELY** remove and keep out all fish from her salon with the exception of those allowed by Board Rule A.A.C. R4-10-112(T)(2) and **IMMEDIATELY CEASE** performing fish pedicures (including fish therapies) in the state of Arizona. This prohibition includes the use of fish in her salon in any manner other than what is authorized by A.A.C. R4-10-112(T)(2).
>
> 2. **IT IS FURTHER ORDERED** that the Board hereby issues a **PUBLIC REPROOF** against [Vong] for the Conclusions of Law stated herein. By issuing this Public Reproof the Board is declaring that the performing of fish pedicures in the State of Arizona violate [sic] the Board's statues and rules.
>
> The Board mailed a copy of the document to Vong on September 21, 2009.

¶ 5 On November 30, 2009, Vong filed a complaint in Maricopa County Superior Court seeking injunctive and declaratory relief against Donna Aune, in her official capacity as the Board's executive director.[1] The

[1] The complaint also named the Board as a defendant, but the parties later agreed that the Board was not subject to suit. Aune argues on appeal that she is merely a "Board employee," that she has insufficient authority to enforce the Cosmetology Act, and that no justiciable controversy can exist between these parties. We disagree. Aune executed the order that implemented the Board's decision concerning Vong's fish pedicures, and is an appropriate party in her official capacity to represent the interests of the state against Vong's legal challenge.

complaint first claimed that Aune lacked jurisdiction over Vong's spa fish business because "spa fish therapy does not constitute the practice of cosmetology, aesthetics, or nail technology as those terms are defined in A.R.S. § 32-501(2), (6), or (10)" and because A.A.C. R4-10-112 did "not encompass the use of fish for removing rough skin on feet." It also claimed state and federal constitutional violations pursuant to Ariz. Const. Art. 2, §§ 4 and 13, and the Fourteenth Amendment.

¶ 6 Aune filed a motion to dismiss. After full briefing and oral argument, the court granted the motion. The court's minute entry explained that it was unclear "whether this is an action for declaratory judgment or an attempt to secure review of the Board's administrative action . . . as manifested in the Consent Agreement," but concluded the complaint should be dismissed under either view:

> If this is treated as a declaratory judgment action, it is improper, as a party may not use a complaint for declaratory judgment as a substitute for a timely appeal for judicial review of an administrative order. . . .
>
> On the other hand, if this is treated as an appeal for judicial review of an administrative order, it was required to be filed by November 2, 2009. It was not filed until November 30, 2009. Accordingly, it was untimely.

¶ 7 Vong moved for reconsideration and asserted that her complaint was a "collateral attack" on the Board's jurisdiction to regulate her business and was therefore "immune" from the rule requiring exhaustion of administrative remedies. She further asserted that Aune lacked personal jurisdiction over the spa fish business, lacked subject matter jurisdiction over spa fish therapy, and had no jurisdiction to order the termination of Vong's business. The court denied the motion, explaining:

> implicit in the Court's ruling were determinations (i) that Plaintiffs' fish spa therapy constituted the practice of aesthetics and/or cosmetology, as those terms are defined in A.R.S. Section 32-501.2(a) and .6(b), (ii) that Plaintiffs' actions constituted unlawful acts within the proscriptions of A.R.S. Section 32-574 and, therefore, (iii) that Plaintiffs were subject to regulation by and the jurisdiction of the Board of Cosmetology . . . pursuant to the provisions of A.R.S. Sections 32-504.4.A.2, 32-572A.6 and 32-575, among others.

Having determined that the Board had 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.

The court entered judgment dismissing the complaint.

¶ 8 Vong timely appeals. We have jurisdiction pursuant to A.R.S. § 12-2101(B).

DISCUSSION

¶ 9 When reviewing a motion to dismiss, we must "assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.,* 218 Ariz. 417, 419, ¶ 7, 189 P.3d 344, 346 (2008). But "mere conclusory statements are insufficient to state a claim upon which relief can be granted." *Id.* We review interpretation of statutes and administrative rules de novo. *Guminski v. Ariz. State Veterinary Med. Examining Bd.,* 201 Ariz. 180, 182, ¶ 10, 33 P.3d 514, 516 (App.2001).

I. THE CONSENT AGREEMENT DID NOT DEPRIVE VONG OF THE RIGHT TO BRING THIS CHALLENGE.

¶ 10 Vong discontinued her fish pedicure business pursuant to the Consent Agreement, and filed the complaint to vindicate her right "to pursue a legitimate business in the face of [Aune's] arbitrary, oppressive, discriminatory, and unlawful actions that . . . prevented her from doing so." Aune contends that Vong's only avenue of prospective relief was a timely appeal of the order. We disagree. We understand

Vong's Complaint to be an effort to establish a right to engage in the fish pedicure business in the future by (1) challenging the Board's statutory jurisdiction to regulate the practice at all, and (2) challenging the constitutionality of the Board's prohibition of the practice to the extent that state law grants the Board jurisdiction to do so. No law prevents Vong from mounting such a challenge.

¶ 11 To be sure, the consent agreement (and Vong's failure to appeal it) preclude her from seeking review of, or relief from, the Board's findings of fact or the public reproof it imposed.[2] But Vong does not appear to challenge the findings of fact, and her consent to the order cannot constitute a waiver or bar for all time of her right to challenge prospectively the lawfulness of the government's regulation of

[2] In the consent order, Vong agreed that the Board had jurisdiction over *her*. But personal jurisdiction is not the issue – the issue is whether the Board had authority to regulate the specific *practice* of fish pedicures. And subject matter jurisdiction cannot be conferred by stipulation. *Cf. Ad Hoc Committee of Parishioners of Our Lady of Sun Catholic Church, Inc. v. Reiss,* 223 Ariz. 505, 510, ¶ 10, 224 P.3d 1002, 1007 (App.2010). Vong further agreed that she had committed a "prior violation of the Board's *interpretation* of Arizona statutes and rules." (emphasis added). But she did not concede the merits of the position she now advances.

her conduct.[3] Vong's constitutional claims for prospective relief have never been litigated in any forum, and the doctrine of res judicata does not apply to those claims.

¶ 12 We are mindful, however, that a collateral attack is limited to the issue of subject matter jurisdiction. *See State ex rel. Dandoy v. City of Phoenix,* 133 Ariz. 334, 338, 651 P.2d 862, 866 (App.1982). We do not, therefore, address the Board's interpretation or application of its own rules to Vong – we consider only whether those rules exceed the Legislature's grant of jurisdiction to the Board or the limits on arbitrary regulation imposed by the state and federal constitutions.[4]

¶ 13 The Consent Agreement does more than regulate Vong's business. The Order provides that "the Board is declaring that the performing of fish pedicures in the State of Arizona violate[s] the Board's

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[3] The day after oral argument on this accelerated appeal, Appellee filed a five-page "Supplemental Citation of Legal Authority" aimed at persuading us that the Board's Order precludes any § 1983 litigation under the doctrine of res judicata. ARCAP 17 allows supplemental authority after oral argument only "[w]hen pertinent and significant authorities come to the attention of a party after . . . oral argument. . . ." Counsel does not avow, and we do not perceive, that the nine cases cited came to her attention after oral argument. The filing is therefore improper under ARCAP 17.

[4] At oral argument, counsel for Appellees conceded that no rules exist that specifically address – or even contemplate – the practice of fish pedicures. We have no occasion to consider the merits of any claimed defects in the existing rules at this juncture.

statutes and rules." The Board thereby used a single instance of discipline as a means of announcing a policy statement that acts as an effective prohibition of the practice statewide. In these circumstances, we conclude that there exists a justiciable dispute between Vong, the Board and its Executive Director concerning the Board's jurisdiction and the constitutionality of its declared position. *Cf. Citizens for Orderly Dev. & Env't v. City of Phoenix,* 112 Ariz. 258, 260, 540 P.2d 1239, 1241 (1975) ("The only proper method for testing the legality or constitutionality of a legislative enactment, be it municipal, county or state, is by judicial review [a]fter the enactment and passage of the offending ordinance, resolution or statute.").

II. THE BOARD HAS SUBJECT MATTER JURISDICTION OVER FISH PEDICURES AS A FORM OF "NAIL TECHNOLOGY."

¶ 14 Vong rightly points out that the trial court appears to have dismissed her state law claims on alternate grounds – both that her action was not a true collateral challenge and that the Board actually had subject matter jurisdiction over Vong's activities. We affirm on the latter ground.

¶ 15 The complaint describes the fish pedicure as "a relaxing and reinvigorating experience in which . . . tiny carp . . . are used to remove dead skin" or "rough skin" from customers' feet. The fish were kept in a community tank whose water was "continuously

recycled through a filter system and ultraviolet system." At the start of the service, the customer's feet were inspected for open wounds, rashes, or other irritations, and then washed with antibacterial soap. The customer then placed his or her feet in an individual tank and the fish were added. The fish were removed and placed in the communal tank immediately after the service, and the customer's feet washed with antibacterial soap. The essential question is whether this practice falls within any of the statutory categories of activities over which the Board has been granted jurisdiction.

¶ 16 The Board is empowered to administer and enforce rules and standards for the practice of cosmetology, aesthetics and nail technology. A salon is "(a)n establishment operated for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices." A.R.S. § 32-501(11)(a). A.R.S. § 32-504 requires the Board to adopt, administer and enforce rules, including sanitary and safety requirements, both for salons and the practice of cosmetology, aesthetics and nail technology, including the development of "standards and requirements for the provision of salon services" in the state. A.R.S. § 32-504.

¶ 17 The trial court concluded that fish pedicures constituted "aesthetics" under A.R.S. § 32-501(2)(a) and "cosmetology" under § 32-501(6)(b). For the reasons set forth below, we disagree that the practice falls within the statutory definition of aesthetics or cosmetology. But "[w]e will affirm if the trial court's

ruling is correct on any ground." *MacLean v. State Dep't of Educ,* 195 Ariz. 235, 240, 986 P.2d 903, 908 (App.1999). We conclude that fish pedicures fall within the plain meaning of A.R.S. § 32-501(10)(c), which defines "nail technology."

A. *The Mere Presence of Fish on Salon Premises Did Not Create Jurisdiction.*

¶ 18 Vong did not dispute that she owns and operates a nail salon in Arizona, and she was therefore generally subject to the Board's sanitary and safety requirements for salons. Aune asserts that the Board's rules prohibit the presence of any "bird or animal, except fish aquariums and service animals," in salons. *See* A.A.C. R4-10-112(T).[5] Vong's complaint specified that she purchased the fish and remodeled her salon to accommodate the fish pedicure business, that the fish were maintained in a communal tank within the salon, and that they were moved to individual tanks when utilized to remove dead skin. We conclude that the rule is susceptible to two competing – but equally implausible – applications to these facts.

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[5] Aune appears to argue, not that the Rule creates jurisdiction, but that it implements the authority granted by A.R.S. § 32-504(A) to regulate sanitary conditions in salons. Because we conclude that the Rule does not support Aune's position, we must likewise conclude that there exists no basis on this record to conclude that the general grant of authority to ensure sanitation confers jurisdiction over the practice of fish pedicures.

¶ 19 One reading of this Rule, which Aune advances, would lead us to the conclusion that the *practice* of fish pedicures is prohibited because the *fish* are "animals" not permitted to be in the salon. This reading ignores the fact that fish are specifically permitted by the rule, and by their nature fish must be kept in water. But the presence of fish in water (arguably an "aquarium") likewise does not dispose of the issue in Vong's favor, because the rule is silent concerning the activities of the fish. It seems plain to us that the Rule was drafted to apply to the mere presence of animals in salons, and not to their use.[6] We therefore conclude that A.A.C. R4-10-112(T) does not operate to bring fish pedicures within the Board's jurisdiction merely because the service occurred within the physical premises of a salon.

B. *Fish Pedicures Are Not "Cosmetology."*

¶ 20 A.R.S. § 32-501(6)(b) defines "cosmetology" to include "[m]assaging, cleansing, stimulating, manipulating, exercising, beautifying . . . either by hand or by mechanical or electrical appliances." Because fish are neither hands, mechanical nor electrical appliances, we conclude that the plain wording of the statute does not bring fish pedicures within the meaning of "cosmetology."

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[6] We have little doubt, for example, that a trained service dog that is permitted under this Rule to be *present* in the salon would not thereby have the unfettered ability to participate in the removal of skin from patrons' feet.

C. *Fish Pedicures are not "Aesthetics."*

¶ 21 A.R.S. § 32-501(2)(a) defines "aesthetics" to include "[m]assaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances." Again, fish are neither manual, electrical or mechanical appliances. Nor are they oils, creams or other media mentioned in the statute. We conclude that the statute does not apply to Vong's practice.

D. *Fish Pedicures Are a Form of "Nail Technology."*

¶ 22 A.R.S. § 32-501(10)(c) defines "nail technology" to include "[m]assaging and cleaning a person's hands, arms, legs and feet." Here, Vong affirmatively alleged that the service included cleaning the customers' feet with antibacterial soap before and after exposure to the fish, and that the fish "are used to remove dead skin." We find no ambiguity in the legislature's use of the word "clean" that would preclude us from deciding as a matter of law that the services described in the complaint include "cleaning."[7] Though the use of fish as a means of cleaning feet may be unusual, the nail technology statute is not limited to specific cleaning techniques. We have little difficulty

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[7] Webster's New Twentieth Century Dictionary of the English Language, 2d Ed., includes within the definition of the verb "clean" the phrase "to remove all foreign matter."

concluding that the statute by its plain terms applies to all "cleaning" services, by whatever means.

¶ 23 Fish pedicures, therefore, fall within the statutory jurisdiction of the Board. Because Vong can only challenge subject matter jurisdiction in a collateral attack, we are precluded from delving deeper into any contention that the Board misapplied its rules, and we therefore affirm the dismissal of this portion of her complaint.

III. VONG'S CONSTITUTIONAL CLAIMS SHOULD NOT HAVE BEEN DISMISSED PURSUANT TO RULE 12(b)(6).

¶ 24 The remainder of Vong's action consists of a constitutional challenge to the Board's prohibition of fish pedicures. In essence, Vong contends that the singling out of fish pedicures for disadvantageous treatment violates her right to equal protection, and that the regulations prohibiting her conduct are irrational and arbitrary in violation of the due process clauses of the federal and Arizona constitutions.[8]

¶ 25 Vong alleges that her method of performing fish pedicures presents no safety risk to the

[8] With respect to this claim, the questions surrounding Vong's failure to pursue an appeal of the Board's action is irrelevant. "[T]here is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 192 (1985).

public, and that the Board's rules cannot rationally apply to a service that was not contemplated when they were drafted. "When adjudicating a Rule 12(b)(6) motion to dismiss, Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein." *Cullen,* 218 Ariz. at 419, ¶ 7, 189 P.3d at 346. "We will uphold dismissal only if the plaintiff would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Dressler v. Morrison,* 212 Ariz. 279, 281, ¶ 11, 130 P.3d 978, 980 (2006) (internal quotations omitted). Here, 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. *See, e.g., Buehman v. Bechtel,* 57 Ariz. 363, 114 P.2d 227 (1941) (holding unconstitutional the regulation of the practice of photography for hire). We have determined merely that the Board has jurisdiction over the practice. We have not determined that the Board's application of rules that did not contemplate the practice at the time of their adoption passes constitutional muster, and the present posture of this case does not permit us to engage in that inquiry.

¶ 26 We express no opinion concerning Vong's likelihood of success on the merits of her constitutional claim. We merely acknowledge the settled rule in Arizona that she is entitled to present evidence in support of a colorable constitutional theory, and

therefore reverse the dismissal of her constitutional claims.

CONCLUSION

¶ 27 For the foregoing reasons we affirm the dismissal of Vong's jurisdictional challenge. We reverse the dismissal of her constitutional claims and remand for further proceedings consistent with this decision. We deny her request for attorney's fees and costs because neither party has yet prevailed. *See* A.R.S. §§ 12-341, -348.

CONCURRING: PATRICK IRVINE, and MAURICE PORTLEY, Judges.

[SEAL]

SCOTT BALES
CHIEF JUSTICE

JANET JOHNSON
CLERK OF THE COURT

Supreme Court
STATE OF ARIZONA
ARIZONA STATE COURTS BUILDING
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November 7, 2014

RE: CINDY VONG/LA VIE LLC v DONNA AUNE
Arizona Supreme Court No. CV-14-0151-PR
Court of Appeals, Division One
No. 1 CA-CV 13-0423
Maricopa County Superior Court
No. CV2009-037208

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on November 6, 2014, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellants Vong/La Vie, LLC) = DENIED.

FURTHER ORDERED: Request for Attorneys' Fees (Appellee Aune) = DENIED.

Janet Johnson, Clerk

TO:
Clint Bolick
Christina Sandefur
G Michael Tryon
Bridget Fitzgibbons Harrington
Stephanie Elliott
Ruth Willingham, Clerk
adc

THE CONSTITUTION OF THE UNITED STATES OF AMERICA
AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

A.R.S. § 32-501 Definitions

In this chapter, unless the context otherwise requires:

1. "Aesthetician" means a person who is licensed to practice skin care pursuant to this chapter.

2. "Aesthetics" means any one or a combination of the following practices if they are performed for cosmetic purposes:

(a) Massaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances.

(b) Arching eyebrows or tinting eyebrows and eyelashes.

(c) Removing superfluous hair by means other than electrolysis or threading.

3. "Board" means the board of cosmetology.

4. "Cosmetic purposes" means for the purpose of beautifying, preserving or conferring comeliness, excluding therapeutic massage and manipulations.

5. "Cosmetologist" means a person who is licensed to practice cosmetology pursuant to this chapter.

6. "Cosmetology" means any one or a combination of the following practices if they are performed for cosmetic purposes:

(a) Cutting, clipping or trimming hair.

(b) Massaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances.

(c) Styling, arranging, dressing, curling, waving, permanent waving, straightening, cleansing, singeing, bleaching, dyeing, tinting, coloring or similarly treating hair.

(d) Arching eyebrows or tinting eyebrows and eyelashes.

(e) Removing superfluous hair by means other than electrolysis or threading.

(f) Nail technology.

7. "Electrical appliances" means devices that use electrical current and includes lasers and IPL devices as defined in § 32-516.

8. "Instructor" means a person who is licensed to teach cosmetology, aesthetics or nail technology, or any combination thereof, pursuant to this chapter.

9. "Nail technician" means a person who is licensed to practice nail technology pursuant to this chapter.

10. "Nail technology" means:

(a) Cutting, trimming, polishing, coloring, tinting, cleansing or otherwise treating a person's nails.

(b) Applying artificial nails.

(c) Massaging and cleaning a person's hands, arms, legs and feet.

11. "Salon" means any of the following:

(a) An establishment that is operated for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices.

(b) An establishment together with a retrofitted motor vehicle for exclusive use as a mobile facility for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices, that is operated and dispatched through the establishment.

(c) A retrofitted motor vehicle exclusively used as a mobile facility for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices that is operated and dispatched from a business that has a physical street address that is on file with the board.

12. "School" means an establishment that is operated for the purpose of teaching cosmetology, aesthetics or nail technology, or any combination of the listed practices.

13. "Threading" means a service that results in the removal of hair from its follicle from around the eyebrows and from other parts of the face with the use of a single strand of cotton thread and an over-the-counter astringent, if the service does not use

chemicals of any kind, wax or any implements, instruments or tools to remove hair.

A.A.C. R4-10-112
Infection Control and Safety Standards

A. An establishment shall have and maintain the following minimum equipment and supplies:

1. Non-leaking, waste receptacles, which shall be emptied, cleaned, and disinfected daily;

2. Ventilated containers for soiled linens including towels and capes;

3. Closed, clean containers to hold clean linens including towels and capes;

4. A covered, wet disinfectant container made of stainless steel or a material recommended by the manufacturer of the wet disinfectant that:

   a. Is large enough to contain sufficient disinfectant solution to allow for the total immersion of tools and instruments,

   b. Is set up with disinfectant at all times the establishment is open, and

   c. Is changed as determined by manufacturer's instructions or when visibly cloudy or contaminated;

5. An Environmental Protection Agency (EPA)-registered bactericidal, virucidal, fungicidal, and pseudomonacidal (formulated for hospitals) disinfectant which shall be mixed and used according to manufacturer's directions on all tools, instruments, and equipment, except those that have come in contact with blood or other body fluids; and

6. An EPA-registered disinfectant that is effective against HIV-1 and Human Hepatitis B Virus or Tuberculocidal which shall be mixed and used according to the manufacturer's directions on tools, instruments, and equipment that come in contact with blood or other body fluids.

B. Procedure for disinfecting non-electrical equipment.

1. Non-electrical equipment shall be disinfected by cleaning with soap or detergent and warm water, rinsing with clean water, and patting dry; and

2. Totally immersing in the wet disinfectant required under subsection (A)(5) or (A)(6) following manufacturer's recommended directions.

C. Procedure for storage of tools and instruments.

1. A tool or implement that has been used on a client or soiled in any manner shall be placed in a properly labeled receptacle; and

2. A disinfected implement shall be stored in a disinfected, dry, covered container and isolated from contaminants.

D. Procedure for disinfecting electrical equipment, which shall be in good repair, before each use.

1. Remove all foreign matter;

2. Clean and spray or wipe with a disinfectant, compatible with electrical equipment, as required in subsection (A)(5) or (A)(6); and

3. Disinfect removable parts as described in subsection (B).

E. Tools, instruments and supplies.

1. 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;

2. Disinfected tools and instruments shall not be stored in a leather storage pouch;

3. A sharp cosmetology tool or implement that is to be disposed of shall be sealed in a rigid, puncture-proof container and disposed of in a manner that keeps licensees and clients safe;

4. An instrument or supply shall not be carried in or on a garment while practicing in the establishment;

5. Clips or other tools and instruments shall not be placed in mouths, pockets, or other unsanitized holders;

6. Pencil cosmetics shall be sharpened before each use;

7. All supplies, equipment, tools, and instruments shall be kept clean, disinfected, free from defects, and in good repair;

8. Cutting equipment shall be kept sharp; and

9. A client's personal cosmetology tools and instruments that are brought into and used in the establishment shall comply with these rules.

F. If there is a blood spill or exposure to other body fluids during a service, licensees and students shall stop the service and:

1. Before returning to service, clean the wound with an antiseptic solution;

2. Cover the wound with a sterile bandage;

3. If the wound is on a licensee's or student's hand in an area that can be covered by a glove or finger cover, the licensee or student shall wear a clean, fluid-proof protective glove or finger cover. If the wound is on the client, the licensee or student providing service to the client shall wear gloves on both hands;

4. Blood-stained tissue or cotton or other blood-contaminated material shall be placed in a sealed plastic bag and that plastic bag shall be placed into another plastic bag (double bagged), labeled with a red or orange biohazard warning, and discarded;

5. All equipment, tools, and instruments that have come in contact with blood or other body fluids shall be disinfected as discussed in subsections (A)(6) and (B); and

6. Electrical equipment shall be disinfected as discussed in subsection (D).

G. All circulating and non-circulating tubs or spas shall be cleaned as follows using the disinfectant in subsection (A) (5) or (6):

1. After each client or service, complete all of the following:

a. Drain the tub;

b. Clean the tub according to manufacturer's instructions, taking special care to remove all film, especially at the water line;

c. Rinse the tub;

d. Fill the tub with water and disinfectant as in subsection (A)(5) or (6); and

e. Allow the disinfectant to stand for non-circulating tubs or to circulate for circulating tubs for the time specified in manufacturer's instructions.

2. At the end of the day, complete all of the following:

a. Remove all filters, screens, drains, jets, and other removable parts;

b. Scrub with a brush and soap or detergent until free from debris;

c. Rinse;

d. Completely immerse in the solution described in subsection (A)(5);

e. Rinse;

f. Air dry; and

g. Replace the disinfected parts in the tubs or store in a disinfected, dry, covered container.

H. Personal cleanliness.

1. A licensee or student shall thoroughly wash his or her hands with soap and warm water or any equally effective cleansing agent immediately before providing services to each client, before checking a student's work on a client, or after smoking, eating, or using the restroom;

2. A licensee or student shall wear clothing and shoes;

3. A client's skin upon which services will be performed shall be washed with soap and warm water or wiped with disinfectant or waterless hand cleanser approved for use on skin before a nail technology service, including a pedicure service, is provided; and

4. A licensee or student shall wear clean, fluid-proof protective gloves while performing any service if any bodily discharge is present from the licensee, student, or client or if any discharge is likely to occur from the client because of services being performed.

I. Disease and infestation.

1. A licensee or student who has a contagious disease shall not perform services on a client until the licensee or student takes medically approved measures to prevent transmission of the disease; and

2. Services shall not be performed on an individual who has a contagious disease that may be transmitted by the performing of the services on the individual.

J. Client protection.

1. A client's clothing shall be protected from direct contact with shampoo bowls or headrests by the use of clean linens, capes, robes, or protective neck strips;

2. Infection control shall be maintained and services shall be performed safely to protect the licensee or student and client;

3. Double bracing shall be used around a client's eyes, ears, lips, fingers, and toes; and

4. A client shall receive a pre- and post-analysis that includes appropriate instructions for follow-up.

K. Care and storage of linens including towels, robes, and capes.

1. Clean linens shall be provided for each client and laundered after each use;

2. Soiled linens shall be stored in a ventilated receptacle;

3. Laundering shall include disinfecting linens by using detergent and bleach; and

4. Clean linens shall be stored in closed containers or closets.

L. Care and storage of products including liquids, creams, powders, cosmetics, chemicals, and disinfectants.

1. All products shall be stored in a container that is clean and free of corrosion and labeled to identify contents, in compliance with state and local laws and manufacturer's instruction;

2. All products containing poisonous substances shall be distinctly marked;

3. When only a portion of a cosmetic product is to be used, the portion shall be removed from the container in a way that does not contaminate the remaining product; and

4. Once dispensed, a product shall not be returned to the original container.

M. Prohibited hazardous substances and use of products.

1. An establishment shall not have on the premises cosmetic products containing hazardous substances banned by the U.S. Food and Drug Administration (FDA) for use in cosmetic products, including liquid methyl methacrylate monomer and methylene chloride; and

2. Product shall be used only in a manner approved by the FDA.

N. Care of headrests, shampoo bowls, and treatment tables.

1. Headrests of chairs and treatment tables shall be disinfected at least daily and treatment tables covered with a clean linen or paper sheet for each client;

2. Shampoo bowls and neck rests shall be cleansed with soap and warm water or other detergent after each use and kept in good repair; and

3. Shampoo neck rests shall be disinfected with a solution described in subsection (A)(5) or (A)(6) before each use.

O. Prohibited devices, tools, or chemicals; invasive procedures.

1. Except as provided in this subsection and subsection (O)(2), all of the following devices, tools, or chemicals are prohibited from being present in or used in a salon:

   a. A devise, tool, or chemical that is designed or used to pierce the dermis; and

   b. A low-frequency, or low-power ultrasonic, or sonic device except one intended for skin cleansing, exfoliating, or product application.

2. A salon or licensee that provides an invasive procedure, using a device, tool, or chemical described in subsection (O)(1), that is otherwise allowed under Arizona law shall ensure that the performance of the procedure complies with statutes and rules governing

the procedure, training, or supervision as required by the relevant, regulatory authorities.

P. Skin peeling.

1. Except as provided in subsections (O)(1) and (O)(2), only the non-living, uppermost layer of skin, known as the epidermis, may be removed by any method or means and only for the purpose of beautification;

2. A skin removal technique or practice that affects the dermal layer of the skin is prohibited;

3. Skin removal products shall not be mixed or combined except as required by manufacturer instructions and approved by the FDA; and

4. Only commercially available products for the removal of epidermis for the purpose of beautification shall be used.

Q. Restricted use tools and instruments.

1. Nippers shall be used only to remove loose cuticles; and

2. Pre-sterilized, disposal lancets shall be used only to dilate follicles and release sebaceous debris from the follicle.

R. Cleanliness and repair of the establishment shall be maintained according to the following guidelines.

1. After each client, hair and nail clippings shall immediately be discarded;

2. All areas of the establishment, including storerooms and passageways, shall be well lighted, ventilated, and free from infectious agents;

3. Floors, walls, woodwork, ceilings, furniture, furnishings, and fixtures shall be clean and in good repair;

4. Shampoo bowls shall be clean and disinfected by using a disinfectant discussed in subsection (A)(5) or (A)(6) and drains shall be free running;

5. Counters and all work areas shall be disinfected after each client by using a disinfectant discussed in subsection (A)(5) or (A)(6); and

6. Waste or refuse shall be removed timely so there is no accumulation.

S. Building standards.

1. There shall be a direct entrance from the outside, not through living quarters, into the establishment;

2. If connected to a residence, all passageways between the living quarters and the establishment shall have a door that remains closed during business hours;

3. The establishment shall not be used for residential or other living purposes;

4. The establishment shall have a restroom for employees' and clients' use during business hours that has a wash basin, running water, liquid soap, and disposable towels; is kept clean and sanitary at all

times; is in close enough proximity to the salon to ensure safety for cosmetology procedures during use; and is open and available for use by employees and clients of the salon;

5. Any excess material stored in a restroom shall be in a locked cabinet;

6. The establishment shall have hot and cold running water;

7. A mobile unit shall have sufficient water at all times; and

8. The establishment shall have a natural or mechanical ventilation and air filtration system that provides free flow of air to each room, prevents the build-up of emissions and particulates, keeps odors and diffusions from chemicals and solutions at a safe level, and provides sufficient air circulation and oxygen.

T. General requirements.

1. The establishment shall have a first-aid kit that contains, at a minimum, small bandages, gauze, antiseptic, and a blood-spill kit that contains disposable bags, gloves, and hazardous waste stickers;

2. No bird or animal, except fish aquariums and service animals, are allowed in the establishment; and

3. The establishment shall comply with federal and state requirements.

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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, in her official capacity as executive director of the Arizona State Board of Cosmetology, and ARIZONA BOARD OF COSMETOLOGY, Defendants.	Case No. CV2009-037208 **COMPLAINT**

INTRODUCTION

1. This is a civil rights lawsuit designed to vindicate the right of Plaintiffs Cindy Vong and La Vie LLC to pursue a legitimate business in the face of Defendants' arbitrary, oppressive, discriminatory, and unlawful actions that have prevented her from doing so. Until Defendants forced her to shut it down under threat of severe penalties, Ms. Vong

operated a business called Spa Fish, which provided a relaxing, enjoyable experience in which fish remove rough skin from the feet of her customers. The procedure was safe, sanitary, and extremely popular. Despite lacking jurisdiction to do so and any evidence of harm to the public, Defendants ordered the business closed. In the process, they violated Ms. Vong's economic liberty, one of her most precious rights as a citizen of the United States and the State of Arizona.

PARTIES, JURISDICTION, AND VENUE

2. Plaintiff Cindy Vong is a naturalized citizen of the United States and a resident of the State of Arizona. She is the owner of La Vie LLC.

3. Plaintiff La Vie LLC is an Arizona limited liability corporation. It operates LaVie Nails & Spa, a licensed nail salon; and until recently operated Spa Fish.

4. Defendant Sue Sansom is executive director of the Arizona State Board of Cosmetology, and is sued in her official capacity only.

5. Defendant Arizona Board of Cosmetology ("Board of Cosmetology") is empowered by the laws of the State of Arizona to license and regulate the cosmetology profession. See A.R.S. § 32-504.

6. Jurisdiction over this action, claims, and parties is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801; and 42 U.S.C. § 1983.

7. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

8. Plaintiff Cindy Vong moved to the United States from Vietnam in 1983, and subsequently earned American citizenship.

9. Plaintiff Vong is owner of Plaintiff La Vie LLC, an Arizona limited liability corporation. She is a professional nail technician and aesthetician licensed by Defendant Board of Cosmetology.

10. Through La Vie LLC, Plaintiff Vong owns and operates LaVie Nails & Spa, a licensed nail salon in Gilbert, Arizona, which she has operated continuously for about three years.

11. Defendant Board of Cosmetology has the power to license and regulate LaVie Nails & Spa and its nail technicians, and thus has substantial control over Plaintiff Vong's livelihood.

12. In 2008, through La Vie LLC, Plaintiff Vong began operating an additional business, Spa Fish, in a separate part of the premises from the nail salon. The spa fish therapy provided a relaxing and reinvigorating experience in which small Garra Rufa fish, which are tiny carp that have no teeth and cannot injure, penetrate the skin of, or transmit diseases to humans, are used to remove dead skin from the feet.

13. The Garra Rufa 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 is popular in European and Middle- and

Far-Eastern countries and in other states in the United States.

14. Plaintiff Vong lawfully imported the fish from China and remodeled her salon for the new business, both at considerable expense.

15. Plaintiff Vong developed an extensive set of Spa Fish Therapy Procedures for the protection of her customers. Among other things, customers used an individual tank for their treatment. Before the treatment, the customers' feet were inspected to ensure they had no open wounds, rashes, or other irritations; feet that passed inspection were then washed with antibacterial soap. Fish were placed in the tank just prior to the treatment and removed immediately afterward. After use, the tank was cleaned and sanitized, allowed to dry in open air, and refilled with clean water just prior to the next use. Customers had their feet washed again with antibacterial soap after treatment. Fish were kept in a community tank whose water was continuously recycled through both a filter system and an ultraviolet system to kill any bacteria.

16. In addition to those procedures, Plaintiff Vong developed and used a Spa Fish Therapy Notice that explained the procedure to customers, including the fact that the treatment is not a pedicure. Customers desiring a pedicure could have one done in a separate part of the salon following the Spa Fish treatment.

17. Plaintiff Vong's Spa Fish business was extremely popular and profitable. She charged $30 for 20 minutes of therapy. She obtained new customers through word-of-mouth. No customer filed any type of health, safety, or business complaint relating to spa fish therapy.

18. During the period in which Plaintiff Vong operated Spa Fish, the salon employed six people.

19. In 2008, while Plaintiff Vong was planning to open Spa Fish, an inspector from Defendant Board of Cosmetology visited the salon for a routine inspection. At that time, Plaintiff Vong informed the official of her plans, and the official stated she would obtain and communicate the Board's position. Thereafter, in October 2008, Plaintiff Vong opened Spa Fish.

20. On or about October 29, 2008, an inspector for Defendant Board of Cosmetology visited the salon and informed Plaintiff Vong that the spa fish therapy was illegal because the procedure involved skin exfoliation subject to the Board's authority and that the fish were a tool that could not be sanitized as required by Board regulations.

21. On November 13, 2008, Plaintiff Vong wrote to Defendant Board of Cosmetology describing the procedure and proposing a pilot program in her salon to determine if there were any health risks associated with spa fish therapy. Defendant Board of Cosmetology never responded to the letter.

22. In an undated letter from Defendant Board of Cosmetology received by Plaintiff Vong on January 3, 2009, the Board informed Plaintiff Vong that 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 Plaintiff Vong to "immediately refrain from offering or performing fish pedicures in your salon."

23. On February 3, 2009, Defendant Board of Cosmetology sent a letter to Plaintiff Vong advising her to attend an informal interview regarding alleged violations of Arizona statutes and administrative rules.

24. Several of Plaintiff Vong's customers sent comments to Defendant Board of Cosmetology urging it not to shut down Spa Fish.

25. On September 21, 2009, Defendant Board of Cosmetology and Plaintiff Vong executed a Consent Agreement in which Plaintiff Vong agreed to immediately cease operating Spa Fish in her salon. The purpose of the Agreement was to create a final, appealable agency decision and preserve Plaintiff's legal and constitutional claims for direct challenge in this Court.

26. Plaintiff Vong has complied with the Consent Agreement and immediately ceased Spa Fish operations and, at considerable expense, removed all spa fish therapy equipment and fish from the salon.

27. As a result of discontinuing her business, Plaintiff Vong has suffered substantial loss of income, had to fire three employees, and has been prevented from pursuing a legitimate business.

28. Other states vary in their regulatory approach to spa fish treatments. Some states allow spa fish therapy and subject it to public health and safety regulation.

29. As conducted by Plaintiff Vong, spa fish therapy poses no health and safety risk to the public.

COUNT I – LACK OF JURISDICTION

30. Defendants possess no authority except for authority that is expressly delegated to them by Arizona statutes.

31. Plaintiff Vong's spa fish therapy does not constitute the practice of cosmetology, aesthetics, or nail technology as those terms are defined in A.R.S. § 32-501(2), (6), or (10). Accordingly, Defendants do not have jurisdiction over that business.

32. Ariz. Admin. Code R. 4-10-112 does not encompass the use of fish for removing rough skin on feet. Accordingly, Plaintiff Vong was not in violation of any law or regulation, and cannot be guilty of a misdemeanor offense for operating Spa Fish.

33. For all of the foregoing reasons, Defendants have no jurisdiction over Plaintiff Vong's Spa Fish business.

COUNT TWO – STATE CONSTITUTION VIOLATIONS

34. Ariz. Const. Art. II, § 13 provides, "No law shall be enacted granting to any citizen, class of citizens, or corporations other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

35. Ariz. Const. Art. II, § 4 provides, "No person shall be deprived of life, liberty, or property without due process of law."

36. Plaintiffs in the operation of Spa Fish have been subjected by Defendants to regulation that does not rationally pertain to that business.

37. The regulations as construed and applied by Defendants have the effect of prohibiting spa fish treatments in the State of Arizona and, specifically, preventing Plaintiff from operating her spa fish therapy business.

38. The regulations as construed and applied by Defendants far exceed whatever legitimate and rational public health and safety requirements necessary to protect the public in the context of spa fish therapies.

39. For all of the foregoing reasons, Defendants' actions violate Plaintiffs' constitutional rights under the Arizona Constitution.

COUNT THREE – FEDERAL CONSTITUTIONAL VIOLATIONS

40. At all times and in all of their actions encompassed by this complaint, Defendants acted under color of state law.

41. The 14th Amendment to the U.S. Constitution protects the privileges or immunities of citizens, the right to due process under law, and the right to equal protection of the law.

42. Defendants' actions have irrationally, arbitrarily, and excessively restricted the ability of Plaintiffs to operate a legitimate business.

43. Defendants have subjected Plaintiffs to a regulatory regime that does not rationally pertain to her chosen Spa Fish therapy business.

44. For all of the foregoing reasons, Defendants' actions violate Plaintiff's 14th Amendment rights.

REQUEST FOR RELIEF

To serve the interests of equity and justice, Plaintiffs request that this honorable Court award the following relief:

A. Issue a declaratory judgment that Defendants do not possess jurisdiction over Plaintiffs' Spa Fish business;

B. Issue a declaratory judgment that Defendants' actions violate Plaintiffs' state and federal constitutional rights;

C. Issue a preliminary and permanent injunction forbidding Defendants from subjecting Plaintiffs' Spa Fish business to regulation and from preventing the operation of such business;

D. Award costs and attorney fees to Plaintiffs pursuant to A.R.S. §§ 12-341, 12-341.01, and 12-348; the private attorney general doctrine; and 42 U.S.C. § 1988;

E. Order such additional relief as may be just and proper.

RESPECTFULLY SUBMITTED this 30th day of November, 2009 by:

/s/ Clint Bolick
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