

No. _____

In The
Supreme Court of the United States

ALFREDO J. MOLINA, a single man; MOLINA, INC.,
an Arizona corporation, dba Molina Fine Jewelers;
BLACK STARR & FROST-PHOENIX, LLC,
an Arizona limited liability company; SEDONA LUXURY
HOMES, LLC, an Arizona limited liability company,

Petitioners,

v.

BMO HARRIS BANK, a banking entity;
JENNINGS HAUG & CUNNINGHAM LLP, a limited
liability partnership; PHILLIP G. MITCHELL and
JANE DOE MITCHELL, husband and wife,

Respondents.

**On Petition For A Writ Of Certiorari
To The Arizona Court Of Appeals,
Division Two**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioners deprived of due process of law under the Fourteenth Amendment to the United States Constitution when the Arizona judicial system denied them their common-law rights to property, to freedom of contract, and to proper application of the ratification doctrine?

PARTIES TO THE PROCEEDING

In accordance with Supreme Court Rule 14(b), all parties to the proceeding are named in the caption.

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Petitioner Molina, Inc., is an Arizona corporation wholly owned by Alfredo J. Molina. Petitioners Black Starr & Frost-Phoenix, LLC and Sedona Luxury Homes, LLC, are Arizona limited-liability companies that have no stock. There are no parent or publicly held companies owning 10% or more of any corporation's stock.

STATEMENT OF RELATED CASES

Molina v. BMO Harris Bank, N.A., Maricopa County Superior Court No. CV2015012839. Under Advisement Ruling entered Oct. 10, 2019.

Molina v. BMO Harris Bank, N.A., Maricopa County Superior Court No. CV2015012839 entered April 29, 2021.

Molina v. BMO Harris Bank, N.A., Arizona Court of Appeals No. 2 CA-CV 2022-0106. Decision entered November 7, 2022.

Molina v. BMS Harris Bank, N.A., Arizona Supreme Court No. CV-22-0295-PR. Minute Letter denying Petition for Review entered April 5, 2023.

STATEMENT OF RELATED CASES – Continued

Molina v. BMS Harris Bank, N.A., Arizona Supreme Court No. CV-22-0295-PR. Order denying Motion for Leave to File Motion for Reconsideration Nunc Pro Tunc entered April 24, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners petition for a writ of certiorari to review a judgment of the Arizona Supreme Court.

OPINION BELOW

April 5, 2023, the Arizona Supreme Court filed its Minute Letter denying the petition for review. (App. 57). That Minute Letter is not officially reported. On April 24, 2023, the Arizona Supreme Court filed an Order denying reconsideration. (App. 61).

JURISDICTION

April 5, 2023, the Arizona Supreme Court filed its Minute Letter that definitively denying the petition for review (App. 57) from the Memorandum Decision that the Arizona Court of Appeals had filed against Petitioners on November 7, 2022. (App. 1). On April 24, 2023, the Arizona Supreme Court filed an Order denying reconsideration. (App. 61).

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. XIV, § 1 provides, in relevant part, that:

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The petition concerns the denial of due process of law through judicial procedures and decisions that misconstrued and misapplied the common-law doctrine of ratification. Because the due process facts and procedure in this matter are tangled, a longer-than-usual preliminary statement is needed to place the appeal in context.

1. In the first lawsuit, the Bank and its lawyers knowingly tried to collect on a falsified 2006 Mortgage Note.

We begin with the first lawsuit, namely, *M&I Marshall & Ilsley Bank v. Molina*, Maricopa County Superior Court Case No. CV 2009-025724. (App. 19, 90-91).

The protagonist in the first lawsuit is the “Bank”—BMO Harris Bank, formerly known as M&I Marshall & Ilsley Bank. On March 8, 2006, Brent Hickey, an associate of Alfredo Molina, signed a facially invalid, false \$1.575 million “Mortgage Note” with the

Bank (the “falsified 2006 Mortgage Note”). (App. 19, 91).

The falsified 2006 Mortgage Note was supposedly for Sedona Luxury Homes, LLC (“Sedona”), and was supposedly in the name of Alfredo Molina. (For ease of discussion and reference, Petitioners will often be referred to as “Alfredo” or as “Alfredo Molina.”) (App. 18-19).

The contract purported to obligate “Alredo [sic] J. Molina . . . a single man”—although, as the Bank knew from its dealings with Alfredo and from its own records, Alfredo was a married man. Moreover, “Alredo Molina” does not exist. In the signature area, the name of the phantom “Alredo Molina” was crossed out. The fake contract was signed by Brent Hickey—with no authority. (App. 68, 112).

But Alfredo never signed the falsified 2006 Mortgage Note. The man who signed it was Brent Hickey. He had no authorization, power of attorney, consent to borrow, or right of any kind to sign for Alfredo. (App. 68). In fact, Alfredo never got a penny of the proceeds from the falsified 2006 Mortgage Note. (App. 68, 163).

Hickey faxed a purported 2006 “Guarantee” to the Bank for the falsified 2006 Mortgage Note. (App. 68, 91). The purported Guarantee had a cut-out signature for an “Alfredo Molina” signature from another document. But Hickey could not do a cut-out signature for Lisa Molina, Alfredo’s wife, since he lacked a copy of her signature. (App. 68, 91). So his falsification on the purported Guarantee was visibly incomplete.

Under Arizona community-property law, the purported 2006 Guarantee was invalid. A.R.S. § 25-214(C)(2) (Joinder “of both spouses is required” for any “transaction of guaranty, indemnity or suretyship.”). (App. 91). But the Bank made no inquiries, despite the invalidity of the purported Guarantee. (App. 92).

The falsified 2006 Mortgage Note defaulted in 2009. The Bank then sued Sedona, Alfredo Molina, and Lisa Molina for a debt they never created or gained anything from. (App. 92).

The Bank and its lawyers attached the falsified 2006 Mortgage Note to the Complaint in the underlying case. Apparently because the purported 2006 Guarantee lacked Lisa Molina’s signature (and was thus instantly recognizable as invalid under Arizona community-property law), the Bank did not disclose it to the court. Instead, the Bank attached an unrelated “Guaranty” from an unrelated 2008 transaction. (App. 92).

The unrelated 2008 “Guaranty” involved Alfredo Molina’s business and a different property. To ensure that the superior court could not figure this out, the Bank altered loan numbers on four separate pages of the 2008 “Guaranty,” trying to conceal the redaction to make it hard to detect. (App. 69, 92).

The Bank stonewalled discovery for years, but Molina eventually obtained the unredacted 2008 “Guaranty” and proved its irrelevance. (App. 69, 92-93).

In desperation, the Bank argued the 2008 “Guaranty” had language broad enough to cover the falsified 2006 Mortgage Note loan executed by Brent Hickey. As a matter of law, Maricopa County Superior Court Judge Patricia Starr rejected that argument, since the 2008 “Guaranty” was limited by its own terms to loans for an entity named Sedona Luxury Homes—and *not* to loans made for Alfredo Molina. (App. 69-70, 92).

Judge Starr granted summary judgment to Alfredo Molina and against the Bank. She awarded attorney’s fees of \$299,176.95 and costs of \$6,106.22 to Molina, and filed a final judgment on April 2, 2015. (App. 93). That ended the first lawsuit.

2. The second lawsuit sought to hold the Bank and its lawyers accountable for their malfeasance in connection with the first lawsuit.

Alfredo Molina then sued the Bank and its lawyers for malicious prosecution and related claims in *Molina v. BMO Harris Bank, N.A.*, Maricopa County Superior Court Case No. CV 2015-012839. (App. 5, 93).

Once again, the Bank and its lawyers hid the truth. Desperate to dodge liability, the Bank and a first set of its lawyers (Jennings Haug & Cunningham and Attorney Phillip Mitchell) concocted a “ratification” defense. (App. 94). They asserted that, even if Alfredo Molina had not authorized Hickey to sign the falsified 2006 Note, Alfredo had supposedly “ratified” Hickey’s unauthorized actions:

- (1) by filing a counterclaim in the underlying case;
- (2) by making some payments on the falsified 2006 Mortgage Note; and
- (3) by deducting some payments on tax returns.

The ratification never happened. Indeed, why would it? After all, Molina never had any benefit from the falsified 2006 Note and never got a penny of its proceeds. Why would he ever ratify it? The theory is absurd in theory and false in reality.

But in a surprising ruling filed on October 19, 2019, the trial court granted the “ratification” motion in favor of the Bank and its first set of lawyers, and then denied reconsideration of that ruling. (App. 93-94). On May 5, 2021, the trial court filed a Rule 54(b) judgment in favor of the Bank and the first set of its lawyers. A timely notice of appeal from that Rule 54(b) judgment was filed on August 6, 2021. But the Arizona Court of Appeals affirmed. (App. 1).

3. A second set of lawyers (Cavanagh and Timmerman) tried jumping onto the “ratification” bandwagon—this time with no success.

Meanwhile, a second set of lawyer defendants had decided to jump on the apparently winning ratification bandwagon and also asserted the very same

“ratification” claim asserted by the Bank and by the first set of its lawyers.

The lawyer defendants seeking to exploit the success of the Bank (and its first set of lawyers) were Cavanagh and Timmerman. They filed copycat motions for summary judgment based on the “ratification” defense. This time, however, the trial court denied the “ratification” claim motions for summary judgment that Cavanagh and Timmerman had filed—although they were based on the same facts and the same legal arguments. (App. 95).

The trial court explained that Molina had come forward with evidence on the issue of Hickey’s authority to enter into the original 2006 transaction and that the second set of the Bank’s lawyers has “failed to establish that the doctrine of ratification applies here to entitle them to judgment in their favor as a matter of law.” (App. 70, 96).

Naturally, Molina filed a motion for reconsideration with the trial court asking it to apply its no-ratification reasoning concerning the Bank’s second set of lawyers to the Bank and its first set of lawyers. (App. 96-97).

But the trial court refused to make the first ruling (there was ratification) match the second ruling (there was no ratification). The trial-court decision finding ratification where no evidence supported that was a denial of due process of law compounded by another denial of due process of law by refusing to grant reconsideration to make the ratification rulings consistent

with each other—and with the state and national common law on ratification, once of the most important doctrines affecting national commerce.

The Arizona Court of Appeals upheld that denial of due process (App. 17), which the Arizona Supreme Court refused to nullify. (App. 57).

REASONS FOR GRANTING THE PETITION

The Court has regularly granted petitions for writ of certiorari to determine if state courts have interpreted and applied state law in a manner that violates the due process of law guaranteed by the Fourteenth Amendment. *See, e.g., Mallory v. Norfolk Southern Railway*, 143 S.Ct. 2028, 2032 (2023). The Due Process Clause “centrally concerns the fundamental fairness of governmental activity” undertaken by the State. *North Carolina Dept. of Rev. v. The Kimberley Rice Kaestner 1992 Family Trust*, 139 S.Ct. 2213, 2219 (2022). In addition, the Due Process Clause requires the States to resolve disputes through the proper exercise of the power of the judiciary—which did not occur here. *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 879 (2011).

The constitutional guarantee of due process protects rights “‘deeply rooted’” in our national history and tradition that are “‘implicit in the concept of ordered liberty.’” *Dobbs v. Jackson Women’s Health Organization*, 142 S.Ct. 2228, 2242 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Here, due

process of law protects Alfredo Molina’s right to have Arizona’s trial and appellate courts properly apply the common-law ratification doctrine, an essential aspect of Arizona commercial transactions and of interstate commerce.

1. The ratification doctrine is a key aspect of due process of law in Arizona and nationally.

The federal courts are “committed to a government of laws and not of men,” under which it is “of the utmost importance that the administration of justice be absolutely fair and orderly.” *Cox v. Louisiana*, 379 U.S. 559, 562 (1965). Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive any person of life, liberty, or property, without due process of law.”

“Considerable historical evidence indicates that ‘due process of law’ is a doctrine requiring, among other things, ‘judicial actors to comply with . . . the common law when depriving a person of life, liberty, or property.’ *Dobbs*, 142 S.Ct. at 2300 (Thomas, J., concurring). State common law, just as federal common law, ‘is, of course, subject to due process limitations.’ *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

In the present case, the Arizona superior court and the Arizona appellate courts failed to comply with the common law on ratification, resulting in a denial of due process to Alfredo Molina. As a result of that denial of due process, Alfredo Molina has suffered a deprivation

of his liberty and valuable property and has incurred enormous legal fees.

If judicial decisions have, as happened here to Alfredo, eliminated “an established property right, the judgment could be set aside as a deprivation of property without due process of law.” *Stop the Beach Re-nourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 735 (2010) (Kennedy, J., and Sotomayor, J., concurring).

“The touchstone of due process under both the Arizona and federal constitutions is fundamental fairness,” *State v. Melendez*, 172 Ariz. 68, 71 (1992), as long as procedural due process guaranteeing “permissible governmental interference is fairly achieved.” *Simpson v. Owens*, 207 Ariz. 261, 267 ¶ 17 (App. 2004). Here, the judiciary’s governmental interference has operated to deprive Alfredo Molina of fundamental fairness.

The Arizona superior court and appellate courts denied due process of law to Alfredo by failing to apply fundamental, controlling, common-law principles. They let the Bank and its lawyers use the judicial process to pursue claims against Alfredo based on false, falsified, fraudulent contracts—and then found that Alfredo had supposedly ratified the contracts although he never received any benefit from them, never approved them, never ratified them, and fought to nullify them since 2009.

“Freedom of contract and freedom in the use and disposition of one’s own are no less sacred than freedom of speech.” *Merrill v. Gordon*, 15 Ariz. 521, 531

(1914). Due process of law in Arizona and in the federal courts is just as fundamental.

“Procedural due process means that a party had the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Comeau v. Ariz. State Bd. of Dental Exam’rs*, 196 Ariz. 102, 106-07 ¶ 20 (App. 1999) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). Molina was heard at a meaningful time, but the judicial refusal to protect his common-law rights shows he was not heard in any meaningful manner.

In a parallel manner, substantive due process protects an individual from government interference with “rights ‘implicit in the concept of ordered liberty.’” *United States v. Salerno*, 481 U.S. 739, 746 (1987) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

The right to be free from the government enforcing a false, fraudulent contract is implicit in the concept of ordered liberty. “At its core, the right to due process reflects a fundamental value in our American constitutional system.” *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971). “American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but *on the common-law model.*” *Id.* at 375 (emphasis added).

The recognition and enforcement of common-law rights is central to due process of law. Here, the Arizona superior court and appellate courts have

interfered with Alfredo Molina's common-law right to be free from judicial enforcement of fraudulent, falsified contracts he never approved of, never benefitted from, and never ratified. As a result of that, the superior court and appellate court have deprived him of due process of law.

2. The Arizona trial and appellate courts violated due process by failing to apply long-established common-law ratification principles.

“Without doubt,” the rights that the Due Process Clause of the Fourteenth Amendment guarantee, include the individual’s right to contract and, necessarily, to have the contract upheld. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

Ratification never happened. There was never any credible evidence that—after battling for over a decade to repudiate the falsified and fraudulent contracts—Alfredo would have ever done the exact opposite and ratified those contracts. There was and remains no possibility that ratification—which requires intentional and voluntary action—ever occurred.

Moreover, under the common law, ratification was a question of fact solely for the jury. Among others, these common-law principles, barred ratification:

First, it “is a question of fact whether conduct is sufficient to indicate consent” to ratification. *Restatement (Third) of Agency* § 4.01 cmt. d (2006). Courts

cannot decide ratification where, as here, the facts are disputed. Despite that, the superior court and Arizona appellate courts found ratification. *See also McCurnin v. Kohlmeyer & Co.*, 477 F.2d 113, 115 (5th Cir. 1973) (“Conduct that can otherwise be explained may not effect ratification.”).

Second, ratification “requires an objectively or externally observable indication that a person consents that another’s prior act shall affect the person’s legal relations.” *Restatement (Third) of Agency* § 4.01 cmt. d (2006). Here, there were no such indications. *See also United Bank v. Mesa N.O. Nelson Co.*, 121 Ariz. 438, 440 (1979) (“Ratification requires intent to ratify.”).

Third, “If formalities are required for the authorization of an act, the same formalities are required for ratification. In particular, if written authorization would be necessary to bind the principal to a transaction, a writing is necessary to bind the principal to a ratification.” *Restatement (Third) of Agency* § 4.01 cmt. e (2006). Here, there were no ratification formalities to match the formalities cloaking the false and fraudulent contracts with a façade of respectability.

Fourth, when “the law requires a writing or record signed by the principal to evidence an agent’s authority to bind a principal to a contract or other transaction, the principal is not bound in the absence of such a writing or record.” *Restatement (Third) of Agency* § 3.02 (2006). Such a writing or such a record was absent.

In the present case, the Arizona trial and appellate courts abrogated the ratification doctrine’s common-law protections shielding persons such as Alfredo Molina from being burdened by contract obligations that they never consented to undertake. That judicial abrogation of a basic common-law protection violates due process of law.

Indeed, this Court has long held that a State’s “abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause.” *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). The “whole purpose” of the Due Process Clause, after all, is “to prevent” the State from committing “arbitrary deprivations of liberty or property.” *Id.* at 434. The due process “guarantee requires governments seeking to take a person’s freedom or possessions to adhere to ‘those settled usages and modes of proceeding found in the common law.’” *Wooden v. United States*, 142 S.Ct. 1063, 1082 (2022) (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 277 (1856) (Gorsuch, J., concurring)).

Justice Neil Gorsuch has emphasized “that the weight of the historical evidence shows that the [due process] clause sought to ensure that the people’s rights are never any less secure against governmental invasion than they were at common law.” *Sessions v. Dimaya*, 138 S.Ct. 1204, 1224 (2018) (Gorsuch, J., concurring). The constitutional guarantee of due process of law encompasses the right to freedom from judicial enforcement of onerous contracts that a person never

agreed to enter into and which that person never later ratified.

The ratification doctrine is a central aspect of the common law that courts have recognized and enforced for centuries. Its judicial abrogation in the present case nullified a vital common-law protection for Alfredo Molina and sets a dangerous precedent that will violate an essential common-law protection for litigants in Arizona and across the nation.

CONCLUSION

For the foregoing reasons, Petitioners ask the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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