ARIZONA COURT OF APPEALS

DIVISION ONE

JIE CAO, et al., Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353

REPLY BRIEF OF PLAINTIFFS/APPELLANTS JIE CAO AND HAINING "FRAZER" XIA

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

I. A.R.S. § 33-1228 does not authorize the forced sale of Unit 106.

The opening brief explained the parties' competing interpretations of A.R.S. § 33-1228, and why multiple provisions in the statute's text and its purpose support the Xias' interpretation. Specifically, § 33-1228 imposes several criteria designed to protect the minority interests, including (1) a provision in the termination agreement that "provide[s] that all the common elements and units of the condominium shall be sold following termination," A.R.S. § 33-1228(C), (2) the association must act as a "trustee" for this sale, and (3) the manner in which the proceeds will be divided (which will almost certainly differ from the appraised value), A.R.S § 33-1228(D).

The answering brief ignores much of the opening brief and makes several demonstrably false claims that ultimately confirm the Court should reject Defendants' interpretation and reverse.

A. Defendants' efforts to justify their failure to follow § 33-1228's requirements miss the mark.

1. Contrary to Defendants' contention, § 33-1228 requires that all the units be sold on the open market consistent with the association acting as a trustee.

Defendants contend (at 9), that the Xias have added two requirements to § 33-1228 that are not there: (1) that the property must "be sold on the

open market," and (2) that the association must sell the property "to someone that is not a current owner."

Open market. On the first point, the opening brief explained (at 29-31) the key fiduciary obligations the Association must discharge when acting as a trustee. Defendants do not dispute that the Association has these obligations when acting as trustee, i.e., that it must act in the best interest of all unit owners and cannot benefit one group of owners over another.

Instead, they dispute *when* the association must act as a trustee (*see* Argument § I.B below). But if the association must act as trustee in connection with the sale, then the association must attempt to sell the property "for the best price and on the best terms possible," including structuring the offering in the way designed "to cause the property to sell to the greatest advantage." 76 Am. Jur. 2d *Trusts* §§ 525-26. Defendants make no argument to the contrary. Perhaps there is a way to do this other than through a sale on the open market (e.g., if a buyer comes in pre-sale and makes an obviously ridiculously high offer that no one would match), but normally a sale on the open market is the only way to get "the best price and on the best terms possible." *Id.*

The law does not dictate the details of how the trustee should conduct the transaction, and the Xias do not contend otherwise. A trustee has discretion on how to conduct the details of the transaction, such as whether to use a commercial listing service, how to market the property, whether to hold an auction or instead accept offers over a particular period, whether to require prequalification of potential buyers, etc. But a trustee cannot merely hand over the units to the supermajority owner without taking any steps to determine whether other buyers might offer more—or even whether the presence of other potential buyers would cause the supermajority owner to offer more. So even if it is "unrealistic" that another buyer might be interested in condominiums near Arizona State University (as Defendants' claim at 9), that fact—found nowhere in the record—is legally irrelevant if the association must act as a trustee during this process.

Moreover, and contrary to their contention (at 10), it is possible to know the minimum terms of the sale and state them in the termination agreement even "[i]f the condominium is not marketed until after the termination agreement is entered into." The *minimum terms* required by A.R.S. § 33-1228(C) are just that—the worst deal the owners will accept. For example, the owners could set the minimum terms at $22.6 million, with a

90-day close, with only a financing contingency. That sets the floor below which no offer may be accepted. But potential buyers may offer better terms. Consequently, the *minimum* terms may differ from the *final* terms, and "the minimum terms of the sale [can] be provided in the termination agreement." (Answering Br. at 10.)

With that clarification, Defendants' list of questions (at 10-11) concerning how the owners would know who the buyer would be, the offer being made, or the timing of the sale have easy answers. The owners would not know those things in advance. Instead, the statute calls for them to set the "minimum terms," and then the condominium association, acting as a trustee, does the rest. Defendants also ask (at 10-11) what would happen if there is no buyer, or if only one buyer made a low-ball offer (i.e., below the minimum terms). Answer: there would be no sale, just like in an auction when no one bids higher than the reserve price. Above that reserve price/minimum-term floor, the auctioneer must accept the best offer, and cannot accept anything below the floor.

This dispute does not concern whether an association must sell the property in a particular way. The point is that the association, acting as

trustee, must comply with its fiduciary duties, which requires acting reasonably to sell the property on the best possible terms.

Sale to current owner. As for Defendants' second point (at 9), the Xias do not dispute that the statute allows for a sale to the current owner. A current owner willing to *outbid* all others may purchase the property. That is hardly an "impractical" requirement. The point is that the statute does not preordain the supermajority owner as the sole potential buyer.

2. The appraisal process is merely one of the protective measures aimed to protect the minority, but the sale price and appraisal price will differ.

Although an appraisal may provide some protection for minority owners, it is not the only protection in the statute. As the Xias explained (at 32-35), the statute requires the unit owners to receive the *actual* proceeds from the sale, not merely the appraised values. Specifically, the statute calls for dividing up the "proceeds of the sale," which get distributed "in proportion to" the unit owners' "respective interests," which in turn are determined by the appraised value. A.R.S. § 33-1228(D). In other words, the appraised values determine the *relative* size of each unit's piece of the pie. In almost all cases, the money a unit owner receives will not exactly equal the appraised value; that would occur only by happenstance.

Defendants nevertheless assert (at 11-12) that the appraised value *is* the required purchase price, and that the phrase "final sale amount" in the statute confirms this. Both arguments fail.

(a) The statute does not set the purchase price at the appraised value.

If the purchase price simply equals the appraisal price, the statute would have said so. Instead, the statute specified what gets distributed to the unit owners: "Proceeds of the sale." A.R.S. § 33-1228(D). That sets the size of the pie. The statute further specifies how to divide the pie: "in proportion to the respective interests of unit owners." *Id.* Those proportions flow from "the fair market values," which means the values set by "[a]n independent appraiser." § 33-1228(G). This process makes no sense if the purchase price simply equals the appraisal price. It would also make no sense to have to approve the "minimum terms of the sale" if the price is predetermined. § 33-1228(C).

Defendants do not explain how their view of the statute incorporates those terms. Instead, they assert (at 12-13) that "[the Xias] fail to recognize express language in the statute that the appraised value is 'the total [sic] fair market values of their units, limited common elements and common element

interests immediately before the termination,' which is also the required sale price under the statute." But everything outside of the quotation marks is not in the statute. Contrary to Defendants' misleading quotation, the quoted statutory phrase defines the "respective interest of unit owners," not the "sale price."

Moreover, requiring that the appraised value equal the purchase price would prevent the owners from recovering gains if a buyer would pay more than the appraised value (which often happens), and would *prevent* a sale if no one wants to buy at the appraised price. Like most real estate transactions, the sale price is the price that the buyer is willing to pay; it will almost always differ from the appraised value of the property.

Indeed, the Xias explained (at 34) that this distorted interpretation works only with an internal hostile takeover. Defendants merely respond by claiming (at 13) that a third-party could also get an appraisal. This misses the point. If an outside buyer bought at the appraised value with any transaction costs, the money would run out before fully paying the unit owners.

(b) The appraisal process ensures that unit owners are fairly compensated *relative to* other unit owners.

Defendants' argument (at 12-13) about the phrase "final sale amount" misunderstands the role of appraisals in the statute. The appraisal process, including a potential second appraisal, ensures that the *pieces* of the pie ('respective interests") are fair *relative to each other*; it does not set the total size of the pie ("proceeds of the sale"). Section 33-1228 hands the proceeds of the sale over to the association as a pot of money and then uses the appraisals to direct how the association should divide up the pot.

Consider an example. A person owns Unit 47 of a 50-unit condominium. An appraiser values Unit 47 at $200,000, and values the sum of all 50 units and common elements at $10,000,000. The "fair market value" of Unit 47 thus is $200,000, and its owner has a "respective interest" of 2%. Market conditions improve between the time of appraisal ("immediately before the termination," § 33-1228(G)(1)) and the time of the sale. The condominium complex sells for $12,000,000, with $750,000 of transaction costs. The net "proceeds of the sale" are $11,250,000. Of that, Unit 47's owner has a 2% "respective interest," so the owner would receive $225,000—

more than the $200,000 appraisal. The statute thus accounts for all the many reasons the sum of the appraised values might not match the net proceeds.

The owner of Unit 47 may also obtain a second appraisal. If it differs by less than 5%, the "higher appraisal is final" for purposes of calculating the respective interest compared to the other unit owners. A.R.S. § 33-1228(G)(1). If the two appraisals differ by more than 5%, an arbitrator sets "the final sale amount" for purposes of calculating the respective interests. *Id*. E.g., if the arbitrator values Unit 47 at $250,000, then the price used to calculate the "respective interest" would yield 2.5% ($250,000÷$10,050,000), which would yield a payment of about $280,000 ($11,250,000×0.025), with slightly reduced payouts to the other owners.

The entire statute works in relative terms ("in proportion to"), not absolute terms. In context, the phrase "final sale amount" means the final amount *relative to* the other unit owners.[1]

[1] Defendants assert in a footnote that the Xias' math comes from an old version of the statute. Not so. Everything in the Xias' briefs comes from the applicable 2018 version of the statute (APP067-68).

3. The fact that Dorsey Investments eventually owned all the units does not show compliance with § 33-1228(C).

The opening brief demonstrated (at 29, 38) that the sale here failed to comply with the statutory requirement that "*all* the common elements and units of the condominium *shall* be sold *following termination*." A.R.S. § 33-1228(C) (emphases added). Defendants do not dispute that the sale did not include all of the common elements and units. They instead contend that the statute allows for less than all of the property to be sold. It does not.

(a) The first sentence of § 33-1228(C) requires all property to be sold following termination, not a sale over time.

Defendants first contend (at 14) that because Dorsey Investments ended up owning everything by gobbling up all the units over time, they satisfied the statute's purpose of "requiring all of the condominiums to be sold." After all, they note (at 14), "PFP is the rightful owner of all the real estate that was once Dorsey Place Condominiums." But A.R.S. § 33-1228 requires that "all the common elements and units of the condominium shall be sold *following termination*." (Emphasis added). The process and timing matters, not whether the property eventually ends up in the hands of a single owner. In fact, an association could sell one part to one buyer and the rest

to another buyer, so long as "all the common elements and units" get sold after termination.

Defendants claim (at 14) that "it would be absurd to require [Dorsey Investments] to repurchase the units it already owns . . . ." But they offer no response to the extensive explanation the Xias presented. (Opening Br. at 43-45.) Far from absurd, this type of arrangement is common with joint-ownership arrangements, such as a tenants-in-common partition action. (*See id.*)

Moreover, as the Xias explained (at 36-38), requiring all the property to be sold aligns everyone's incentives—both the supermajority and the minority have an incentive to get the most favorable terms. It also avoids a conflict of interest prohibited by A.R.S. § 10-3863. (Opening Br. at 37-38.)

By contrast, allowing the supermajority to pluck off the minority units gives the supermajority an incentive to *minimize* the sale price. *See, e.g.*, *Kai v. Bd. of Dirs. of Spring Hill Bldg.*, 171 N.E.3d 42, 51 ¶ 22 (Ill. App. Ct. 2020) (Where all the property is to be sold, "the majority owners and the minority owners have the same interest . . . and majority owners can be expected to refuse to agree to any price that is significantly lower than the fair value of their units.").

Defendants do not respond to any of these arguments. But far from absurd, the statutory requirement to sell "all the common elements and units" follows longstanding common-law principles, aligns everyone's incentives, and makes perfect sense.

(b) The second sentence of § 33-1228(C) does not authorize a sale of less than all of the common elements and units.

Defendants next contend (at 15) that the second sentence of § 33-1228(C) permits a sale of less than all of the common elements and units. *See* A.R.S. § 33-1228(C) ("If, pursuant to the agreement, any real estate in the condominium is to be sold following termination, the termination agreement shall set forth the minimum terms of the sale.").

As the Xias explained in their opening brief (at 41-42), this sentence does not *authorize* any sales at all. It merely explains what must happen if the termination agreement will involve the sale of property (because not all terminations will involve a sale). So the only sentence authorizing a sale unambiguously requires "all" the common elements and units. This should end the inquiry.

But even if the second sentence creates ambiguity, the opening brief explained (at 42) that "any ambiguity or uncertainty [must be] decided in

favor of property owners" (the Xias). *Kubby v. Hammond*, 68 Ariz. 17, 22 (1948). Statutes such as this that "exist in derogation of property rights" must "be strictly construed in favor of the property owner." *Maricopa Cnty. v. Rana*, 248 Ariz. 419, 423, ¶ 11 (App. 2020). Those principles would require construing "any" to mean "all," as the dictionary Defendants cite confirms, *i.e.* any can be "used to indicate a . . . whole." Merriam-Webster Online Dictionary, "Any," 2.b., https://www.merriam-webster.com/dictionary/any; *see also State v. Sutherby*, 204 P.3d 916, 920, ¶¶ 17-25 (Wash. 2009) (collecting instances of "our repeated construction of 'any' as including 'every' and 'all'").

B. Contrary to Defendants' contention, the trustee's fiduciary obligations work exactly as the opening brief explained.

In light of the above, the only remaining point of contention is whether the Association must act as a trustee with fiduciary obligations when it sells the property. After all, Defendants admittedly made no attempt to sell property "for the best price and on the best terms possible." 76 Am. Jur. 2d *Trusts* §§ 525-26.

But Defendants' argument on this point rests entirely on the false premise (at 16) that "if the Association is required to seek other buyers in the

open market, the minimum terms of the sale cannot be provided in the termination agreement, which is in direct contravention of the requirements under A.R.S. § 33-1228(C)." As explained above (Argument § I.A.1), the termination agreement can easily include the minimum terms before a sale, just as the minimum reserve price can easily be provided before an auction occurs. Termination and sale are separate steps. The termination agreement contains the minimum terms and the sale sets the final terms. By conflating these steps and then contending (at 16) that the trustee obligations kick in after the *final* terms have been worked out, Defendants essentially eviscerate the trustee's obligations from the statute.

Fundamentally, Defendants urge the Court to hold that a condominium association satisfies its fiduciary obligations imposed by the statute even if it favors the interests of the supermajority owner over the interests of all of the other owners (to which the association also owes fiduciary obligations) and makes no effort to determine whether any other buyer would offer better terms. This interpretation would allow the supermajority owner to engage in rampant self-dealing. But the Legislature's decision to require the condominium association to act as a

trustee with fiduciary duties guards against that kind of self-dealing—like that which occurred here.

C. The statute's history does not help Defendants.

Defendants invoke the statute's legislative history (at 16-18), but the history does not help them. Nothing in the statute indicates legislative support for the kind of self-dealing that occurred here. To the contrary, the Legislature has continued to *add* protections for minority owners, including increasing the required percentage vote and strengthening appraisal protections.

A.R.S. § 33-1228 unquestionably gives special powers to a supermajority owner: the supermajority owner may terminate the condominium and authorize a sale of the real estate over the objections of the minority owners. But no version of the statute, past or present, also gives the supermajority owner an additional, extraordinary superpower: a unilateral guaranteed option to take the minority owners' property at an appraised value, regardless of whether any other buyers would offer better terms, and without any competition from any other buyers.

D. Defendants urge the Court to adopt an unreasonable and dangerous interpretation.

The opening brief demonstrated that Defendants' proposed interpretation is unreasonable and dangerous. Defendants' answering brief largely ignored this, but the effects are real and predictable.

Consider one example. Consider, where a hypothetical "Alternative Investor" is willing to pay $25 million for the entire development and Dorsey Investments knows it. Dorsey Investments would have no incentive to accept the offer, even though more than 90% of the proceeds would go into Dorsey Investments' pocket. Instead, Dorsey Investments could still exercise its supposed option to take the remaining units for their appraised values of $1,454,870 (at a $22.6 million total valuation), and then turn around and sell the whole thing to Alternative Investor for $25 million, netting an extra $2.4 million for itself in the process (and depriving the Xias and the other minority owners of the extra $150,000 they would otherwise get). Defendants' interpretation thus invites mischief and self-dealing.

By contrast, under the Xias' interpretation, the existence of Alternative Investor means that the sale price would be at least $25 million, or perhaps higher if Dorsey Investments beats that offer. The Association's fiduciary

duties as trustee would require accepting the best offer, which would benefit *all* owners and would avoid the self-dealing that occurred here, even if Dorsey Investments still ends up as the buyer.

II. As applied, A.R.S. § 33-1228 authorized an unconstitutional taking of the Xias' property.

In their opening brief (at 52-54), the Xias demonstrated that A.R.S. § 33-1228, as-applied to the forced sale of Unit 106, authorized an unconstitutional taking of their private property for a private purpose in violation of the Arizona Constitution. Defendants do not contend that this transaction has a public purpose, and they have abandoned their argument from below that the takings clause requires direct government involvement.

Instead, they first argue (at 19-21) that the Xias had to notify elected officials under A.R.S. § 12-1841. Second, they argue (at 21-23) that the Xias contractually consented to having a third party force the sale of their property against their will. Both arguments fail.

A. The Xias have asserted an as-applied challenge to the statute, which does not require notice.

1. The Xias brought an as-applied claim because it attacks the application of the statute to their specific property.

An individual who challenges the constitutionality of a statute may bring a facial, an as-applied challenge, or both. Generally, "a plaintiff can

only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional *in all of its applications*." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quotation marks omitted; emphasis added); *see also* 16 C.J.S. *Constitutional Law* § 163 ("A facial challenge to the constitutional validity of a statute considers only the text of the measure itself and not its application to the particular circumstances of an individual."). A typical facial challenge alleges a defect in the law itself, such as federal preemption or unconstitutional vagueness. A successful facial challenge renders a statute "invalid in *all* of its applications." *Washington*, 552 U.S. at 449 (emphasis added).

By contrast, "[a]n 'as-applied' challenge assumes the standard is otherwise constitutionally valid and enforceable, but argues it has been applied in an unconstitutional manner to a particular party." *Korwin v. Cotton*, 234 Ariz. 549, 559, ¶ 32 (App. 2014).

In takings cases, "[a]n 'as-applied' challenge . . . occurs when the landowner attacks the application of the [law] *to specific property*." *Mutschler v. City of Phoenix*, 212 Ariz. 160, 162, ¶ 6 n.3 (App. 2006) (emphasis added). On the other hand, a facial challenge in this context "requires the

landowner to show that the *mere enactment* of the statute" constituted a taking of his or her property. *Id.* (emphasis added).

Here, the Xias challenge Defendants' use of the statute to transfer title of a particular piece of property ("Unit 106 at 1275 E. University Drive, Tempe, Arizona 85281") in a particular transaction on a particular date. [IR-40 at 2, ¶ 7.] The relief they seek is limited to their property. They seek to quiet title of their unit, declare this specific termination transaction invalid, impose a constructive trust, declare the statute unconstitutional only as applied to "the power to compel Plaintiffs to transfer their real property to [Dorsey Investments]," and grant possession of their unit, plus damages, etc. [IR-40 at 13-14, ¶¶ A-F (APP089-90).] They want their unit back.

The Xias have not asked to enjoin the statute or for any declaratory relief that extends beyond their unit's four walls. If this case succeeds, A.R.S. § 33-1228 would not be unconstitutional in all applications. For example, an association selling terminated condominium property to a municipality to build a public road could involve a constitutional public purpose.

The Xias brought only an as-applied challenge and § 12-1841 does not apply.

2. Under Defendants' view, nearly all challenges to the application of a statute would be facial.

Defendants nevertheless argue (at 19) that the Xias have brought a facial challenge because their challenge "reaches beyond the particular circumstances of" the given transaction. They emphasize that the Xias' situation is not "unique or particular" and that one would "encounter the same arguments in any other condominium termination and sale." This is not the test.

Defendants cite *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010), as support, but *Reed* focused on the fact that the plaintiffs expressly sought to enjoin government action that went beyond their particular case. The scope of *relief* matters, not the scope of the legal theory. As the Supreme Court put it elsewhere, "the distinction between facial and as-applied challenges . . . goes to the *breadth* of the remedy employed by the court . . . ." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010) (emphasis added).

Here, the Xias have not sought to enjoin any other condominium association from using § 33-1228. Under *Reed*, the Xias challenge the law only as applied to the four walls of Unit 106.

Defendants may mean that if the Xias prevail, the *precedent* could curtail the use of § 33-1228. But courts look at the direct relief, not future precedential effect. Any other rule would obliterate the dividing line. In any as-applied challenge, a published opinion will create precedent applicable to other cases. But that possibility does not render the case a facial challenge. For example, in *State v. Havatone*, 241 Ariz. 506, 508, ¶ 1 (2017), the Supreme Court ruled that A.R.S. § 28-1321(C), which authorizes "nonconsensual blood draws from unconscious DUI suspects," is "unconstitutional as applied to the facts of this case." As a matter of *precedent*, the case effectively obliterated § 28-1321(C). But as a matter of *remedy*, the only relief awarded was to suppress blood test results in one criminal trial. The criminal defendant did not have to notify the Speaker of the House about his challenge.

So too here. Regardless of whether this case creates precedent for future cases, the Xias seek relief only as to their particular unit, in a particular transaction, on a particular date.

3. In the alternative, the parties agree that failure to comply with A.R.S. § 12-1841 does not require dismissal.

Even if the Court decides that A.R.S. § 12-1841 applies, the superior court still erred by dismissing the complaint. "A litigant does not waive a challenge, however, by failing to comply with § 12-1841." *Merrill v. Merrill*, 238 Ariz. 467, 469, ¶ 13 (2015), *vacated on unrelated federal grounds*, 137 S.Ct. 2156 (mem.) (2017). Instead, "[t]he consequence for noncompliance is that an unserved official can move to vacate any finding of unconstitutionality, and the court must give the official a reasonable opportunity to be heard." *Id.*

If A.R.S. § 12-1841 applies, therefore, the proper remedy is merely to invite the government officials to intervene in the appeal. *See id.* This Court has repeatedly done so. *See, e.g.*, *Grammatico v. Indus. Comm'n*, 208 Ariz. 10, 12 n.3 (App. 2004), *aff'd*, 211 Ariz. 67 (2005) ("[W]e issued an order notifying the Arizona Attorney General of Grammatico's constitutional challenge to [the statute] and providing the Attorney General an opportunity to address the claim."). Defendants agree, asking the Court not to affirm dismissal on this point, but merely to "require compliance with A.R.S. § 12-1841 before

addressing Appellants' arguments." (Answering Br. at 20.) The superior court erred by dismissing.

B. The Declaration did not authorize the sale.

On the merits, Defendants make one argument: that the condominium Declaration is "a contractual agreement allowing for the sale or transfer of property" that provides independent authorization for the forced sale of the Xias' unit. (Answering Br. at 22.) They rely upon two sections of the Declaration: § 13.4, which authorizes termination (not sale), and § 6.1, which establishes the Association and defines its sources of power.

But these sections do not authorize what happened here, and even if they did, they do not do so conspicuously and unambiguously, as required by law.

In evaluating these arguments, the Court should bear in mind that Dorsey Investments and the Association have offered no substantive defense of the constitutionality of A.R.S. § 33-1228 as applied to this transaction. In other words, they do not argue that § 33-1228 itself is constitutional as applied to this transaction. Consequently, in evaluating whether Declaration §§ 13.4 and 6.1 authorize the transaction, the Court may assume

that § 33-1228 is unconstitutional as applied to this particular taking of Unit 106.

1. Declaration § 13.4 authorizes only terminations, not sales.

Defendants assert (at 21) that Declaration § 13.4, titled "Termination of the Condominium," authorizes the termination and sale of Unit 106. But this section authorizes only *termination*, not sale:

> [T]he Condominium may be terminated only by the agreement of Unit Owners of Units to which at least ninety percent (90%) of the votes in the Association are allocated.

[IR-51 at 49, § 13.4; (APP146).]

Termination and sale are different. Termination does not require selling any property at all. The statute specifically provides for termination without sale, in which case the unit owners retain the property as "tenants in common." *See* A.R.S. § 33-1228(E). The declaration provision authorizing a termination therefore does not authorize a taking.

2. Section 6.1 cannot give the Association more power than the statute gives.

Defendants also assert (at 21) that a generalized reference to the Condominium Act—a statute that would have defined the scope of the Association's powers regardless of the terms of the Declaration—serves to

waive the fundamental property rights of all unit owners. But Declaration § 6.1, which serves as the initiating clause for the Association, contains only a general statement that the Association will have the powers of the Condominium Act as well as other laws and regulations, and says nothing about a forced sale:

> No later than the date on which the first Unit is conveyed to a Purchaser, the Association shall be organized as a nonprofit Arizona corporation. The Association shall be the entity through which the Unit Owners shall act. The Association shall have such rights, powers and duties as are prescribed by the Condominium Act, other applicable laws and regulations and as are set forth in the Condominium Documents together with the [sic] such rights, powers and duties as may be reasonably necessary in order to effectuate the objectives and purposes of the Association as set forth in this Declaration and the Condominium Act.

[IR-51 at 24, § 6.1 (APP121).]

For several reasons, this general statement does not authorize the Association to force a sale when exercising the statutory power as to a particular case is unconstitutional.

(a) Defendants waived this argument.

Below, no one asserted that § 6.1 authorized this transaction. The Association cited only § 13.4; Dorsey Investments cited nothing. [IR-59 at 6 (citing § 13.4).] The Court should disregard the new argument on appeal

about § 6.1. *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 349, ¶ 17 (App. 2007) ("Generally, an appellate court will not consider issues not raised in the trial court." (quotation marks and citation omitted)).

(b) If an application of a statute is unconstitutional, contractual power derived from that statute does not salvage it.

Importantly, this is not a case where the condominium declaration specifically and explicitly authorizes the supermajority to vote to sell individual units. The only question presented by Declaration § 6.1 is whether giving an association the powers of the Condominium Act gives it the power to effect an unconstitutional application of the Act. It does not.

Giving the Association the powers specified by the Condominium Act merely gives the Association the powers specified by the Act—nothing less and nothing more. So if the Constitution limits the permissible applications of the Act, then the constitutional applications are the only powers the Association can derive from the Act. After all, the Association's power is derivative—Declaration § 6.1 relies on A.R.S. § 33-1228 and does not grant any relevant power *independent* of the statute. A derivative power cannot be greater than the principal source of power. Section 6.1 does not therefore salvage this unconstitutional application of A.R.S. § 33-1228.

To illustrate, consider a hypothetical statute (A.R.S. § 33-1299) in the Condominium Act that gives a condominium association the power to fine residents for displaying a religious symbol. This hypothetical statute would plainly violate Article 20, § 1, and Article 2, § 6 of the Arizona Constitution. Consider a hypothetical condominium declaration that says nothing about displaying religious symbols, but has a provision identical to Declaration § 6.1 giving the condominium association the powers of the Condominium Act. If an association fines a resident for displaying the Cross or a Mezuzah, a court would hold that application of the statute unconstitutional. The association could not rely on the general grant of Condominium Act authority to salvage the constitutionality of the otherwise unconstitutional application of the statute. If a particular application of a statute is unconstitutional, a general statement giving an actor the power provided for by the statute does not render constitutional an otherwise unconstitutional application of the statute.

At bottom, a term in a declaration cannot bless an unconstitutional statutory application. For example, a municipal ordinance restricting "the alienation of the property in question to a person of color" violates the Fourteenth Amendment of the U.S. Constitution. *Buchanan v. Warley*, 245

U.S. 60, 82 (1917). A condominium association cannot avoid that unconstitutional result through a declaration provision that gives the association the power to enforce the ordinance. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (holding unconstitutional the enforcement of racially restrictive covenants in real property servitudes).

Or consider two hypothetical condominiums. Condominium A's declaration says, "The Association shall have the powers as are prescribed by the Condominium Act." The Act still applies equally to both condominiums regardless of whether the declaration says so. *See* A.R.S. § 33-1201 ("This chapter applies to all condominiums created within this state without regard to the date the condominium was created."). Under Defendants' view, Condominium B's association would be limited to constitutional applications of the Condominium Act, whereas Condominium A's association could apply the Act in plainly unconstitutional ways, merely because of a sentence in the declaration that gives powers already granted by law. The Constitution does not work this way.

Simply put, when the only source of contractual authority derives solely from a statute, and a particular application of the statute is

unconstitutional, that authority cannot be exercised as to that unconstitutional application. Ruling otherwise would expand the *delegated* power to be broader than the *principal* source of power. Here again, Defendants do not defend the constitutionality of the *statute* as to this application, so Declaration § 6.1 cannot authorize this otherwise unconstitutional application.

(c) The general reference to the Condominium Act does not clearly and unambiguously modify the Xias' fundamental property rights.

In addition, even if § 6.1 did purport to authorize the forced sale of private property, it does not do so in a manner sufficient to overcome Arizona's strong protections of property rights.

Arizona favors "the free use and enjoyment of [] property." *Wilson v. Playa de Serrano*, 211 Ariz. 511, 515, ¶ 16 (App. 2005) (quotation marks and citation omitted). Condominium declarations may modify those rights. But under longstanding Arizona condominium law, "a fundamental restriction of the individual owners' expected property rights must be set forth in the Declaration with sufficient specificity that purchasers are on notice" of that restriction. *Id.* Restrictions on the property rights of individual unit owners contained within a Declaration are enforceable only if the restriction is "clear

and unambiguous." *Id.* at 514, ¶ 10. Accordingly, "when there is *any* ambiguity" as to the restriction, courts "will construe the Declaration against the restriction and in favor of the free use of enjoyment of the property." *Id.* at 515, ¶ 16 (internal quotation marks omitted; emphasis added).

Defendants essentially argue that in agreeing to Declaration § 6.1, the unit owners consented to have their property sold out from underneath them. But the rights to alienation or disposition are fundamental property rights that cannot be abrogated or modified lightly. *See generally* 63C Am. Jur. 2d *Property* § 43 ("property right consists not merely in its ownership and possession, but in the unrestricted right of disposal.").

Here, Declaration § 6.1 does not provide even an ambiguous modification, much less the required "clear and unambiguous" modification or abrogation of the Xias' property rights of alienation or disposition. *Wilson*, 211 Ariz. at 514, ¶ 10.

Declaration § 6.1 says *nothing* about a forced sale following termination or giving a developer the ability to forcibly take the Xias' property. Instead, a reasonable buyer would interpret Declaration § 6.1 merely as the initiating provision for the Association—it *establishes* the Association and specifies the *sources* of the Association's rights. Moreover, by operation of law, the

Association already has the powers specified by the Condominium Act, regardless of whether Declaration § 6.1 specified them or not. *See* A.R.S. § 33-1201. Granting statutory power already applicable by law does not "clear[ly] and unambiguous[ly]" give buyers notice that they would be (1) giving the Association broader powers than the Association would have under the statute alone, (2) consenting to *unconstitutional* applications of the law, or (3) giving up fundamental property rights. *Wilson*, 211 Ariz. at 514, ¶ 10.

The power Defendants exercised is extraordinary. This is not a case about how many cats a unit owner may keep, or about whether a unit owner may install a satellite dish, clothesline, or basketball goal. (All of which the Declaration addresses in more specificity. [Declaration §§ 4.2, 4.7, 4.9, 4.22 (APP112, APP116, APP119).]) This is a case about the most fundamental private property rights—the right to occupy a unit, and the right to sell it. To tinker with those fundamental rights, the Declaration must do more than merely give the Association whatever powers the Association already has under the generally applicable law. Again, Defendants do not defend the constitutionality of this application of § 33-1228 on the merits, so the Court may assume that this application is unconstitutional.

For these reasons, the Court should hold that Declaration § 6.1 does not authorize the forcible taking of private property.

(d) A.R.S. § 33-1228 provides the only possible source of authority.

Defendants claim (at 21) that "A.R.S. § 33-1228 "in [and] of itself does not authorize the sale of the condominium . . . ." Instead, they claim, it merely "dictates the process of terminating and selling . . . ." They describe (at 22) the statute as "permissive," explaining that nothing can happen "without a minimum percentage of unit owners agreeing to the termination and sale of the condominium, pursuant to the Declaration."

As covered above, the Declaration does not directly authorize any *sale*, so the Declaration does not provide the necessary authority to sell someone else's private property. As for the termination agreement, that would have sufficed had it borne the signatures of *the people whose property was being sold*. But none of the six minority owners agreed to sell their property. This argument presupposes that the voters have *power* to force a sale, but they do not. *See* 63C Am. Jur. 2d *Property* § 43 ("[O]ne who does not hold title to property or is not acting within his or her scope as an agent for the owner cannot pass or transfer title to that property.").

A.R.S. § 33-1228 is the only possible source of authority. But Arizona cannot authorize one party to take another person's private property for private use. Defendants do not dispute that point, nor do they otherwise substantively defend the constitutionality of applying A.R.S. § 33-1228 to this transaction.

3. Foreclosure sales, mechanic's liens, and special assessments are all different in kind from the transaction at issue.

To illustrate their point that a valid contract permits one party to take another party's property, Defendants compare this case to foreclosure, mechanic's lien sale, and special assessment. They list these as examples where a contractual provision allows for a forced sale. Indeed, Defendants claim (at 23), "[i]t is the agreement among the parties that allow for a foreclosure or sale of property . . . ." But as explained above, the only alleged sources of a contractual agreement (Declaration §§ 13.4 and 6.1) do not authorize the forced sale of any property.

Moreover, all three examples involve the same fundamental premise: foreclosure of an interest one party has in someone else's real property, all of which originate in debt. *See, e.g.*, *Steinberger v. McVey ex rel. Cnty. of Maricopa*, 234 Ariz. 125, 140, ¶ 65 (App. 2014) ("under [a] deed of trust, the

trustee holds legal title until the loan balance is paid."). If the lender has "an interest in real property," as in the case of a mortgage (or a deed of trust in Arizona), then the property owner no longer has sole ownership with clear title. Restatement (Third) of Property: Mortgages § 1.1. Instead, the lender with an interest in property by definition has certain rights to the property. If the property owner fails to satisfy the obligation, the other party may foreclose. Here, by contrast, the Xias owed no debt to Defendants, and Defendants did not have an interest in the Xias' property that allows them to initiate a forced sale.

In addition, in all those examples the property owner has the legal power to keep the property merely by paying the debt or otherwise satisfying the obligation. Here, the Xias could do nothing to stop the forced sale even though they had done nothing wrong and owed nothing to Defendants.

In sum, and unlike in Defendants' foreclosure/lien examples, no contractual provision authorized the sale, the Xias owed no debt, Defendants had no interest in Unit 106 to authorize a forced sale, and the Xias could do nothing to prevent the sale. The only source of authority for the Association to sell Unit 106 is A.R.S. § 33-1228. But authorizing a third party to sell the

Xias' property for a private purpose is a taking under settled constitutional law. What occurred here is unconstitutional.

CONCLUSION

The Court should reverse and remand.

RESPECTFULLY SUBMITTED this 8th day of November, 2021.

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