



State of Louisiana

Louisiana State Board of Cosmetology
11622 Sunbelt Court, Baton Rouge, LA 70809
(225) 756-3404 Telephone - (225) 756-3410 Fax
Web Address: www.lsbcc.louisiana.gov

Jeff Landry
Governor

PETITION FOR DECLARATORY ORDER

THIS FORM MUST BE TYPED OR PRINTED

PLEASE COMPLETE AND FORWARD THIS FORM TO THE LOUISIANA STATE BOARD OF COSMETOLOGY, 11622 SUNBELT COURT, BATON ROUGE, LOUISIANA 70809 OR FAX TO (225) 756-3410.

Applicant(s):

Amy Cao 833440323
Full Name License Number, if Licensed
c/o James Baehr, Attorney, Pelican Institute for Public Policy, 400 Poydras St., Ste. 900, New Orleans, LA 70130
Street Address, City, State, and Zip Code

504-952-8016 james@pelicaninstitute.org
Telephone number E-mail address
Not applicable
Fax number

Applicant hereby requests an interpretation of the Louisiana Cosmetology Act on the rules promulgated by the Louisiana State Board of Cosmetology. Please describe, in detail, the matter which you request the Board to issue a declaratory order on.

The attached letter explains the matter and the question presented in detail.

Please attach additional 8 1/2 X 11 pages, if necessary and any written materials which you would like the Board to review in conjunction with this request.

James Baehr 9/18/24
Signature of Applicant Date

.....
Office Use Only: Date Received _____
Hearing Date: _____



September 18, 2024

Louisiana State Board of Cosmetology
11622 Sunbelt Court, Baton Rouge, LA 70809

Honorable Members of the Louisiana State Board of Cosmetology:

Five licensees of the Louisiana State Board of Cosmetology (Licensees)¹ respectfully request a declaratory order under L.R.S. § 49:977.4 and Admin. Code tit. 46, pt. XXXI, § 1501, to determine whether they have the right to trial by jury when the Board seeks civil monetary fines in excess of twenty dollars. Licensees assert the Seventh and Fourteenth Amendments to the U.S. Constitution guarantee them that right.

This letter proceeds in five parts. First, the statutory framework and procedure that the Board follows when it issues declaratory orders. Second, the factual context that is relevant to the Board's decision. Third, the Licensees' question presented. Fourth, the Licensees' position on the question presented. Fifth, a conclusion recommending how the Board should answer the question.

Statutory Framework

The Board exercises "all of its duties, powers, and authority in accordance with the Administrative Procedure Act." L.R.S. § 37:575(A)(11). The Administrative Procedure Act states that "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders and rulings as to the applicability of any statutory provision or of any rule or order of the agency." L.R.S. § 49:977.4. Accordingly, the Board has provided by rule that "[a]ny person desiring an interpretation of the Cosmetology Act or the rules promulgated in accordance with the Cosmetology Act shall make application to the board on a form provided by the board." Admin. Code tit. 46, pt. XXXI, § 1501(A). "An application for a declaratory order shall be heard within 60 days of receipt." *Id.* § 1501(B). "The board shall issue a ruling on an application for declaratory order within 30 days of the hearing." *Id.* § 1501(C). Such "[d]eclaratory orders and rulings shall have the same status as agency decisions or orders in adjudicated cases." L.R.S. § 49:977.4. That is to say, the Board's decision or order is subject to "judicial review" under the Administrative Procedure Act. L.R.S. § 49:978.1.

¹ Licensees asking the Board to issue a declaratory order are Amy Cao, Linda Ho, Hien Hoang, Jan Thoa Nguyen, and Bich Doan Vo.

Licenseses “desir[e] an interpretation of the Cosmetology Act or the rules promulgated in accordance with the Cosmetology Act.” Admin. Code tit. 46, pt. XXXI, § 1501(A). Accordingly, Licenseses request that the Board answer the question presented below.

Background

Licenseses are individuals licensed by the Louisiana State Board of Cosmetology (Board). The Board enforces the Louisiana Cosmetology Act² and rules promulgated thereunder³ against Licenseses. Relevant here, the Board conducts frequent inspections,⁴ and then administratively levies civil monetary fines against alleged wrongdoers.⁵

In the year July 2023–June 2024, the Board entered into 103 consent agreements and conducted 4 hearings, amounting to 107 adjudicated cases. *Each* of these, that is, 100% of these cases, led to the imposition of monetary fines. Of these 107 cases, 78 involved Vietnamese individuals or businesses run by Vietnamese individuals. Actions against Vietnamese-run businesses or Vietnamese individuals thus constitute roughly 73% of the Board’s disciplinary actions. The violations noted in these 107 cases range from allowing unlicensed individuals to work, operating an unregistered business, using unauthorized equipment, and miscellaneous violations such as working on an expired license, having no full-time cosmetologist on staff, or allowing an unregistered animal on the salon premises. No case arose from a customer complaint. No case involved proof of jeopardizing the health or safety of customers. And none of these 107 cases found any harm to customers.⁶

The statistic that 100% of cases adjudicated by the Board lead to monetary fines is probably explained by the fact that the Board “receives no state funds and is not included in the state budget”; instead, “[a]ll [Board]

² L.R.S. §§ 37:561–607.

³ Admin Code. tit. 46, pt. XXXI, §§ 101–1715.

⁴ L.R.S. §§ 37:575(A)(10), 37:576(A)(1), 37:576(A)(6); Admin. Code tit. 46, pt. XXXI, §§ 901, 1201(D).

⁵ L.R.S. §§ 37:575(A)(8), 37:601, 37:604; Admin. Code tit. 46, pt. XXXI, § 903.

⁶ The information is collected from the minutes of the Board’s meetings for the stated period. The executed consent agreements and Board orders resulting from hearings are attached to the Board’s minutes. All of the Board’s minutes and attachments are available on the Board’s website at <http://www.lsbclouisiana.gov/bdmt.aspx>.

funds are received through license fees or fines.”⁷ However, monetary penalties or license suspensions or revocations are not the exclusive tools available to the Board. The Board has the statutory authority to issue a “reprimand or warning,” L.R.S. § 37:600(C), seek an “injunction,” L.R.S. §§ 37:605(A), 37:606(C), or issue “cease and desist” orders, L.R.S. § 37:606(B).

The Board’s usual practice described above can be illustrated by the consent agreement it entered into with one of the Licensees asking for this declaratory order. Amy Cao d/b/a Hollywood Salon & Spa entered into a consent agreement with the Board. The allegation was that Ms. Cao allowed two unlicensed individuals to work as manicurists at the salon. The Board imposed a monetary fine totaling \$2,600 on Amy Cao individually and as owner of Hollywood Salon & Spa.⁸ Ms. Cao remains subject to the Board’s random inspections. Ms. Cao’s matter did not arise out of a customer complaint, and it did not involve any allegation of harm to the health and safety of any individual whatsoever. Yet, instead of issuing a cease and desist order, a reprimand, or a warning, the Board suspended her license for one year, suspended the suspension, and placed her on probation for one year, in addition to levying the aforementioned monetary fines. Facing a language barrier and having no option but to succumb to the Board’s formal or informal pressures, Ms. Cao agreed to the Board-dictated terms. The correspondence Ms. Cao received from the Board and the executed consent agreement are attached to this letter as exhibits.

Each Licensee is licensed by the Board and remains subject to the Board’s authority to levy fines. In the future, they wish to request a trial by jury if the Board initiates any proceeding involving the collection of a fine from them.

Licensees, therefore, submit this request for a declaratory order to secure their constitutional rights going forward. The Licensees are not native English speakers. They primarily speak Vietnamese, and little to no English. They must often rely on the goodwill, honesty, and fairness of the Board’s inspectors and other personnel. The Board has no policies or procedures and no reasonable accommodations in place to ensure that the Board adequately protects all constitutional and statutory rights of such individuals. Without

⁷ Minutes of Board Meeting held on April 1, 2024, Attachment B, 2025 Budget Approval, <http://www.lsbclouisiana.gov/Board/Apr/April%201,%202024%20Board%20Meeting%20Minutes.pdf>.

⁸ Minutes of Board Meeting on January 5, 2015, <http://www.lsbclouisiana.gov/Board/Jan/January%205,%202015%20Board%20Meeting%20Minutes.pdf>.

such protections, the Board's actions against them cross the line and become a system whereby the Board periodically sweeps Licensees' bank accounts to fund itself.

Question Presented

When charged with a violation of the Louisiana Cosmetology Act, L.R.S. §§ 37:561–607, the rules promulgated thereunder, Admin Code. tit. 46, pt. XXXI, §§ 101–1715, and other applicable provisions of Louisiana law for which the Board seeks monetary fines, do the individuals or entities so charged have a right to trial by jury?

Licensees' Position

The Seventh Amendment to the United States Constitution states, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.” U.S. Const. amend. VII. The Seventh Amendment right to a jury trial (1) is “fundamental to our scheme of ordered liberty,” and (2) has “deep roots in our history and tradition.” *Timbs v. Indiana*, 586 U.S. 146, 149–50 (2019) (simplified); *see also McDonald v. Chicago*, 561 U.S. 742, 767 (2010) (same). Therefore, the right to a jury trial is available whenever the Board seeks monetary fines exceeding \$20 from regulated parties. *See Timbs*, 586 U.S. at 150; U.S. Const. amend. XIV, § 1.

The United States Court of Appeals for the Fifth Circuit, which has jurisdiction over cases arising out of Louisiana, has concluded that “[u]nder the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies” to “actions” for civil monetary “penalties ... brought” by an administrative agency against a regulated party. *Jarkesy v. Securities and Exchange Commission*, 34 F.4th 446, 454 (5th Cir. 2022), *affirmed by SEC v. Jarkesy*, 144 S.Ct. 2117 (2024). In *United States v. ERR, LLC*, 35 F.4th 405 (5th Cir. 2022), the Fifth Circuit again confirmed that when a government entity acts against a non-government party “to get money,” such an action is one at “common law” whereby the “Seventh Amendment guarantees [the non-government party’s] right to a jury trial.” 35 F.4th at 412, 416.

The United States Supreme Court recently confirmed in *SEC v. Jarkesy* that “[a]ctions by the Government to recover civil penalties under statutory provisions, ... ‘historically ha[ve] been viewed as [a] type of action in debt requiring trial by jury.’” 144 S.Ct. 2117, 2129 (2024). The remedy is the “more important” consideration. *Id.* That is, if the agency “seeks civil penalties” or


“money damages,” then it seeks “to punish or deter the wrongdoer.” *Id.* Such actions must be decided by courts where the alleged wrongdoer is entitled to a jury trial. *Id.* at 2139.

The same rule should apply to enforcement actions brought by the Louisiana State Board of Cosmetology for civil monetary fines against the Board’s regulated parties. The jury-trial rule applies to the Board’s actions to collect money. The Cosmetology Act sets the minimum fine at “twenty-five dollars per violation of any provision of this Chapter.” L.R.S. § 37:601. That statutory minimum exceeds the Seventh Amendment’s twenty-dollar trigger. Therefore, the licensee or the registrant in such cases is entitled to a trial by jury under the Seventh and Fourteenth Amendments.

Conclusion

The Board should answer the question presented as follows: When charged with a violation of the Louisiana Cosmetology Act, L.R.S. §§ 37:561–607, the rules promulgated thereunder, Admin Code. tit. 46, pt. XXXI, §§ 101–1715, and other applicable provisions of Louisiana law for which the Board seeks monetary fines, the individuals or entities so charged have the right to trial by jury.

Respectfully submitted,



James Baehr

Sarah Harbison

PELICAN INSTITUTE FOR PUBLIC POLICY

400 Poydras Street, Suite 900

New Orleans, LA 70130

Telephone: (504) 952-8016

sarah@pelicaninstitute.org

james@pelicaninstitute.org

Anh “Joseph” Cao

Amy Schapansky

CAO LAW FIRM, P.C.

1440 Lapalco Boulevard

Harvey, LA 70058

Telephone: (504) 367-5001

acao@mygrad.loyno.edu

aschapansky@caolawfirm.com