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(ENDORSED)
ELECTRONICALLY FILED

Arizona Supreme Court
on **Dec 19, 2022 4:01 PM MST**

CLERK OF THE COURT
Tracie K. Lindeman

By Deputy Clerk: *JN*

ATTACHMENT NAME: **BRIEF - Amicus Curiae: Amicus Curiae Brief of Community Associations Institute in Support of Cross-Petition for Review**

CASE NAME: **CAO et al. v PFP DORSEY et al.**

CASE NUMBER: **CV-22-0228**

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IN THE SUPREME COURT OF ARIZONA

JIE CAO, et al., Petitioners/Appellants/ Cross-Respondents v. PFP DORSEY INVESTMENTS, LLC., DORSEY PLACE CONDOMINIUM ASSOCIATION Respondents/Appellee/ Cross-Petitioners	Arizona Supreme Court Case No: CV-22-0228-PR Court of Appeals Div. 1 No: 1CA-CV-21-0275 Maricopa County Superior Court No: CV2019-055353

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF CROSS-PETITION FOR REVIEW

(*FILED WITH THE WRITTEN CONSENT OF THE PARTIES*)

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INTEREST OF CAI AS AMICUS CURIAE

Community Associations Institute (CAI) is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 43,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 74.1 million homeowners who live in more than 355,000 community associations in the United States. https://foundation.caionline.org/publications/factbook/statistical-review/. CAI is representing not only itself, but also its tens of thousands of members on this important issue.

THE PETITION PRESENTS ISSUES OF BOTH GENERAL IMPORTANCE AND STATEWIDE CONCERN

Over 2.2 million residents live in one of the approximately 9,900 community associations in Arizona (more than 30% of Arizona residents) and approximately 74.2 million people live in community associations throughout the United States. *The Community Association Fact Book, National and State Statistical Review for 2021*: Fact Book 2021 Dashboard - Foundation for Community Association Research (caionline.org). While the issues in this case most directly impact

condominiums, their reach is even broader, posing issues of general and statewide importance, as well as national concern. As it stands, the decision below will cause great uncertainty in community associations and will prevent the duly enacted laws of the Arizona State Legislature from taking effect. Moreover, because the Arizona Condominium Act is based on Articles 1 through 3 of the Uniform Condominium Act, the erroneous decision has the potential to adversely affect condominium law nationwide.[1] Accordingly, this Court should grant review.

INTRODUCTION

The decision below incorrectly applies this Court's recent holding in *Kalway v. Calabria Ranch*, 252 Ariz. 532 (2022) to find that amended versions of the Condominium Act (A.R.S. § 33-1201 *et. seq*.), duly enacted by the Legislature, do not apply to all condominium unit owners, even when the condominium declaration explicitly incorporates the statute "as amended from time to time." *Kalway*, however, did not declare such a rule of legislative impairment or even suggest that its reasoning should be extended to provide for it. On the contrary, *Kalway* set forth contract interpretation principles for determining which version of a frequently

[1] Section 1-110 of the Uniform Condominium Act entitled "Uniformity of Application and Construction" states that: "This [act] shall be applied and construed so as to effectuate its general purpose to make uniform the law with respect to the subject of this [act] among states enacting it."

amended *private contract*—a condominium declaration—would apply to unit owners who acquire their property at different times. That is not this case. Yet the Court of Appeals overextended that contract rubric to conclude that different versions of a *statute*—even fully repealed versions—can apply to unit owners in a disparate and splintered basis. Ignoring the legal and factual context in which *Kalway* was decided, that transposition violates controlling law on the separation of powers and parties' reasonable expectations with respect to legislative changes. Also, as explained below, the decision makes the lawful operation of a condominium nothing short of impossible.

The consequences of this inapt and novel extension of law cannot be understated, nor can the need for this Court to grant review. If the decision stands, 45 different versions of the same condominium statute could apply to a single condominium, creating an unworkable quagmire of rules in which associations and unit owners must operate. The legislative goals codified in the Condominium Act are undermined with each day that presently enacted law may be disregarded based on speculation as to what each individual unit owner could reasonably expect.

Controlling law rejects such a result. Contracts, including condominium declarations, are understood to automatically incorporate relevant statutes. Likewise, when a declaration incorporates the law, it is reasonable for parties to expect for the law, as amended, to apply. No unconstitutional impairment of a

contract exists when parties agree for the Condominium Act, as amended from time to time, to apply and when, as here, the Condominium Act was amended. Moreover, courts have long warned of turning a question of statutory application into one of contractual interpretation. So too have they enshrined the duty of the judiciary to apply the law as written—including its amendments.

This Court's immediate intervention is needed to forestall the perils that will ensue if the Court of Appeals' decision remains good law. This Court likewise is in the best position to declare the reach of its own precedent. And in making that declaration, this Court should hold that *Kalway*'s contract principles have no application on facts like these. By the same token, this Court likewise should hold that the Condominium Act, as amended from time to time, is the law that governs the relationship between a condominium association and its members—just as the Legislature intended.

ARGUMENTS

I. The Court of Appeals' decision creates uncertainty and confusion for planned communities, condominium associations, timeshare associations, and anyone governed by a contract impacted by statutes.

The Court of Appeals' misapplication of *Kalway* creates an untenable situation for planned communities, condominiums, timeshares, and any parties governed by a contract that is impacted by statutes. Misunderstanding *Kalway*, the Court of Appeals held that even where a "[d]eclaration incorporates amendments to

the Condominium Act, an amendment will be included only if it falls within the [unit owners'] 'reasonable expectations based on the declaration in effect at the time of the purchase.'" (Opinion ¶ 20 (citing *Kalway*, 252 Ariz. at 544, ¶ 15)). Applying that expectation analysis, the court found that: "[t]he Declaration did not provide sufficient notice of such a substantive [statutory] amendment." (Opinion ¶ 22.) Thus, instead of applying the current version of the statute, the court ruled that an outdated and replaced 1986 version must apply, because that was the law in effect when the unit owners purchased. (Opinion ¶ 24.)

Unlike *Kalway*, which created consistency within a community, the Court of Appeals' transposition of *Kalway*'s expectations analysis to statutes creates uncertainty and non-uniformity. Under the decision, "if there have been substantive post-purchase changes to the statute, the version of the statute in place at the time of purchase controls." (Opinion ¶ 2.) The result is that multiple, different statutory regimes—including ones that the legislature has replaced or invalidated—will apply to the very same common interest community. Different unit owners will be subject to different laws simply based on time of purchase.

The unworkability of this rule is especially pronounced in the condominium context. The Condominium Act has been amended 45 times since its enactment in 1985, and condominium units are frequently bought and sold. Under the Court of Appeals' rule, the condominium association is required to determine which version

of the law applies to each individual unit owner based on when they joined the community. Such a task would be unduly burdensome for a team of lawyers, let alone the usual condominium board often made up of volunteer laypersons.

To make matters worse, an association would also need to decide how to take community-wide actions that implicate all unit owners' interests. For example, in 2008, the Condominium Act was amended to require all condominiums in Arizona to be subject to the Act effective January 1, 2009, even if they were originally formed before its enactment (pre-1985 condos). (A.R.S.§33-1201. (H.B. 2276, 48th Leg., 2nd Reg. Sess. (Ariz. 2008))). The Act added many new provisions, including changing requirements for amending an association's declaration (A.R.S. §33-1227), requiring ratification of the association's budget unless the declaration stated that the board could adopt the budget (A.R.S. §33-1243), prohibiting the use of proxies and requiring the use of absentee ballots (A.R.S. §33-1250), and requiring an association to carry specific insurance (A.R.S. §33-1253), just to name a few. Any owner who purchased before January 1, 2009, can now argue that none of these provisions should apply to them. For example, they can argue that the members of their association should be able to amend the declaration with a majority approval per their declaration. However, a subsequent owner would argue that declaration amendments require at least the approval of 2/3 of the voting power, as required by

the Act. (A.R.S. §33-1227). There is no way to reconcile these two requirements—yet the decision below requires condominium boards to do just that.

The harms are not limited to associations either. Important legislative protections for unit owners can effectively be cast aside. For example, in 2006, the Legislature limited when an association can foreclose on assessment liens, requiring an owner to be delinquent in the amount of at least $1,200 or one year's assessment, whichever comes first. (A.R.S. § 33-1256). However, owners who purchased before 2006 may not have reasonably expected that the Legislature would grant them further protection, opening the door for associations to promptly start foreclosure proceedings, regardless of the consumer protection measures currently enacted.

The Legislature has also added several restrictions on associations' authority to prohibit for sale and for lease signs. (A.R.S. §33-1261(C)). If an owner bought into a community prior to adoption, and the declaration already prohibited for sale and for lease signs, long-term unit owners may be prohibited from freely marketing their units. At the same time, unit owners who bought after the change would be allowed to post signs as they please, creating two classes of owners.

That is just the tip of the iceberg, as other statutory provisions have been amended more than just two times. For example, the provision relating to fines being secured by the assessment lien of an association has been changed multiple times. Various versions permit: (1) no imposition of fines at all (if originally not subject to

the Condominium Act and not in their declaration); (2) fines secured by the assessment lien (as originally allowed under the Condominium Act and in many declarations); or (3) fines not secured by the assessment lien (if an owner purchased after 2004). (A.R.S. § 33-1256 (1985) (amended in 2004)). Similar examples of changing rules include (but are not limited to) an association's ability to restrict rentals (A.R.S. §33-1260.01), fees relating to resale of units (A.R.S. §33-1260(C)), open houses and open house signs (A.R.S. §33-1261(C)), displaying flags and political signs and conducting political activity in the community (A.R.S. §33-1261), and the right of association members to peacefully assemble (A.R.S. §33-1261(J)).

Planned communities (governed by A.R.S. §33-1801 et seq.) will suffer similar problems. In addition to the changes noted above, amendments to the planned communities statutes now require associations to allow artificial turf and solar panels (A.R.S. §§33-1816 and 33-1819), allow children to play in the streets (A.R.S. §33-1808), prevent associations from limiting certain parking on the streets (A.R.S. §33-1809), and provide a process for removing board members (A.R.S. §33-1813). For an association to apply the law to each owner—if it could even be done—would create a patchwork effect on the community.

The decision below also provides no direction about how to apply a statutory amendment that a new owner might find beneficial, but goes against a prior owner's reasonable expectations. For example, if an owner bought into a community that did

not allow artificial turf and their neighbor now wants to install artificial turf based on new legislation, does the original owner have the right to live in a turf-free community or does the new owner have the right to install turf on their lot? Where the Legislature has amended how Board members may be removed—something which impacts *all* unit owners—whose reasonable expectations prevail? These and countless other problems will ensue, with no clear outcome and only expensive, burdensome litigation to follow.

II. The decision below overlooks the fundamental principle that statutes generally apply to all contracts, including declarations, regardless of whether the contract specifically incorporates it.

Not only has the appellate court created an unworkable statutory framework for every association in the State of Arizona, its decision flies in the face of a previous ruling by the Court of Appeals in *Qwest Corp. v. City of Chandler*, when it reiterated the principle that "all contracts incorporate applicable statutes and common law principles." 222 Ariz. 474, 484, ¶ 34 (App. 2009) (citation omitted).

Condominium associations and their members are subject to and bound by the Condominium Act. A.R.S. §33-1201; *Qwest Corp.* 222 Ariz. at 484, ¶ 34. Their "rights and obligations" can arise from both "statute" and contract—"the declaration, and the bylaws," *American Savings Service Corp. v. Selby*, 149 Ariz. 348, 355-356 (App. 1985)—all of which "must be read in relation to each other to bring harmony, if possible." *Sun-Air Estates, Unit 1 v. Manzari*, 137 Ariz. 130,

132 (App. 1983). However, the laws of the state are a part of every contract and, "[w]here a contract is incompatable with the statute, the statute must, of course, govern." *Sch. Dist. No. One of Pima Cnty. V. Hastings*, 106 Ariz. 175, 177 (1970). Indeed, the Condominium Act itself mandates that it "applies to all condominiums created within this state without regard to the date the condominium was created." A.R.S. § 33-1201.

Nevertheless, the Court of Appeals cast aside those mandates by holding that unit owners are not bound by the amended and controlling version of A.R.S. §33-1228 simply because they bought their property prior to its enactment and the "Declaration did not provide sufficient notice of such a substantive amendment." (Opinion ¶ 20 & ¶22). The Court reached this strained conclusion by misapplying *Kalway* and extending its expectations rule beyond amendments to declarations and to legislative acts. Nothing in *Kalway* suggests that its contract law-driven rule is to be applied when a statute is amended, and, as discussed in Section IV below, that would be contrary to courts' duties to uphold the laws enacted by the legislature. *Trump v. Badet*, 84 Ariz. 319, 324 (Ariz. 1958).

III. Where a contract incorporates and subjects itself to subsequent changes to the law, there is no constitutional impairment of the contract when the legislature does as anticipated and changes the law.

The Court of Appeals further reasoned that "a forced termination and sale under the statute is unconstitutional but for an owner's contractual agreement under

the declaration. And we cannot read A.R.S. § 33-1228(K) to affect agreements already in place because 'no ... law impairing the obligation of a contract[ ] shall ever be enacted.' Ariz. Const. art. 2, § 25." (Opinion ¶ 23). However, in the declaration, the parties agreed to be bound by amendments to the Condominium Act, and Arizona precedent has already established that when a declaration incorporates the law, the reasonable expectations of the parties include subsequent amendments. *Hawk v. PC Vill. Ass'n*, 233 Ariz. 94 at ¶16 (2013).

In *Hawk*, the Court of Appeals held that a state statute abrogating covenant provisions that barred "for sale" signs was not an unconstitutional impairment of a contract in existence before the statute was enacted. *Id.* at ¶ 18. The statute, A.R.S. § 33-441, was enacted in 2009. *Id*. at ¶ 9. Before then, the declaration at issue prohibited "for sale" signs but, notably, excluded from the ban "signs…the prohibition of which is precluded by law." *Id*. at ¶ 3.

The court noted that, to be successful in a challenge of a statute as violating the federal and state contract clauses, a party must first show that the statute substantially impairs the contractual relationship. *Id*. at ¶ 15 (citation omitted). "To determine whether an impairment is substantial, we must consider the parties' reasonable expectations. The absence of contractual language contemplating permanency, or the presence of language affirmatively contemplating change, may also be relevant." *Id*. at ¶ 16 (citation omitted).

The language in the declaration anticipating applicable statutory law provided just that. As the court explained:

> Though the [condominium documents] generally prohibit nearly all signs, and specifically prohibit "for sale" signs, they exempt from the ban those signs "the prohibition of which is precluded by law." This exception is flexible—it contemplates that there will be types of signs that the law will protect, and it is not limited to legal protections in effect at the time of recordation. Because the parties anticipated that the [condominium documents] would yield to laws concerning signs, we conclude that A.R.S. § 33–441 does not significantly impinge on the parties' reasonable expectations.

Id.

Hawk further noted that "the pervasiveness of prior regulation in the subject area of the impairment is relevant to the question of the parties' reasonable expectations." *Id. at note 3 (citations omitted)*. Because the statute did not significantly impinge on the parties' reasonable expectations, the Court of Appeals held that the statute did not violate the constitutional contract clauses. *Id*. at ¶ 18.

Here, however, the Court of Appeals broke from these fundamental principles concerning what parties can reasonably expect. The only basis given for that departure was *Kalway*, which does not support such an extension in a legislative context. *Supra* Sect. I. Given the declaration's express contemplation of amendments to the Condominium Act, it simply cannot be said that the amendment at issue was "unknown" or "beyond the range of reasonable expectation." (Opinion ¶ 19). If anything, this case is an even easier one than *Hawk*. The language here—

specifically contemplating statutory "amend[ing] from time to time"—goes even farther than *Hawk*'s general language subjecting the contract "by law." 233 Ariz. at 99, ¶ 3.

Other states are in accord. The Florida courts have held that if a declaration incorporates the Condominium Act "*as amended from time to time*," then any changes to the Act automatically become part of the declaration and the most recent version of the Act applies. *See* *Tropicana Condo. Ass'n, Inc. v. Tropical Condo.*, *LLC*, 208 So. 3d 755, 756 (Fla. Dist. Ct. App. 2016) (citing *Kaufman v. Shere*, 347 So. 2d 627, 628 (Fla. Dist. Ct. App. 1977). As the *Kaufman* court explained, there is "no ambiguity in [] language" "stat[ing] that the provisions of the Condominium Act are adopted 'as it may be amended from time to time.'" 347 So. 2d at 628. The only reasonable conclusion is "that it was the express intention of all parties concerned that the provisions of the Condominium Act were to become a part of the controlling document of [the condominium] whenever they were enacted." *Id.*

Accordingly, the Court of Appeal's concern regarding contract impairment is misplaced.

IV. The Court of Appeals' decision destroys the ability of the legislature to perform its function.

The decision below also presents an inescapable separation of powers problem. By permitting courts to speculate as to unit owners' expectations as a way of preventing the application of duly enacted statutes, the decision ignores this

Court's pronouncement of "a duty on the courts to give effect to statutory amendments, since it is presumed that the legislature by amending a statute intends to make a change in existing law." *Trump*, 84 Ariz. at 324. Rather than the policy decisions of the Legislature taking effect as intended, a single condominium may be governed by 45 different versions of the Condominium Act, creating a patchwork application of the law—the very thing the legislature sought to avoid. *See* A.R.S. § 33-1201 (mandating that the Condominium Act "applies to all condominiums created within this state without regard to the date the condominium was created."). In fact, Section 33-1203 of the Condominium Act entitled "Variation" clearly states that: "Except as expressly provided in this chapter, the provisions of this chapter shall not be varied by agreement and rights conferred by this chapter shall not be waived." Also, "[b]eginning on the effective date of this amendment to this section, any provisions in the declaration that conflict with subsection G, paragraph 1 of this section are void as a matter of public policy." A.R.S. § 33-1228 (effective August 3, 2018). The legislative intent could not be clearer.

Beyond that, the decision below has morphed a question of statutory application into one of contractual interpretation, something which the U.S. Supreme Court has warned against:

> Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, '[t]he continued existence of a

> government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation.'

Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 466 (1985) (citations omitted).

This Court should grant review to reverse the Court of Appeals' improper denial of the Legislature's power to amend the laws of Arizona, in contravention of that warning and the duty for courts to apply the law as written.

CONCLUSION

For the foregoing reasons, CAI urges this Court to grant the Association's Petition and reverse and vacate the decision.

RESPECTFULLY SUBMITTED this 19th day of December, 2022.

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