No. 23-1109

IN THE

Supreme Court of the United States

DIETMAR AND LINDA HANKE,

Defendant-Intervenors, Petitioners,

v.

STATE OF ARIZONA and FOOTHILLS RESERVE OWNERS' ASSOCIATION, INC., an Arizona Corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR A REHEARING

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PETITION FOR REHEARING

There is nothing speculative herein. Nor are there any gold-leaf distinctions at play in this case. Nor are there any factual disputes. This is a plain vanilla taking of private "common lands" within a secluded HOA where there was no need to justify building a freeway - certainly not in the location where it was built - and no pressing need to violate the State's own "Directive"[1] issued decades earlier.

This Directive was the only item in the Intervenors' Title Report and was made by the same state agency in 1987 that claims, 30+ years later, that it can take such lands at will. To date, no judge/no court has confronted that inconvenient fact in this litigation. It has simply been ignored. Further, the Intervenors know of no other Court that was brazen enough to buy into a State's claim that it needs to condemn lands and demolish private homes for the purpose of developing empty land to grow its economy.[2]

This has been a long (7 year)[3] circuitous and flawed litigation that avoided most of the basic components of eminent domain litigation in Arizona, specifically: a Jury Trial, the concept of *Collective*

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1 AZ Resolution of Establishment and Advance Acquisition (87-578089. Aug. 21, 1987) mandated that the State must purchase such lands at issue here, *before* such empty lands are developed.

2 Growth of Arizona's population was the top priority of Governor Ducey, who also appointed five of the seven AZ Supreme Court Justices. (*Ducey stacked the Supreme Court*, AZ Mirror, Julie Erfle, 15 Mar 2022)

3 Following 13 years of the threat of condemnation.

Ownership[4], a Voter Initiative, Discovery, Interrogatories, Document Production, and FOIA requests. The Courts below simply refused to enforce any such requests by the Intervenors. Due process, by any measure, did not happen here.

Companion case (AZ CV-23-0292-PR), litigated by the Intervenors' HOA, is currently at the Arizona Supreme Court, and is currently in a "Continued" status, apparently pending the outcome of this Petition.

Larger/Smaller Parcel Analysis is on hold.

In the *companion case* noted above (CV-23-0292-PR), litigation is focused on an ill-fitting "larger/smaller parcel" analysis, rather than on the much more relevant "dominant/servient estate"[5] analysis. The former fails to identify and recognize the only beneficial/equitable owners, the homeowners. [6] Significantly, the legal title holder of the common lands of the HOA is the HOA; and, the legal title to the homes/lots and their individual easements are the individual homeowners'. Thus, the larger/smaller parcel analysis is misplaced due to the failure of unity

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4 Collective Ownership vs. Common Property: the former refers to property owned jointly by agreement of a set of members, whereas the latter refers to assets that are completely open for public access, such as a public park (en.wikipedia.org/wiki/Common ownership)

5 https://mcrazlaw.com: The "servient estate" of an easement is the property owned by the owner/grantor that the easement burdens or runs on. The "dominant estate" is the property owned by the grantee benefitted by the easement.

6 The "larger/smaller parcel" concept is promoted by the private International Right of Way Association, a private organization comprised of global real estate "practitioners".

of title to begin with.

As in most all HOA's in this country, the homeowners herein are the *only* beneficial and equitable owners of common lands, who have the right to use, possess, and transfer their private property, along with their easements to use such common lands.[7] They own the dominant estates with easements to use and enjoy the lands of the HOA's servient estate(s).

And, the HOA is merely the legal title owner of the common lands for convenience, per Arizona statutes.[8] The HOA entity can't sell or, as a corporate entity, even have the ability to use and enjoy the common lands. Instead, the HOA has a fiduciary duty owed to the homeowners to protect, preserve, and maintain such. The common lands of the HOA is the servient estate, providing easements of access and use to homeowners, while being burdened by numerous restrictions.

Here the value of the common lands is baked into the value/cost of each homeowner's property. The HOA paid nothing for the common lands, nor the improvements thereon; specifically, the elaborate, wide, and high-quality concrete walking trails, perimeter decorative steel fencing and block walls, mail kiosks, supplemental natural landscaping, and drainage engineering. The HOA is the legal owner, as

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[7] Some HOA's grant access to the general public in order to claim 501(c)(4) tax status.

[8] Per ARS 42-13402(C)(5) If that weren't the case, every time an HOA home was sold, all common parcels would have to be retitled and the taxing authority would have to allocate a percentage to each homeowner for property tax purposes.

dictated by AZ state law.[9] The HOA is entrusted with care and maintenance of the lands, pays no property tax on such lands, and has a fiduciary duty to the homeowners to preserve and maintain such lands.

It is the developer, and subsequently the home purchasers, who paid for everything. Upon completion of the project, the developer transferred the common land titles gratis to the newly formed HOA. The HOA is simply the custodial owner for convenience, not unlike a stockbroker whose name is on the traded shares that are beneficially and equitably owned by the shareholders. Similar schemes are evident in the timeshare industry, building co-ops, etc. This is not a new concept, but it is very different from the King's Commons in feudal times (aka, common ownership).

Once one realizes that the homeowners can dissolve the HOA, place all reserve lands (with their limited improvements) into a collectively owned trust, nothing changes, except that each homeowner gets the pro rata monetary windfall from the eminent domain taking and associated devaluation of their overall estate.

In this case, each homeowner has lost value in their individual home due to the loss of the common lands, the loss of the improvements thereon, and their easements to use and enjoy such lands. Additionally, owing to the radical change in usage of the common lands (and parts of the neighborhood itself) and the elevated HAZMAT truck-route freeway construction thereon, each homeowner has also lost the enjoyment of using the remainder of such lands. This is a

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[9] ARS 42-13402 (C) (1)

significant nuisance, if nothing else.

Finally, homeowners in close proximity to the elevated HAZMAT freeway have already been, and will continue to be, burdened by the concomitant visual blight, glaring all-night stadium lighting, 24x7 noise and attendant sleep interruption[10], loss of enjoyment of their back yard, the risk of accidental events, and the risk of long-term injury from the noxious and unhealthy freeway fumes. This translates into a significant loss of intrinsic value in their individual homes and enjoyment thereof.

What that change in value is, is obviously heavily dependent upon (a) homeowner proximity to the Loop202 freeway, (b) whether the home was purchased before or after ADOT's 2005 announcement that it would build the L202 through the HOA, and (c) whether and at what cost suitable replacement locations/homes are available. The lack of understanding of these concepts by the court has already resulted in a wide and unsupported disparity of proposed homeowner compensation.

As one of the few remaining original purchasers of a semi-custom home in the HOA, Intervenors have suggested that it is reasonable that a jury of their peers could conclude that a substitute home in a different, but similar, location is the only just remedy. Equity demands more compensation to homeowners than just the loss in bank value of an easement to use

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[10] Unlike most states, Arizona has no meaningful vehicle noise restrictions and does not prohibit the use of Jake Brakes within City Limits. One edge of this community is situated at the lowest point of the freeway; ergo, Jake Brakes are utilized by truck traffic in both directions of traffic.

some of the common lands. After all, homes and locations are not fungible goods. Intervenors have been asking for such compensation since they intervened six years ago.

State and Federal Constitutional Requirements and Arizona State Law were ignored.

America is at cross-roads here in these two related cases. Building on the reality that the HOA's homeowners are the only true owners of their homes and the assets of an HOA, this case further tests whether Arizona must adhere to its own constitution.

In this case, Arizona clearly did not. First, "No Person ("homeowner") shall be deprived of life, liberty, or property without due process of law" per AZ Const. Title II, Art. 2., Sec. 4. (due process). Second, a that jury trial is required to ascertain the scope of that loss is inviolate per AZ Const. Title II, Art. 2., Sec. 23 (jury). Finally, Title II, Art. 2, Sec. 17 (compensation) requires that compensation be determined by jury.

Additionally, the U.S. Constitution expressly guarantees Notice, Due Process, a Jury, and Just Compensation. The Fourteenth Amendment of the US Constitution guarantees such for State actions as well.[11]

Here, in this case, none of these federal and state constitutional requirements were satisfied or even addressed by the courts or the state, the Intervenors' repeated demands notwithstanding. Discovery did not happen. The Arizona courts (at all

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[11] U.S. Const. XIV Amend, Sec. 1; Ableman v. Booth, 62 U.S. 506 (1859); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

levels) simply ignored the Intervenors' repeated requests and demands. It's as if they were confused that the Intervenor were such by permission, not of right.

Yet homes were demolished, common lands and improvements were destroyed, and heavy machinery invaded and destroyed the common lands and homeowner quality of life for the remaining homeowners. Ultimately, a behemoth of an elevated industrial-strength, eight-lane HAZMAT freeway was constructed upon the lands of the HOA, a mere three hundred feet from the Intervenors' bedroom.

Finally, Arizona voters had overwhelmingly voted for AZ Prop207 (the "Private Property Rights Protection Act") of 2006 in the wake of the *Kelo* decision, which excludes the rationale of "economic development" from the definition of "public use". Specifically, ARS 12-1136 Sec. 5 (iv)(b) expressly excludes "the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health." Significantly, in Arizona, voter initiatives are protected from legislative and/or administrative meddling by the Arizona Constitution itself.[12]

But, as noted above, population growth was/is the Arizona governor's very publicly declared top priority. The State has not produced one iota of evidence, reason, argument, or authority to the contrary. "Public Need" was only addressed by the state inasmuch as it was "not required" for eminent domain actions, only "public use" was so required per

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[12] Const. of Ariz. Art. IV, Pt. 1, Sec. 1

the Court and the State.

To add insult to injury the State claimed that this case was purely a matter of accounting rules and calculations, and that certainly doesn't wash with the concepts of just compensation and equity. The courts, however, summarily agreed with the state.

It is clear that neither the Fifth Amendment to the United States Constitution, nor the State of Arizona's Constitution, were ever addressed by any court in this matter, Intervenors' advocacy thereof notwithstanding. Yet, constitutional requirements and prohibitions were violated in flagrant, wholesale fashion.

Relief Requested - the Courts below assessed damages against the Intervenors

The Intervenors have, and continue to, steadfastly maintain that the "larger/smaller parcel analysis" is completely irrelevant in this case. The HOA lands are beneficially and equitably owned by the homeowners. The proceeds from the eminent domain taking and attendant nuisance damages belong to the homeowners, who are protected by the panoply of protections identified in the United States and Arizona Constitutions.

Intervenors are requesting that this court vacate the judgment of the Arizona courts in this litigation and order a trial de novo, complete with Production, Discovery, Interrogatory Responses, etc. and complete with the Instructions that homeowners are the rightful recipients of any further compensation.

Additional Relief Requested

Intervenors submit that it is the HOA and its Attorney that should be sanctioned by the court, not the Intervenors, especially since the homeowners are the only aggrieved rightful owners of the HOA's common lands. The HOA and its attorney failed to (timely) notify the HOA homeowners (and the Intervenors), the true owners, that a takings claim had been filed in the first place.[13]

Second, the HOA and its attorney failed to oppose the taking on P207 grounds, because such attorney thought that that law was a "zoning law." Third, the HOA, its attorney, and the judge tempore failed to understand how contract law works in general.[14]

Finally, how can one party advocating and pursuing a greater amount of damages or prevent the construction altogether, possibly harm the interests of any other homeowners or the HOA who is seeking a lot less in damages?

When the Intervenors filed their Interlocutory Appeal on the Taking, a lone wolf judge pro tempore, rejected such, in violation of Arizona civil appellate procedure calling for two judges.[15]

The Interveners allege that this has been a textbook case of a self-serving prosecution and

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[13] Indeed, it was the Intervenors that recommended to an HOA Board member that they should get an attorney experienced in the field of Eminent Domain.

[14] To wit: a non-exclusive grant of authority in a contract of adhesion is not a prohibition against the grantor.

[15] ARS 12-120 "Creation of court of appeals; court of record; composition; sessions"

violation of Federal and Arizona laws, specifically the US Const. 5th Amed, and Title II, Art. 2., Title II, Art. 2., Sec. 23 of the Ariz. Const. and AZ Prop207 (the "Private Property Right Protection Act") of 2006, now codified as ARS 12-1136 Sec. 5 (iv)(b).

Such freeway opened at the end of 2019, and many homeowners have been sick on and off for the duration, due to exposure to the freeway emissions.

CONCLUSION

Intervenors request this court grant the Petition for Rehearing and the Petition for Writ of Certiorari and vacate the punitive fee assessment.

Respectfully Submitted,

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CERTIFICATE OF PETITIONER

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

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