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' OPENING BRIEF

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Statement of the Case

Appellants Ryan and Laetitia Coleman appeal the trial court's dismissal of their civil rights challenge to the appellee City of Mesa's denial of a special use permit for the operation of a tattoo studio, which deprived them of their livelihood and violated their freedom of speech, equal protection, and due process rights under the Constitutions of the United States and Arizona.[1] This Court has jurisdiction over the appeal pursuant to A.R.S. §§ 12-2101(B) & (F)(2).

Appellants filed this action in Maricopa County Superior Court on March 22, 2010, seeking special action, declaratory, and injunctive relief; plus damages, costs and attorney fees in connection with these proceedings and the ones below. The City filed a motion to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6). Following oral argument during which the court made legal rulings, the court granted the motion to dismiss in a minute entry on September 20, 2010 (I.R. 16). This timely appeal follows.

Statement of the Facts

Because this case was decided on a motion to dismiss, the facts alleged in the Complaint are taken as true.

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[1] The relevant constitutional provisions are attached in the Appendix.

Body art, which includes tattooing and piercing, is as old as humanity and constitutes a highly personal form of self-expression (I.R. 1, ¶ 7). Previously it operated on the fringes of American society, but has become a mainstream practice (*id.*, ¶ 9).

The State of Arizona imposes minimal health and safety requirements on tattooing. See A.R.S. §§ 44-1342 and 13-3721. Appellee City of Mesa does not specifically regulate tattoo studios, but requires them to be at least 1,200 feet away from similar uses or schools (*id.*, ¶ 11). Additionally, tattoo studios are among a number of businesses for which a special use permit is required. The City has approved several tattoo studios, including at least one, Damage Ink, that was approved over neighborhood concerns despite the fact that it did not meet code requirements because it is within 1,200 feet of a school (*id.*, ¶¶ 11-12).

Appellants Ryan and Laetitia Coleman are United States citizens who own a successful body art studio in Nice, France. No complaints have been filed against the studio over 14 years of continuous operation (*id.*, ¶ 13).

On July 14, 2008, appellant Ryan Coleman initiated the use permit process to open Angel Tattoo at the Dobson Ranch Shopping Center strip mall. The strip mall includes several restaurants and small businesses as well as empty storefronts. The premises the Colemans intended to occupy previously were

vacant (*id.*, ¶ 19). The proposed use comported with applicable zoning requirements (*id.*, ¶ 14). The appellants formally applied for a special use permit on January 1, 2009 (*id.*, ¶ 15).

On February 5, 2009, following a detailed review of the application, the Mesa Planning and Zoning Board staff recommended approval of the special use permit subject to certain conditions: the owners would proactively limit loitering at or near the premises; they would limit business hours to 9 AM-7 PM from Monday to Saturday; they would refuse service to anyone under age 18 and check identification for anyone appearing below the age of 25; they would cooperate with the Mesa Police Department to identify known gang tattoos and refuse to provide racist or gang tattoos; and they would not admit or provide services to anyone appearing to be under the influence of drugs or alcohol (*id.*, ¶ 16). The staff made specific findings that the proposed use conformed with the zoning code, distance requirements, and development requirements; that it conformed with city plans and policies; and that the Police Department reported no increase in crimes attributable to a similarly situated tattoo studio (*id.*, ¶ 18).

On February 19, 2009, the Planning and Zoning Board considered the application, and despite hearing no evidence of detrimental impact, voted 3-2 to recommend that the City Council deny the permit, concluding that the proposed

use was not "appropriate" to the neighborhood or the best use of the property (*id.*, ¶ 21). On March 23, 2009, the Council held a public hearing on the application (*id.*, ¶ 22). Some Council members urged denial of the permit due to "secondary effects," including crime and decreased property values (*id.*, ¶ 23). However, no direct evidence was presented to substantiate those claims. As Mayor Scott Smith remarked, "I still have yet to hear a really solid argument to why this activity is somehow detrimental to the neighborhood other than perception." Nonetheless, the Council voted 6-1 to deny the special use permit (*id.*, ¶ 24).

Had the studio been authorized, it would have provided employment opportunities, contributed to the economy and the tax base, offered desired consumer services, and improved the neighborhood by creating a legitimate business in a strip mall that has experienced chronic storefront vacancies (*id.*, ¶ 25). As a result of the denial, the Colemans sustained extensive economic costs and lost business opportunities estimated to net $8,000 to $16,000 per month (*id.*, ¶ 26).

Statement of Issues Presented

Where the City Council denied a special use permit for a tattoo studio based on perceptions rather than direct evidence of secondary effects, where its discretion was not bounded by strict objective criteria, and where the studio would

have made a positive contribution to the community, was it error for the trial court to dismiss the action for failure to state a claim, thereby denying plaintiffs any opportunity to prove:

1. A violation of their free speech rights under the First Amendment and Ariz. Const. Art. II, § 6;

2. A violation of their equal protection rights under the 14th Amendment and Ariz. Const. Art. II, § 13; and

3. A violation of their due process rights under the 14th Amendment and Ariz. Const. Art. II, § 4?

Standard of review. The applicable standard of review is the same for all issues presented by the appeal. "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. . . . Courts must also 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, 189 P.3d 344, 346 (2008). "We review a trial court's decision on a motion to dismiss for an abuse of discretion, but review issues of law de novo." *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, 180, 181 P.3d 219, 227 (App. 2008).

Summary of Argument

The right to earn an honest living by creating a legitimate business is a cornerstone of our free society. Government ought not eviscerate it lightly.

Yet it did just that in the case of the Colemans, two professionals who have operated a tattoo studio successfully for 14 years in France (a country not known as a haven for enterprise) and wanted to open a studio in Mesa. Even though the studio comported with applicable zoning regulations; even though the City's staff recommended approval based on the relevant criteria; even though it would have provided a desired service, employment opportunities, and a thriving business in a strip mall beset by chronic storefront vacancies, the Council voted to deny the requisite special use permit and thereby to deprive the Colemans of their chosen livelihood.

Fortunately, both the federal and state constitutions forbid such action. Under recent Ninth Circuit precedent, the practice and business of tattooing are protected by free-speech guarantees. Those guarantees allow government to regulate the time, place, or manner of protected speech only in carefully tailored ways, and forbid the exercise of broad discretion by government officials in issuing permits. Likewise, the equal protection guarantees of our two constitutions require the City to demonstrate why it has subjected the business of

tattooing to special disabilities. And the guarantees of due process prevent the type of arbitrary and capricious decisionmaking displayed by the City of Mesa.

Those constitutional principles are especially salient in the context of a Motion to Dismiss, which cuts off at the pass any opportunity for plaintiffs to demonstrate that their rights have been scrupulously honored. It is not mere verbiage that "motions to dismiss for failure to state a claim are not favored under Arizona law." *Sensing v. Harris*, 217 Ariz. 261, 262, 172 P.3d 856, 857 (App. 2007). The judgment below should be reversed so that appellants may have their day in court.

Argument

I. FREEDOM OF SPEECH

At oral argument on the motion to dismiss, the trial court repeatedly acknowledged that "tattooing is speech" (Tr. at 22-23, 29-30), declaring that "tattooing and the business of operating a tattoo parlor comes within the confines of the First Amendment. I'll give you that. You can have that. You can take that to the bank" (*id.* at 36).

Good thing they didn't try to take it to the bank. The court concluded—remarkably, inconsistently, and without reasoning or explanation—that the case "boils down to a simple proposition, land use. This case does not deal with any

type of violation of any First Amendment rights at all" (*id.*). The court held in its minute entry ruling that the City's denial of the special use permit "was a reasonable and rational decision based upon community concerns" (Tr. at 2). The sum and substance of the court's analysis of free speech issues was that "this decision was not a violation of Plaintiff's First Amendment rights" (*id.*).

The court was correct that tattooing is a form of protected speech. Once that threshold finding is made, contrary to the court's ruling, it has enormous legal significance. It removes the matter from the simple ambit of land-use regulation. Under both the First Amendment and the Arizona Constitution, a decision to deny a permit to engage in speech must be narrowly tailored. Moreover, the decisionmaking process cannot place excessive discretion in the hands of government officials. The process and decision here clearly flunk that test. At the very least, as a matter of law, appellants deserve the opportunity to present their case.

A. Just days before the oral argument below, the Ninth Circuit issued its decision in *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010), which struck down the city's ban on tattoo studios. At oral argument, the City attempted to distinguish *Anderson* on the grounds that it involved a complete ban, whereas Mesa does not prohibit tattoo studios (Tr. at 12). While that is correct,

correct, *Anderson* does much more than that, setting forth the framework by which any type of government regulation of tattoo businesses should be analyzed, and did so in a way that demolishes the legal basis for the City's argument.

In its briefs below, the City took the unequivocal position that tattooing is not protected by the First Amendment at all (I.R. 3 at 4-6; see also I.R. 11 at 8 ("regulation of tattoo parlors is universally recognized as not regulating speech at all!" (emphasis in original)). *Anderson* not only held squarely to the contrary ("We hold that tattooing is purely expressive activity fully protected by the First Amendment," *id.*, 621 F.3d at 1055), it also expressly disagreed with the contrary precedents on which the City relied. *Id.*; see also *id.* at 1060 ("we disagree with the basic premise underlying the conclusions of both the City and the lower courts that have considered this issue").

To reach its determination on the threshold issue of whether tattooing is an expressive activity protected by the First Amendment, the Ninth Circuit began with "relevant background information," *id.* at 1055, including the history of body art, health and safety considerations, and applicable regulations, evidence that appellants here were not afforded an opportunity to present. Among other things, the court considered the plaintiff's declaration that the "tattoo designs that are applied by me are individual and unique creative works of visual art, designed by

me in collaboration with the person who is to receive the tattoo." *Id.* at 1057.

Applying the applicable First Amendment framework to the facts, the court concluded that "tattooing is purely expressive activity" that is "entitled to full First Amendment protection." *Id.* at 1059. The court went on to hold specifically 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 1060-64 (emphasis in original).

Having concluded that tattooing is protected speech, the court went on to determine whether the ban was a reasonable time, place, or manner regulation. "This determination requires an inquiry into whether the restriction: (1) is 'justified without reference to the content of the regulated speech'; (2) is 'narrowly tailored to serve a significant governmental interest'; and (3) 'leave[s] open ample alternative channels for communication of the information.'" *Id.* at 1064 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The court held that the ban was not a reasonable time, place, or manner regulation "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.

Although the requirement of a special use permit and the denial of such a

permit here do not amount to a total ban, the City's actions here must be subjected to the same time, place, or manner analysis. In particular, there is a gaping factual issue of whether the City's action is narrowly tailored; i.e., whether it is "substantially broader than necessary," *id.*, to achieve the City's legitimate regulatory interests.

It is not even entirely clear exactly what those interests are. No direct evidence of harm was presented at the Council hearing (I.R. 1, ¶ 24). See, e.g., I.R. 3, Exh. 2 at 11(Mayor Smith "has not heard any evidence that the tattoo business is detrimental to a neighborhood other than the perception").

Vague references were made at the Council hearing by residents and Council members about "secondary effects," including lower property values and increased crime (I.R. 1, ¶ 23). In the absence of credible evidence, much less an opportunity to conduct discovery, it is improper to credit those claims, and thus impossible to conclude as a matter of law that the denial of the special use permit was not broader than necessary to effectuate the City's legitimate regulatory interests.

On this question, the Ninth Circuit in *Anderson*, 621 F.3d at 1065, found that "the City has given us no reason to conclude that these concerns cannot be adequately addressed through regulation of tattooing." Likewise, the City staff

proposed conditions to the special use permit addressing such issues as loitering, hours of operation, underage access, gang tattooing, and drug or alcohol use (I.R. 1, ¶ 16). In light of those available conditions—and others that the Council might have adopted—it appears that the outright denial of the permit was "substantially broader than necessary," *Anderson*, 621 F.3d at 1068, to meet the City's legitimate regulatory interests.

But we cannot yet know for sure because the trial court dismissed the case in its cradle. As a result, the City was excused from its burden of demonstrating narrow tailoring, and the appellants were prevented from offering contrary evidence. This is premature and improper as a matter of law.

The Ninth Circuit's decision in *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983), is precisely on point. There plaintiffs challenged on First Amendment grounds zoning decisions that prevented them from opening an adult theater and bookstore. The trial court granted summary judgment for the defendants, which the Ninth Circuit reversed.[3]

Applying the First Amendment analysis to the facts, the court ruled that

[3] Of course, summary judgment allows for a greater evidentiary presentation than a motion to dismiss, so the concerns underlying the Ninth Circuit's decision in *Tovar* are even more weighty here.

"summary judgment is proper in this case only if, viewing the evidence in the light most favorable to plaintiffs, it can be said as a matter of law that the purpose of the zoning decisions was to serve a compelling governmental interest unrelated to the suppression of free expression. (Citation omitted.) In addition, the incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* at 1264 (citing *Young v. American Mini Theatres*, 427 U.S. 50, 79-80 (1976) (Powell, J., concurring)).

These constitutional standards necessitate a factual record. "Defendants are of course free to prove at trial that a compelling governmental interest, rather than a desire to curtail free expression, motivated their zoning decisions." *Id.* at 1266. With regard to the requirement that restrictions on speech must be narrowly drawn, the "City must show" that plaintiffs' activity presents different concerns than other businesses, and that those concerns cannot be addressed through ordinances rather than through denial of the permit. *Id.* Moreover, the "justifications offered by the City Council must consist of more than '[c]onclusions alone.' . . . Rather, there must be 'a factual basis for the . . . Council's conclusion that this kind of [zoning] restriction will have the desired effect'." *Id.* (citations omitted). Here, of course, the City's explanations are purely conclusory, based on no factual evidence whatsoever; nor have appellants had any

opportunity to conduct discovery or offer their own evidence.

Because the trial court failed to conduct the appropriate First Amendment inquiry, which necessarily raises factual issues and places heavy evidentiary burdens on the City, dismissal was manifestly improper.

B. Applicable free-speech requirements under the Arizona Constitution are at least as stringent as those under the First Amendment, and require separate and additional analysis.

Ariz. Const. Art. II, § 6 differs significantly from the First Amendment in its language: "Every person may speak freely, write, and publish on all subjects, being responsible for the abuse of that right." Unlike the First Amendment, which constrains government action, Art. II, § 6 confers affirmative rights upon all Arizonans, and provides "greater scope than the first amendment." *Mtn. States Telephone and Telegraph Co. v. Ariz. Corp. Comm'n*, 160 Ariz. 350, 354, 773 P.2d 455, 459 (1989).

By its plain terms, Art. II, § 6 permits the exercise of free-speech rights and allows restrictions only for the abuse of those rights. By denying the Colemans' special use permit, Mesa turned the constitutional guarantee on its head, presuming the abuse in advance and thereby denying the speech before it even takes place. That is precisely the type of government action our free-speech

guarantee forbids.

In *Mtn. States*, the Court struck down an order of the Corporation Commission blocking consumer access to certain informational services. The Court held that "given Arizona's constitutional protections, when dealing with regulations that affect speech, the Commission must regulate with narrow specificity so as to affect as little as possible the ability of the sender and receiver to communicate." *Id.*, 160 Ariz. at 358, 773 P.2d at 463. Based on the record, the Court could not conclude that a complete ban was necessary to address the concerns the Commission identified.

Likewise, here, the denial of the special use permit deprives appellants and their customers the ability to engage in the exercise of speech. Absent a record, and in light of contrary factual allegations that must be taken as true, no basis exists to conclude that the City has regulated with "narrow specificity," that its actions affected appellants and their customers "as little as possible," or that the alternative conditions urged by the City's staff were inadequate to address whatever legitimate concerns the City might have. Accordingly, under the Arizona Constitution, dismissal was inappropriate.

In *State v. Stummer*, 219 Ariz. 137, 194 P.3d 1043 (2008), the Arizona Supreme Court reviewed a statute limiting the operating hours of adult bookstores,

and its decision resounds with the importance of factual development in free-speech cases. The issue before the Court was whether the statute was a permissible way to regulate the "secondary effects" associated with adult bookstores. As in *Mtn. States*, the Court emphasized that the "encompassing text of Article 2, Section 6 indicates the Arizona framers' intent to rigorously protect freedom of speech." *Id.*, 219 Ariz. at 142, 194 P.3d at 1048. Declining to "strictly apply the federal test because it is inconsistent with the broad protection of speech afforded by the Arizona Constitution," *id.*, 219 Ariz. at 144, 194 P.3d at 1050, the Court held that where a statute is directed toward a specific type of speech, the State bears the burden of demonstrating a reasonable basis for the conclusion that targeted speech creates secondary effects different from other types of speech, that the regulation addresses those effects, and that "any substantial interests would be achieved less effectively" by other means. *Id.*, 219 Ariz. at 144-46, 194 P.3d at 1050-52.

Even more on point with the present case, the Court held that "because this case was decided on motion to dismiss, the record contains no evidence 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. Accordingly, "we conclude that all parties should have the opportunity to present additional evidence supporting their positions." *Id.* For the same reasons, the same conclusion applies here.

C. Beyond the failure of the City's actions to satisfy the exacting scrutiny applicable under both the First Amendment and Arizona Constitution, the process in this case is fatally flawed because government officials exercised broad subjective discretion in denying the special use permit. Case law is abundant that such subjective discretion in allowing or suppressing speech is fundamentally incompatible with free-speech guarantees.

Under the City's policies for special use permits, which apply to tattoo studios as well as several other business categories, in addition to evidence of licensure and compliance with the distance requirement, a proposed permit "shall also be reviewed and findings made for compliance" with additional criteria, including that the "proposed use is found to be compatible with surrounding uses, the General Plan, and other recognized development plans or policies" (I.R. 3, Exh. 1 at § 11-6-3(B)(4)). Nowhere is "compatible with surrounding uses" defined.

This is the height of subjective discretion, and the Council exercised it with great subjectivity. The City cites specific reasons given by members of the

Council in denying the permit, such as that the "use is not compatible" with the neighborhood, that "neighborhoods with a concentration of these types of businesses have lower property values," and the "primary concern . . . to avoid the proliferation of these types of businesses" (I.R. 3 at 10-11). However, these were mere opinions, based on no direct objective evidence. The only actual findings made by the City were by the Planning and Zoning Commission staff, which concluded that all applicable criteria were satisfied (I.R. 1, ¶ 18. Little wonder that "Mayor 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, Exh. 2 at 11).

Such subjective decisionmaking, based on vague criteria, may be permissible in garden-variety zoning decisions, but they are anathema to the First Amendment. See, e.g., *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130-31 (1992). Indeed, even "a facially content-neutral time, place, and manner regulation may not vest public officials with unbridled discretion over permitting decisions." *Burk v. Augusta-Richmond County*, 365 F.3d 1247, 1256 (11th Cir. 2004).

The applicable First Amendment standards in this regard are well-

established, but are especially well-summarized in *Swearson v. Meyers*, 455 F. Supp. 88 (D. Kansas 1978), enjoining a solicitation licensing law. The court observed, *id.* at 91, that "licensing laws governing conduct protected by the First Amendment are invalid unless they include precise narrow, definite, and objective standards from which the appropriate official must make his decision to grant or deny the license application." Moreover, "the standards must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made, or discretion to be exercised by the appropriate licensing official." *Id.* The criterion applied here to deny the special use permit is anything but "precise, narrow, definite, and objective." Plainly they leave factors to be assessed, judgments to be made, and discretion to be exercised. Such discretion is intolerable under the First Amendment.

In *3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1268 (D.C.Cali. 1996), the court struck down the requirement of a conditional use permit for live entertainment on precisely those grounds. The criterion applied by the city was similar to the one at issue here: whether the proposed use would be "detrimental to the public health, safety, or welfare of persons residing or working adjacent to the neighborhood of such use, or injurious to properties or improvements in the vicinity." *Id.* at 1274. Applying applicable precedents, the

court found that the conditional use ordinances were facially invalid because they "confer excessive discretion on the licensing authorities." *Id.* at 1275.

Similarly, in *Desert Outdoor Advertising, Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996), 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. Accord, *Forsyth County*, 505 U.S. at 133 ("The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision"). The process here suffers from the same infirmities: unbridled discretion, vague criteria, and no evidentiary requirement. It is so subjective that it is unconstitutional on its face.

The Massachusetts Superior Court applied this analytical framework to the permit process in the context of a tattoo studio in *MacNeil v. Bd. of Appeal of Boston*, 2004 WL 1895054 (Mass. Super., Aug. 9, 2004). The relevant criteria included whether the proposed site is "appropriate" to the use and whether the use

will "adversely affect the neighborhood." *Id.* at *2. Those standards, the court found, "are not narrow, objective and definite." *Id.* at *5. Instead, they "comprise purely subjective evaluations of wholly unrestricted factors, and thus vest the denial of a permit in the essentially unbridled discretion of the BOA. Where a license is necessary for the exercise of protected activity such a standard cannot withstand constitutional scrutiny." *Id.* at *6. The same result should follow here from nearly identically vague, subjective criteria, and boundless discretion, to which appellants' free-speech rights were subjected.

Further, "[i]n almost every instance it is not acceptable for the state to prevent a speaker from exercising his constitutional rights because of the reaction to him by others." *Beckerman v. City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981). Yet the trial court here found that the Council's decision was "based upon community concerns" (I.R. 16 at 2; see also I.R. 3 at 10-11).

The City permissibly may directly address secondary effects that actually exist. But the wholesale denial of a permit upon which free-speech rights depend plainly states a cause of action. Subjecting the exercise of those rights to the subjective, boundless discretion of government officials is virtually a *per se* violation of the First Amendment. Appellants' case should be allowed to proceed.

II. EQUAL PROTECTION

Appellants likewise state a cause of action for the violation of their equal protection rights under the U.S. and Arizona Constitutions.

Because appellants seek to exercise a fundamental right—protected speech—the applicable equal protection analysis is ratcheted up from rational basis to strict scrutiny. Appellants' proposed use fits within the applicable zoning parameters. But tattoo studios, along with several other uses, are required to obtain a special use permit. The City must justify this discriminatory treatment.

In *Minneapolis Star and Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575 (1983), the U.S. Supreme Court in an opinion by Justice Sandra Day O'Connor struck down the imposition of a special tax placed upon certain publications. As the Court explained, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585. Such discriminatory treatment, the Court held, "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 taxation." *Id.*

Here, of course, the trial court conducted no such inquiry, instead dismissing the cause of action out of hand. What are the City's reasons for treating tattoo studios more harshly than many other businesses? What is the basis for sweeping tattoo studios in with other businesses subject to such requirements? The Council proceedings suggest an animus toward tattoo studios. See, e.g., I.R. 3, Exh. 2 at 8 (one resident spoke against "individuals he perceived to be typical tattoo parlor customers and stated the opinion that the presence of these individuals would be undesirable in the neighborhood"); *id.* at 11 (Council member stated that the "primary concern" was to "avoid the proliferation of these types of businesses"). Does the City's special use process effectuate the desire to suppress this type of protected speech? It certainly appears so; and at the very least the appellants should be able to conduct discovery and present an evidentiary case.

Even under the rational basis test, when discrete groups are forced to go through a special use process, the government must demonstrate that the requirement is based upon and addresses characteristics attributable to the group. In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court applied the rational basis test to a special use permit requirement for various uses, including group homes for the mentally retarded. The district court found that one

of the animating factors for the city's decision to deny the permit was neighborhood opposition. "But mere negative attitudes, or fear," the Supreme Court ruled, "unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like." *Id.* at 448. The City "cannot avoid the strictures of the equal protection guarantee," the Court held, "by deferring to the wishes or objections of some fraction of the body politic." *Id.* "Because in our view the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests," the Court concluded that the permit process violated equal protection. *Id.*

Applying the rational basis test, federal courts frequently have struck down laws subjecting certain businesses to disadvantageous treatment that denied freedom of enterprise. See, e.g., *Cornwell v. Joseph*, 7 F. Supp.2d 1106 (S.D. Cal. 1998) (African hairstyling); *Santos v. City of Houston*, 852 F. Supp. 601 (S.D. Tex. 1994) (jitneys); *Brown v. Barry*, 710 F. Supp. 352 (D.D.C. 1989) (street-corner shoeshine stands). Plainly appellants have stated a cause of action and the trial court should have allowed and engaged in fact-finding to facilitate the applicable equal protection review.

Arizona courts likewise have applied the equal protection guarantee of Art. II, § 13 robustly. In *Big D Constr. Corp. v. Ct. of Appeals*, 163 Ariz. 560, 789 P.2d 1061 (1990), the Arizona Supreme Court applied a rational basis standard to strike down a bid preference statute. If a statute "limits a 'fundamental right' or affects a suspect class," the Court declared, "we subject it to strict scrutiny and will only uphold it if it is necessary to promote a compelling state interest." *Id.*, 163 Ariz. at 566, 789 P.2d at 1067. But even if strict scrutiny does not apply, "we must first ascertain whether the challenged legislation has a legitimate purpose and then determine if it is reasonable to believe that the classification will promote that purpose." *Id.*

Whether strict scrutiny or the rational basis test applies here is not dispositive of the legal question presented on appeal: under either standard, the lawsuit should not have been dismissed. The Complaint (I.R. 1, ¶ 41) alleges that appellees "have encompassed tattoo studios in general, and Plaintiffs' business in particular, in a disadvantageous category of businesses deemed unsavory and undesirable, and have taken damaging action against Plaintiffs on that basis. Defendants' decision to discriminate against tattoo studios is based on perceptions, stereotypes, and prejudice, rather than facts relevant to Plaintiffs' fitness to operate a business that is as legitimate as scores of other businesses

routinely approved by Defendants." That allegation is made in the context of a business protected by free-speech guarantees. It states an equal protection claim under both the federal and state constitutions, and it was manifest error for the trial court to dismiss the claim. See, e.g., *Blue Horseshoe Tattoo, V, Ltd. v. City of Norfolk*, 2007 WL 6002098 (Va. Cir. Ct., Jan. 17, 2007) at *3-4 (it was error to dismiss a lawsuit challenging the denial of a business permit for a tattoo studio where unequal treatment was alleged).

III. DUE PROCESS

The U.S. Supreme Court has proclaimed that the "touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998). The due process claim here also is intertwined with the free-speech cause of action. Due process guarantees that a "public official may not constitutionally possess unrestricted power to license or to prohibit the exercise of First Amendment rights according to the official's own conception of what may be the socially beneficial course." *Main Rd. v. Aytch*, 522 F.2d 1080, 1088 (3rd Cir. 1975).

The legal argument over due process under Arizona law is about the level of scrutiny the Court should apply, which in turn depends upon whether the City's decision to deny the special use permit was legislative or administrative in nature.

The answer is not the same for all cities and all special use processes, but depends on the specific rules governing the process.

The test for determining whether a government action is legislative or administrative consists of 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." *Redelsperger v. City of Avondale*, 207 Ariz. 430, 433, 87 P.3d 843, 846 (App. 2004). This Court has held that generally, zoning decisions are legislative in nature because they are authorized by general police power, whereas special use permits are administrative in nature because generally they are issued pursuant to the language of an ordinance and do not create or alter existing zoning. *Sandblom v. Corbin*, 125 Ariz. 178, 184, 608 P.2d 317, 323 (App. 1980). Accordingly, "the issuance of a special use permit is generally recognized as an administrative act." *Id.* Accord, *Redelsperger*, 207 Ariz. at 437, 87 P.3d at 850.

In Mesa, decisions on special use permits are an administrative act. Though they are permanent decisions, they are of specific and limited application. Indeed, the City has approved special use permits for tattoo studios in other contexts. Moreover, the City has adopted criteria governing special use permits (I.R. 3, Exh. 1 at § 11-6-3(B)), and applied those criteria in denying the special use permit here.

By contrast, no policy was created by the denial of the special use permit. Indeed, it would be impossible to describe any "policy" emanating from the Council's decision given that the reasons were varied and not made explicit. The Council simply denied the permit.

The applicable standard of review of administrative decisions is the arbitrary and capricious standard. An action 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). Additionally, the decision must be supported by substantial evidence. *Siegal v. Ariz. St. Liquor Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (App. 1991). By contrast, the trial court appeared to apply a lesser standard of review applicable to legislative decisions. See, e.g., *Aegis of Ariz., LLC v. Tn. of Marana*, 206 Ariz. 557, 569-70, 81 P.3d 1016, 1028-29 (App. 2003) ("listening to public opposition . . . is part of the *legislative* process of rezoning") (emphasis added).

The permit denial cannot be said to be supported by substantial evidence, and the trial court did not insist on it. As a result, this cause of action should be remanded to the trial court for consideration on the merits as well.

Conclusion

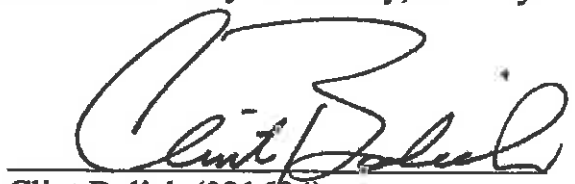
The City's actions here call to mind the landmark U.S. Supreme Court decision 125 years ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886), which struck down the denial of business licenses to applicants for reasons "not having respect to their personal character and qualifications for the business, . . . but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other those from whom that consent is withheld, at their mere will and pleasure." The action is even more suspect when the business is imbued with protected speech.

Perhaps the City would not have filed its motion to dismiss had the Ninth Circuit's decision in *Anderson* come out earlier, imploding the foundations of the City's arguments. But the deed is done and now nearly two years have elapsed since the City denied appellants' rights. Not only have they been prevented from opening a legitimate business and pursuing their chosen livelihood during that time, but they have not been allowed to present a shred of evidence to vindicate their constitutional rights.

The narrow issue before this Court at this time is whether appellants have stated a cause of action. Plainly they have. We respectfully urge this Court

promptly to reinstate their case.

RESPECTFULLY SUBMITTED this 10th day of January, 2011 by:



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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 6,424 words.

RESPECTFULLY SUBMITTED this 10th day of January, 2011.

Carrie Ann Sitren

Certificate of Service

ORIGINAL and SIX COPIES of the foregoing Opening Brief FILED this 10th day of January, 2011, with:

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TWO COPIES of the Opening Brief MAILED this 10th day of January, 2011, by prepaid United States Postal Service First Class Mail, to:

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