IN THE SUPREME COURT

STATE OF ARIZONA

FOOTHILLS RESERVE MASTER OWNERS ASSOCIATION, INC. Petitioner/Defendant, v. STATE OF ARIZONA, et al. Respondents/Plaintiffs.	Supreme Court No. CV-23-0292-PR Court of Appeals Division One Case No. 1 CA-CV 22-0371 Maricopa County Superior Court No. CV2017-010359

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITION FOR REVIEW FILED WITH CONSENT OF ALL PARTIES

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Goldwater Institute is a public policy foundation dedicated to principles of individual liberty, limited government, and property rights. Through its Scharf-Norton Center for Constitutional Litigation, it often represents parties or appears as amicus curiae in cases challenging unconstitutional government actions, particularly cases involving eminent domain. *See, e.g.*, *Cao v. Dorsey*, No. CV-22-0228-PR (Ariz. filed Sept. 23, 2022) (pending); *Aspen 528 LLC v. City of Flagstaff*, No. 1 CA-CV 11-0512, 2012 WL 6601389 (App. 2012); *Kelo v. New London*, 545 U.S. 469 (2005). The Institute helped draft the Arizona Private Property Rights Protection Act, A.R.S. § 12-1130 et seq., and Institute scholars have published extensive research about property rights and just compensation. *See, e.g.*, Timothy & Christina Sandefur, *Cornerstone of Liberty: Property Rights in 21st-Century America* (2d ed. 2016). The Institute believes its expertise will aid the Court in considering this petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court of Appeals commited two fallacies that, if left uncorrected, will cause significant confusion in the law and harm property owners.

First, it erred in its interpretation of the compensation statute, the relevant portion of which says that "[i]f the **property** sought to be condemned constitutes only a part of a larger **parcel**," the property owner is entitled to severance damages

(which includes proximity damages). A.R.S. § 12-1122(A)(2) (emphasis added). The Court of Appeals concluded that the second boldfaced word, "parcel," modifies the first boldfaced word, "property," in such a way as to make "property" *synonymous with* "parcel." It consequently held that the only property compensable under this section is property that qualifies as a "parcel," which necessarily excludes an easement.

This was plain error. To read the statute as if it said "if the **parcel** sought to be condemned …" doesn't interpret the statute—it changes it. Such a reading violates a cardinal rule of statutory interpretation: that courts should "giv[e] effect to every word or phrase" in the text. *Bilke v. State*, 206 Ariz. 462, 464 ¶ 11 (2003). It also represents a misapplication of the *exclusio alterius* principle. *Cf. Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). This interpretation narrows the scope of the statute in a way that its actual operative language does not allow.

Second, and more broadly, the court below implicitly assumed that the compensation statute is coterminous with the Constitution's just compensation requirement—i.e., it concluded that if a form of compensation is not provided for by statute, no such compensation is available. Although the court purported to acknowledge that the legislature can expand but not contract the compensation to which property owners are entitled, it nevertheless concluded that these property owners are entitled to *no* compensation for proximity damage because the statute

provides none. But that is incorrect. The Constitution's just compensation requirement is "self-executing," *Mohave Cnty. v. Chamberlin*, 78 Ariz. 422, 429–30 (1955), and the fact that the statute does not specify how to calculate that type of compensation doesn't mean it's not constitutionally guaranteed. What's more, our Constitution's language—particularly the phrase "or damaged"—was adopted *precisely* to cover situations like this.

These errors pose a serious risk to Arizona property owners if left uncorrected. Arizona's constitutional guarantee of just compensation provides some of the strongest security for property owners in America. Curtailing that protection threatens the rights of all owners of intangible property interests.

ARGUMENT

I. The Court of Appeals' statutory construction was plainly erroneous.

A. The court lost sight of the statute's operative text.

The court below fell into a common error: employing statutory construction tools in a way that obscures a statute's operative text. It noted that the compensation statute begins with the phrase "if the property sought to be condemned constitutes only a part of a larger parcel," *see* *State v. Foothills Reserve Master Owners Ass'n, Inc.*, No. 1 CA-CV 22-0371, 2023 WL 8467518, *2 ¶ 15 (App. 2023) (quoting A.R.S. § 12-1122(A)(2)), then found that the phrase "part of a larger parcel" creates an implication that the word "property" in the opening

three words is synonymous with "parcel." *Id.* at *3 ¶ 19. It therefore concluded that the statute really means "if the *parcel* sought to be condemned constitutes only a part of the larger parcel."

But that changes the text, and interpretive tools are supposed to shed light on the *given* text. *See State ex rel. Indus. Comm'n v. Pressley*, 74 Ariz. 412, 421 (1952) ("the words should be taken in such a sense, bent neither one way nor the other, as will best manifest the legislative intent." (citation omitted)).

In fact, Justice Scalia—on whose book the Court of Appeals purported to rely—was conscientious about avoiding the "tempting fallacy" of substituting interpretive tools for a statute's actual words. *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 718 (1995) (Scalia, J., dissenting). He repeatedly explained that whatever else a court may consider when interpreting a statute, it must always keep its eyes on the statute's *operative terms*—that is, the words the legislature put into the statute.

Babbitt is instructive.[1] There, the Supreme Court, using *Chevron* deference, reviewed an agency regulation which purported to interpret the word "take" in the Endangered Species Act. But that purported definition was actually broader than the defined term: it said "take" included both acts *and omissions* that might *impair*

[1] Justice Scalia and Bryan Garner discussed it in more detail in Antonin Scalia & Bryan Garner, *Reading Law* 230–32 (2012).

behavioral patterns of an endangered species, including the species' *breeding*. *See id.* at 697 n.10. The category of omissions that impair breeding (i.e., actions one might fail to take, the consequences of which make it harder for an endangered species to reproduce) is far broader than the category of actions normally denoted by the word "take." Nevertheless, the *Babbitt* majority said that because the regulation purported to *define* that statutory term, the Court could, as it were, *replace* the word "take" with the regulatory definition, pursuant to the transitive property.

Justice Scalia dissented. He emphasized that "the only operative term" in the statute was "take," and by substituting the (excessively broad) definition for that term, the majority was "read[ing] the defined term 'take'—the only operative term—out of the statute altogether." *Id.* at 717—718 (Scalia, J., dissenting). Congress had never enacted the regulatory definition (or alleged definition), so it was not *operative*. The substitution the majority was engaging in was not interpretation of the given text, but alteration of it—not the transitive property, but rewriting.

The court below committed a similar error. The compensation statute's operative term is "property" ("if the *property* sought to be condemned …"). But the court sought to define this term by applying interpretive techniques that (it thought) proved the word to be the equivalent of "tangible real property"—and

then applied *that*, instead of the operative term. That strains interpretive devices to the breaking point.

In their commentary on this issue in *Reading Law* (at 56–57), Scalia and Garner call this the "Supremacy-of-Text" principle: "the very words of the instrument" must control above all else, so only "*textually permissible meanings*" can qualify as acceptable interpretations. Because "property" is a broader category than "parcel," the interpretation below is not textually permissible.

If the legislature had meant to say "if the *parcel* sought to be condemned," etc., rather than "if the *property* sought to be condemned," etc., it easily could have done so. We know this, because it actually *did* use the word "parcel," in the same sentence. "When the Legislature has used [two different words] in the same paragraph of a statute, we infer that the Legislature acknowledged the difference and intended each word to carry its ordinary meaning." *HCZ Const., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361, 365 ¶ 15 (App. 2001).

The rule that the legislature must be presumed to have intended its specific wording is *especially* applicable here, because Section 12-1122(A)(2) actually uses *three* different nouns: "If the **property** sought to be condemned constitutes only a part of a larger **parcel**, the damages that will accrue to the **portion** not sought to be condemned by reason of its severance from the **portion** sought to be condemned." (Emphasis added). The boldfaced terms show that the legislature chose its words

carefully. It could have started this section with "if the *parcel* sought to be condemned…" and concluded with "…will accrue to the *parcel* not sought to be condemned." Instead, the operative language contemplates the possibility that when one thing ("property") is taken from a "parcel," those two become *portions* (not "parcels") and that the owner of the non-condemned *portion* is entitled to damages caused by its severance from the non-condemned *portion*.

In addition, Section 12-1122(A)(1) expressly addresses compensation for property that is *not* a parcel. It refers to "[t]he value of the property ... and of each and every separate *estate or interest* in the property, and ***if*** it consists of different parcels, the value of each parcel ... ." (Emphasis added.) In other words, the statute addresses the question of "separate estate[s] or interest[s]"—which, of course, can include intangible interests, just as the word "property" can—and then goes on to specify two possibilities: one in which the property *does* consist of separate parcels, and one in which it does *not*. It separates these with the word "if." This, again, shows that the legislature knew how to confine its language to cases involving *parcels*—and it chose *not* to do that in Section 12-1122(A)(2).

Thus, far from suggesting that the legislature meant to permit recovery only for taken *parcels*, the statute's operative language reveals a conscientious usage of different nouns—including two ("property" and "portion") that encompass both tangible and intangible property rights.

The bottom line is simple: when **property**—of any sort—is taken, and it constitutes part of a bigger **parcel**, then if the un-taken **portion**—whatever its nature—is damaged by separation from the taken **portion**, compensation should be paid.

B. Easements are routinely and rightly considered "property" for eminent domain purposes.

Easements or other intangible interests are obviously property for purposes of eminent domain, *see, e.g.*, *Salt River Project Agric. Improvement & Power Dist. v. Miller Park, L.L.C.*, 218 Ariz. 246, 248 ¶ 3 (2008), and are compensable. *See, e.g.*, *City of Yuma v. Lattie*, 117 Ariz. 280, 285 (App. 1977); *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318, 324 (1960).

And many states have held that building restrictions such as the negative easements here, are compensable "property" rights. *See S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964, 966 (Cal. 1973) (citing cases). In *Bourgerie*, California's Supreme Court held that a building restriction in a deed, which prohibited using property for an electricity transmission station, was not a non-compensable contractual interest, but instead a compensable property interest under the state's eminent domain laws. *Id.* at 965. The government argued that such restrictions are essentially contractual, and that to hold otherwise would create an anomalous situation whereby private parties could create compensable property rights merely by agreement between themselves. *Id.* at 966–67. But the court dismissed this as a

"somewhat esoteric" façade for what was actually a debate over "pragmatic considerations of public policy." *Id.* at 967. As far as policy was concerned, the better policy was to compensate citizens when their property is taken: to deny compensation would "plac[e] a disproportionate share of the cost of public improvements upon a few individuals." *Id.* at 968.

Given the bedrock principle that the just compensation requirement exists "so that government cannot 'forc[e] some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole,'" *Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 81 ¶ 17 (App. 2012) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)), the *Bourgerie* court was correct that compensation was a more just and equitable path than non-compensation. This Court should hold likewise.

C. The Court of Appeals' reliance on *exclusio alterius* was misplaced.

The court below reached a contrary conclusion by relying on the *exclusio alterius* principle. *See Foothills Reserve Master Owners Ass'n,* 2023 WL 8467518, *3 ¶ 19. It thought the phrase "part of a larger *parcel*" evinces an intent to exclude from compensation any property that cannot be a parcel (such as intangible property rights).

This was a misapplication of the *exclusio alterius* canon. As Scalia and Garner warn, that canon "must be applied with great caution" because it can easily

mislead. *Supra* at 107. For one thing, it "properly applies only when the *unius* (or technically the *unum*, the thing specified) can reasonably be thought to be an expression of *all* that shares in the grant or prohibition involved." *Id.* Or, as the U.S. Supreme Court put it, *exclusio alterius* only applies when the items listed in the statute give rise to an "inference that items not mentioned were excluded by deliberate choice." *Barnhart*, 537 U.S. at 168. Where no such inference exists, applying *exclusio alterius* can lead to false results.

Scalia and Garner, *supra* at 107, give an example: it would be wrong to use *exclusio alterius* to conclude that a sign reading "No dogs in the park" means that monkeys, pigs, or elephants are allowed in the park—the reason being that the sign does not purport to establish a "unius" in the first place, and consequently gives rise to no implication that the list is intended to exclude anything. *Cf. State v. Patel*, 251 Ariz. 131, 136 ¶ 23 (2021) (*exclusio alterius* inappropriate absent evidence of "a legislative intent to exclude" items from a list).

Here, *exclusio alterius* actually has even less applicability than in the hypothetical, because Section 12-1122(A)(2) does not purport to create a list *at all*. It includes no "'series of terms from which an omission bespeaks a negative implication,'" *Barnhart*, 537 U.S. at 168 (citation omitted), but merely says that if something is taken from a larger parcel of land, that thing shall be compensated

under such-and-such a formula. The court below was plainly misled in applying *exclusio alterius*.

II. Even if the statute did not specify how to calculate severance or proximity damages, that does not mean they are not available.

Arizona's eminent domain clause is among the strongest in America. Although modeled on the Fifth Amendment to the U.S. Constitution, its language is considerably stronger, because it was written 130 years later, after social and technological innovations—especially the building of railroads and city infrastructure—inflicted much uncompensated harm on property owners.

Like much else in Arizona's Constitution, the clause was modeled on Washington's, *see* Bugbee v. Super. Ct. of Ariz., 34 Ariz. 38, 41 (1928), and was intended to close potential loopholes left open by the Fifth Amendment. Among the most important of its innovations was the phrase "or damaged." *See* Brown v. City of Seattle, 31 P. 313, 314 (Wash. 1892) (phrase was added because "the interpretation put upon the word 'taken' by the courts" led to "great and manifest injury ... to the private citizen without any legal means of reimbursement.").

This phrase actually originated in Illinois' Constitution of 1870. Other states swiftly copied it, including Missouri (1875), California (1878–79), and Washington (1889). The phrase was adopted out of a concern that property owners often suffered a diminishment in value or usefulness of their property, due to government action with respect to *adjacent* property, especially the installation of

roads and railroads. One California Constitutional Convention delegate gave an example:

> In some instances a railroad company cuts a trench close up to a man's house, and while they do not take any of his property, it deprives him of the use of it to a certain extent. ... [I]n the case of the Second [S]treet cut in San Francisco ... the Legislature authorized a street to be cut through, which left the houses on either side high in the air, and wholly inaccessible. It was destroyed, although none of it was taken or moved away. There are many such cases.

Customer Co. v. City of Sacramento, 895 P.2d 900, 907 (Cal. 1995) (quoting 3 *Debates & Proceedings at the California Constitutional Convention 1878–1879* at 1190 (1880)).

These words echoed the concerns of delegates at Illinois's 1870 Convention. *See* *2 Debates and Proceedings of the Constitutional Convention of the State of Illinois* 1577 (1870) (Delegate Underwood) ("courts have decided that cities, in their [road] grading, may cut down lots so as to almost ruin men ... but that … lot-owners are entitled to no compensation ... . They say it is not taking property, but is an incidental damage which lot-owners must sustain, by reason of these public improvements and for which they are entitled to no compensation... . . [The 'or damaged' provision] will require compensation to be made for those damages which necessarily and naturally arise to a party in consequence of these public improvements."). Delegates at Missouri's 1875 Convention expressed the same concern: "in some of these towns a man buys a lot and builds a valuable house, to

the amount of $50,000 ... and then they conclude to improve him out of his property. They go to work and improve his street, cut him down 50 feet and leave him up in the air. ... I say in such a case as that the city itself ought to pay him damages he suffers." 3 *Debates of the Missouri Constitutional Convention of 1875* at 25 (1936) (Delegate Adams).

These considerations influenced Washington's Constitution. On July 4, 1889, the day the state's Convention began, attorney W. Lair Hill published a proposed constitution[2] in the *Morning Oregonian* which included "or damaged," noting that "experience has demonstrated" that a provision lacking this phrase wouldn't address "injuries inflicted by making adjacent property public." *Id.* at 9. The words "or damaged" would "give redress for all damages which are the direct, natural, and immediate results of the taking of property for public use even though the property actually taken did not belong to the person so damaged." *Id.*

Three years later, Washington's Supreme Court held that the phrase "or damaged" was added to the Constitution to address what is now called "proximity" damage. *Brown*, 5 Wash. at 39–41. Specifically, it said the grading of a street in Seattle would "seriously reduce both the rental and selling value of [the plaintiff's] property," and this could not be done without compensation. *Id.* at 43.

[2] Hill's proposal was among the most important sources on which the Washington framers relied. *See* Snure, *A Frequent Recurrence to Fundamental Principles*, 67 Wash. L. Rev. 669, 685 (1992).

This history shows that the phrase "or damaged" in Arizona's Constitution was designed to constitutionalize, among other things, the right to proximity and severance damages. Indeed, in *Mosher v. City of Phoenix*, 39 Ariz. 470, 482–83 (1932), this Court—citing Illinois, California, and Washington decisions—concluded that "[u]nder provisions like this" (i.e., the "or damaged" phrase) "a change in the established grade of a street, which injuriously affects the value of adjoining property, is 'damage'. ... And the measure of damage is the difference between the value of the abutting property before and after the change of grade."

Mosher is significant because of what happened later. In 1934, this Court overruled *Mosher* in *In re Forsstrom*, 44 Ariz. 472 (1934), and said that Arizona's takings clause "is not self-executing, but requires legislation to put it into effect." *Id.* at 477. Further, it said the compensation statutes only provided compensation for takings, not damage—which, it concluded, meant that compensation was *not available* for "damage," notwithstanding the constitutional promise. *See id.* at 479 ("[because] there is no method set forth in our statutes by which such damage may be ascertained ... the right [to compensation] may not be exercised until the Legislature has acted.").

But *Forsstrom* was then itself overruled in *Chamberlin*, 78 Ariz. at 429–30. *Chamberlin* said that the takings clause *is* self-executing, *id.*, and that the lack of a statutory remedy for "damage" did *not* preclude the plaintiff from compensation.

Instead, "justice requires plaintiff[] … be given an opportunity to amend her complaint on the theory of a 'damaging' of her property ... alleging what damages, if any, she suffered by reasons thereof and that a new trial be granted if a proper claim for relief is stated." *Id*. at 430; *accord*, *Householder v. Kansas City*, 83 Mo. 488, 495–96 (1884).

But here, the Court of Appeals implicitly assumed that because the statute provides no compensation for this proximity damage, no compensation is constitutionally owed. That's precisely the logic *Chamberlin* rejected when it restored effectiveness to Arizona's just compensation mandate. Our Constitution requires compensation for "damage," including proximity and severance damage, even if the legislature failed to provide a mechanism for assessing it (which is not the case, *see* Section I above).

CONCLUSION

The Petition should be *granted*.

Respectfully submitted this 26th day of April 2024 by:

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