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

PLAINTIFFS/APPELLANTS/RESPONDENTS' SUPPLEMENTAL 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) 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

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Argument

THE TRIAL COURT'S DISMISSAL OF THE CASE SHOULD BE REVERSED.

For the reasons ably set forth in the Court of Appeals decision and for additional reasons raised by respondents in the Issues on Review set forth in their Response, this Court should affirm the Court of Appeals decision reversing the trial court's dismissal of the case.

1. Facts and Procedural Context. This case was killed in its infancy upon the trial court's misreading of the issue presented. The trial court and petitioners treat this case as a routine land-use matter. Neither the procedure used by the City nor the business subjected to it are routine, and both trigger judicial scrutiny beyond the complete deference accorded by the trial court.

This case has nothing to do with generally applicable zoning requirements, with which respondents are fully compliant. Rather, the City has created a special category for a hodge-podge of property uses: tattoo parlors, pawn shops, body piercing salons, apartments, townhouses, condominiums, schools, plasma centers, farmer's markets, homeless shelters, day labor hiring centers, substance abuse treatment centers, swap-meets, and rescue missions. Mesa Code § 11-6-3. Those uses may take place only pursuant to a "Council Use Permit." That permit

is not simply another hurdle in the planning process. Rather, it subjects approval to the unfettered discretion of the City Council, based only on a finding of whether the use is "compatible with" adjacent uses. *Id.*

Thus, individuals like Ryan and Laetitia Coleman cannot know in advance where, or even whether, they can open a tattoo studio in Mesa. The process seems equally baffling to the Mesa staff members assigned the duty of administering the code, who recommended approval of the permit subject to several unobjectionable conditions. *Coleman v. City of Mesa*, 228 Ariz. 240, ___ (¶ 3), 265 P.3d 422, 427 (App. 2011). However, the Planning and Zoning Board voted 3-2 to deny the permit, voicing concerns that the studio would not be "appropriate" for the neighborhood. *Id.* On appeal, although opponents "presented no evidence," the Council voted 6-1 to deny the permit. *Id.*

The City says that the Colemans have lost nothing; after all, they can apply for Council Use Permits as many times as they like. The trouble is that they have no assurance that such a permit ever will be granted, nor any objective criteria that either can inform their business decisions nor constrain the City's discretion.

Respondents filed this action alleging violations of the freedom of speech, equal protection, and due process guarantees of the state and federal constitutions. Despite the fact that motions to dismiss are disfavored and should be granted

"only when it can be certain that plaintiff cannot prove facts entitling it to relief," *id.*, 228 Ariz. at ¶ 5, 265 P.3d at 427 (citations omitted), the trial court dismissed the action. Regardless of whether the City's actions are subject to a heightened standard of review by virtue of the expressive nature of tattooing or to a more forgiving rational basis standard, the dismissal was in error. Respondents alleged facts that, if proven, would demonstrate constitutional violations under either standard. It is not the role of courts to rubber-stamp the subjective decisions of political officials; it is to ensure that those actions comport with constitutional guarantees.

2. First Amendment. Contrary to petitioners' assertions (Pet. at 11), this case is not about whether the City can subject tattoo studios to "the normal land-use laws regulating the location of businesses." The Council Use Permit process at issue says nothing about location, nor is it a "normal land-use law." Rather, it subjects a handful of businesses to a requirement that they must win Council approval in order to locate *anywhere* in the City. As such, this case is a classic example of a differential burden placed on certain types of speech, which triggers heightened scrutiny under the First Amendment. See, e.g., *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575 (1983).

That tattooing is a form of protected expression ought not be a difficult or

controversial question. As the U.S. Supreme Court unanimously observed in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), " a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' [citing *Spence v. Wash.*, 418 U.S. 405, 411 (1974)], would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll."

To reach the legal conclusion that tattooing is not protected speech, a court would have to find a difference of constitutional magnitude in the medium chosen to display art; that is, between art created on canvas which is "unquestionably shielded" versus art created on human skin which is not. If anything, the particulars weigh in the opposite direction. By its nature, tattooing is a collaborative artistic enterprise encompassing the artist and the person on whose skin the work is displayed. The work reflects the deeply personal and intimate desire of the patron to have a particular artistic expression become a permanent part of his or her body. And the studio, by definition, is not merely a passive gallery displaying pre-made art for purchase but a place where art is collaboratively created. See, e.g., *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055-59 (9th Cir. 2010); *State v. White*, 560 S.E. 2d 420, 425 (S.C. 2002)

(Waller, J., dissenting) ("If a painter who creates an image on a piece of canvass has created a work of 'art' thereby engaging in 'speech' worthy of First Amendment protection, I see no reason why a tattoo artist who creates the same image on a person's body should be entitled to less protection").

For all of those reasons, the Ninth Circuit in *Anderson*, 621 F.3d at 1060 (emphasis in original) concluded that the "tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are . . . purely expressive activity fully protected by the First Amendment." Note that contrary to petitioners' assertion, the court did not hold that tattooing is protected only against categorical bans, such as the ordinance that Hermosa Beach deployed.[1] Rather, the court held that all government restrictions on tattooing trigger intermediate scrutiny under the First Amendment. *Id.* at 1064.

In that regard, although *Anderson* apparently is the only decision by a federal court of appeals on the subject, it reflects a minority view among the

[1] We do not know whether the process in Mesa amounts to a categorical ban. Although other tattoo studios have been allowed in Mesa in the past, the only way to find out whether they will be allowed in the future is to file a Council Use Permit application in every conceivable location in the City. If all such requests are denied, we will know there is a categorical ban. In that regard, Hermosa Beach's ordinance is less-offensive in the sense that tattoo artists were told in advance not to waste their time and resources. An "anyone's guess" ordinance is not a favored approach under the First Amendment.

handful of jurisdictions that have considered the question.[2] That may owe (though it should not) to the evolution of tattooing from a counter-cultural activity to a popular mainstream form of expression. See, e.g., *State v. White*, 560 S.E. 2d at 425-26 (Waller, J., dissenting). Regardless, although it is not bound by the Ninth Circuit's precedents on federal constitutional issues, this Court has stated that it will follow such holdings in the interest of comity and predictability if the Ninth Circuit has announced a clear rule of law that appears just. *Weatherford v. State*, 206 Ariz. 529, 532-33, 81 P.3d 320, 323-24 (2003). Were this Court to hold that the First Amendment does not protect tattooing, it would create the anomalous consequence that individuals would possess fewer federal constitutional rights in the courts of this state than if they walked a few blocks away to the federal courts. Nor would that divergent rule of law contribute to the predictability that Mesa and their *amicus* claim to want.

Should this Court decide not to apply the First Amendment to tattooing as a matter of law, the proper course still is to reverse the trial court's decision granting the motion to dismiss. Though tempered by the U.S. Supreme Court's admonition in *Hurley*, 515 U.S. at 569, that "a narrow, succinctly articulable message is not a condition of constitutional protection," earlier Court decisions

---

[2] But see *MacNeil v. Bd. of App. of Boston*, 2004 WL 1895054 (Mass. Super.,

held that symbolic speech is entitled to protection if there is intent to convey a particularized message and a great likelihood that the message would be understood by those who view it. See, e.g., *Tex. v. Johnson*, 491 U.S. 397, 404 (1989). Those two questions are intensely factual. For a trial court to conclude that there is no such intent or likelihood, especially in the face of factual allegations to the contrary, is a fundamental error of law.[3] See, e.g., *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) ("Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom"); *Tovar v. Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (reversing summary judgment based on inadequate evidence supporting zoning decision under First Amendment heightened scrutiny). The court of appeals correctly identified the analytical confusion on this point in the trial court's ruling, see *Coleman*, 265 P.3d at 428 n.5, 228 Ariz. at ¶ 9 n.5, and this Court should affirm the appeal court's reversal and remand.

3. Standardless Discretion. Another reason why this case does not present

---

Aug. 9, 2004) (applying First Amendment in nearly identical factual context).

[3] Indeed, the only case cited by petitioners that reached the conclusion that tattooing is not protected by the First Amendment in the context of a motion to dismiss, as opposed to a factual record, is *Hold Fast Tattoo, LLC v. City of N. Chicago*, 580 F.Supp.2d 656 (N.D. Ill. 2008), which is awash with factual findings for which the court identifies no foundation in the record.

a garden-variety zoning dispute is the complete absence of objective criteria to guide the City's consideration of Council Use Permits. Such broad and standardless discretion is anathema where free expression is concerned.

The key terms "compatible" and "appropriate" are nowhere defined in the Code. As such, their meaning resides entirely within the eye of the beholder. The government may not condition the exercise of free expression upon the subjective whim of government officials. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992); *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1256 (11th Cir. 2004); *3570 E. Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268, 1274-75 (C.D. Cal. 1996); *Swearson v. Meyers*, 455 F. Supp. 88, 91 (D. Kan. 1978).

The case closest on point (apart from *MacNeil*, *supra* n.2) is *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), in which the Ninth Circuit reversed the trial court's judgment on the pleadings in a challenge to a sign ordinance and permit process. The court found the 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." *Id.* at 819.

That is exactly the case here. The only content that the compatibility criterion possesses is what the government decision-makers subjectively assign it. No evidence is necessary and in this case none was provided. The sole dissenter on the Council, Mayor Scott Smith, "questioned the subjective manner in which the Council approaches the process for Council Use Permits, and he suggested that the decision was likely to be based on emotions and perceptions rather than the legality of the business" (I.R. 3, Ex. 2 at 10-11). As he voted, Mayor Smith remarked that "I still have yet to hear a really solid argument to why this activity is somehow detrimental to the neighborhood other than perception" (I.R. 1, ¶ 24). The process accommodated all too well what one Council member referred to as the "primary concern," which was "to avoid the proliferation of these types of businesses" (I.R. 3, Ex. 2 at 11).[4]

[4] To the extent that tattoo studios raise significant community concerns, intermediate scrutiny requires that the regulatory response must be narrowly tailored and leave open ample alternative channels of expression. *Anderson*, 621 F.3d at 1064 (citing *Clark v. Comm. for Creative Nonviolence*, 468 U.S. 288, 293 (1984)). Mesa already has an ordinance requiring tattoo parlors to be at least 1,200 feet away from each other and from schools. *Coleman*, 228 Ariz. at ¶ 2, 265 P.3d at 426. City staff recommended approval of the permit subject to

The excessive discretion is apparent from the face of the Code. Respondents urge this Court, upon remand, to provide the strongest possible direction that boundless subjective discretion in the context of free expression is constitutionally fatal.

4. Ariz. Const. Art. II, § 6. This case presents an opportunity to further develop the doctrine that the Arizona Constitution's free-speech protections are even broader than the First Amendment's. *Mtn. States Tel. & Tel. Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989). We urge the Court to take that opportunity given that the U.S. Supreme Court has not yet ruled on whether tattooing is entitled to First Amendment protection. A definitive resolution of this question under our Constitution will provide enduring protection.

One existing doctrine that applies directly to this case is that "given Arizona's constitutional protections, when dealing with regulations that affect speech, the [government] must regulate with narrow specificity so as to affect as

---

multiple criteria designed to ameliorate potential negative effects. *Id.* at ¶ 3 & n.3, 427 & n.3. Further, the City could consider restricting tattoo studios to certain areas if, in so doing, this constitutional standard was met. The existence of such alternatives means that, as a matter of law, the City's approach is "substantially broader than necessary" to meet the City's legitimate concerns. *Anderson*, 621 F.3d at 1068.

little as possible the ability of the sender and receiver to communicate." *State v. Stummer*, 219 Ariz. 137, 142, 194 P.3d 1043, 1050 (2008). In tattooing, the "sender" and "receiver" of expression are intertwined, and by definition the expressive activity is consummated at the studio. Hence, an ordinance that confers complete subjective discretion upon government officials to determine whether or where a tattoo studio can be located is hostile to our Constitution.

The Court applied that doctrine in *State v. Stummer*, 219 Ariz. at 144, 194 P.3d at 1050, in which it ruled in the context of a statute regulating the hours of an adult bookstore that it would not "strictly apply the federal test because it is inconsistent with the broad protection of speech afforded by the Arizona Constitution." In particular, the Court held that where a statute is directed at a particular type of speech, the government bears the burden of demonstrating (1) a reasonable basis for treating the speech different than other types of speech, (2) that the regulation addresses the unique effects attributable to that type of speech, and (3) that "any substantial interests would be achieved less effectively" by other means. *Id.*, 219 Ariz. at 144-46, 194 P.3d at 1050-52. Here, the burden imposed on tattoo studios—unlike any other type of speech—is far more onerous than a mere restriction on hours of operation; yet the trial court required absolutely no justification by the City in singling it out for such treatment.

In *Stummer*, as here, the case was decided on a motion to dismiss. The Court in *Stummer* remanded to allow development of an essential record of "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." *Id.*, 219 Ariz. at 146, 194 P.3d at 1052.

The Court might usefully address other issues as well. As noted in Part 2, *supra*, some tension exists in U.S. Supreme Court jurisprudence between the test articulated in *Tex. v. Johnson* and other cases, which seems to require a showing that a speaker is intending to convey a particularized message and there is a great likelihood that the message will be understood, as contrasted with *Hurley*, 515 U.S. at 569 (1995), which held that " a narrow, succinctly articulable message is not a condition of constitutional protection." We believe the standards can be harmonized by applying the first standard to "whether *particular* conduct possesses sufficient communicative elements to bring the First Amendment into play," *Tex. v. Johnson*, 491 U.S. at 404 (emphasis added) (addressing flag burning), and the second to determining protection for a particular medium of communication (such as parades). See, e.g., *Jos. Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (extending First Amendment protection to motion pictures, and

overturning *Mut. Film Corp. v. Indus. Comm'n of Oh.*, 236 U.S. 230 (1915), which held that motion pictures were merely a form of business not meriting First Amendment protection).

Applying an intent and perception standard in this context could produce the discordant result that a particular tattoo might be protected while another might not. This Court has exhibited skepticism about such subjective "reasonable person" tests in a different context. See *Ariz. Together v. Brewer*, 214 Ariz. 118, 124-125, 149 P.3d 742, 748-749 (2007) (discarding the "reasonable voter" test in separate amendment jurisprudence). The Court would contribute to doctrinal coherence by extending the *Hurley* rationale to tattooing, recognizing that it is a medium for personal expression and therefore entitled to protection under Arizona's free-speech guarantee.

Finally, this case presents an appropriate occasion to consider the text of Art. II, § 6, which provides that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." Rather than merely creating a constraint on government, it invests all Arizonans with an affirmative right to speak. The language suggests a strong preference for *allowing* speech in the first instance and arresting abuses afterward. The Mesa ordinance and its application to the Colemans turn the constitutional protection on its head,

presuming amorphous harms up front and arresting the speech rather than its abuses. The language of Art. II, § 6 militates toward rigorously applying the *Stummer* rule, ensuring that government regulations are directed to the demonstrated negative effects of speech rather than denying the speech itself.

The City staff here did exactly that, attaching unoffensive and well-tailored conditions to the recommended permit. By contrast, the ultimate decisionmakers did exactly what our Constitution forbids, denying the permit pursuant to a subjective process that substitutes whim for the rule of law. In a state whose constitution guarantees freedom of speech, both the process and its application are intolerable.

5. Equal Protection and Due Process. Petitioners express anxiety over a supposed anomalous quirk of law, whereby subjecting the content-neutral regulation of tattooing to intermediate scrutiny under the First Amendment would nonetheless subject the same regulation to strict scrutiny under equal protection and due process because it involves a fundamental right. The courts have addressed that very situation and there is no anomaly. Where the regulation of speech triggers intermediate scrutiny under the First Amendment, it also triggers intermediate scrutiny under the equal protection and due process guarantees as well. *Brown v. City of Pgh.*, 586 F.3d 263, 283 n.22 (3rd Cir. 2009); accord,

Maldonado v. Morales, 556 F.3d 1037, 1048 (9th Cir. 2009); *Jones Intercable v. City of Chula Vista*, 80 F.3d 320, 327 (9th Cir. 1996). For the reasons set forth in the preceding sections, petitioners' ordinance, actions, and motion to dismiss cannot remotely survive intermediate scrutiny, much less the more-searching scrutiny applied by this Court under the Arizona Constitution.

Nor can the ordinance and permit denial survive even rational basis review. Even under that forgiving standard, subjecting to a few types of property uses to the requirements of a special-use permit requires meaningful rational-basis justification under the equal protection clause. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985); see also *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating permit requirement for certain laundries that invested broad discretion in government officials); *Perry v. Brown*, 2012 WL 372713 (9th Cir. Feb. 7, 2012) (striking down California's exclusion of gays from marriage status under rational basis test). Federal courts repeatedly have invalidated legislation that prevented individuals from pursuing a livelihood when it failed to evidence a rational basis. See, e.g., *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002); *Cornwell v. Hamilton*, 80 F. Supp.2d 1101 (S.D. Cal. 1999); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989).

This Court similarly has recognized the right to pursue a livelihood as finding protection under our state constitution. See, e.g., *Buehman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *Edwards v. St. Bd. of Barber Examiners*, 72 Ariz. 108, 114, 231 P.2d 450, 453 (1951) ("individual liberties can be sacrificed only upon a clear showing of a benefit to the public commensurate with the loss of individual rights"). The Court likewise has wielded a robust rational basis test to invalidate various types of legislation. See, e.g., *St. Comp. Fund v. Symington*, 174 Ariz. 188, 194, 848 P.2d 273, 279 (1993); *Big D Constr. Corp. v. Ct. of App.*, 163 Ariz. 560, 566, 789 P.2d 1061, 1067 (1990). Finally, the application of a City policy in a specific instance—here, the denial of a permit to the Colemans under the Council Use Permit process—is arbitrary and capricious where it 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); or where the decision is not supported by substantial evidence. *Siegel v. Ariz. St. Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991).

The complaint paints a picture of arbitrary government action, taken pursuant to a hopelessly subjective permit process that lumps tattoo studios together with unrelated businesses and subjects them to disadvantageous

clear directions to fulfill the essential judicial enterprise of protecting individual rights.[5]

RESPECTFULLY SUBMITTED this 7th day of March, 2012 by:

/S/ Clint Bolick
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/Respondents

[5] When the Petition in this case was granted, the Court continued respondents' request for reasonable attorney fees, which respondents wish to preserve for this stage of proceedings.