

SUPREME COURT OF ARIZONA

JIE CAO, et al.,

Plaintiffs/Appellants,

v.

PFP DORSEY INVESTMENTS, LLC, et al.,

Defendants/Appellees.

Arizona Supreme Court
No. CV-22-0228-PR

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
(FILED WITH PARTIES' CONSENT)**

KATHRYN D. VALOIS*
Fla. Bar. No. 1010150
PACIFIC LEGAL FOUNDATION
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
(561) 691-5000
KValois@pacificlegal.org
**Pro hac vice pending*

JAMES M. MANLEY
Ariz. Bar No. 031820
PACIFIC LEGAL FOUNDATION
3241 E. Shea Blvd., #108
Phoenix, AZ 85028
(916) 419-7111
JManley@pacificlegal.org

*Attorneys for Amicus Curiae
Pacific Legal Foundation*

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (“PLF”) respectfully submits this amicus curiae brief in support of Plaintiffs/Appellants, Jie Cao, Haining “Frazer” Xia, and Stone Xia (collectively “the Xias”), to address the first and second questions presented:

1. Either on its face or as applied in this case, does A.R.S. § 33-1228 authorize the taking of private property for private use in violation of Article 2, § 17, of the Arizona Constitution?
2. If any common elements or units in a condominium are to be sold pursuant to a condominium termination agreement, does A.R.S. § 33-1228 require all the common elements and units to be part of that sale?

See Order Granting Review, *Cao v. PFP Dorsey Invs., LLC*, No. CV-22-0228-PR (Ariz. Aug. 23, 2023) (“Order”), at 1.

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 50 years ago, PLF is the most experienced legal organization of its kind. PLF attorneys have participated as lead counsel in many 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., Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369 (2023); *Sackett v. Env’t Prot. Agency*, 598 U.S. 651 (2023); *Wilkins v. United States*, 598 U.S. 152 (2023); *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S. Ct. 2226 (2021); *Knick v.*

Twp. of Scott, 139 S. Ct. 2162 (2019); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013). PLF also regularly participates in important property rights cases as amicus curiae in other federal and state courts nationwide. *See, e.g., Horne v. Dep’t of Agric.*, 135 S. Ct. 2419 (2015); *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012); *Walton v. Neskowin Reg’l Sanitary Auth.*, 369 Or. 338 (2022) (decision forthcoming).

PLF submitted an amicus curiae brief in the Court of Appeals in this case.

INTRODUCTION

Because A.R.S. § 33-1228 abrogates an owner’s fundamental right to possess and keep private property, the authority it delegates must be viewed through an extraordinarily careful lens, strictly avoiding any construction that may raise constitutional concerns. Thus, the statute must be read as authorizing a condominium termination agreement to require sale of “*all* ... units” following termination, not just the units held by holdout owners.

But as applied by PFP Dorsey Investments, LLC (“Dorsey Investments”) here—where a private investment company has taken over a condominium association and singled out individual unit owners to force the sale of their property to the investment company at the investment company’s price—Section 33-1228 authorizes an unconstitutional private seizure of another’s private property. Because the government cannot take the Xias’ private property and transfer it to Dorsey

Investments for its private use and benefit, a statute cannot be applied to authorize Dorsey Investments to do the same thing itself.

FACTS

In 2018, the Xia Family purchased one of the 96 units in the Dorsey Place condominium for their home. However, less than a year later, Dorsey Investments acquired as many of the units as it needed to convert the condominium from privately-owned units to a Dorsey Investments-owned rent-generating apartment building. The Xias and five other families wanted to keep their homes, and they declined to sell.

Ultimately though, their refusal amounted to nothing because Dorsey Investments had acquired 90 of the 96 units and had thereby garnered control of the condominium association's board.¹ As the controlling member of the condominium association, Arizona law authorized the condominium termination agreement to require "that all the common elements and units shall be sold following termination."

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 the declaration specifies. . . .").

Id. § 33-1228(C).² However, Dorsey Investments maintained that the statute authorizes the sale of “all common elements,” but does not require the sale of *all units*, permitting the piecemeal sale of *individual* units. In short, it read the requirement of “all” in the statute’s text that “all common elements and units” be sold, to apply only to “common elements” and not “all . . . units.” Under the purported authority of the statute, it sold the Xias’ unit to itself at a price established by its own appraiser.

The Xias asserted that the Dorsey Investments-controlled association had no authority to sell the Xias’ unit alone, without selling all other units. 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 for private benefit, which violates the U.S. and Arizona Constitutions’ requirements that takings of private property be for public use and provide just compensation. The superior court dismissed the Xias’ complaint.

² The language regarding the sale of “all common elements and units of the condominium” is currently found in A.R.S. § 33-1228(E). However, in 2018, when the Xias purchased their condominium the 1986 version of A.R.S. § 33-1228 was in effect. *Cao v. PFP Dorsey Investments, LLC*, 253 Ariz. 552, 556–57 (App. 2022). In the 1986 version, the “all common elements and units” language was found in A.R.S. § 33-1228(C). As the operative version of § 33-1228 is the 1986 version, this brief cites to A.R.S. § 33-1228(C) for the “all common elements” language.

The Court of Appeals agreed with Dorsey Investments and held that Section 33-1228 does not require the sale of “all ... units,” but allows picking-off of units for individual sale. *Cao*, 253 Ariz. at 557. Both parties cross-petitioned for review. This Court granted both petitions in part.

SUMMARY OF ARGUMENT

1. Section 33-1228 should be read to effectuate its plain and natural meaning, permitting a condominium termination agreement to require a free-market sale of the *entire* property. A.R.S. § 33-1228(C) (“*all* the common elements and units shall be sold”) (emphasis added). The statute cannot authorize the association to carve out a single unit and forcibly acquire it. Property owners have a fundamental right to keep property and to decide whether to sell it, except in the face of a valid exercise of the sovereign power of eminent domain. To avoid an unconstitutional application of Section 33-1228(C), the statute cannot be construed as authorizing a private for-profit investment company to forcibly acquire—for its own private benefit and without any judicial determination of just compensation—another’s private property.

2. If the Xias’ property is sold, Section 33-1228 should be read in a manner that grants the Xias constitutionally-required just compensation. Just compensation is the price that their property would obtain at a public sale, not the reduced price that Dorsey Investments itself valued the property at.

ARGUMENT

I. Section 33-1228 Should be Construed to Avoid Authorizing a Taking of the Xias' Private Property for Dorsey Investments' Private Use

A. Arizona Zealously Guards Private Property Rights

As a necessary corollary of the fundamental right to exclude others, the right to keep and possess property includes the right to not be forced to sell property, absent a lawful exercise of eminent domain. *See Culp v. United States*, 131 F.2d 93, 98 (8th Cir. 1942) (“The right to the enjoyment of life and liberty and the right to acquire and possess property are fundamental rights[.]”); *United States v. Dominion Oil Co.*, 241 F. 425, 427 (S.D. Cal. 1917) (“Possession of property, with an accompanying presumptive right of ownership, such as exists in the case at bar, carries with it a right to the use and enjoyment of such property until by due process of law and after full hearing it has been finally adjudged that such possession and claim of title are unfounded.”); *Arizona Elec. Power Coop., Inc. v. DJL 2007 LLC*, 246 Ariz. 534, 540 (App. 2019) (“Possession is certainly one of the greatest attributes of ownership of property. The possessor exercises dominion over the property, and *a condemnor, be it municipality or private corporation* thereafter denies the owner of its usage, its rental value, and its enjoyment.”) (citation omitted); *see also* 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 right to keep, use, and exclude are private property’s most essential attributes and remain the foundation of our concept of property rights. The U.S. Supreme Court recently reaffirmed the fundamental nature of the right to keep private property. *See Tyler*, 598 U.S. at 637–42 (finding the government cannot take more property than it is owed). The Court also recently reaffirmed the fundamental right to possess private property. *See Ala. Ass’n of Realtors v. Dep’t of Health & Human Svcs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (“And preventing them from evicting tenants who breach their leases intrudes on one of the most fundamental elements of property ownership—the right to exclude.”). And to control who enters onto property. *Cedar Point*, 141 S. Ct. at 2072 (“The right to exclude is ‘one of the most treasured’ rights of property ownership.”) (internal citation omitted). The right to exclude others from private property obviously encompasses the right to keep it and to not be forced to sell it.

Likewise, Arizona law presumes that owners can keep and maintain their private property. *See, e.g., Calmat of Arizona v. State ex rel. Miller*, 176 Ariz. 190, 195 (1993) (“Possession is certainly one of the greatest attributes of ownership of property.”) (citation omitted); *Siemsen v. Davis*, 196 Ariz. 411, 415 (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 (App. 1991)).

A core purpose of government is to protect private property. *See, e.g., Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Warford*, 69 Ariz. 1, 8 (1949) (“The constitutional provision on ‘Eminent Domain’ gave the right to take private property, in a limited way for ‘private use’ and in a broader and general way for ‘public use,’ provided payment is made. If there were no eminent domain provision, private property could not be so taken. Therefore, private property rights existed prior to the enactment of that provision.”); *Bailey v. Myers*, 206 Ariz. 224, 227 (App. 2003) (“The framers of our Constitution understood that one of the basic responsibilities of government is to protect private property interests.”); *see also* Declaration of Independence (U.S. 1776) (“We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty and the pursuit of happiness.— That to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed[.]”); *Cedar Point Nursery*, 141 S. Ct. at 2071 (The founders recognized “that the protection of private property is indispensable to the promotion of individual freedom.”).

B. The Fundamental Right to Keep Property and Exclude Others May Only be Taken by a Lawful Exercise of Eminent Domain for Public Use

The fundamental property rights to possess, keep, and exclude may give way to the public interest in very limited circumstances, such as a valid exercise of the sovereign power to take private property for public use upon payment of just compensation. Arizona’s Constitution recognizes greater protections for private property owners—and recognizes more limits on governmental power—than the U.S. Constitution. These protections include stronger prohibitions against taking private property for private use:

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 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. § 12-1136(5)(b).

Arizona expressly recognizes the longstanding principle that the sovereign power of eminent domain may not be legitimately exercised to take property from one private owner and give it to another private owner. *See Calder v. Bull*, 3 U.S. 386, 388 (1798) (“[A] law that takes property from A. and gives it to B . . . is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.”). In the wake of *Kelo*, the people of Arizona adopted the Private Property Rights Protection Act, prohibiting eminent domain that does not serve a public use. *See* 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 as 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.

A.R.S. § 12-1136(5)(a); *see also*, A.R.S. § 12-1111 (listing the purposes for which eminent domain may be exercised).

Thus, no Arizona government has the power to take the Xias' private property and transfer it to Dorsey Investments for Dorsey Investments' private use and benefit.

C. Section 33-1228 Must be Construed Narrowly to Avoid Authorizing a Private Taking

If the government is prohibited from taking the Xias' property for a private use or purpose, Section 33-1228 cannot be interpreted to empower a private actor such as Dorsey Investments to have greater authority to take private property than the government itself has. *See Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 264–67 (1914) (holding that a mining company was not entitled to forcibly acquire a right of way through another private mine, because the tunnel was purely for the company's private profit, and not a public use). Dorsey Investments' stated purpose in acquiring the Xias' home was to own the entire condominium building and convert it into a rent-generating apartment building for Dorsey Investments' benefit. Appellees' Supp. Br. at 16, *Cao v. PFP Dorsey Investments, LLC*, No. CV-22-0228-PR (Ariz. Sep. 12, 2023). The taking of the Xias' unit for such use and purposes decidedly would not serve a "public purpose" under even the permissive *Kelo* test—let alone the more rigorous "public use" standard adopted by the Arizona Constitution and the Private Property Rights Protection Act.

Before enabling a private purpose taking of property under the authority of Section 33-1228, this Court must examine the statute with an extraordinarily sharp lens to ensure that the Xias' constitutional property rights are not being infringed. Courts have long employed a rule of constitutional avoidance which requires statutes that abrogate property rights to be read narrowly to avoid treading on protected constitutional rights. *See Orsett/Columbia L.P. v. Superior Ct. ex rel. Maricopa Cnty.*, 207 Ariz. 130, 133 (App. 2004) (“[A] policy of strict construction protects private property rights from overreaching by the government.”); *see also United States v. Security Indus. Bank*, 459 U.S. 70, 78–82 (1982) (construing a bankruptcy statute narrowly to avoid violating the Takings Clause).

For example, in *Outdoor Sys., Inc. v. City of Mesa*, this Court explained that courts construe zoning ordinances narrowly in favor of the property owner, because such restrictions “exist in derogation of property rights[.]” 169 Ariz. 301, 304 (Ariz. 1991). Similarly, Arizona eminent domain statutes are construed strictly against permitting the unlawful exercise of eminent domain. *See City of Phoenix v. Harnish*, 214 Ariz. 158, 161–62 (App. 2006) (“We are also guided by the strict principles of statutory interpretation applied to exercises of eminent domain power by local governments generally and to extraterritorial condemnations in particular. . . . We narrowly construe these [eminent domain] powers and will not expand them beyond what is expressly granted by the legislature. . . .”); *see also City of Mesa v. Smith*

Co. of Ariz., Inc., 169 Ariz. 42, 44 (App. 1991) (“We interpret the statutes narrowly because the power of eminent domain belongs to the state. . . .”).

This Court should apply this rule of construction and read Section 33-1228 narrowly to protect private property. Reading the statute as Dorsey Investments urges would result in an unconstitutional private-benefit taking in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and Article 2, Section 17, of the Arizona Constitution.

D. Reading Section 33-1228 To Require All Condominium Units be Sold at Termination Protects Private Property Rights

Reading Section 33-1228 to require all condominium units be sold at termination is consistent with the Xias’ private property rights and long-standing Arizona property law that protects the right to jointly own property, and also protects individual owners when terminating collective ownership forms.

The court of appeals incorrectly interpreted the permissive and required clauses in Section 33-1228(C). The statute reads: “A termination agreement may provide that all the common elements and units of the condominium shall be sold.” § 33-1228(C). The lower court read “may” to modify “all,” so that the termination agreement *could* require the sale of all the elements and all the units, but it could also require the sale of just *some* of the units. *Cao*, 253 Ariz. at 559.

But in the statute, “may” refers to whether the termination agreement requires that the units be sold at all. This statutory section is the first time that the statute

references the units being sold, so it would make sense to read the statute as saying that the termination agreement does not have to provide for the sale of the units *at all*. The very next sentence in the statute further shows that “may” was modifying whether the termination agreement required the sale at all: “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.” § 33-1228(C). There could be termination agreements that did *not* require the sale of any real estate. In the full context of the statutory provision, “may” qualifies whether the termination agreement required the sale of any units, not how many of the units must be sold. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167–69 (2012) (“The entirety of the [statute] thus provides the context for each of its parts.”).

When “may” is properly read as modifying whether the termination agreement requires the units to be sold, then when the termination agreement *does* provide that the units should be sold, the statute requires that “all” the common elements and “all” the units “shall” be sold. Requiring all the common elements and units to be sold is a narrow statutory interpretation that does not violate the takings clauses of the United States and Arizona Constitutions. If all the units are sold, then the units will bring back the highest price on the market. However, if “may” is interpreted as modifying “all” and Dorsey Investments can buy up the individual

units without any competition, then this statute, as applied to the Xias, authorizes an unconstitutional taking for private use.

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. The Xias Are Entitled to Just Compensation, and Section 33-1228 Should be Read to Require that All the Units be Sold

This Court should also read Section 33-1228 narrowly to avoid violating the Just Compensation Clause. If the Xias' property is taken, they are entitled to just compensation, but reading the statute to allow the sale of some of the units prevents the Xias from receiving their constitutionally required 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 (1991) ("Just compensation implies the full monetary equivalent of the loss sustained by the owner whose land

[was] taken or damaged.”). Under Arizona law, the preferred method of valuing “fair market value” is based on the sale of similar properties. *See Pima Cnty. v. Gonzalez*, 193 Ariz. 18, 20 (App. 1998); *Maricopa Cnty. v. Barkley*, 168 Ariz. 234, 241 (App. 1990). Under this measure, the homeowner is entitled to an amount as close as possible as what their property would obtain if put up for sale. As the Sixth Circuit recently explained, even in tax foreclosure cases, where the property owner is not entitled to fair market value, the owner is still entitled to what the property would obtain at a public sale. *Freed v. Thomas*, Nos. 21-1248/1288/1339, 2023 WL 5733164 at *2 (6th Cir. Sept. 6, 2023). Here, where the Xias *are* entitled to fair market value, they are entitled to what their property would obtain at a public sale, not the self-dealing price that Dorsey Investments wants to pay.

The forced sale of the Xias’ property 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 6–7 (“[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.”). This amount was calculated by Dorsey Investments’ own appraiser, who appraised unit *type* without appraising the actual condominium units themselves. *Id.*

This odd valuation scheme violates 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 Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (“There can . . . be no doubt that the compensation must be a full and perfect equivalent for the property taken[.]”). Just compensation is supposed to be the equivalent of what a willing buyer would pay a willing seller. *S’holders & Spouses of Carioca Co. v. Superior Ct. in & for Maricopa Cnty.*, 141 Ariz. 506, 509 (1984) (“[C]ompensation for condemned property is determined by the market value of the property taken, or the price at which a willing seller will sell and a willing buyer will buy.”). The amount determined by Dorsey Investments’ appraiser, for which Dorsey is willing to sell itself the Xias’ property, is not the price a willing buyer would likely pay to a willing seller. It is not just compensation.³

³ “The Constitution, both State and Federal, requires ‘just compensation’. This Court holds that in meeting this test the trial court must use the measure of damages [that] is most appropriate under the circumstances to insure fair compensation to the landowner whose property rights are taken. The constitutional test makes it mandatory upon the trial court to determine what is fair and just compensation, and to use this method or formula to arrive at [the] amount of damages.” *State ex rel. Miller*, 168 Ariz. at 150–51 (citing *State ex rel. Herman v. S. Pac. Co.*, 8 Ariz. 238, 242 (App. 1968)).

The Xias are entitled to just compensation, but Dorsey Investments is trying to bypass this requirement by arguing it is permitted, via Section 33-1228, to sell itself these units at its own set price. The statute cannot be interpreted in such a manner. Instead, the statute should be interpreted narrowly to require the sale of *all* the units, in which case, Dorsey cannot sell the Xias' units to itself for a discounted price. Rather, competing purchasers should be permitted to bid competing offers on the property, putting the "market" in "fair market value" and avoiding a violation of the Just Compensation Clause.

CONCLUSION

This Court should vacate or reverse the court of appeals in part and affirm in part and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 26th day of September, 2023.

KATHRYN D. VALOIS*
Fl. Bar No. 1010150
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
(561) 691-5000
KValois@pacificlegal.org
**Pro hac vice pending*

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

*Attorneys for Amicus Curiae
Pacific Legal Foundation*