SUPREME COURT OF ARIZONA

JIE CAO, et al. Plaintiffs/Appellants, v. PFP DORSEY INVESTMENTS, LLC, et al., Defendants/Appellees.	Arizona Supreme Court No. CV-22-0228-PR Court of Appeals Division One No. 1 CA-CV 21-0275 Maricopa County Superior Court No. CV2019-055353 *This brief has been filed with the written consent of the parties.*

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPORT OF PLAINTIFFS/APPELLANTS

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INTEREST OF THE *AMICUS CURAE*[1]

The Cato Institute's Robert A. Levy Center for Constitutional Studies is dedicated to restoring the principles of limited government that are the foundation of liberty. This case interests *amicus* because property rights are critical to freedom and prosperity and yet among the least respected constitutional rights.

INTRODUCTION

Life would be so much easier if we could force others to do what we want. Disgruntled sports fans wish they could force a stingy owner to sell their favorite team to a more generous benefactor. Passionate patrons of the arts wish they could force a private collector to sell a prized painting to a public gallery to be appreciated by the masses. Aggrieved social media users wish they could force a big tech company to sell the platform to an idealistic billionaire who promises to fix its moderation rules. And then many wish they could force the billionaire to sell it back.

We all wish we could force unwilling sellers to transfer property to owners we like better. But in a country that respects private property rights, we can't always get what we want. If one private citizen could force another to sell her own private property against her will, that would be an egregious violation of the owner's property rights. The Arizona Constitution recognizes this fact, but the Arizona law at issue in this case does not.

[1] Rule 16(b)(4) Statement: No person or entity other than amicus and its members made a monetary contribution to its preparation or submission.

Under an Arizona law called the Condominium Act, a supermajority of condo owners can force a minority of condo owners to sell their units against their will. That's exactly what happened when an LLC called PFP Dorsey Investments bought ninety out of ninety-six units in a condo building in Tempe. That was enough, under the Act, to allow PFP Dorsey to force a sale of the remaining six units to *itself*—never mind that the remaining owners, including Jie Cao, did not want to sell.

PFP Dorsey defends the Arizona law on both legal and policy grounds, but its arguments fall flat. PFP Dorsey claims that it would be unreasonable to allow a minority of condo owners in a building to potentially block the sale of the entire building and prevent its conversion to a so-called better use:

> Consider a 10-unit condominium on what has now become a busy street surrounded by commercial space negatively driving down residential values. If a commercial developer offers to buy all the units and redevelop it, and nine of the owners agree, should one owner be able to prevent that transaction from occurring when the parties agreed that a 90% vote is the only requirement for this precise circumstance? The answer is no.

Defendants' Supp. Br. At 4.

In fact, as a question of both law and policy, the answer is "yes." Arizonans made that determination in the Arizona Constitution and mandated that property rights should be protected. Furthermore, Arizonans explicitly commanded that this Court should not defer to the legislature on the question of whether a taking is for a

truly public use and reiterated this decision in the wake of *Kelo v. New London* with the Private Property Rights Protection Act, which trumps other Arizona statutes.

That determination is also correct as a policy matter. Property rights are critical to achieving a free and prosperous society; as Friedrich Hayek said: "The system of private property is the most important guaranty of freedom." FRIEDRICH HAYEK, ROAD TO SERFDOM 103 (1944). The protection of property rights is strongly correlated with economic prosperity. But fully protecting property rights means protecting those rights even when individual property owners wish to use their property in manners that may seem inefficient. The forced sale of property through eminent domain can be too easily abused when (mostly private) "economic benefits" are enough to justify takings. And the supposed problems caused by unwilling sellers are overblown, anyway—time and time again developers have managed to prosper despite holdouts.

If the government can negate property rights whenever it deems it to be in the public interest, people do not really have property rights at all. Property rights are too important to be so easily thrown away. This Court should hold the challenged provision incompatible with the Arizona Constitution.

ARGUMENT

I. THE CONDOMINIUM ACT EFFECTS A TAKING FOR PRIVATE USE IN VIOLATION OF THE ARIZONA CONSTITUTION.

A key principle going back to the Founding Era is that the government may not take a person's property for *private* use, even with just compensation. In *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), Justice Samuel Chase wrote of a "law that takes property from A. and gives it to B.," and remarked that the "genius, the nature, and the spirit, of our State Governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them." *Id.* at 388. John Locke, whose works were very influential on the American founders, stated that "I have truly no property in that which another can by right take from me when he pleases against my consent." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 360–61 (Peter Laslett ed., Cambridge Univ. Press, Student ed. 1988) (1689). William Blackstone, a similarly influential figure to early American jurists, said that property rights cannot be violated "even for the general good of the whole community." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 135 (Oxford, Clarendon Press 1765). This principle led to the inclusion of the Takings Clause in the Fifth Amendment, which guarantees that private property will not be taken for private use, and even if taken for public use, can only be taken with "just compensation."

The Arizona Constitution similarly holds that "[p]rivate property shall not be taken for private use, except for [listed uses not relevant here]" ARIZ. CONST. art. 2,

§ 17. Whether the use for which the private property is taken is a public use is a question for the court, which must not give any deference to the legislature. *See id*.

A. Under Arizona takings law, the taking is clearly unconstitutional.

Under the Arizona Takings Clause, the taking in this case is not for public use. In *Bailey v. Myers*, the court of appeals invalidated a taking that was part of a city development project because it was not for public use. *See Bailey v. Myers*, 206 Ariz. 224, 225–26 (2003). It held that "[t]he constitutional requirement of 'public use' is only satisfied when the public benefits and characteristics of the intended use substantially predominate over the private nature of that use." *Id.* at 230.

PFP Dorsey's taking of Jie Cao's condominium unit fails *Bailey*'s test. The private developer PFP Dorsey holds title to the entire building, including those units forcibly sold against the original owners' will. *See Cao v. PFP Dorsey*, 243 Ariz. 552, 555 (Ariz. Ct. App. 2022). The record does not appear to say for what purposes the property will be used, but PFP Dorsey is the sole driver of this forced sale. The sale involves a private developer selling the few condominium units it did not already own to *itself*, and the private developer will be the primary beneficiary of the new use. *See id.* at 554–55. Taken together, *Bailey*'s factors weigh against the use being public.

Arizona law goes even further to cabin the scope of "public use" than the text of the Arizona Constitution's Takings Clause alone. In the aftermath of *Kelo* in 2006,

Arizona passed by nearly a two-to-one margin the Private Property Rights Protection Act (PPRPA), A.R.S. §§ 12-1131–38 (LexisNexis 2023). Critically, the PPRPA explicitly excludes from the category of public use "the public benefits of economic development, including an increase in tax base, tax revenues, employment or general economic health." A.R.S. § 12-1136(5)(b). But the only potential public purpose justifying takings under section 33-1228 of the Condominium Act is promoting economic development. "[I]f a conflict between [the PPRPA] and any other law arises, [the PPRPA] controls." A.R.S. § 12-1137.

Nor can the force of the PPRPA be avoided by recharacterizing the taking as a matter of contract rather than statute. PFP Dorsey argues, and the court below agreed, that Cao is bound to the terms of the Condominium Act by private contract because she voluntarily signed a condominium agreement "grant[ing] the Association the 'rights, powers and duties as are prescribed by the Condominium Act.'" *Cao*, 243 Ariz. at 556. For this reason, even though the court below agreed that "A.R.S. § 33-1228 is unconstitutional on its face," *id.* at 555, the court held that the forced termination and sale under section 33-1228 was constitutional as applied to Cao. *Id.* at 558.

Cao has explained why she did not, in fact, agree to these statutory terms by signing the contract. *See* Plaintiffs' Supplemental Brief at 14–24; Cao/Xia Petition at 12–19. But even if Cao did agree, that would not make § 33-1228 of the

Condominium Act constitutional—it would only mean that there is a separate private contract containing terms identical to those in the statute. For the reasons explained above, section 33-1228 of the Condominium Act is unconstitutional.

II. TAKINGS FOR ECONOMIC DEVELOPMENT DO MORE HARM THAN GOOD.

PFP Dorsey's policy arguments are no more successful than its legal ones. PFP Dorsey largely rests its appeal on the so-called "holdout problem," insisting that this is a problem requiring government intervention. The classic formulation of the holdout problem proceeds as follows: A developer seeks to purchase a property to move forward with a larger project, but the property owner refuses to sell the property to the developer at market price. Thus, the developer must either pay above market price or forgo purchasing the property altogether. If the developer purchases the property at above market price, the project produces less net economic gain. If the developer declines to purchase the property at the inflated price, the developer must change the project, reducing the value of the project to the developer. These losses, if large enough, could cause the developer to cancel the project.

Many development projects are economically beneficial in that the new use of the property produces more wealth than its original use. Since this increased wealth generation is taxable, some argue that the increased tax revenue to the government can benefit the surrounding community, which can have trickle-down effects on the surrounding economy as the extra wealth is spent. On this view, the

holdout problem can cause economic harm by interfering with economically beneficial projects. *See, e.g.*, Thomas J. Miceli & Kathleen Segerson, *Sequential Bargaining, Land Assembly, and the Holdout Problem* 2–4 (Univ. of Conn. Dept. of Econ., Working Paper No. 2011-13R, 2012).

But even accepting that these harms may occur, government interventions attempting to "solve" the holdout problem do not actually make things better. Strict protection of property rights produces much more prosperity than government control of the economy for the "public good." And as a practical matter, the harm holdouts may cause is outweighed by the harm caused by eminent domain abuses.

A. Property rights are critical for economic prosperity.

The profound value of property rights means that the holdout problem is less harmful than the abuse of eminent domain. Strong protection of property rights is critical to economic prosperity. One cannot live, let alone live well, without obtaining goods. And people generally will not spend time, effort, and resources producing goods unless they benefit from that expenditure. As Aristotle said: "What is common to many is taken least care of, for all men have greater regard for what is their own than for what they possess in common with others." Walter E. Williams, *Economics and Property Rights*, FOUND. FOR ECON. EDUC. (Jan. 1, 2008). The primary critics of property rights, such as Karl Marx, denied this fundamental aspect of human nature. *See* Gerald P. O'Driscoll Jr. & Lee Hoskins, *Policy Analysis No.*

482, Property Rights: The Key to Economic Development, CATO INST. 4–5 (2003). Property rights ensure that people get the benefit of their expended time, effort, and resources.

Our Founding Fathers and Arizona's framers understood the importance of protecting property rights. *See Bailey*, 206 Ariz. at 227. John Adams proclaimed that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila*, *in* 6 WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1851). Alexander Hamilton declared that "one great obj[ect] of Gov[ernment] is the personal protection and security of property." I MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (1937). In *Federalist* 10, James Madison famously wrote that "the first object of government" is the "protection of different and unequal faculties of acquiring property." ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* & THE LIMITS OF EMINENT DOMAIN 37 (2015) (quoting THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961)).

This understanding was evident in the law of the founding era. In 1776, George Mason wrote the Virginia Declaration of Rights, which helped inspire the Declaration of Independence, other state constitutions, and the federal Bill of Rights. In its first article, the declaration stated that "all men . . . have certain inherent rights, of which . . . they cannot, by any compact, deprive or divest their posterity; among which [is] . . . the means of acquiring and possessing property." Memorandum by R.

Carter Pittman, The Virginia Declaration of Rights: Its Place in History (Oct. 28, 1955). In 1795, Supreme Court Justice William Patterson, riding circuit, wrote that "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man." *Vanhorne's Lessee v. Dorrance*, 20 U.S. 304 (C.C.D. Pa. 1795). Even Adam Smith stated in a 1760s lecture in Glasgow that "[t]he first and chief design of every system of government is to . . . prevent the members of society from incroaching [sic] on one another's property, or seizing what is not their own . . . to give each one the secure and peacable [sic] possession of his own property." ADAM SMITH, LECTURES ON JURISPRUDENCE 5 (R. L. Meek, D. D. Raphael & P. G. Stein eds. 1978).

The Founders were particularly interested in protecting property rights from "oppressive majorities, special interests, and government officials." SOMIN, *supra*, at 42. James Madison, author of the Fifth Amendment Takings Clause, feared that property rights would be undermined by the majority under republican government. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 16–66 (1990). Gouverneur Morris agreed, stating that "[e]very man of observation had seen in the democratic branches of the State Legislatures, . . . [and] in Congress . . . excesses ag[ainst] . . . private property." SOMIN, *supra*, at 42 (quoting FARRAND, *supra*, at 512). Morris feared not just that a majority would seize the property of the wealthy minority, but that the wealthy would use their

influence to threaten the property rights of the poor. *See id.* These fears led to the ratification of the Fifth Amendment Takings Clause.

The Founders were correct to prioritize the protection of property rights. A 2001 study measured the correlation of fourteen potential explanatory variables with Gross National Income per capita to determine which variables best explain economic prosperity, and the variable with the highest level of significance was property rights. *See* Richard Roll & John Talbott, *Why Many Developing Countries Just Aren't* 4 (UCLA Anderson Sch. of Mgmt., Finance Working Paper No. 19-01 2001). Two other studies also found a significant relationship between stronger property rights protections and higher income per capita. *See* Germinal G. Van, *Property Rights and Income Inequality* 8–12 (Jan. 2021), MPRA Paper 105195; Timothy Besley & Maitreesh Ghatak, *Property Rights and Economic Development*, *in* 5 HANDBOOK FOR DEVELOPMENT ECONOMICS 4554–56 (Dani Rodrik & Mark R. Rosenzweig eds., 2010). The 2007 edition of *The Economic Freedom of the World* found that the countries in the top quartile of economic freedom had an average GDP per capita of $26,013, versus an average GDP per capita of $3,305 for the bottom quartile. *See* Williams, *supra*. Similarly, the top quartile had an economic growth rate of 2.25% compared to 0.35% for the bottom quartile. *See id*. Given that a 10% increase in a country's average income corresponds to a 20–30% decrease in the poverty rate, *see* DEP'T FOR INT'L DEV., U.K., GROWTH: BUILDING JOBS AND

PROSPERITY IN DEVELOPING COUNTRIES 3 (2008), this provides a real and profound benefit to individual well-being.

The benefits of economic freedom are seen even in places with related language, culture, and traditions. South Koreans have, on average, at least 17 times the income of North Koreans. *See* O'Driscoll Jr., *supra*, at 2. Finland and Estonia are practically neighbors, their languages share a common root, and they have similar cultures and values. Yet while their standard of living was approximately the same in the 1930s, in 2000, after Estonia suffered fifty years of Communist rule, the average Finn earned from 2.5 times to over seven times what the average Estonian earned. *See id.* East Germany was also significantly poorer than West Germany after suffering Communist rule. *See id.* Communist China's real per capita GDP in 2000 was less than $4,000. *See id.* Taiwan, which split from China during the Communist revolution, had a real per capita GDP of more than $17,000. *See id.* Hong Kong, which had ended a century of British rule just a year before, had a real per capita GDP $25,153. *See id.* In every case, the nation that better respected property rights had greater prosperity.

Given this fundamental fact of human prosperity, eminent domain abuse is a much more serious problem than the holdout problem that eminent domain attempts to solve. *Voluntary* exchanges make all parties either better off or no worse off; otherwise not every party would agree to the exchange. *Involuntary* exchanges like

takings do not inherently create a net benefit, since one party is forced to sell at a price they would not choose to sell and thus is made worse off. In many circumstances the benefit will be outweighed by the harm.

Advocates for compelled takings of "holdout" properties argue that the owners are often not worse off when forced to sell, because they only held out to extract extra value from the developer. But it is frequently impossible to distinguish "strategic" holdouts from genuine holdouts. *See* Edward J. Lopez & J. R. Clark, *The Problem with the Holdout Problem*, 9 REV. L. & ECON. 151, 158 n.10 (2013). For sentimental and other reasons, many people value their own property much higher than the "market" price, particularly homes they have long lived in and family heirlooms. It is entirely reasonable that they would refuse to sell at market price. Because of this greater personal valuation, using eminent domain to gift property to developers decreases economic efficiency. *See* SOMIN, *supra*, at 92.

In sum, forced sales undermine property rights and deprive owners of the unique value they derive from their personal property, both of which lead to decreased economic and overall well-being.

B. Abuse of eminent domain causes more harm than the holdout problem.

Even if some takings provide a net benefit, the government cannot be trusted to ensure that eminent domain is used primarily for beneficial takings. The government consists of flawed, corruptible humans who often wield their power in

"efficiency-reducing, opportunistic" ways rather than just to "recover[] lost allocative efficiencies generated by holdouts." Lopez & Clark, *supra*, at 153.

Given that most takings benefitting private businesses can be rationalized as promoting "economic development," *see* SOMIN, *supra*, at 74–75, such takings create great opportunity for private businesses to rent-seek—to use the government to take property for the private businesses' own private gain. *See id.* at 81. Rent-seeking comes with its own economic costs. *See id.* at 75. And government officials are incentivized by rent-seekers to take property from genuine good-faith holdouts, causing economic inefficiency. *See* Lopez & Clark, *supra*, at 162–63. Further, the "economic development" rationale is so broad that it allows corrupt officials to come up with *some* benefit, even when those supposed benefits often fail to materialize. *See* SOMIN, *supra*, at 76–78.

No case better showcases this issue than *Kelo* itself. Private interests hopelessly compromised the project from the beginning. When New London, Connecticut, created the New London Development Corporation (NLDC) to establish an economic development plan to help with the city's economic troubles, the appointed head of the NLDC was married to a high-ranking employee of Pfizer. *See id.* at 15. This led the head to recruit an executive of Pfizer to join the NLDC board, partly in the hope of getting Pfizer to build a new headquarters in New London. *See id.* Pfizer conditioned its move to the area on New London condemning

90 acres of property to turn into "upscale housing, office[] space, a conference center, a five-star hotel, and other facilities . . . useful to the corporation and its employees." *Id.* at 16. This demand directly led to the condemnations at issue in *Kelo*. Much of the condemnation was not even practically necessary for the redevelopment but was sought for aesthetic reasons. *See id.* at 17. Yet Pfizer and the NLDC's representatives insisted that Pfizer was not involved in the condemnation decision and did not make it a condition for moving into the area. The full truth of Pfizer's involvement was not revealed until after the Supreme Court's ruling. *See id.*

Worse, after the tremendous legal battle, the redevelopment plan fell through. Largely due to flaws in the project, Pfizer abandoned its New London facility in 2009, costing New London 1,400 jobs. *See id.* at 235. A decade after the *Kelo* decision, the condemned properties at the center of *Kelo* remained "empty and undeveloped," occupied only by feral cats. *Id.*

But *Kelo* is not the only example of eminent domain gone wrong. In 1998 in Garden Grove, California, a mobile home park for fixed-income senior citizens was condemned for a private mall project that was never completed. *See* Dana Berliner, *Government Theft: The Top 10 Abuses of Eminent Domain*, INST. FOR JUST., at 1 (Mar. 2002). In another case, a family was forced to sell their home of 20 years at below-market value as part of a plan to create yet another golf course in West Palm Beach, Florida, which was never built. *See* Jake Rossen, *7 Maddening Examples of*

Eminent Domain, MENTAL FLOSS (Apr. 28, 2015); Stephen Deere & Andy Reid, *College Pitches Hillcrest Plan: Apprehensive Residents Want to See Details*, SUNSENTINEL (Sept. 19, 2005).

In the early 1990s, Bremerton, Washington, settled a suit about odor complaints from a sewage treatment plant and agreed to install odor controls. *See* John Stang, *Bremerton Case Among Inspirations for Anti-Eminent Domain Legislation*, KITSAP SUN (Jan. 19, 2011, 7:33 PM). The city then condemned 53 homes near the sewage treatment plant, including one owner's home of 40 years, supposedly to create an odor easement. *See id.* However, days after the condemnations were finalized, the city rezoned the land and sold it to a car dealership for $1.99 million. *See id.* The city never created an odor easement. *See id.*

In 1997, St. Luke's Pentecostal Church in North Hempstead, New York, managed to purchase property for a new church using more than a decade of savings. *See* Berliner, *supra*, at 9; Jane Lampman, *Property Rights: Not a Given for Churches*, CHRISTIAN SCI. MONITOR (Feb. 16, 2005). The building department denied the church permits for the previously unmentioned issue of insufficient parking, forcing the church to engage in costly litigation. *See* Berliner, *supra*, at 9. And after all that, the North Hempstead Community Development Agency (NHCDA) condemned the property. It turned out that the property had been slated for condemnation before the church even purchased it, though no one mentioned that to the church. S*ee id.* The

government offered the church $80,000 for the property, $50,000 less than what the church had paid. *See* Lampman, *supra*. When the church tried to object, the NHCDA successfully argued to the court that New York's 30-day window for objecting to condemnations expired in 1994, before the church bought the property. *See id.* at 9. After title passed to the NHCDA, the church discovered that the time limit never applied to the case. It tried to sue again, but the litigation was unsuccessful. *See* Lampman, *supra*.

In 1997, Hurst, Texas, used eminent domain to seize 127 homes to expand a real estate company's mall, hoping to increase sales and property tax revenue. *See* Rossen, *supra*; Berliner, *supra*, at 11. Ten couples, who had lived in those homes for as many as 30 years, sued to stop the condemnations. *See* Berliner, *supra*, at 11. The trial judge refused to stay the condemnations while the suits were ongoing, so the residents lost their homes. S*ee id.* The judge also refused an extension to a resident whose wife was in the hospital for brain cancer, forcing him to leave her bedside to move out his belongings. *See* Rossen, *supra*. A total of three couples died and four others suffered heart attacks during the litigation. *See* Berliner, *supra*, at 11. There was evidence that the land surveyor who designed the roads for the mall was told to change the path of one road to run through eight of the litigants' houses. S*ee id.* After years of litigation and receiving no compensation, the families were forced to settle. S*ee id.*

This is far from an exhaustive list; one can find many more examples of abuse. But the true amount of harm caused by eminent domain is unknown. One report estimated that there are approximately 80 municipal projects per year involving the use of eminent domain for the benefit of private businesses, and many involve condemnation of multiple properties. *See id*. Frequently, property owners cannot afford litigation and therefore settle. *See id.* Many of those who do litigate have the legal decisions in their cases go unpublished and unpublicized. But just because these cases are not covered does not mean that they do not exist. And it's well known that the harm disproportionately falls on the politically powerless, such as minorities and the poor. *See* SOMIN, *supra*, at 82–83.

In contrast, the holdout problem is not as problematic as some suggest; economic development has long managed to succeed despite holdouts. In 1902, Macy's decided to move its flagship New York store to the corner of 34th Street and Broadway. *See* Mimi Kirk, *The World's Most Stubborn Real Estate Holdouts*, BLOOMBERG (Apr. 17, 2017, 3:05 PM). The new store was planned to cover the entire block. *See id.* However, the owners of the competing Siegel-Cooper Co. bought one parcel on the corner of the block to bargain for a lease of the old Macy's location. *See id.*; Lauren Glen, *Real Estate Holdouts Who Held Out To The Bitter End*, RANKER (June 22, 2023). Macy's thwarted this plan by refusing to negotiate, and it instead built the store around the tiny parcel. Glen, *supra*. Macy's has never

owned the parcel since, but it advertised on the parcel's exterior from the 1940s until Amazon outbid it in 2021. *See* Kirk, *supra*; Glen, *supra*. Despite Macy's being unable to get part of the property it sought, it still successfully built the store and even leased the holdout parcel for advertising space.

In 1983, Japan planned to expand the Osaka section of its Hanshin Expressway. *See* Kirk, *supra*. However, the site of a planned exit ramp was already owned. *See id.* The owners, who had held the property since the mid-19th century, wanted to build a 16-story office building on the land and refused to sell. *Id*. After five years of negotiations, the government and the landowners managed to come to a compromise without the use of eminent domain: in exchange for approving permits for the office building, the government leased the fifth, sixth, and seventh floors of the building and built the exit ramp through it. *See id.*; Glen, *supra*.

In 2005, the legal practice Acker + Associates P.C. moved to the Figo House in Portland, Oregon, built in 1894 in Queen Anne Victorian Style. *See* Glen, *supra*; *The Figo House*, ACKER + ASSOCIATES P.C. (last visited Sept. 25, 2023). TriMet, a local transportation development authority, sought to acquire the house by eminent domain on the theory the land was needed to build a public transit system. *See* Glen, *supra*. Acker + Associates attorneys managed to stop the eminent domain action when they discovered that TriMet really intended to acquire the land and sell it to

Portland State University for the construction of a dormitory. *See* Glen, *supra*. This shows how eminent domain can be—and is—abused for private gain.

Advocates of using eminent domain to solve the holdout problem miss the insight of Arthur Pigou:

> In any [market failure], there is a *prima facie* case for public intervention. The case, however, cannot become more than a *prima facie* one, until we have considered the qualifications, which governmental agencies may be expected to possess for intervening advantageously. . . . [W]e cannot expect that any public authority will attain, or will even whole-heartedly seek, that ideal. Such authorities are liable alike to ignorance, to sectional pressure and to personal corruption by private interest.

Lopez & Clark, *supra*, at 164 (quoting ARTHUR PIGOU, THE ECONOMICS OF WELFARE 331–32 (4th ed. 1932)).

Ultimately, the choice to permit the forced sale of property by unwilling sellers for the benefit of others is a choice between two systems: the first enforces and protects private property rights, even when that means individuals can stand in the way of economic development projects that would provide benefits to others. The second grants the government the power to seize private property to support projects it likes, with enormous potential for abuse. The Framers believed that the first system was the better one, and history has proven them correct. Arizonans have made the same choice. This Court should faithfully enforce it.

CONCLUSION

This Court should reverse and rule for Plaintiffs/Appellants.

Respectfully submitted,

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