COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ARIZONA CREDITORS BAR ASSOCIATION INC., et al., Plaintiffs/Appellants, vs. STATE OF ARIZONA, Defendant/Appellee, ARIZONANS FED UP WITH FAILING HEALTHCARE (HEALTHCARE RISING AZ), an Arizona political action committee, Intervenor/Defendant/Appellee	Court of Appeals Division One No. 1 CA-CV 22-0765 Maricopa County Superior Court No. CV2020-015921

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE (CAI)

(FILED WITH THE WRITTEN CONSENT PLAINTIFFS/APPELLANTS AND DEFENDANT/APPELLEE STATE OF ARIZONA)

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II. IDENTITY AND INTEREST OF 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 million homeowners who live in more than 355,000 community associations in the United States.[1] CAI is representing not only itself, but also its tens of thousands of members on this important issue.

CAI supports public policy that recognizes the rights and responsibilities of homeowners and promotes the self-governance of community associations—affording associations the ability to operate efficiently and protect the investment owners make in their homes and communities. CAI is dedicated to preserving the rights of homeowners and community associations. CAI recognizes that the potential ramifications of Proposition 209 ("Prop 209") will have a significant negative

[1] FOUND. FOR CMTY. ASS'N RESEARCH, *Statistical Review: Summary of Key Ass'n Data and Info*, https://foundation.caionline.org/publications/factbook/statistical-review/ (last visited July 26, 2023).

impact on both homeowners and community associations and supports Appellants' request to overturn the decision of the trial court and find the statute unconstitutional.

III. INTRODUCTION

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 74.1 million people live in community associations throughout the United States.[2] CAI is uniquely situated so as to be highly sensitive to the interests and concerns of both homeowners and community associations. Legislation, such as Prop 209, which will have a major impact on the way community associations and homeowners operate, arrests the attention of CAI. While the proponents of Prop 209 focused on issues related to medical debt in their efforts to pass the legislation, they failed to contemplate the implications of the legislation with respect to community associations and homeowners in those associations. Thus, on behalf of CAI and the 9,900 community associations in Arizona, CAI wishes to lend its support to Plaintiff/Appellant's efforts to demonstrate Prop 209's constitutional failings.

Community associations serve a vital function in the State of Arizona and throughout the Country. Collectively, the community associations in Arizona own and care for thousands of acres of real property, and are responsible for managing

[2] FOUND. FOR CMTY. ASS'N RESEARCH, *The Community Association Fact Book, National and State Statistical Review for 2021,* https://foundation.caionline.org/publications/factbook/state-facts-and-figures-2021/ (last visited July 26, 2023).

and maintaining millions of dollars' worth of improvements. Community associations commonly hold the responsibility to landscape and maintain common area parks and green belts, club houses and lakes. They often carry maintenance responsibilities with respect to the roofs covering units with shared walls, parking lots and private streets. Community Associations also procure insurance to protect against liability for injuries that may occur on the common areas. These responsibilities cannot be performed without money.

The financial engine of community associations in Arizona is the assessment obligation established in the governing documents and protected by statute. The Arizona Planned Communities Act at A.R.S. § 33-1801 *et seq*., and the Arizona Condominium Act at A.R.S. § 33-1201, *et seq*., provide that community associations have a lien against any unit for which assessments are unpaid that can be enforced through lien foreclosure. In addition to the lien foreclosure rights held by community associations codified in the Planned Communities Act and Condominium Act, community associations also hold a personal claim for breach of contract against any homeowner who fails to pay assessments. The personal obligation to pay assessments held by homeowners has traditionally been enforced through garnishment proceedings. These remedies available to community associations help ensure that they can continue to provide valuable services to their homeowners and avoid widespread disrepair in Arizona's neighborhoods.

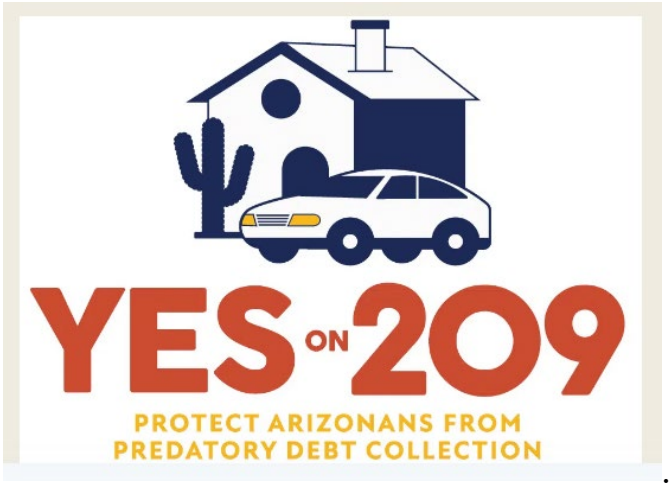
IV. ARGUMENTS AND ANALYSIS

The collection remedies available to community associations are not reserved exclusively for them. Indeed, creditors routinely require that collateral be pledged in order to secure financing for large purchases yet also retain rights to pursue personal judgment against debtors who default on an obligation. Arizona has long recognized both *in rem* and *in personam* proceedings as viable ways to recover on a debt. The landmark case of *Pennoyer v. Neff*, 95 U.S. 714 (1878) decided by the United States Supreme Court 34 years before Arizona obtained Statehood, continues in its relevance as to *in rem* and *in personam* jurisdiction. Although the legal principles allowing a creditor to pursue recovery of a debt both personally against the debtor or through execution against the property are not new, they are uniquely blended with respect to community associations. Nearly every community association in Arizona is established through the recording of covenants that run with the land and include contractual terms imposing a personal obligation on homeowners to pay assessments and establishing the association's lien rights. Likewise, by the contractual terms of the recorded covenants, nearly every community association in Arizona has the right to pursue recovery of unpaid assessments through enforcement of both the personal obligation and the lien, provided there is no double recovery. Community associations are further unique as creditors because both the Arizona

Condominium Act and the Arizona Planned Communities Act provide that the lien of a community association is not subject to the homestead exemption.[3]

A. Prop 209 Will Not Save Homes, but Will Cause Foreclosures to Increase.

Healthcare Rising AZ marketed Prop 209 as a way to save homes. Repeatedly, Prop 209 was touted as a solution to home foreclosures. The visual symbol used in the effort to gain voter support for Prop 209 was a picture of a home and a car, reminding voters that Prop 209 would protect their most valuable assets from predatory medical debt collection. Below is a copy of that symbol used repeatedly in Prop 209 marketing materials and advertisements:



.[4]

[3] A.R.S. § 33-1256(C) and A.R.S. § 33-1807(C).
[4] HEALTHCARE RISING ARIZ., https://www.healthcarerisingaz.org/news/ (last visited July 26, 2023).

Thus, proponents of Prop 209 sold the voters on Prop 209 by focusing on the assets that would be protected by its passage. Healthcare Rising AZ promised that Prop 209 would protect voters' assets from *in rem* proceedings seeking to recover debt.

Contrary to the advertising materials and flashy marketing slogans, the functional effect of Prop 209 will not save homes. Rather than protecting Arizonans from foreclosure, Prop 209 effectively eliminated wage garnishment as a viable means to collect debt. With the increased exceptions in place through the passage of Prop 209, nearly one-half of all Arizonan wage earners were made un-garnishable. For those who remain within the narrow parameters where a writ of garnishment can still attach to wages, the possibility of timely recovery is so remote as to render garnishment ineffective and non-viable as a collection option. Consequently, for many community associations, foreclosure will be the only remaining viable option to recover unpaid assessments from homeowners who become delinquent. Whereas prior to the passage of Prop 209, many community associations opted to pursue collection of unpaid assessments through enforcement of homeowners' personal obligation through garnishment, community associations are being compelled to avoid the less expensive, less invasive collection method of garnishment and instead pursue lien foreclosure. It is anticipated that because of the passage of Prop 209, lien foreclosures by community associations will increase exponentially in the coming years.

This result should not have been unforeseeable to proponents of Prop 209. When one of two remedies is essentially eliminated through statutory amendment, the remaining remedy will be the one that is employed. This is the case with Prop 209. Despite the promises from Healthcare Rising AZ that Prop 209 would protect Arizonans' homes, Prop 209's drastic emasculation of the garnishment statutes will compel community associations to resort to lien foreclosure as its first and primary means of collection. Thus, Prop 209 will accomplish the opposite of what it promised. Homes will not be protected by Prop 209 but rather homes will become the primary target for collection purposes.

B. Application of the Standard Articulated in the Case of *Cao v. PFP Dorsey Invs., LLC*, Causes Additional Confusion.

This Court, in the case of *Cao v. PFP Dorsey Invs., LLC*, 253 Ariz. 552, 516 P.3d 1 (Ct. App. 2022)[5], held that where the contractual language of the recorded covenants references statutory rights, powers and duties, those statutory rights, powers and duties are incorporated into and become part of the recorded covenants. *See Cao*, 253 Ariz. at 556, ¶¶ 17-20. As established by this Court in *Cao*, the incorporated statutory rights, powers and duties can only be effectively changed in accordance with the standard applicable to amendments to the recorded covenants.

[5] *Cao v. PFP Dorsey Invs., LLC*, 253 Ariz. 552, 516 P.3d 1 (Ct. App. 2022) (petition for rev. filed Sept. 23, 2022).

See id. The standard applicable to amendments to the recorded covenants requires that amendments be within "the range of reasonable expectation" in order to be enforceable. *See id*., 253 Ariz. at 556, ¶ 19. Quoting the Arizona Supreme Court decision of *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, 506 P.3d 18 (2022), the Court in *Cao v. PFP Dorsey Invs., LLC*, explained that

> [a]lthough contracts are generally enforced as written, in special types of contracts, we do not enforce unknown terms which are beyond the range of reasonable expectation. . . . CC&Rs, like the Declaration, are subject to this rule. . . . As a result, we will not allow substantial, unforeseen, and unlimited amendments to the Declaration, as that would alter the nature of the covenants to which the homeowners originally agreed. . . . We will not subject a minority of the landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants. . . .

Cao, 253 Ariz. at 556, ¶ 19 (citations omitted). Based on the foregoing analysis, this Court in *Cao* determined that "although the Declaration [of recorded covenants] incorporates amendments to the [incorporated statutes], an amendment will be included only if it falls within the [homeowners'] reasonable expectations based on the declaration in effect at the time of the purchase." *Cao*, 253 Ariz. at 556, ¶ 20 (citations omitted). Thus, despite the passage of statutory amendments, those amendments, to the extent they are incorporated into the recorded covenants, will only be applicable to community associations if they were reasonably foreseeable. *See id*.

In the matter before this Court, two community associations joined as plaintiffs/appellants to challenge the constitutionality of Prop 209: the Augusta Ranch Community Master Association ("Augusta Ranch") and the Desert Ridge Community Association ("Desert Ridge"). The recorded covenants contained in the Declaration of Covenants, Conditions and Restrictions for August Ranch, recorded December 16, 1997 with the Maricopa County Recorder's Office at Document No. 1997-0879019 ("Augusta Ranch Declaration") contain language incorporating the garnishment statutes amended by Prop 209. Article 5, Section 5.1 contains a general incorporation, and Article 8, Section 8.2(a) contains a more specific incorporation. Article 5, Section 5.1 provides in pertinent part as follows: "The [Augusta Ranch] Association shall be a nonprofit Arizona corporation charged with the duties and invested with the powers prescribed by law . . .". *See* Appendix, No. 1. Article 8, Section 8.2(a) provides in pertinent part as follows:

> [T]he [Augusta Ranch] Association may enforce the payment of such Assessments and/or Assessment Lien by taking either or both of the following actions, concurrently or separately (and, by exercising either of the remedies hereinafter set forth, the [August Ranch] Association does not prejudice or waive its right to exercise the other remedy): (a) Bring an action at law and recover judgment against the member personally obligated to pay the Assessments . . . .

See id. Intuitively, the language empowering Augusta Ranch to "recover judgment" includes both the act of obtaining a judgment from a court and executing on that judgment through a garnishment proceeding, as there is no particular value to

obtaining a judgment without executing on it. Therefore, pursuant to the incorporation standard articulated in *Cao*, the Augusta Ranch Declaration incorporates the Association's rights under the garnishment and exemption statutes amended by Prop 209.

By incorporating into the Augusta Ranch Declaration the right to recover delinquent assessments through garnishment, the homeowners reasonably expect that Augusta Ranch could employ garnishment as a means of assessment recovery. This provides homeowners three clear benefits. First, based on the language of both the Augusta Ranch Declaration and the garnishment statutes incorporated therein, homeowners may reasonably expect that if they grow delinquent, Augusta Ranch has the ability to pursue collection through garnishment and that their homes need not be the exclusive targets for collection purposes. Second, homeowners have the reasonable expectation that if their neighbors fail to pay assessments (and foreclosure is not an available remedy either for lack of lien ripeness, lack of equity, or some other reason), Augusta Ranch will be able to pursue recovery through garnishment. Third, tied closely to this expectation is the homeowners' reliance that homeowners will not have to bear the burden of significant assessment increases in order to meet the budgetary needs of the of the community caused by a shortfall due to non-payment of others. According to the Supreme Court's holding in *Kalway*, these expectations bear significant weight, and the covenants that secure them may

only be changed through consent of all homeowners in Augusta Ranch. *See Kalway*, 252 Ariz. at 539, ¶ 17, 506 P.3d at 25.

As with the statutory change in *Cao*, the statutory change to the garnishment and exemption statutes by Prop 209 effected a change that was completely "beyond the range of reasonable expectation". It was entirely unforeseeable for the homeowners that a statutory change would effectively render non-viable the ability of Augusta Ranch to recover assessments through garnishment. Consequently, according to the analysis in *Cao*, the statutory changes accomplished by Prop 209 cannot be effective as against homeowners who were members of Augusta Ranch prior to its passage. *See Cao*, 253 Ariz. at 557, ¶ 22.

The analysis is similar with respect to Desert Ridge. The Declaration of Covenants, Conditions, Restrictions and Easements for Desert Ridge, recorded February 7, 1994 with the Maricopa County Recorder's Office at Document No. 1994-0106341 ("Desert Ridge Declaration") includes general incorporation in Article 7, Section 7.1 and specific incorporation language in Article 10, Section 10.1(b). Article 7, Section 7.1 provides in pertinent part as follows: "The Association shall be a nonprofit Arizona corporation charged with the duties and vested with the powers prescribed by law . . .". *See* Appendix, No. 2. Article 10, Section 10.1(b) provides in pertinent part as follows:

> [T]he [Desert Ridge] Association may (and each owner hereby authorizes the Association to) enforce the payment [of assessments] by

> taking any of the following actions, concurrently or separately (and by exercising one remedy the Association does not prejudice or waive its right to exercise any other remedy) . . . (b) Bring an action at law to recover judgment against the Owner who is personally liable for the Assessments . . . .

See id. Consequently, pursuant to the holding of *Cao*, the Desert Ridge Declaration incorporates the statutory remedy of garnishment as a viable option to recover on a judgment and establishes the homeowners' expectation that garnishment is an available tool for assessment recovery. Thus, the statutory change effected by Prop 209 cannot be enforced as against Owners in Desert Ridge who purchased their homes prior to Prop 209's passage because the amendment was "beyond the range of reasonable expectation." *See Cao*, 253 Ariz. at 556, ¶ 19.

The contractual provisions in the Augusta Ranch Declaration and the Desert Ridge Declaration are representative of the language found in nearly all of the recorded covenants in the 9,900 community associations in Arizona. Although the exact language may vary from community to community, nearly every such community incorporates the right to pursue owners personally for unpaid assessments and to recover on a judgment through garnishment.

Applying the *Cao* standard, as courts must do with binding precedent, increases the convolution of the Savings Clause of Prop 209. As explained in Appellant's Opening Brief, the contradictions inherent in the Savings Clause of Prop 209 leave "the ordinary people who will need to interpret and apply Prop 209 every

day . . . hopelessly confused as to when and how it applies." *See* Appellants' Opening Brief, p. 13. In addition to the difficult position created by Prop 209 of requiring courts to decipher whether the contract date or the maturity date should apply for purposes of implementation of the statutory changes, courts also must determine which version of the contract applies based on the law established in *Cao*. Based on the holding in *Cao*, the applicable contract language and the maturity date of the Savings Clause have become moving targets that cannot be deciphered without determining the date of the owner/debtor's home purchase and the owner/debtor's reasonable expectations at that time. Thus, not only does the Savings Clause cause hopeless confusion due to its contradictory claims to leave untouched both "rights and duties that matured before the effective date" as well as "contracts entered into before the effective date", but based on the holding in *Cao*, neither the maturity date nor the contract date can even be identified without understanding the reasonable expectations of the owner/debtor. This standard is impossibly burdensome in addition to impossibly confusing.

V. CONCLUSION

Prop 209 creates a quagmire of confusion and concern for the 2.2 million Arizona residents living in community associations. Although the proponents of Prop 209 claimed that the statutory change would prevent foreclosures, the net effect of the legislation will compel community associations to foreclose with greater

frequency. Moreover, the application of the standard articulated in *Cao v. PFP Dorsey Inves., LLC*, renders practical application of Prop 209 impossibly confusing and burdensome. As such, CAI urges this Court to strike Prop 209 as unconstitutionally vague and burdensome.

RESPECTFULLY SUBMITTED this 7th day of August 2023.

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