No.

IN THE

SUPREME COURT OF THE UNITED STATES

ALCR, LLC,

Petitioner,

vs.

Linda W. Swain and Eileen R. Breslin,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a court order requiring the owner of private property to operate a business on the private property violates the involuntary servitude provision of the Thirteenth Amendment of the United States Constitution.

PARTIES TO THE PROCEEDINGS BELOW

The Plaintiffs/Respondents are Linda W. Swain and Eileen R. Breslin.

The original Defendants at the trial court were Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, and Kwang Co., LLC (collectively referred to as "Bixby"). They sold the property at issue to TTLC Ahwatukee Lakes Investors, LLC ("TTLC"). The Appellants before the Arizona Court of Appeals and the Arizona Supreme Court were TTLC and ALCR, LLC ("ALCR"). Now, ALCR owns the property that is at the center of this case.

CORPORATE DISCLOSURE STATEMENT

ALCR, LLC has no parent corporation and no publicly held company owns any interest in it.

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TABLE OF CITED AUTHORITIES

OPINIONS AND ORDERS BELOW

The opinion of the Arizona Supreme Court's Denying the Petition for Review is reported at ___ Ariz. ___; __ P.3d ___ (2020). The Arizona Appellate Court's opinion is reported at 247 Ariz. 405, 450 P.3d 270 (Ariz. App. 2019).

JURISDICTION

The Arizona Supreme Court denied the Petition for Review on April 3, 2020. The Chief Justice of the Supreme Court of the United States extended the time for filing petitions for certiorari due to the COVID-19 Pandemic by sixty (60) days so that the Petition for Certiorari is due by August 31, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The Thirteenth Amendment of the Constitution of the United States provides:

> Section. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation

U.S. Const. Amend. XIII.

STATEMENT OF THE CASE

This case addresses the question of whether the owner of private property can be compelled by law to operate a business on the property. Petitioner contends that forcing a private property owner to operate a business on its property violates the involuntary servitude provision of the Thirteenth Amendment of the United States Constitution ("Thirteenth Amendment").

I. Facts Material to Consideration of the Issue Presented

In 1986, a master planned community known as Ahwatukee was developed in Maricopa County, Arizona. Deed restrictions were recorded on a portion of the property ("the Property") restricting its use to a golf course, facilities and improvements thereto, for ten (10) years.

On November 13, 1992, an amendment was made to the deed restricting governing the Property as follows:

> The Property shall be used for no purposes other than golf courses and such improvements and facilities (including without limitation, clubhouses, restaurants, pro shops, overnight lodging facilities, resort and connected recreational facilities, bars, parking areas and golf cart trails) and uses as are reasonably related to, convenient for or in furtherance of golf course use or the accommodation of golf course patrons and guests; except that the Property may be further used for easements for ingress and egress (vehicular and otherwise), pedestrian trails and walks, cables, utilities, drainage and other similar easements and rights of way, and for the construction and maintenance of walls, fences and other boundary type protection, in each case reasonably related to the development and use of the Ahwatukee project, together with improvements reasonably related to said easements, uses and related services. . . . Declarant on its behalf and on behalf of its successors and assigns, reserves the right to redesign or reconfigure the golf courses at the Property or remove, modify, alter, relocate, replace, expand, abandon, demolish, cease the use of or rebuild any of the

improvements or facilities related to the use of the Property for golf courses, all at the discretion of the then owner of the Property.

5. Paragraph 5:

No Right or Privilege. Nothing in this Declaration shall constitute, nor be deemed to constitute, a right or privilege for any Benefitted Person to enter upon or use the Property for any purpose.

6. Paragraph 6:

Term. The covenants, conditions, restrictions and easements set forth herein shall be appurtenant to and run with the land and shall be binding upon all present and future owners, occupants and users of the Property or any portion thereof and all persons claiming an interest in and to the Property in perpetuity; provided however, that if Declarant or Developer (including their successors or assigns) determines that there has been a material change in conditions or circumstances affecting the Property or the covenants, conditions, restrictions and easements set forth herein, Declarant or Developer may petition the Maricopa County Superior Court or any other court or adjudicative body of competent jurisdiction for modification of this Declaration. (Emphasis added).

In the 1980's, a golf course ("the Golf Course") was built and operated on the Property. In June of 2006, Bixby purchased the Property. At the time of the purchase of the Property, Bixby's only interest was owning and operating golf courses, and at the time of trial, the only assets of Bixby were four golf course properties.

After the purchase, Bixby invested an additional $400,000 into the Golf Course to improve it. By early 2007, the Golf Course was losing money and Bixby began using profits from the operation of its other golf courses to subsidize the operation of the Golf Course. By late 2007, the Great Recession hit the United States that adversely affected many businesses and caused a sharp downturn in the world economy. The economic downturn caused by the Great Recission caused golf courses

across the United States to close at an accelerated rate. Roan Vincent, *Golf Courses Suffer as Recission Deals a Bogey*, L.A. Times (Nov. 22, 2009); *see* section II(c) *supra*.

In 2008, Bixby explored options to redevelop the Property. When the homeowner's association and surrounding neighborhood indicated there was no interest in a redevelopment of the Property, Bixby discontinued any discussions about redevelopment and continued to operate the Golf Course at a loss until May 2013. At that time, Bixby's other golf courses were becoming less profitable and could no longer subsidize the operation of the Golf Course. In the fall of 2013, Bixby ceased operation of the Golf Course and placed a fence around the Property. In May of 2014 Bixby drained the ponds on the Property and the Property began to revert to its natural state.

A year after the Golf Course was closed, the Respondents, Linda Swain and Eileen Breslin, owners of property adjacent to the Golf Course, sued Bixby claiming that the closing of the Golf Course violated the CC&Rs. Respondents did not seek any damages due to their property being devaluated, but rather, sought a mandatory injunction to require Bixby to operate a golf course on the Property. Bixby answered and filed a counterclaim seeking declaratory relief alleging that it was losing money operating the Golf Course, it was permitting the Property to revert to its natural state, it was not otherwise using the Property for any commercial purpose and it should not be compelled to operate a golf course business on the Property. In June, TTLC entered into a Purchase and Sale Agreement with Bixby and purchased the Property from Bixby and became the defendant in the pending litigation.

TTLC attempted to obtain an amendment to the 1992 Lakes Deed Restriction pursuant to Paragraph 10(b) of the deed restrictions, which required 51% of the Benefitted Persons to approve the amendment. TTLC failed to obtain the required number of signatures.

The case went to trial and TTLC argued that it could not financially operate a golf course on the Property because 1) a golf course could not operate at a profit; 2) the cost to reconstruct a golf course on the Property was prohibitive; 3) it would be impossible to obtain financing to reconstruct a golf course, and 4) to require it to build and operate a golf course on the Property violated the prohibition against involuntary servitude found in the Thirteenth Amendment.

After a trial to the bench, the trial court entered a mandatory injunction ordering TTLC to restore a golf course on the Property and operate it. Thus, even though the Respondents had no right to "enter upon or use the Property for any purpose," (¶ 5 of the CC&Rs) the trial court not only ordered that the Property owner build a golf course it was ordered to operate it. The trial court did not specify if the golf course had to be 9 or 18 holes, whether it had to have water hazards or sand traps or how large it should be. Neither did the order state the number of hours or days it had to be open, the amount it had to charge for a round of golf nor did it discuss a multitude of other issues that arise when one operates a business.

TTLC filed a notice of appeal to the Arizona Court of Appeals and then defaulted on its payments on the Property under the Purchase and Sale Agreement. Bixby noticed a Trustee's Sale on May 14, 2018. Prior to the Trustee's Sale, the Deed

of Trust and Assignment of Rents between Bixby and TTLC was assigned from Bixby to ALCR. The Trustee's Sale occurred on September 20, 2018, at which time ALCR was the highest bidder and is the current owner of the Property.

II. The Issue Decided by the Arizona Court of Appeals Presented for Review

The Arizona Court of Appeals' ("Court of Appeals") decision, *Swain, et al. v. Bixby Village Golf Course, Inc.*, 247 Ariz. 405, 450 P.3d 270 (Ariz. Ct. App. 2019) upheld the trial court's mandatory permanent injunction that requires that the owner of the Property must build a golf course and then operate it. The Court of Appeals ignored the fact that the CC&Rs were restrictive rather than affirmative; and held that the Property could not be permitted to go back to its natural state but had to be maintained as a golf course and the Property owner ***must operate*** a golf course business on the Property. The Court of Appeals held that requiring a property owner to operate a business on the Property does not violate the involuntary servitude provision of the Thirteenth Amendment. *Swain*, 247 Ariz. at 418, 450 P.3d at 283.

The trial court and the Court of Appeals determined that even if the condition on the Property was a restrictive covenant, it requires the owner of the Property to build a golf course and operate it even though the local homeowners do not have a right to use it. This holding by the Court of Appeals requiring that a property owner must operate a golf course business on its private property violates the Thirteen Amendment's prohibition against involuntary servitude.

Property all over the United States contains restrictive covenants that limit how properties can be used, but now, based on this decision, if one buys property

containing a restrictive covenant, the property owner can be affirmatively mandated to operate a business on the property when the CC&Rs contain a restrictive covenant. Thus, if a developer creates a planned community and allocates a portion of the property to be used as a golf course or other recreational activity; i.e., tennis or swimming club and has covenants placed on the property to limit its use to such, the property owner must build and operate a golf course or other recreational facilities for as long as the deed restriction runs with the property even if in the future it is not economically viable, the residents have no right to use the facility and the owner of the property wants to permit the property to revert to its natural state.

Under the Court of Appeals' ruling, a court has the power to make a property owner run a business on their private property. Petitioner believes this violates the prohibition against involuntary servitude found in the Thirteenth Amendment.

The Petitioner filed a Petition for Review to the Arizona Supreme Court which was denied on April 3, 2020.

ARGUMENT

I. REASONS FOR GRANTING THE WRIT

Even before the passage of the Thirteenth Amendment, it had been a fundamental principle of law in England and the United States that courts would not issue mandatory injunctions to force an individual in a personal service contract to perform under the contract. This hornbook law finds its roots in the holding in *Lumley v. Wagner* (1852) 42 Eng. Rep. 687, 693 (Ch.). With the passage of the Thirteenth Amendment, slavery was forever prohibited in the United States but the

Amendment went even further condemning various forms of domination under the heading of "involuntary servitude." Forcing one to run a business that they do not want to run is involuntary servitude.

A. Background on Involuntary Servitude

This case presents the important question about the Constitutional rights of property owners not to be compelled by the State into involuntary servitude in violation of the Thirteenth Amendment. Also, 42 U.S.C. § 1994 is relevant to this discussion and it states:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

The primary purpose of the Thirteenth Amendment was to abolish the institution of African slavery as it existed in the United States at the time of the Civil War, but the Thirteenth Amendment was not limited to that purpose due to the clause involving "involuntary servitude." Thus, the Thirteenth Amendment prohibits two conditions, slavery and involuntary servitude, without enumerating what rights are necessary to eliminate those conditions. The Thirteenth Amendment does not prohibit action only by the State, but by individuals, since slaveowners were generally private individuals. Also the Thirteenth Amendment is

self-executing without need of any ancillary legislation so far as its terms are applicable to any existing state circumstances. *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). The text of the Thirteen Amendment mentions no right, but it outlaws conduct. Yet the courts and commentators that have explored the issue all seem to agree that it grants rights. *See, e.g., Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443-44 (1968); *The Civil Rights Cases*, 109 U.S. 3, 22 (1883); Alexander Tsesis, *The Thirteenth Amendment and American Freedom; A Legal History* 44-46 (2004); James Gray Pope, *Contract, Race and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 Yale L.R. 1474 (2010). The question often is what are those rights and how are those rights enforced versus the right to contract. This Court has dealt with the issue of involuntary servitude several times but it has not set out a clear standard, test or definition to apply to determine what rights are granted so that one is free from involuntary servitude.

In *Bailey v. Alabama*, 219 U.S. 219 (1911), Justice Charles Evan Hughs writing for the majority, held that in addition to abolishing slavery, the Thirteenth Amendment was intended "to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." *Id.* at 241. The Court defined involuntary servitude as the control by which the personal service of one person is coerced for another's benefit. Thus, the evil is found in the relationship of control. The Court struck down an Alabama law that made it a crime

for a laborer to obtain an advance of wages by means of a fraudulent promise of future labor.

Soon after, in *Butler v. Perry*, 240 U.S. 328 (1916) the Court upheld a state law making every able-bodied male liable to be drafted for six days each year to work on public roads. The Court held the Thirteenth Amendment "was not intended to interdict enforcement of those duties which individuals owe to the State, such as service in the army, militia, on the jury, etc. *Id.* at 333. Civic duties are generally performed under the direction of representative government for the benefit of the people. *See Selective Draft Law Cases*, 245 U.S. 366, 390 (1918)(distinguishing involuntary servitude from "the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and harm of the notion, as the result of a war declared by the great representative body of the people"). This Court has held that there are limited circumstances under which a person can be compelled to work in the United States and those circumstances require a compelling governmental interest and relate to the fulfillment of fundamental societal obligations, *see Butler v. Perry*, 240 U.S. 328 (1916)(working on public roads) *Selective Draft Law Cases*, 245 U.S. 366, 390, 38 S. Ct. 159 (1918)(upholding forced military service); *Hurtado v. United States*, 410 U.S. 578, 589, n. 11, 93 S. Ct. 1157 (1973)(upholding compelled jury service).

Additionally, this Court has held that a contractual obligation is not of sufficient import to require compulsory labor which amounts to involuntary servitude. *Pollock v. Williams*, 322 U.S. 4, 64 S. Ct. 792 (1944). "Whatever of social

value there may be, and of course it is great, in enforcing contracts and collection of debts, Congress has put it beyond debate that no indebtedness warrants a suspension of the right to be free from compulsory service." *Pollock*, 322 U.S. at pp. 17-18. The Court struck down a Florida statute similar to the one in *Bailey*. *Pollock*, 322 U.S. at 11-13. The Court held the Thirteenth Amendment imposed a substantive ban on relations of demonstration and subjugation.

This Court's decision in *United States v. Kozminski*, 487 U.S. 931 (1988) is often cited for its definition of involuntary servitude in which the Court determined that the ban on involuntary servitude had "never been interpreted specifically to prohibit compulsion of labor by means other than physical or legal coercion." 487 U.S. at 944. However, the Court made clear that this narrow reading resulted from constraints on the interpretation of the criminal statutes involved and did not limit the scope of the Thirteenth Amendment. The Court in *Kozminski* held that "in every case in which this Court has found a condition of involuntary servitude, the victim had no available choice but to work or be subject to legal sanction. 487 U.S. at 943. By its terms, the Thirteenth Amendment excludes involuntary servitude imposed a legal punishment for a crime.

Involuntary servitude occurs where a person has "no available choice but to work or be subject to legal sanction." *United States v. Kozmiski*, 487 U.S. 931, 943, 108 S. Ct. 2751 (1988) *superseded by statute, Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA 2000")*, Pub. L. No. 106—386, 114 Stat. 1464. This is

what is occurring in this case. The Petitioner has no choice but to work or operate a business on his personal property or be subject to a legal sanction.

The Court has yet to adopt and apply a comprehensive standard for assessing rights under the Involuntary Servitude Clause of the Thirteenth Amendment. Courts agree that the Thirteenth Amendment guaranteed whatever rights were necessary to negate slavery and involuntary servitude but there does not appear to be a consensus as to what those rights are. Just as the First, Second, and Fourth Amendment encompass modern forms of communication, weaponry and search, (*see District of Columbia v. Heller*, 128 S. Ct. 2783, 2791-92 (2008)) so should the Thirteenth Amendment extend to modern forms of activity. Forcing a property owner to operate a business is such an activity.

Here, the Respondents interest in compelling the owner of private property to build and operate a golf course violates the Thirteenth Amendment's prohibition against involuntary servitude. Involuntary means an entity is being forced to do something it does not want to do and is being legally coerced thus being deprived of the power of choice and free will. Requiring the Petitioner to build a golf course on its Property, which has reverted back to its natural state, and then to operate a golf business on the Property is involuntary servitude. Currently, the Petitioner was found in contempt by the trial court for not taking steps the trial court deemed necessary to build a golf course on the Property and operate it.

In this case, there was a restriction placed on how the Property could be used. It was used, as restricted for over 30 years but due to outside forces, *i.e.*, the Great

Recession, it became uneconomical to continue operating the business so the Property owner decided not to use the Property which is analogous to an individual deciding to quit a job or not work. Certainly, the owners of the property cannot use it for a purpose that is in violation of the restriction but they should be able not to use it just as one has a right not to work.

This Court dealt with this issue in relation to labor contracts and ultimately held that if a person agreed to sell themselves into servitude for a number of years and then changed their mind and walk away, that to hold a person to service who wanted at that moment to leave was to impose an impermissible involuntary servitude. This Court held it was immaterial that the person had agreed to work, what mattered was that the person was compelled to do so against their will at the time of performance. *See Clyatt v. U.S.*, 197 U.S. 207, 215 (1905) and *Bailey*, 219 U.S. at 244. The same rational applies here.

To compel a property owner to run a business whether it is making money or not amounts to involuntary servitude. What if the property owner dies and leaves the property to his children, are they going to be compelled to operate a business they may have no interest in or knowledge of? And what if they cannot sell the property because the business is unprofitable, certainly it is involuntary servitude to compel them to operate the business.

Operating a business for the entertainment benefit of individuals is hardly the class of interest such as national security and the fundamental right to a jury trial

that courts have recognized to be so compelling as to justify the abrogation of such a basic human and Constitutional right as the right against involuntary servitude.

B. Personal Service Contracts

Courts have consistently held that although no person may be enjoined to perform a contract for personal services, a person who performs "unique" services may be barred from performing those services for others. These rulings find their genesis in the English case *Lumley v. Wagner*, (1852) 42 Eng. Rep. 687, 693 (Ch.), in which an opera singer under contract to Her Majesty's Theatre was enjoined from singing for anyone else during the term of the contract. Thus, the Court could not force her to sing but only restricted her from singing for others during the contract period.

In the United States, these same principles that are the foundation for not granting a mandatory injunction to enforce personal service contracts support the Thirteenth Amendment's prohibition against involuntary servitude. *Gardella v. Chandler*, 172 F.2d 402 (2nd Cir. 1949) involved the reserve clause placed in professional baseball players' contracts giving the employing team the exclusive right to employ a player for a period of one year after his contract expired. Gardella violated the reserve clause by playing in the Mexican league for which he was barred from American baseball for years. His antitrust suit was dismissed by the District Court but was reinstated by the Second Circuit Court of Appeals. Circuit Judge Jerome Frank explained his vote for reinstatement partly in reliance on the Thirteenth Amendment. *Id.* at 409, 410. The reserve system was eventually

abandoned after Curt Flood, a Black athlete challenged the system arguing that a well-paid slave is still a slave. Brad Snyder, *A Well Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports* (2006). The rational against involuntary servitude has a long history in the law.

C. There are Hundreds of Communities that Could be Affected by this Decision

Numerous CC&Rs are placed on property to limits its use. The decision by the Arizona Court of Appeals to mandate that a property owner operate a business on his property is impacted by more than golf. However, golf has been declining over a decade and this decision has an impact on hundreds if not thousands of property owners.

Between 2006-2013, 643 18-holf golf courses closed. In 2013, more golf courses closed than operated in the United States for the eighth straight year according to the National Golf Foundation. In 2012, 13 18-hole golf courses opened and 154 closed. In 2013, 14 18-hole golf courses opened and 157 closed. *See* Michael Buteau, *US Golf Course Closures Exceed Openings for Eighth Year*, Bloomberg News, Bloomberg News, Jan 16, 2014.

Golf reached its peak in 2005 with 30 million participants playing 550 million rounds of golf; however, in 2013, there were only 25 million participants playing 485 million rounds. Aimee Picchi, "MoneyWatch," May 23, 2014. These were the numbers when Bixby closed the Golf Course. The numbers have not improved. According to the National Golf Foundation, roughly 200 courses closed in 2017 and

200 closed in 2018. Jason Scott Deegan, *A Depressing Deegan's Dozen: Obituaries of the Best Golf Courses to Close in 2018*, Golf Advisor, December 28, 2018. Thus, there are hundreds of communities in the United States that have deed restrictions placed on property limiting its use to a golf course while the golf course business continues to decline.

CONCLUSION

Clearly, affirmative covenants that require property owners to maintain their properties in a certain condition have been enforced for decades. This case involves much more than simply requiring the owner of property to maintain its property. The Appellate Court's opinion requires the owner to spend millions of dollars to build a golf course and then to operate a business on the property. Operating a business would require the owner to hire people to manage tee times, collect greens fees, maintain the tee boxes, greens and fairways, to act as the course ranger, to maintain the books and records of the business, generally manage the golf business and do all the other things necessary to operate a business. To say that the trial court is merely requiring the owner to maintain the Property is completely disingenuous. It is requiring the property owner to do something it does not want to do and this is involuntary servitude.

RESPECTFULLY SUBMITTED this 31st day of August, 2020.

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