ARIZONA COURT OF APPEALS
DIVISION ONE

RYAN COLEMAN and LAETITIA COLEMAN, Plaintiffs/Appellants, v. CITY OF MESA, a municipal corporation; MESA CITY COUNCIL, a body politic; SCOTT SMITH, Mayor; LINDA CROCKER, City Clerk; KYLE JONES, Vice Mayor and City Councilmember; ALEX FINTER, DINA HIGGINS, DENNIS KAVANAUGH, DAVE RICHINS, SCOTT SOMERS, City Councilmembers, Defendants/Appellees.	Court of Appeals, Division One Case No. 1CA-CV 10-0808 Maricopa County Superior Court Case No. CV2010-092351

APPELLANTS' REPLY BRIEF

Clint Bolick (021684)
Carrie Ann Sitren (025760)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
(602) 256-7045 (Fax)
litigation@goldwaterinstitute.org

Michael Kielsky (021864)
KIELSKY, RIKE & ELGART, PLLC
2919 North 73rd Street
Scottsdale, AZ 85251
(480) 626.5415
(480) 626.5543 (Fax)
Michael@KRElegal.com

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Introduction

Appellees ("City") spend very little time addressing the actual issue before this Court: whether it was appropriate as a matter of law to dismiss Appellants' First Amendment, equal protection, and due process claims, without allowing any evidentiary development or factual determinations. On that issue, the City is swimming decidedly upstream, for the overwhelming current of case-law favors the adjudication of the types of issues raised by this case on the basis of a factual record. The City has not met its high burden.

Argument

I. FREEDOM OF SPEECH

A. The City's motion to dismiss depends upon this Court agreeing with its proposition (Br. at 18-19) that the "regulation at issue in this case do[es] not give rise to the constitutional claims by the Colemans because the business of operating a tattoo parlor for the 'act of tattooing' is not an activity protected under the First Amendment." That is a proposition that given the contrary holding by the Ninth Circuit—and, apart from that, the nonexistence of a factual record—cannot stand as a matter of law.

The City urges this Court to reject the holding of the Ninth Circuit in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055 (9th Cir. 2010) that

"tattooing is purely expressive activity fully protected by the First Amendment," and to instead follow contrary rulings from other jurisdictions.

The City asserts that this Court is not bound by Ninth Circuit interpretations of the Constitution, and that is true. Arizona courts are bound only by rulings of the U.S. Supreme Court. However, Arizona courts will follow rulings of the Ninth Circuit in the interest of furthering federal/state court relationships and predictability in the law if the Ninth Circuit has announced a clear rule on an issue of substantive federal law and if the rule appears just. *Weatherford v. State*, 206 Ariz. 529, 532-33, 81 P.3d 320, 323-24 (2003). Here, the applicable rule of law announced by the Ninth Circuit in *Anderson*—that "tattooing is purely expressive activity fully protected by the First Amendment"—is as clear as it can be. Given Arizona's even broader protection of free-speech rights (see discussion *infra* and Op. Br. at 14-17), the rule appears manifestly just as well. Indeed, it would be both anomalous and unjust if, solely by virtue of having filed this action in state court, the Colemans were accorded less protection of their free-speech rights than they would had they filed the action in the federal court down the street. Further, it would promote judicial economy to accompany a remand of the case to the trial court with direction from this Court on the applicable legal framework within which the issues should be determined.

But this appeal spares this Court the absolute necessity of choosing between the Ninth Circuit rule or decisions from other jurisdictions. That is because the narrow issue on appeal is whether the case should have been dismissed without factual development. In that regard, *Anderson* is not the outlier. Rather, among all of the cases cited by the City (City Br. at 21), the only one to have been decided on a motion to dismiss was *Hold Fast Tattoo, LLC v. City of N. Chicago*, 580 F. Supp. 2d 656 (N.D. Ill. 2008). The rest, along with *Anderson*, were decided on motions for summary judgment or after trial—that is, all were based upon a factual record.

Such an evidentiary record is necessary because the applicable constitutional standard depends upon whether the activity is protected by the First Amendment, which in turn depends upon the nature of the activity. Even the federal district court in *Hold Fast Tattoo*, 589 F. Supp. 2d at 659-660 (emphasis added), acknowledged that "the court must determine whether there was *intent* to convey a particularized message and whether there is a great likelihood that the message would be understood by those who view it" (citing, *inter alia*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Yet the court went on to decide the applicable standard on a motion to dismiss not only with no evidence of intent or anything else regarding plaintiffs' tattooing activities, but without even citing to a single allegation from the complaint (or finding that the complaint was silent on the relevant factual allegations). By contrast, all of the other courts to have addressed

the appropriate constitutional standard—regardless of which standard they adopted—have done so on the basis of a factual record.

The Colemans allege (I.R. 1, ¶ 7) that tattooing is a type of art that is "a highly personal form of self-expression." They allege that they are both fully qualified body artists and own and operate a tattoo studio in Nice, France (*id.* at ¶ 13). But the action was dismissed, without the opportunity to present evidence on the nature of the Colemans' business, much less their intent or the intent of their patrons. Nor were they permitted to probe the City's justifications for denying their permit to operate. Without such evidence, it was improper for the court to dismiss the action.

By contrast, the Ninth Circuit in *Anderson*, 621 F.3d at 1055-1063, ruled on the basis of the record that tattooing is expressive activity. Essentially, tattooing involves a work of expressive art, commissioned by the patron and performed by the artist. "As with all collaborative creative processes," the court concluded, "both the tattooist and the person receiving the tattoo are engaged in expressive activity." *Id.* at 1062. The City's denial of the use permit prevents this collaboration between the Colemans and their patrons.

Because the ban on tattoo studios at issue in *Anderson* was not content-based but involved expressive activity, the court applied intermediate scrutiny, which requires an additional factual inquiry "into whether the restriction: (1) is 'justified

without reference to the content of the regulated speech'; (2) is 'narrowly tailored to serve significant governmental interest'; and (3) 'leave[s] open ample alternative channels for communication of the information.'" *Id.* at 1064 (citation omitted). By dismissing the complaint, the trial court here conducted neither the requisite factual inquiry into whether tattooing is protected expressive activity, nor whether the City's actions were narrowly tailored to a significant government interest, nor whether the Colemans have ample alternative channels of communication. The plaintiffs are entitled as a matter of law to make their case that their activity is expressive in nature; if they do so, the City faces a substantial burden that cannot be satisfied by mere conclusory assertions but must be demonstrated in the factual record. See, e.g., *Tovar v. Billmeyer*, 721 F.2d 1260, 1264-66 (9th Cir. 1983).

Oddly, as we noted in our opening brief (at 7), the trial court below acknowledged that tattooing is speech protected by the First Amendment—then went on to hold that the rational basis test rather than strict or intermediate scrutiny applied, and to dismiss the action without any evidentiary record. If the First Amendment applies, of course, it triggers a higher level of scrutiny, which the court failed to apply either to the First Amendment or equal protection claims.[1] On that basis alone, the dismissal should be reversed.

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[1] The City (Br. at 32 n.8) makes the astonishing assertion that even though the trial court used the language of the rational basis test, in fact it "applied the principles of intermediate scrutiny." To the contrary, it ruled the City's actions were

We believe this Court should adopt the Ninth Circuit's clear and just rule that tattooing is a form of expression protected by the First Amendment, and that intermediate scrutiny applies. Alternatively, the Court should rule that the proper level of First Amendment scrutiny depends upon factual determinations that were precluded by the granting of the motion to dismiss here. Either way, the decision below should be reversed and the case remanded for development of a factual record.

B. The City also attempts to distinguish *Anderson* on the ground that it involved a complete ban on tattoo studios, as opposed to the use permit process and determination at issue here. In terms of applicable legal analysis, that is a distinction without a difference. For if tattooing constitutes a form of expression, content-neutral government action limiting it triggers intermediate scrutiny regardless of whether the government action takes the form of a ban, a permit process, or a regulation. The outcomes may differ depending on the nature and extent of the government action, but the constitutional analysis is the same.

The City repeatedly characterizes the use permit process as a time, place, or manner regulation. But the use permit requirement on its face it does not tell the Colemans or anyone else when, where, or how they can operate a tattoo studio,

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"reasonable and rational," and did not even reference applicable intermediate scrutiny standards (I.R. 16 at 2).

which is the essence of a time, place, or manner regulation. It simply tells them that if they wish to establish a tattoo studio, they must submit to a use permit process. That process is "a discretionary authorization issued by the City Council." Mesa City Code, § 11-1-6.

Any time the exercise of free-speech rights depends upon the "discretionary authorization" of government officials, it rings First Amendment alarm bells. The U.S. Supreme Court has recognized that "even content-neutral time, place, and manner restrictions can be applied in such a manner as to stifle free expression." *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002). Accordingly, the Court has required that such regulations "contain adequate standards to guide the official's decision and render it subject to judicial review." *Id.* In *Thomas*, the Court sustained event-permit requirements that allowed the National Park Service to deny a permit if the application is incomplete or contains a material falsehood or misstatement; if the applicant has damaged Park District property on prior occasions and has not paid for the damage; if the activity would present an unreasonable danger to the health or safety of park patrons or staff; or if the applicant violated prior permit terms. Those grounds, the Court concluded, "are reasonably specific and objective, and do not leave the decision 'to the whim of the administrator.'" *Id.* at 324 (citation omitted).

Here, by contrast, the applicable criteria are neither specific nor objective, and leave the decision whether to grant the use permit to the discretion of the City. See Mesa City Code § 11-1-6 (Council discretion to award permit is based upon a finding "that the proposed activity is in conformance with the Code, the General Plan . . . [and] will be compatible with, and not detrimental to, adjacent properties or the neighborhood in general").

The City's depiction of the basis of the denial of the Colemans' permit illustrates the subjectivity. Members of the public objected on the basis that "typical tattoo parlor customers . . . would be undesirable in the neighborhood," that customers would engage in "loitering and smoking," and that the studio would be "inappropriate" for the neighborhood (City Br. at 6-7). Likewise, Council members raised conclusory concerns that the studio was "inappropriate" for the neighborhood and the desire to "avoid the proliferation of these types of businesses" (*id.* at 7). By contrast, the city staff, which recommended approval of the permit, made specific findings that the proposed use conformed with the zoning code and applicable requirements, that it conformed with city plans and policies, and that there were no crime issues associated with a similarly situated tattoo studio (I.R. 1, ¶ 18). But the permit was denied anyway, despite the absence of contrary findings.

It is thus clear that the use permit process does not remotely satisfy the requirements of specific and objective criteria that limit discretion and lend themselves to judicial review, as required by *Thomas*. As in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996), in which the court overturned the trial court's judgment on the pleadings in a challenge to a sign ordinance, the permit process:

> contains no limits on the authority of City officials to deny a permit. City officials have unbridled discretion in determining whether a particular structure or sign will be harmful to the community's health, welfare, or 'aesthetic quality.' Moreover, City officials can deny a permit without offering any evidence to support the conclusion that a particular structure or sign is detrimental to the community.

(See also Op. Br. at 17-21.) The permit process on its face and as applied here suffers all of those same fatal infirmities.

C. A court cannot properly determine that a suppression of speech is justified under intermediate scrutiny without a factual inquiry. The court below, despite acknowledging that tattooing is protected speech, did not even purport to undertake the inquiry.

Of the three requirements necessary to show that the City's action denying the Colemans a use permit satisfies intermediate scrutiny, only the first is apparent on the face of the permit ordinance—that is, the regulation is not content-based. But the City also must show that the restriction is narrowly tailored to serve a

significant governmental interest, and that ample alternative channels remain open. *Anderson*, 621 F.3d at 1064. Those factors cannot be determined on a motion to dismiss.

Under the First Amendment, the City must show that the means employed to achieve the important government interest "are not substantially broader than necessary." See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989). It is impossible for the City to show narrow tailoring without a record. To the contrary, the Council's concern over the "concentration of these types of businesses" (City Br. at 7) already is dealt with by the City's requirement that tattoo studios must be at least 1,200 feet away from similar uses (I.R. 1, ¶ 11). Likewise, other concerns expressed by residents and Council members were addressed by City staff, which recommended conditioning the permit on requirements that the studio owners limit loitering, restrict business hours, refuse to provide service to anyone below the age of 18, cooperate with the Mesa Police Department to identify gang symbols and refuse to provide gang tattoos, and to refuse service to anyone appearing to be under the influence of drugs or alcohol (*id.*, ¶ 16). Similarly, if it is "inappropriate" to locate a tattoo studio in this or other neighborhoods, the City could address the matter in its zoning code, so that people like the Colemans would know where such studios are permissible and not have to endure substantial time, resources, and lost revenues in a subjective permit process

(*id.*, ¶ 26). The Complaint plainly alleges facts sufficient to put into play the question whether the City's permit process and decision to deny the permit are "substantially broader than necessary."

Likewise, the court below could not determine in the context of the motion to dismiss that ample alternative channels of communication are open to the Colemans. That is another reason why the subjective permit process employed by the City of Mesa is more burdensome than actual time, place, or manner regulations. We know that other tattoo studios exist in Mesa. That is not the same thing, however, as saying that new tattoo studios will be given permits. The City asserts (Br. at 44) that the "Colemans may apply for a Council Use Permit in any other part of Mesa and the permit process will be considered anew." Pardon the Colemans if they consider that assurance a tad hollow. Where exactly should they locate the business? How can they know that a permit will be approved? How many times will they be put to the cost and effort of seeking Council permission?

The Colemans cannot know the answer to any of those questions. And as a consequence, the court cannot conclude that ample alternative avenues exist for the Colemans to engage in their expressive enterprise. Although tattoo studios are permissible in various parts of Mesa under applicable zoning rules, the requirement of a use permit that is wholly subject to the Council's discretion means that as a practical matter, there is no assurance that a new tattoo studio will be allowed

anywhere in Mesa. Even if future permits are granted, there is no assurance that the Colemans in particular will be able to receive one. As a matter of law, there is no valid time, place, or manner regulation if the Colemans cannot determine when, where, or under what conditions they may engage in their chosen speech. Contrast *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 62 (1976) (ordinance involved a "locational restriction," dispersing adult theaters and assigning them to specified commercial zones).

For all of those reasons, it was improper for the court below to dismiss the First Amendment claim.

D. If the City's action in subjecting the Colemans' exercise of free-speech rights to the prior restraint of a subjective and discretionary permit approval process is inconsistent with First Amendment guarantees, it is absolutely anathema to the Arizona Constitution, which guarantees that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Ariz. Const. art. II, § 6. That guarantee translates into permitting speech and holding the speaker accountable for abuse, rather than (as the City has done here) assuming an abuse up front and curtailing the speech.

The City relies heavily on *Salib v. City of Mesa*, 212 Ariz. 446, 133 P.3d 756 (App. 2006), which sustained a sign ordinance that prohibited advertisements in excess of a certain portion of storefront windows. In *Salib*, the court distinguished

two other cases, *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 773 P.2d 455 (1989) (discussed in Op. Br. at 14-16) and *Empress Adult Video & Bookstore v. City of Tucson*, 204 Ariz. 50, 59 P.3d 814 (App. 2002), both of which struck down speech restrictions. Unlike the sign ordinance in *Salib*, the Court observed, in both *Mtn. States* and *Empress* "communication was actually prevented from occurring. Moreover, in each case the court found no evidence that the regulation was the least restrictive means to accomplish the regulatory goal." *Salib*, 212 Ariz. at 455, 133 P.3d at 765.[2]

This case is unlike *Salib* and like *Mtn. States* and *Empress* in those two critical respects. Here, the denial of the use permit prevents speech from occurring. And the court below, because it dismissed the Complaint, did not and could not find that the regulation was the least restrictive means to accomplish the regulatory goal.

In *Mtn. States*, 160 Ariz. at 358, 773 P.2d at 463, the Arizona Supreme Court held that a content-neutral time, place, and manner regulation "must regulate with narrow specificity so as to affect as little as possible the ability of the sender and receiver to communicate." In turn, in *Empress*, 204 Ariz. at 57, 59 P.2d at 821, the court held that the referenced holding in *Mtn. States* "adopted a different

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[2] The Court also explained that sign ordinances are treated differently than other speech restrictions. *Id.*, 212 Ariz. at 455 - 56, 133 P.3d at 765-66.

and more restrictive standard for regulations affecting speech than the federal standards enunciated in *Ward*" (cited *supra*). Among other things, *Empress* requires that the City must show that its regulation is "the least restrictive means" of achieving its substantial government purpose. *Id.* at 59, 59 P.3d at 823.

It is black-letter law in Arizona that this inquiry necessitates an evidentiary record. The City attempts (Br. at 39-42) to distinguish *State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043 (2008) on the grounds that the factual inquiry involved "secondary effects" relating to the operating hours of adult bookstores. The attempted distinction is untenable for two reasons. First, "secondary effects" can be associated with activities other than adult bookstores and movie theaters, and include precisely the types of concerns voiced about the Colemans' proposed tattoo studios by members of the public and Council (City Br. at 6-7), such as loitering, reduced property values, crime, etc. See, e.g., David L. Hudson Jr., "Secondary Effects Doctrine: Overview," available at http://www.firstamendmentcenter.org/speech/adultent/topic.aspx?topic=secondary_effects_topic (accessed Apr. 15, 2011) ("The secondary-effects doctrine has been applied in cases far removed from issues relating to the land-use regulation of adult businesses"). Second, the evidence required in *Stummer* was not triggered by the secondary-effects defense but by the free-speech challenge, which requires a factual determination regarding "the significance of the infringement on speech, the effectiveness of the statute in

reducing negative secondary effects, the nexus between the ends sought and the means employed, or the availability of alternative measures." *Stummer*, 219 Ariz. at 146, 194 P.3d at 1052. As here, the case was decided on a motion to dismiss, which the Court reversed because "we conclude that all parties should have the opportunity to present additional evidence supporting their positions." *Id.*

The development of the evidentiary record triggered by the free-speech challenge presented in this case was short-circuited. While the Court should adopt the Ninth Circuit's holding in *Anderson* that tattooing is protected free speech, there is much evidence that both parties need to develop and present an evidentiary record to allow a full and fair resolution of the case. Accordingly, the decision below should be reversed and the case remanded to the trial court.

II. EQUAL PROTECTION AND DUE PROCESS

The City spends little time addressing the Colemans' equal protection and due process claims. Again, those claims require factual determinations and therefore were improperly dismissed.

A. Regardless of whether strict scrutiny or rational basis scrutiny applies, the City must demonstrate that there is a reason to subject tattoo studios to a more-burdensome process than other types of businesses. The City states (Br. at 51) that "tattoo parlors are treated the same as plasma centers, charitable dining services, schools, apartments and many other businesses." That is not the same as saying

that tattoo studios are treated the same as all businesses, or even similarly situated services (given the diversity of the types of businesses included in the City's use-permit category). Some businesses can be established so long as they conform to applicable zoning. Other businesses, including tattoo studios, even though they conform to zoning and all other applicable requirements, must submit to a use-permit process in which Council members have unbounded discretion as to whether they may exist or not. Regardless of whether or not such businesses involve free-speech protection, classifying them into a use-permit penalty box also imposes severe restraints on the proprietors' economic liberty, therefore triggering equal protection scrutiny.

Among the odd lot of businesses placed in the penalty box, however, tattoo studios stand out because they alone are engaged in expressive activities. The City notes (Br. at 52-53) that the seminal case involving such disparate treatment, *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 581 (1983), states that government "can subject newspapers to generally applicable economic regulations." Indeed it may. The point here is that tattoo studios are *not* subject to generally applicable regulations. They are subject along with a handful of other businesses to a burdensome and highly discretionary prior restraint. It may be that tattoo studios, plasma centers, and charitable dining centers share common characteristics that are not immediately apparent, and that there are good

reasons to classify them and subject their existence to the whims of the City Council. But we do not and cannot know that at this point in the proceedings. Indeed, the City has not even suggested such reasons.

Such differential treatment in the context of speech-related activities "places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve" without differential treatment. *Minneapolis Star*, 460 U.S. at 585. Even under the rational basis standard, requiring certain groups to seek a special-use permit requires a showing that such treatment is made necessary by a "special threat to the city's legitimate interests." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985); see also *Romer v. Evans*, 517 U.S. 620 (1996) (under rational basis standard, state may not subject homosexuals to special burdens without showing there are special characteristics justifying such treatment).

The Colemans' equal protection challenge should be allowed to proceed.

B. On the Colemans' due process challenge, the City's focus is on standard rather than substance. Its main argument (Br. at 45) is that "legislative actions are given more latitude and deference than administrative decisions." Again true. Unfortunately for the City, under applicable Arizona law, the use permit process falls into the category of administrative actions.

In making this determination, Arizona courts have not focused on which level of government is making the decision (hence it doesn't matter whether the permits at issue are called "special use" or "Council Use" permits), but on whether the decisionmaking entity is acting in a legislative or administrative capacity. The City does not analyze at all the applicable test set forth in *Redelsperger v. City of Avondale*, 207 Ariz. 430, 433, 87 P.3d 843, 846 (App. 2004), which assesses three factors: "whether the action is (1) permanent or temporary, (2) of general or specific (limited) application, and (3) a matter of policy creation or a form of policy implementation." Here, the second and third factors weigh decisively in favor of an administrative determination. Plainly, this is a decision of specific rather than general application for, after all, as the City says (Br. at 44), the "Colemans may apply for a Council Use Permit in any other part of Mesa and the permit will be considered anew." And it is a matter of policy implementation rather than policy creation because, as the City acknowledges (Br. at 5), the permit criteria that the Council "must consider" are set forth by City ordinance. Those criteria pre-exist the individual determination, they survive the individual determination, and apparently the individual determination sets no future precedent. Accordingly, the issuance of a use permit, as contrasted with a zoning ordinance, "is generally recognized as an administrative act." *Sandblom v. Corbin*, 125 Ariz. 178, 184, 608 P.2d 317, 323 (App. 1980).

The resulting standard is whether the City's actions were "arbitrary and capricious," which is an "unreasoning action, without consideration and in disregard for facts and circumstances." *Hamilton v. City of Mesa*, 185 Ariz. 420, 428, 916 P.2d 1136, 1144 (App. 1995). The City's decision must be supported by substantial evidence. *Siegal v. Ariz. St. Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991). Even where a lesser standard is implicated, judicial review of a decision denying the Colemans their livelihood should be made on the basis of actual evidence rather than conclusory assertions. The dismissal of the Colemans' due process claim should be reversed.

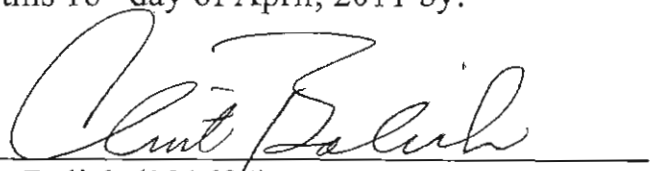
Conclusion

Certainly it would be useful on remand for the Court to decide to the extent practicable the legal framework that should govern this case. But the bottom line is that the case was decidedly prematurely. We recognize that the City wishes to protect its prerogatives, and that nothing would make it happier than a decision affirming that its discretion will be rubber-stamped by the courts. But what marks ours as a nation of law and not of men, and as a republic rather than an unfettered democracy, is robust and independent judicial review of government decisions that implicate the rights and opportunities of individuals. Here the damage to the Colemans in both respects is grievous. They deserve nothing less than their day in

court to show that the actions taken against them exceed the limited powers conferred upon the City of Mesa.

Appellants respectfully request that this honorable Court reverse the ruling below and remand for further proceedings.

RESPECTFULLY SUBMITTED this 18th day of April, 2011 by:



Clint Bolick (021684)
Carrie Ann Sitren (025760)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 East Coronado Rd., Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
Attorneys for Plaintiffs/Appellants

Certificate of Compliance

Pursuant to ARCAP 14, I certify that the attached brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font and contains approximately 4600 words.

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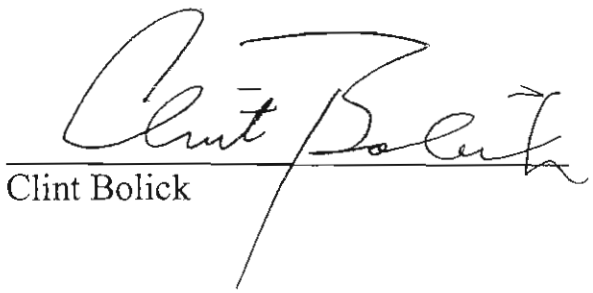

Clint Bolick

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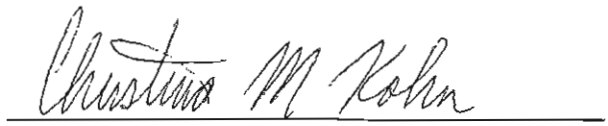
Clerk of the Court
Arizona Court of Appeals, Division One
Arizona Courts Building
1501 West Washington Street
Phoenix, AZ 85007

TWO COPIES of the Reply Brief MAILED this 18th day of April, 2011, by prepaid United States Postal Service First Class Mail, to:

Scott A. Holcomb, Esq.
MARISCAL, WEEKS, McINTYRE & FRIEDLANDER, P.A.
2901 North Central Avenue, Suite 200
Phoenix, AZ 85012
Attorneys for Defendants



Christina Kohn