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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFFS/APPELLANTS

JAMES M. MANLEY
Ariz. Bar No. 031820
Pacific Legal Foundation
3241 E. Shea Blvd., #108
Phoenix, AZ 85028
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
JManley@pacificlegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellants, Jie Cao, Haining "Frazer" Xia, and Stone Xia, to address the second issue presented:

> Article 2, § 17 of the Arizona Constitution prohibits takings of private property for private use … except for inapplicable exceptions. As applied, A.R.S. § 33-1228 authorizes a private investor to take private property for private real estate development. In this case, did A.R.S. § 33-1228 authorize an unconstitutional taking of private property for private use?

Op. Br. at 20.

PLF is a nonprofit, tax-exempt corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom. Founded over 45 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in several landmark United States Supreme Court cases in defense of the right to make reasonable use of one's property, and the corollary right to obtain just compensation when that right is infringed. *See, e.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City and Cty. of San Francisco*, 141 S. Ct. 2226 (2021); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). PLF also routinely participates in important property rights cases as amicus curiae. *See, e.g.*, *Horne v. Dep't of Agriculture*, 135

S. Ct. 2419 (2015); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012).

INTRODUCTION

Statutes that infringe upon fundamental property rights are interpreted strictly. This rule of statutory construction requires that Arizona's condominium statute—A.R.S. § 33-1228, which provides that upon termination of a condominium property regime, "all common elements and units" may be sold—be read narrowly; and it is in this narrow context that the statute cannot be read to authorize the picking-off of individual units for sale to favored insiders at an insider price.

In 2018, the Xia Family (also known as the Caos) purchased one of the 96 units in the Dorsey Place condominium as a home. However, less than a year later, PFP Dorsey Investments LLC ("Dorsey Investments") purchased as many of the units as it could to convert Dorsey Place from privately-owned condominiums to a Dorsey Investment-owned rent-generating apartment building. But the Xias and five other families refused to sell.

Ultimately, though their refusal amounted to nothing as Dorsey Investments had acquired 90 of the 96 units and had garnered control of the condominium's

homeowner's association.[1] As majority owner, Dorsey Investments terminated the condominium, which converted the Xias' ownership of their unit into to a tenancy in common. Dorsey Investments believed it was empowered, as the controlling member of the condominium association, to sell "all common elements and units" within the development. *Id*. § 33-1228(C). However, Dorsey Investments did not intend to sell all the common elements and all units. Instead, it maintained that section 33-1228(C) permits the sale of *individual* units in an insider sale. Under the purported authority of the statute, it sold the Xias' unit to itself at a price established by its own appraiser.[2]

The Xias' lawsuit alleged that the Dorsey Investment-controlled association had no authority to sell the Xias' unit. The Xias argued that as applied by Dorsey Investments, section 33-1228 allows a private for-profit entity to forcibly acquire private property in an insider sale, in violation of the U.S. and Arizona Constitutions' requirements that takings of private property be for public use, and with just compensation.

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[1] A.R.S. § 33-1228(A) ("Except in the case of a taking of all of the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage of the declaration specifies. . . .").

[2] *See id*. § 33-1228(D) ("If any real estate in the condominium is to be sold following termination, title to that real estate on termination vests in the association as trustee for the holders of all interest in the units. Thereafter, the association has all powers necessary and appropriate to effect the sale.").

SUMMARY OF ARGUMENT

There are two reasons why this Court should conclude as a matter of statutory interpretation that section 33-1228 does not permit the association to pick off individual units and sell them to a favored insider.

1. Property owners have a right to keep their own property and to decide whether to sell it to another private party. To guard this right, statutes that purport—but do not expressly require—an owner to surrender property should be narrowly interpreted to avoid any abrogation of that right. Thus, section 33-1228 should be read in its plain and natural words, which requires a free-market sale of the *entire* property, and does not allow individual sales of individual units. A.R.S. § 33-1228(C) ("*all* the common elements and units shall be sold") (emphasis added).

2. Additionally, as applied by the court below, section 33-1228(C) unconstitutionally allows a private for-profit investment company to forcibly acquire another's private property, for its own private benefit and without any judicial determination of just compensation, violating both Arizona and U.S. Constitutions' Public Use and Just Compensation Clauses.

ARGUMENT

I. The Termination Statute's Sale Provisions Cannot be Read To Deprive Property Owners of Their Property Rights

The plain and natural reading of the termination statute's sale provision—that "all the common elements and units of the condominium shall be sold"—means that

if a sale is to take place after termination, then *everything* must be sold. *See Bilke v. State*, 206 Ariz. 462, 464, 80 P.3d 269, 271 (2003) ("If the language is clear, the court must 'apply it without resorting to other methods of statutory interpretation,' unless application of the plain meaning would lead to impossible or absurd results.") (citations omitted). Individual units may not be carved out for individual sale.

But even if the statute is not sufficiently clear, any ambiguity must be construed against the abrogation of private property. One of government's key functions is to protect private property, and as a consequence Arizona's courts recognize strong protections of property rights. *See*, *e.g*., *Bailey v. Myers*, 206 Ariz. 224, 227, 76 P.3d 898, 901 (Ariz. App. 2003) ("The framers of our Constitution understood that one of the basic responsibilities of government is to protect private property interests."). The Founders recognized "that the protection of private property is indispensable to the promotion of individual freedom." *Cedar Point Nursery*, 141 S. Ct. at 2071. Thus, a court may not approve a forced deprivation of private property under the authority of a statute, unless the statute is first examined through an extraordinarily sharp lens to ensure it does not deprive the owner of her property rights. *See Orsett/Columbia L.P. v. Superior Ct. ex rel. Maricopa Cty*., 207 Ariz. 130, 133, 83 P.3d 608, 611 (Ct. App. 2004) ("a policy of strict construction protects private property rights from overreaching by the government"). The courts must be especially careful where, as here, a statute delegates to a private party the

authority to acquire the property of another private party. *See* Ariz. Const. art. 2, § 17 ("Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes."). The termination statute recognizes that owners of condominiumized property have not forfeited their fundamental property rights simply by virtue of having chosen this form of ownership. *See* A.R.S. § 33-1228(A) ("Except in the case of a taking of all the units by eminent domain, a condominium may be terminated only by agreement of unit owners of units to which at least eighty percent of the votes in the association are allocated, or any larger percentage the declaration specifies.").

An owner's fundamental property rights include the right to keep it (*i.e.*, the right not to sell it). *See Hodel v. Irving*, 481 U.S. 704, 716 (1987) ("Even the United States concedes that total abrogation of the right to pass property is unprecedented and likely unconstitutional. Moreover, this statute effectively abolishes both descent and devise of these property interests[.]"); *Buchanan v. Warley*, 245 U.S. 60, 74 (1917) ("Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land."); Donald Kochan, *The ~~[Takings]~~ Keepings Clause: An Analysis of Framing Effects from Labeling Constitutional Rights*, 45 Fla. State U. L. Rev. 1021 (2018) (the right to keep property and protect it from unjust acquisition is a fundamental property right).

The U.S. Supreme Court recognized this principle more than a century ago. *See Buchanan*, 245 U.S. at 74 ("Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property"). In *Buchanan*, the Court held that one of the "essential attributes" of property is the right to sell it to someone of the seller's choosing:

> The concrete question here is: May the occupancy, and, necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the States, or by one of its municipalities, solely because of the color of the proposed occupant of the premises? That one may dispose of his property, subject only to the control of lawful enactments curtailing that right in the public interest, must be conceded. The question now presented makes it pertinent to enquire into the constitutional right of the white man to sell his property to a colored man, having in view the legal status of the purchaser and occupant.

Id. at 75.

This right includes the right to not be forced to sell it, and remains the foundation of the Supreme Court's view of property rights today. As recently as last term the Court reaffirmed the fundamental nature of the right to possess property, and to keep others out. *See Cedar Point Nursery*, 141 S. Ct. at 2072 ("The right to exclude is 'one of the most treasured' rights of property ownership.") (internal citation omitted). This right is "of the most fundamental elements of property ownership." *Ala. Ass'n of Realtors v. Dep't of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam). The right to exclude others from private property

obviously encompasses the right keep it, and to not be forced to sell it. As a result, courts often construe statutes, like section 33-1228, which appear to deprive owners of property, very carefully, to protect against incursions on constitutionally protected property rights. *See, e.g., Siemsen v. Davis*, 196 Ariz. 411, 415, 998 P.2d 1084, 1088 (Ariz. Ct. App. 2000) (The owner's "right to preserve and protect their private property is also constitutional 'and should not be lightly regarded or swept away.'") (quoting *Bickel v. Hansen*, 169 Ariz. 371, 374, 819 P.2d 957, 960 (Ariz. Ct. App. 1991); *Gulotta v. Triano*, 125 Ariz. 144, 146, 608 P.2d 81, 83 (Ariz. Ct. App. 1980)); *McCready v. McCready*, 168 Ariz. 1, 3, 810 P.2d 624, 626 (Ariz. Ct. App. 1991) (a court lacks jurisdiction in a partition action to order one owner to sell its interests to the other owner, and the only remedy is that the entire property be sold).

It may be more advantageous for the Dorsey Investments-controlled association to pick off individual units and sell them to itself than to put the entire building up for sale, which would require Dorsey Investments to compete in the open market for ownership of the entire building. But the careful statutory lens that this Court applies must disregard Dorsey Investments' convenience, and counsels against affirming the judgment unless the statute clearly and unambiguously authorizes the sale of individual units, which it does not. The plainest and most natural reading of section 33-1228(C) is that the term "all" modifies both "common elements" and "units." But even if that reading is not clear, any ambiguity in the

statute's meaning should be resolved in favor of protecting the Xias' right to keep their property.

II. Reading the Termination Statute To Authorize Insider Sale of Individual Units Puts It in Grave Constitutional Risk

A second principle of statutory construction compels the same narrow reading of section 33-1228: "if possible [the] court construes statutes to avoid rendering them unconstitutional." *Hayes v. Cont'l Ins. Co*., 178 Ariz. 264, 272, 872 P.2d 668, 676 (1994) (citations omitted). Dorsey Investments' interpretation of section 33-1228, as endorsed by the superior court, puts the statute in grave risk of authorizing a violation of Arizona's and the U.S. Constitution's Public Use and Just Compensation Clauses: (1) the statute empowers the association to take private property for the sole benefit of Dorsey Investments; and (2) the statute allows an insider sale not accompanied by a guarantee of just compensation.[3] Consequently, this Court should find the statute requires the sale of all units.

[3] Dorsey Investments' effort to shift focus from the statute to the condominium documents, and its argument that these documents provide the authority needed to acquire the Xias' condominium unit, fails to recognize that the condominium documents expressly incorporated section 33-1228, and are therefore subject to the same defects. Although the Xias agreed to the Declaration of Condominium—which allows for the termination (but not sale) of the condominium if 90% of the association members approve—Dorsey Investments sought and obtained dismissal *only* under the authority of section 33-1228, and not the Declaration. Because the superior court did not consider the Declaration, it is not relevant to this appeal. In any event, the Declaration does not authorize the sale of any property upon termination, much less individual units.

A. Converting Private Condominium Units to Rent-Generating Apartments Is a Purely Private Use

Reading the statute to authorize the Dorsey Investments-controlled association to sell the Xias' unit to Dorsey Investments would result in an unconstitutional private-benefit taking in violation of the Fifth and Fourteenth Amendments, and article 2, section 17 of the Arizona Constitution. Although section 33-1228 is not cast as an express delegation of the State's sovereign eminent domain power, Dorsey Investments' reading of the statute effects the same result: it authorizes one private party to acquire the property of another private owner against their will. As approved by the court below, the statute impermissibly delegates to Dorsey Investments a power only the government possesses—the ability to forcibly acquire private property.

Arizona respects and protects private property and is at the forefront of states with strong recognition of private property rights and strict limitations on the power to take private property. Since 1970, Arizona's Constitution has recognized more limits on governmental power—and greater protections for private property owners—than the corresponding provisions in the U.S. Constitution:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having first been made . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a

> judicial question, and determined as such without regard to any legislative assertion that the use is public.

Ariz. Const. art. 2, § 17.

Arizona was one of the states that—in the wake of the Supreme Court's infamous decision in *Kelo v. City of New London*, 545 U.S. 469 (2005)—rejected the conflation of the phrase "public use" with "public purpose," which sometimes permits the use of the takings power for private gain. In the wake of *Kelo*, the citizens of Arizona adopted the Private Property Rights Protection Act, prohibiting eminent domain that does not serve a public use. A.R.S. § 12-1131 ("Eminent domain may be exercised only if the use of eminent domain is authorized by this state, whether by statute or otherwise, and for a public use defined by this article."). Public uses are expressly limited to: "(i) The possession, occupation, and enjoyment of the land by the general public, or by public agencies; (ii) The use of land for the creation or functioning of utilities; (iii) The acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or (iv) The acquisition of abandoned property." *Id*. § 12-1136(5)(a).[4] *See*, *e.g*.,

[4] In Arizona, public use "[d]oes not include the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health." A.R.S. § 12-1126(5)(b).

Valencia Kolb Properties v. Pima Cty., No. CV-13-1319-TUC-DCB, 2014 WL 12575855 *7 (D. Ariz. 2014) ("Under the [Private Property Rights Protection Act] a landowner is entitled to compensation if 'the existing rights to use, divide, sell or possess private real property are reduced by the enactment or applicability of any land use law enacted after the date the property is transferred to the owner and such action reduces the fair market value of the property.'").

Dorsey Investments' express purpose in acquiring the Xias' home was part of its plan to convert the privately-owned condominium building into a rent-generating apartment building it owned. The Xias' complaint alleged that this benefits only Dorsey Investments and fails to satisfy Arizona's definition of "public use." *See* Plaintiffs' Second Amended Complaint at 9–10. In considering a motion to dismiss for failure to state a claim, the superior court was obligated to treat the complaint's factual allegations as true. *Brosie v. Stockton*, 105 Ariz. 574, 576, 468 P.2d 933, 935 (Ariz. 1970) ("[W]e have held that a motion to dismiss concedes the truth of all material facts."). The complaint sufficiently stated a claim for a private-benefit taking in violation of the Arizona Constitution. The complaint also pleaded a viable private use taking under the U.S. Supreme Court's more lax "public use" standard. The Xias alleged that the sale of their unit would not serve a "public purpose" under *Kelo* because it was done for the sole purpose of converting their condominium into

a rent-generating apartment owned by Dorsey Investments. *Kelo*, 545 U.S. at 477–89.

B. An Insider Sale Does Not Ensure Just Compensation

When forcibly deprived of property, the owner is at least entitled to fair market value. *State ex rel. Miller v. Filler*, 168 Ariz. 147, 149, 812 P.2d 620, 622 (1991) ("Just compensation implies the full monetary equivalent of the loss sustained by the owner whose land [was] taken or damaged."). "Just Compensation" does not mean a take-it-or-leave-it amount determined solely by Dorsey Investments or an arbitration process with no possibility of judicial review. *See Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893) (determination of just compensation is a judicial question). The Xias' complaint stated a claim for a violation of the just compensation requirements by alleging that the sale to Dorsey Investments was not for fair market value, but was based solely on an appraisal by Dorsey Investments. *See* Plaintiffs' Second Amended Complaint at 7 ("[T]he Draft Condominium Termination Agreement provided that the distribution of the sale shall be allocated to unit owners of five different types of property: Owners of a Type A Unit will receive $234,000 . . . The Xia Condo was determined to be a Type A Unit."). The complaint alleges that this amount was calculated by Dorsey Investments' appraiser, which appraised each unit *type* without appraising the Xias' condominium itself. *Id.* at 6. This states a claim for a violation of the Just Compensation Clauses of the

Arizona and U.S. Constitutions, which require that compensation reflect "the full and perfect equivalent" of the property taken, generally determined by the fair market value of the property on the date of the taking. *See Monongahela*, 148 U.S. at 326 ("There can . . . be no doubt that the compensation must be a full and perfect equivalent for the property taken[.]"). The allegations in the Xias' complaint state a valid claim that they have not been provided just compensation for the taking of their property.

CONCLUSION

This Court should vacate or reverse the superior court's dismissal for failure to state a claim and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 29th day of November, 2021.

/s/ James M. Manley
JAMES M. MANLEY
Ariz. Bar No. 031820
Pacific Legal Foundation
3241 E. Shea Blvd., #108
Phoenix, AZ 85028
(916) 419-7111
JManley@pacificlegal.org

Attorney for Amicus Curiae
Pacific Legal Foundation