No. 20-288

IN THE

SUPREME COURT OF THE UNITED STATES

ALCR, LLC,

Petitioner,

vs.

Linda W. Swain and Eileen T. Breslin,

Respondents.

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

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS BELOW

Respondents Linda W. Swain and Eileen T. Breslin ("Respondents") dispute that ALCR, LLC ("Petitioner" or "ALCR") was a party to the underlying state court action or to the appeal of the state court Judgment to the Arizona Court of Appeals and to the Arizona Supreme Court. The Appellants before those courts were Bixby Village Golf Course, Inc., Hiro Investment, LLC, Nectar Investment, LLC, and Kwang Co., LLC (collectively, "Bixby") and TTLC Ahwatukee Lakes Investors, LLC ("TTLC"). See Appendix A (Notice of Appeal filed by Bixby) and Appendix B (Notice of Appeal filed by TTLC).

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ARGUMENT

I. REASONS FOR DENYING THE WRIT

A. Introduction

Nowhere in Petitioner's argument appears a discussion of choices or responsibility. From the instant Bixby purchased the underlying golf course ("Property") to the moment successor TTLC purchased it, to the entering of Judgment enjoining compliance with the deed restrictions ("Deed Restrictions"), to Petitioner's earlier and failed appeals, to the moment Petitioner filed its Petition for Writ of Certiorari ("Petition"): choices existed; responsibility has been clear. The Property can be sold; or the underlying Deed Restrictions can be modified; or the Property never purchased in the first place. Presented the choice to purchase the Property on which the Deed Restrictions run with the land anyone might have done as former First Lady Nancy Reagan urged: 'Just say no.' Instead dollar signs in his eyes, this developer ignored Mrs. Reagan, and Polonius: "Neither a borrower nor a lender be; For loan oft loses both itself and friend, And borrowing dulls the edge of husbandry."

No! Instead, for a dozen years, Petitioner's managing member has imposed himself profligately and relentlessly on our community, seeking to bend us to his will, for his financial advantage. Except now, having utterly lost, he asserts – the trial court findings to the contrary, twice affirmed – it is not financially prudent to operate a golf course on the Property.

As if his impositions on us have not been sufficient, comes Petitioner now to convince this Court of a legal and historical absurdity: that the Constitutional

protections extended a century and a half ago to deliver African Americans from slavery under the Thirteenth Amendment should now be bent to protect him from the extended folly of his own choices.

Perhaps his actions fit our times – litigate to the bitter end, irrespective of the costs to all involved and the arguments' absurdity. Judicial economy alone, let alone the feigned assertion of indenture should suffice to dispatch this case.

The Petitioner's chose to acquire the Property. The writ of certiorari should be denied.

B. No Involuntary Servitude Exists When There is a Choice Not to Serve

Petitioner points to *United States v. Kozminski*, where the court stated, "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." *United States v. Kozminski*, 487 U.S. 931, 943 (1988). It is upon this holding the Petitioner largely relies and it is exactly where it fails. Fundamentally, there can be no involuntary servitude where the choice not to serve is available. Consistent with this Court's holding in *Kozminski*, the Second Circuit in *Immediato v. Rye Neck School Dist.*, 687 F.3d 505, 510 (2nd Cir. 1996), noted the Thirteenth Amendment does not "bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad.'"

The Petitioner claims it has "no choice but to work or operate a business on [its]1/ personal property." Petitioner also claims it is legally coerced to build a golf course in compliance with the Deed Restrictions. Neither is true. Petitioner has a choice, and one cannot be coerced when it had freely accepted the consequence by voluntarily purchasing the Property subject to the Deed Restrictions.

The original deed restriction was recorded in 1986. Then, after subsequent amendments, the Deed Restrictions became binding on all future owners of the Property in 1992. Bixby purchased the Property in 2006, fully aware of the Deed Restrictions. Irrespective of the recording and notice, in Arizona, courts have found neighborhoods surrounding a golf course sold using the golf course as a draw are likewise restricted for use solely as a golf course. *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36 (Ariz. Ct. App. 1984). Bixby, in 2006, knew the Deed Restrictions limited the Property, and should have known that homes built around a golf course as a draw for their purchase would otherwise operate as a restrictive covenant. Despite the Deed Restrictions, Bixby chose to purchase the Property nonetheless.

The trial court found the structure of Bixby's purchase of Property belied Petitioner's managing member's2/ trial testimony that Bixby purchased the Property

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1 Petitioner uses the word "his" for its LLC on pg. 11 (first two lines). This is likely because Wilson Gee, managing member of Petitioner, acts on behalf of the whole, and has done so both in the prior Bixby ownership and the current ALCR ownership.

2 Petitioner's manager is Wilson Gee, who was also the primary Bixby principal. See, e.g., trial court's Findings of Fact 14 and 15. The trial court's Findings of Fact and Conclusions of Law are included as Exhibit D to Petitioner's Appendix to Petition

in order to operate a golf course.3/

In 2013, Bixby closed and dismantled the golf course despite knowing there was a deed restriction that meant it must be a golf course. Thus, this was another opportunity of choice, where they could have sold the property before closing it. Instead, Bixby fenced the perimeter, drained the lakes, shut off all power, stripped the sod, and generally left the property in a dilapidated state. There was no coercion involved, nor allegation of such at the time of purchase when they dismantled the golf course. It was not until 2015 after this litigation commenced, that Bixby sold the property.4/

When Bixby finally chose to deal with the burden of the Deed Restrictions, Petitioner chose to sell the property to an entity that had no intention of returning it to a golf course. TTLC and Bixby agreed to a non-recourse loan to protect TTLC from any substantial monetary liability if the deed restriction was not removed. The sale acknowledges the non-use as a golf course and Respondents' pending litigation. TTLC stepped into the shoes of Bixby, fully aware of the obligation to operate a golf course. Nevertheless, they had no intention of doing so.5/ Nor could there be a

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for Writ of Certiorari.

3 Findings of Fact 17 and 25.

4 The facts in this paragraph are supported by Findings of Fact 27, 28 and 36.

5 The state court action was originally filed in 2014 against Bixby. When TTLC purchased the property in 2015, Respondents stipulated to dismissing Bixby from the case. Respondents subsequently amended the complaint to name TTLC as the defendant. It is the adjudication of the TTLC claims that is now the subject of the Petition.

claim they were coerced.6/

When it purchased the Property, TTLC had a choice. They could comply with the Deed Restrictions or seek an alternative. TTLC did try to persuade the beneficiaries of the Deed Restrictions, the homeowners surrounding the golf course, to eliminate the golf course requirement. However, they only obtained 28% approval, not the required 51% as dictated by the Deed Restrictions. TTLC subsequently filed a counterclaim against Respondents seeking to modify the Deed Restrictions under a section that, TTLC argued, provided it with discretion upon a material change in circumstances. However, the trial court held there was no material change, the course before the self-inflicted dismantling of the golf course could have been operated profitably, with adequate maintenance, at any point in time before it closed.7/

TTLC and Bixby purchased the Property fully aware of the consequences the Deed Restrictions required. The Property must be a golf course. Nevertheless, here we are, still litigating the matter while the Property sits barren and burdensome. It is true, as TTLC complained and their expert testified at trial, the cost of rebuilding the course is high, but that is the choice Bixby and TTLC each made. A choice made free of bondage, coercion, or compulsion, and nothing akin to slavery.

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6 The facts in this paragraph are supported by Findings of Fact 46 – 53, 56 – 59 and 64 & 65.

7 The facts in this paragraph are supported by Findings of Fact 28, 79, 80, 81 and Conclusions of Law 17 – 21.

C. Personal Service Contracts

Petitioner unsuccessfully alludes to the notion the enforcement of the Deed Restrictions amounts to an unconstitutional act by ordering specific performance of a personal services contract. While it is correct and well established, a court generally will not order specific performance of a contract for personal services (Restatement, Contracts, § 379; Lumley v. Wagner 1 De G.M. G. 604; 42 Eng. Rep. 687.), this case does not involve a personal services contract. The "contract" at issue here is a deed restriction, or better stated as a restrictive covenant. There are times when a restrictive covenant such as a non-compete agreement can be personal, but deed restrictions are not personal. More specifically, *this* deed restriction is not personal. The Deed Restrictions requires the Property to be used for no purpose other than a golf course. It is not specific to any one person, nor does it care who maintains the Property as a golf course.

Moreover, even if it can be construed as a personal service contract, such contracts require "unique" services, as Petitioners noted. They are performed by individuals who have specialized skills, such as musicians, writers, artists, professional athletes, among others. *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999) ("Unique services have been found in various categories of employment where the services are dependent on an employee's special talents; such categories include musicians, professional athletes, actors and the like."), among many others. Petitioners have not shown they have such unique skills requiring specialized treatment. With neither being a personal services agreement nor have unique skills

been shown, it cannot be said the traditional rule of not ordering specific performance for personal services contracts is applicable.

Moreover, the Petitioner's personal services contract argument loses because of the competing public policies which must be considered on this issue. Arizona's public policy underpinning deed restrictions "is to protect those who have purchased property relying on restrictions from the invasion of those who attempt to break down the guaranties of home enjoyment under the guise of business necessities." *Swain v. Bixby Village Golf Course, Inc.*, 247 Ariz. 405, ¶ 37 450 P.3d 270, 279 (Ariz. Ct. App. 2019). Whereas the public policy supporting personal services contracts "mitigate[es] against the sanction of a person's loss of the ability to earn a livelihood". *Ticor Title Ins. Co. v. Cohen*, at F.3d 70. The public policy against ordering specific performance of personal service contracts is to protect an employee, not a landowner trying to mitigate their losses. The Petitioner needs to accept the consequences of its choices, even if those consequences are 'exceedingly bad'.

D. **The Issue Raised by the Petition Will Not Have Widespread Effect**

The Arizona Court of Appeals' holding in *Swain v. Bixby Village Golf Course, Inc.* will not have widespread effect because the basis for that holding is firmly based on the relatively unique language in the Deed Restrictions tying the covenant to compliance with Arizona's golf valuation statutory scheme. The original 1986 deed restriction stated the trustee "hereby makes this deed restriction pursuant to Arizona Revised Statutes ("A.R.S.") § 42-125.01, restricting the use of said property to use as

a golf course, facilities and improvements related thereto".8/ Each of the initial three iterations of the deed restriction incorporated the earlier version and the 1992 Deed Restrictions likewise incorporated and restated the requirement to comply with Arizona's golf valuation statute.9/

The *Swain* court noted this fact and that three subsequent amendments to the original deed restriction extended the original deed restriction. *Id.* at 275-76 (¶¶ 22-23). The *Swain* court made clear that compliance with Arizona's golf course valuation statutes was key,

> **The covenant's language confirms its twin purposes: first, to maintain the property so that it qualifies for the tax benefits under A.R.S. §§ 42-125.01 and 42-146, and second, to protect the Benefitted Persons' interest in living next to, or having views of, a golf course.**

The *Swain* court expressly held the tax benefit purpose "can be achieved only if golf can be played or practiced on the property", citing to *Phxaz Ltd. P'ship v. Maricopa County*, 192 Ariz. 490, 494 ¶¶ 20-22 (App. 1998). *Swain v. Bixby Village Golf Course, Inc.*, at P.3d 275-76 ¶¶ 22-23.

Given the statutory keystone for the *Swain* holding, Petitioner's forecast of "hundreds of communities" around the country being potentially impacted by a ruling on Petitioner's issue is just not so.

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8 Findings of Fact 1 and 2
9 Findings of Fact 3 – 8.

CONCLUSION

The *Swain* court devoted the correct amount of space – one paragraph – in summarily dismissing Petitioner's involuntary servitude argument. Bixby, TTLC and now ALCR each voluntarily made the choice which went against the grain of the contract they each entered into with the Ahwatukee community members. Involuntary servitude is not a legal basis for a business to be let off the hook of a poor choice it did not have to make in the first instance.

RESPECTFULLY SUBMITTED this 30th day of September 2020.

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