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IN THE SUPREME COURT FOR THE STATE OF ARIZONA

RYAN COLEMAN and LAETITIA COLEMAN, Plaintiffs/Appellants/ Respondents, 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/ Petitioners.	CV11-0351-PR Court of Appeals, Division One Case No. 1CA-CV 10-0808 Maricopa County Superior Court Case No. CV2010-092351

RESPONSE TO PETITION FOR REVIEW

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) 467-3081 (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

Attorneys for Plaintiffs/Appellants/Respondents

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ISSUES ON REVIEW

1. Are tattoos, the process of tattooing, and the business of tattooing protected by the First Amendment and Ariz. Const. Art. II, § 6, so as to require reversal of the dismissal of a lawsuit challenging the denial of a special use permit to open a tattoo studio pursuant to a process that confers broad, standardless discretion upon City officials?

2. Does the arbitrary denial of a permit pursuant to a subjective process that subjects tattoo studios to special burdens state a cause of action pursuant to the due process protection of Ariz. Const. Art. II, § 4, the guarantee of equal privileges and immunities under Art. II, § 13, and the due process and equal protection guarantees of the 14th Amendment?

MATERIAL FACTS AND PROCEDURAL HISTORY

Plaintiffs Ryan and Laetitia Coleman own a successful tattoo studio in Nice, France, and are fully qualified body artists (Compl., Index of Record (I.R.) 1, ¶ 13). Body art, which includes tattoos, is a practice as old as mankind, and a highly personal form of self-expression (*id.*, ¶¶ 7-8).

The City of Mesa subjects tattoo studios, along with a handful of other businesses, to a "Council Use Permit" process that requires, *inter alia*, a finding that the proposed use is "compatible" with surrounding uses. *Coleman v. City of Mesa*, No. 1 CA-CV 10-0808 (Ariz. App. Nov. 3, 2011), slip. op. ("Op.") at 3. In

July 2008, the Colemans commenced the permit review process to open Angel Tattoo at the Dobson Ranch Shopping Center strip mall. The proposed use was consistent with applicable zoning requirements (I.R. 1, ¶ 14).

In February 2009, the Mesa Planning and Zoning Board staff recommended approval of the Colemans' permit subject to several conditions (*id.*, ¶ 16; Op. at 4 n.3). The staff made specific findings that the use conformed with the zoning code, distance requirements, and city plans and policies, and that no likely issues with crime were presented (*id.*, ¶ 18).

Nonetheless, the Planning and Zoning Board in February 2009 by a 3-2 vote recommended denial of the permit, making no formal findings but concluding that the use was not "appropriate" to the neighborhood or the best use of the property (*id.*, ¶ 21). The next month, after listening to public comments, the Council voted 6-1 to deny the permit, again making no formal findings (*id.*, ¶¶ 22-24). The permit denial has caused substantial costs and lost business opportunities (*id.*, ¶ 26).

The Colemans filed a complaint against the City of Mesa in Maricopa County Superior Court in March 2010 alleging violations of their free speech, equal protection, and due process rights under the U.S. and Arizona Constitutions;

and seeking special action, declaratory, and injunctive relief, along with damages and attorney fees.[1]

The City filed a motion to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6). Although the trial court found that tattooing is a form of speech (Op. 8 n.5), it dismissed the lawsuit, concluding that the permit denial was "a reasonable and rational regulation of land use" (*id.* at 5). The Court of Appeals reversed in a unanimous decision by Judge Ann Timmer, holding that tattooing is protected by the free-speech guarantees of both the U.S. and Arizona Constitutions, and that plaintiffs had stated a cause of action on all of their constitutional claims.

REASONS THE PETITION SHOULD NOT BE GRANTED

1. Although this case presents interesting and important constitutional issues and no Arizona Supreme Court decision controls the central point of law in question, there is a compelling reason not to grant review and disturb the Court of Appeals decision: a different outcome would create the anomalous and apparently unprecedented condition of Arizonans being entitled to *less* free-speech protection than they enjoy under federal law.

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[1] Plaintiffs/respondents seek attorney fees for this stage of the proceedings, pursuant to A.R.S. §§ 12-341.01 and 12-348(A)(3), Ariz. R. Proc. Spec. Act. 4(g), 42 U.S.C. § 1988, and the private attorney general doctrine. Recognizing that this Court's disposition likely will not conclude the proceedings, we make this request to preserve plaintiffs' rights in a subsequent award of attorney fees.

At the outset, we disagree with the City's hyberbolic assertion (Petition at 1) that the Court of Appeals ruling "could severely impair the ability of all branches of government in Arizona to regulate a wide variety of businesses, from a land-use or health and safety perspective." The decision does not alter at all the preexisting constitutional framework that applies to all speech-related businesses and activities. Rather, the opinion decides only that the framework applies to tattoo studios.

In so doing, the Court of Appeals (Op. at 15) adopted the rule established by 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." Obviously, the City disagrees with that legal conclusion, and urges this court instead to adopt the view of an Illinois federal district court in *Hold Fast Tattoo, LLC v. City of N. Chicago*, 580 F. Supp.2d 656 (N.D. Ill. 2008), that tattooing is not protected speech. All of the decisions on tattooing agree 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." *Id.* at 659-60 (citing, *inter alia*, *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). Odd, then, that the district court in *Hold Fast* decided the case—and made a flurry of factual determinations—in the context of a motion to dismiss, without allowing any evidence or even once citing the complaint, whose

allegations in a motion to dismiss are taken as true. The Ninth Circuit's decision in *Anderson*, by contrast, was based on a factual record and decided on cross-motions for summary judgment. *Anderson*, 621 F.3d at 1055.

Obviously, both the Colemans and the Court of Appeals think that the Ninth Circuit has the better of the argument. But the more salient point, from the perspective of this Court deciding whether to review the Court of Appeals decision, is that we reside in the Ninth Circuit, and that court has ruled on the central point of law in question. So what do we do with that?

The City glibly asserts that "[t]his Court is not bound by the Ninth Circuit's interpretation of constitutional rights" (Pet. at 9). True. However, this Court has stated that it will follow rulings of the Ninth Circuit in the interest of furthering federal/state relationships and predictability in the law if the Ninth Circuit has announced a clear rule on an issue of federal substantive law and if the rule appears just. *Weatherford v. State*, 206 Ariz. 529, 532-33, 81 P.3d 320, 323-24 (2003). Here, both criteria are met. The rule announced by the Ninth Circuit that tattooing is protected free speech literally could not be clearer. And in a state that adopted a ringing protection of freedom of speech in its Declaration of Rights, a decision that subjects to intermediate scrutiny a City's highly subjective permit process in which a form of speech is singled out for disadvantageous treatment appears manifestly just.

Of course, this Court is free to interpret our own Constitution independently of federal judicial decisions interpreting the federal constitution. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). But it is a one-way ratchet: our courts may provide Arizonans with greater rights than the federal courts provide, but not lesser rights. Were this Court to reverse the Court of Appeals ruling and choose a lower standard of constitutional protection than provided by *Anderson*, the perverse consequence would be that—surely for the first time in our state's history—Arizonans would have less constitutional protection if they filed a lawsuit in our state courts than if they walked down the street and filed the identical lawsuit in federal court.

It would be an especially strange result given that the free-speech protection of the Arizona Constitution provides "greater scope than the first amendment." *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989). The "encompassing text of Article 2, Section 6 indicates the Arizona framers' intent to rigorously protect freedom of speech." *State v. Stummer*, 219 Ariz. 137, 142, 194 P.3d 1043, 1048 (2008) (applying the Arizona free-speech protection more broadly than the federal test, see *id.*, 219 Ariz. at 144, 194 P.3d at 1050). That provision states, "Every person may speak freely, write, and publish on all subjects, being responsible for the abuse of the right."

That language speaks directly to the issue here. It creates a constitutional presumption that in the first instance, speech should be allowed—exactly the opposite of the "may I, please?" approach embodied in Mesa's special use permit process. The Ninth Circuit's decision in *Anderson*, and the Court of Appeals' adoption of it, provides a clear and just rule for a state that places tremendous value on freedom of speech.

2. Apart from its ruling in a case of first impression that tattooing is protected free speech, the Court of Appeals did not break any jurisprudential ground, but instead applied well-established legal principles in holding that the Colemans should be allowed to prove their case.

The City contends the Court of Appeals "misapplied" the holding of *Anderson* (Pet. at 1), because it "ignores the fact that *Anderson* dealt with a *total ban* on tattoo parlors, not their regulation (*id.* at 9, emphasis in original). Nonsense. The Court of Appeals focused on the holding of *Anderson*, not its application of the rule of law to the facts. That holding is about as clear as a holding gets: "We hold that tattooing is purely expressive activity fully protected by the First Amendment." *Anderson*, 621 F.3d at 1055. The court went on to hold that "the tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are . . . purely expressive activity fully protected by the First Amendment." *Id.* at 1060 (emphasis in original). "Having determined that tattooing is protected by the

First Amendment, our next inquiry is whether the City's total ban on tattooing is a constitutional restriction on free expression." *Id.* at 1063. Ultimately, the court applied intermediate scrutiny, concluding that the city's ban "is not a reasonable 'time, place, or manner' restriction because it is substantially broader than necessary to achieve the City's significant health and safety interests *and* because it entirely forecloses a unique and important method of expression." *Id.* at 1068 (emphasis added).

The Court of Appeals reached the same conclusion as the Ninth Circuit in *Anderson* that the tattoo, the process of tattooing, and the business of tattooing are fully protected speech (Op. at 15-18). Having reached that conclusion, it likewise ruled that "Mesa's ordinance and permit process are subject to intermediate scrutiny" (*id.* at 19). A restriction on speech may be struck down whether or not it amounts to a complete ban. The question under intermediate scrutiny is not whether the speech is completely prohibited, but whether "it regulates significantly more speech than is necessary to achieve the City's" legitimate objectives. *Comite de Journaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011); accord, *Mtn. States*, 160 Ariz. at 358, 773 P.2d at 463. Applying that principle, the Court of Appeals held that the "Colemans sufficiently state a claim that Mesa did not narrowly tailor application of its ordinance to achieve its legitimate interest in controlling the locations of tattoo parlors" (Op. at 21).

Indeed, we do not even know for sure whether the ordinance as applied here is a regulation or a *de facto* ban. It is not a regulation that confines the location of or disperses tattoo studios within the City, as was at issue in *Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50 (1976). Although permits for tattoo studios have been approved in Mesa in the past, and City officials have told the Colemans they can apply elsewhere (subject, of course, to the same process), it is not clear that they can, with any certainty, locate their studio *anywhere* within Mesa (Op. at 25-26). A special use process that can be applied to turn down all future applications can effectively create a ban even if it is not called a ban. That is why it is appropriate to subject *any* restriction on speech-related activities to intermediate scrutiny, to ensure the appropriate fit between the objective and the means employed to achieve it.

As the Court of Appeals also ruled, the "Colemans may also show that Mesa failed the 'narrowly tailored' requirement by demonstrating that Mesa City Code § 11-6-3(B) fails to sufficiently guide or limit the discretion of the Council." The Council Use Permit process applied by the City of Mesa provides sweeping authority in which the amorphous key criterion upon which a permit will or will not be approved—"compatible with surrounding uses"—is nowhere defined (Op. at 23-25 & n.18). Processes in which government officials have broad discretion to decide whether or not to allow speech without clear standards are anathema to

the First Amendment. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Fosyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814, 819 (9th Cir. 1996); *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268 (C.D. Calif. 1996) (applying the principle in the context of a conditional use permit); *MacNeil v. Bd. of App. of Boston*, 18 Mass. L. Rep. 153, 2004 WL 1895054 (Mass. Super., Aug. 9, 2004) (applying the principle in the context of tattoo studios).

Even if the lowest standard of judicial review was applied, the City's decision was so bereft of findings (except for findings that supported granting the permit) that the complaint plainly stated a due process cause of action.[1] See, e.g., *Hamilton v. City of Mesa*, 185 Ariz. 420, 428, 916 P.2d 1136, 1144 (App. 1995) (a decision is "arbitrary and capricious" where it is an "unreasoning action, without consideration and in disregard for facts and circumstances") (citation omitted); *Siegal v. Ariz. St. Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 199) (decision must be supported by substantial evidence).[2]

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[1] Due process guarantees, "No person shall be deprived of life, liberty, or property without due process of law." Ariz. Const. Art. II, § 4; see also U.S. Const., 14th Amendment, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law").

[2] The Court of Appeals' apparent disagreement with Division Two with respect to part of its holding in *Aegis of Ariz., LLC v. Tn. of Marana*, 206 Ariz. 557, 81 P.3d

Similarly, the special use permit process, which singles out tattoo studios and other businesses for disadvantageous treatment, triggers equal protection analysis that should not have been cut off at the pass in a motion to dismiss.[3] The paradigm case establishing that principle is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), in which the Court struck down a municipal ordinance requiring homes for the mentally retarded to obtain a special use permit, while not requiring such a permit for other uses such as apartment houses, multiple dwellings, fraternity houses, etc. The fact that the uses were different was not sufficient to justify differential treatment. The Court concluded that "the record does not reveal any rational basis for believing" that the home for the mentally retarded "would pose any special threat to the city's legitimate interests." *Id.* at 448. Moreover, the regulatory response was not shown to be reasonably related to that special threat. Accord, *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down under the rational basis test a legal disability imposed upon homosexuals).

1016 (App. 2003) (Op. at 30 n.21) is not critical to the resolution of this case given the holdings on other issues. Hence resolution of that issue should await a case in which the issue is clearly presented.

[3] "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Ariz. Const. Art. II, § 13. See also U.S. Const., 14th Amendment, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws").

Plainly, Mesa needs to go back to the drawing board. Just as plainly, it was wrong on multiple grounds for the trial court to dismiss the Colemans' complaint. The Court of Appeals decision leaves open ample alternatives for the City to achieve legitimate land use and public welfare objectives through legitimate means. But it also recognizes important free-speech rights and gives Ryan and Laetitia Coleman, who have played by the rules every step of the way, a light at the end of the tunnel. It soon will be three years since the Council wrongly denied their permit, and thus the Colemans have lost three years of precious opportunities.

We respectfully request that this honorable Court allow the Court of Appeals decision to stand.

RESPECTFULLY SUBMITTED this 9th day of January, 2012 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

Michael Kielsky (021864)
KIELSKY, RIKE & ELGART, PLLC
2919 North 73rd Street
Scottsdale, AZ 85251
(480) 626.5415
Michael@KRElegal.com
Attorneys for Plaintiffs/Appellants/Respondents

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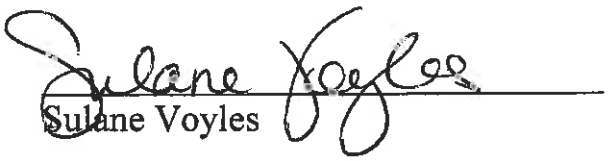
January 9, 2012



Sulane Voyles

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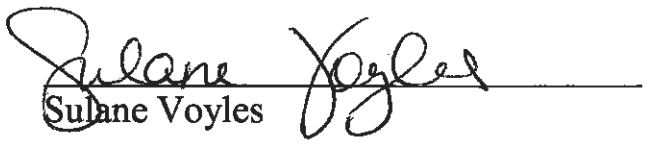
Clerk of the Court
Arizona Supreme Court
1501 West Washington Street
Phoenix, AZ 85007

TWO COPIES MAILED this 9th day of January, 2012 to:

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



Sulane Voyles