

**ARIZONA SUPREME COURT**

State of Arizona, et al.,

Plaintiffs/Appellants,

v.

Foothills Reserve Master Owners  
Association, Inc.,

Defendant/Appellee.

No. CV-23-0292-PR

Court of Appeals No. 1 CA-CV  
22-0371

Maricopa County Superior Court  
No. CV2017-010359

**STATE’S SUPPLEMENTAL BRIEF**

Hayleigh S. Crawford (No. 032326)

Clinton N. Garrett (No. 022457)

Michelle Burton (No. 030311)

Joe Acosta, Jr. (No. 005378)

OFFICE OF THE ARIZONA

ATTORNEY GENERAL (Firm No. 14000)

2005 N. Central Ave.

Phoenix, AZ 85004

(602) 542-3333

[Hayleigh.Crawford@azag.gov](mailto:Hayleigh.Crawford@azag.gov)

[Clinton.Garrett@azag.gov](mailto:Clinton.Garrett@azag.gov)

[Michelle.Burton@azag.gov](mailto:Michelle.Burton@azag.gov)

[Joe.Acosta@azag.gov](mailto:Joe.Acosta@azag.gov)

[ACL@azag.gov](mailto:ACL@azag.gov)

*Attorneys for Plaintiff/Appellant State of  
Arizona*

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
STATEMENT OF FACTS AND THE CASE .....	2
ISSUE PRESENTED .....	4
ARGUMENT .....	4
I.    Relevant law. ....	4
II.   The court of appeals correctly concluded that § 12-1122(A)(2) limits severance damages to partial takings of land. ....	6
A.   On its face, § 12-1122(A)(2) provides for severance damages only when the State takes a portion of land in a “larger parcel.” .....	6
B.   Arizona caselaw confirms that § 12-1122(A)(2) applies only when the property partially taken is land. ....	8
III.  Even if § 12-1122(A)(2) applies to partial takings of property other than land, there is no partial taking here.....	11
IV.  The homeowners’ position rests entirely on mischaracterization. ....	15
A.   The homeowners have been compensated for their easements.....	15
B.   The State did not concede that the homeowners are entitled to severance damages. ....	16
C.   The homeowners misrepresent the caselaw. ....	18
D.   The ingress and egress cases are inapposite.....	19
CONCLUSION .....	20

## TABLE OF AUTHORITIES

	<u>Page(s)</u>
<b>Cases</b>	
<i>Ammer v. Ariz. Water Co.</i> , 169 Ariz. 205 (App. 1991).....	17
<i>Andrews v. City of Greenbelt</i> , 441 A.2d 1064 (1982).....	14
<i>Ariz. State Land Dep’t v. State ex rel. Herman</i> , 113 Ariz. 125 (1976).....	5, 12, 13, 15
<i>Calmat of Ariz. v. State ex rel. Miller</i> , 176 Ariz. 190 (1993).....	4
<i>Catalina Foothills Unified Sch. Dist v. La Paloma Prop. Owners Ass’n</i> , 238 Ariz. 510 (App. 2015).....	9, 10
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063 (2021).....	14
<i>City of Phoenix v. Garretson</i> , 234 Ariz. 332 (2014).....	8, 11, 19, 20
<i>City of Scottsdale v. Eller Outdoor Advert. Co.</i> , 119 Ariz. 86 (App. 1978).....	8
<i>City of Yuma v. Lattie</i> , 117 Ariz. 280 (App. 1977).....	11, 19
<i>Hemmerling v. Tomlev, Inc.</i> , 432 P.2d 697 (Cal. 1967).....	18
<i>People ex rel. Dep’t of Pub. Works v. Dickinson</i> , 41 Cal. Rptr. 427 (Dist. Ct. App. 1964).....	15
<i>Redevelopment Agency v. Tobriner</i> , 200 Cal. Rptr. 364 (Ct. App. 1984).....	17
<i>Selective Res. v. Superior Ct. In &amp; For Pinal Cnty.</i> , 145 Ariz. 151 (App. 1984).....	10
<i>State ex rel. Herman v. Wilson</i> , 4 Ariz. App. 420 (1966).....	10, 19
<i>State ex rel. Herman v. Wilson</i> , 103 Ariz. 194 (1968).....	10, 19
<i>State ex rel. LaPrade v. Carrow</i> , 57 Ariz. 429 (1941).....	12
<i>State ex rel. Miller v. Filler</i> , 168 Ariz. 147 (1991).....	10

<i>State ex rel. Miller v. J.R. Norton Co.</i> , 158 Ariz. 50 (App. 1988).....	10
<i>State ex rel. Miller v. Wells Fargo Bank of Arizona, N.A.</i> , 194 Ariz. 126 (App. 1998).....	10
<i>State ex rel. Morrison v. Jay Six Cattle Co.</i> , 88 Ariz. 97 (1960).....	12, 13
<i>State ex rel. Morrison v. Thelberg</i> , 87 Ariz. 318 (1960).....	10, 19
<i>State ex rel. Ordway v. Buchanan</i> , 154 Ariz. 159 (1987).....	10
<i>State v. Foothills Rsrv. Master Owners Ass’n</i> , 256 Ariz. 422 (App. 2023).....	2
<i>Symms v. City of Mountain Home</i> , 493 P.2d 387 (Idaho 1972).....	6
<i>Town of Kearny v. Mun. Sanitary Landfill Auth.</i> , 363 A.2d 390 (N.J. Super. Ct. Law. Div. 1976).....	14
<i>United States v. 10.0 Acres</i> , 533 F.2d 1092 (9th Cir. 1976).....	17
<i>United States v. 57.09 Acres of Land</i> , 706 F.2d 280 (9th Cir. 1983).....	18

**Statutes**

A.R.S. § 12-1122.....	passim
A.R.S. § 12-1116.....	7
A.R.S. § 12-1117.....	7
Ariz. Const. art. II, § 17.....	4

## INTRODUCTION

At the outset, it is important to clarify exactly what the State “took” in this case. The property the State sought to condemn was land belonging to a third party. Doing so resulted in the extinguishment of the homeowners’ easements on the third party’s land. But the State did *not* seek to condemn any of the homeowners’ land.

For eminent domain purposes, the State taking your land—whether to own it outright or burden it with an easement that did not previously exist—is fundamentally different than the State merely extinguishing an existing easement you held on *someone else’s* land. In the first scenario, you can recover consequential damages for harm to your remaining land, in addition to compensation for what the State actually took. But in the second scenario, you are limited to recovering compensation for what the State actually took from you—the easement interest.

In accordance with A.R.S. § 12-1122(A)(1), the State has paid the homeowners \$6 million to compensate them for the value of the easements they lost when the State condemned land on which the easements ran. The only issue before this Court is whether the homeowners may recover *additional* consequential damages under A.R.S. § 12-1122(A)(2), above and beyond the value of their easements.

The court of appeals determined that § 12-1122(A)(2) provides for severance damages only when the property taken by the State is a piece of a larger parcel of

land—that is, a smaller parcel of land. Because the homeowners’ easements are not land, the court of appeals held that they could not recover additional consequential damages.

The court of appeals reached the correct result. Reading § 12-1122(A)(2) as authorizing payment of severance damages when the State takes a smaller parcel of land out of a larger parcel of land comports with the plain text and Arizona jurisprudence. And even if § 12-1122(A)(2) authorizes severance damages for partial takings of property interests other than land, under settled caselaw the homeowners’ homes together with the easements cannot be considered the “larger parcel” for compensation purposes. This Court should affirm.

### **STATEMENT OF FACTS AND THE CASE**

The Foothills Reserve subdivision includes 590 single-family homes and shared common areas. *State v. Foothills Rsrv. Master Owners Ass’n*, 256 Ariz. 422, ¶ 3 (App. 2023). The Foothills Reserve Master Owners Association (the “HOA”) owned the common area parcels, on which the homeowners had appurtenant easements. *Op.* ¶ 4. The appurtenant easements gave the homeowners the right to use the common areas (IR-168, ¶ 8) and generally preserved the common areas for open space and landscaping (*id.* ¶¶ 10-11).

In 2017, the State filed an action to condemn two common area parcels to allow for the South Mountain Freeway extension. (IR-1.) The State agreed to pay

the HOA \$6.5 million as compensation for taking the parcels. (IR-332; IR-342.) Because this taking extinguished the homeowners' appurtenant easements, as well, the State also agreed to pay the homeowners \$6 million to compensate for the easements' value under A.R.S. § 12-1122(A)(1). (*Id.*)

The homeowners argued, however, that they were also entitled to consequential damages (known as "severance" or "proximity" damages<sup>1</sup>) under A.R.S. § 12-1122(A)(2) based on their homes' proximity to the freeway. The State disagreed, maintaining that the homeowners were entitled to compensation only for the value of the lost easements under subsection (A)(1). (IR-162 at 2, 11.)

After cross-motions for summary judgment, the superior court ruled that the homeowners could recover "severance" damages under § 12-1122(A)(2). (IR-202.) The parties thereafter agreed that if the homeowners were legally entitled to damages under subsection (A)(2), they would be \$12 million. (*See* IR-332; IR-342.)

The parties subsequently agreed to, and the court entered, a Stipulated Partial Judgment memorializing the State's agreement to pay \$6.5 million to the HOA for taking the two parcels and \$6 million to the homeowners for extinguishing their easements. (IR-332; IR-342.) The Stipulated Partial Judgment further specified that if the appellate courts determined that the homeowners were entitled to severance

---

<sup>1</sup> Proximity damages are one type of severance damages. For simplicity, this brief will use the term "severance damages."

damages under § 12-1122(A)(2), the State would pay them an additional \$12 million in damages, on top of the \$6 million the State has already paid for the value of the extinguished easements. (IR-342 at 5, ¶¶ g, h.)

The court of appeals reversed the superior court, holding that the homeowners were not entitled to severance damages because “severance damages are available only if the claimant owns the larger parcel from which a smaller parcel is condemned.” *Op.* ¶ 23. This Court accepted review on August 23, 2024.

### **ISSUE PRESENTED**

Does [A.R.S. § 12-1122\(A\)\(2\)](#) provide for compensation for severance damages after taking of an appurtenant easement?

### **ARGUMENT**

#### **I. Relevant law.**

Arizona’s “Takings Clause” provides, “No private property shall be taken or damaged for public or private use without just compensation having first been made . . . .” [Ariz. Const. art. II, § 17](#). The Legislature, in turn, “has enacted a statutory scheme designed to facilitate direct condemnation actions by condemning agencies.” [Calmat of Ariz. v. State ex rel. Miller, 176 Ariz. 190, 192 \(1993\)](#). As relevant here, A.R.S. § 12-1122 specifies how to calculate the “just compensation” owed for property taken by eminent domain. It provides:

- A. The court or jury shall ascertain and assess:
1. The value of the property sought to be condemned and all improvements on the property pertaining to the realty, and of each and every separate estate or interest in the property . . . .
  2. 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, and the construction of the improvement in the manner proposed by the plaintiff.

These two subsections address two different elements of just compensation:

(1) the value of the property actually taken; and (2) severance damages, i.e., the amount owed for damage to remaining property as a result of the taking. *See also Ariz. State Land Dep't v. State ex rel. Herman*, 113 Ariz. 125, 128 (1976) (“The statute provides two elements of damage: (1) the value of the property actually taken by condemnation, and (2) the lessening in value of the property remaining, as it may be affected by severing it from the property actually taken, and by the manner in which the proposed improvements may be constructed.”).

On the statute’s face, severance damages are available under subsection (A)(2) only when there has been a “partial” taking of property from a larger parcel. Consequently, whether the homeowners can recover severance damages depends upon whether the State’s extinguishment of their appurtenant easements constitutes a “partial taking.” It does not.

**II. The court of appeals correctly concluded that § 12-1122(A)(2) limits severance damages to partial takings of land.**

**A. On its face, § 12-1122(A)(2) provides for severance damages only when the State takes a portion of land in a “larger parcel.”**

Examining § 12-1122(A)(2)’s plain text, the court of appeals reasoned that qualifying the term “property” with the phrase “part of a larger parcel” necessarily implies that “property” refers to a smaller parcel. [Op. ¶ 19](#). And because the well-settled meaning of “parcel” refers to land, subsection (A)(2) applies only when “the property sought to be condemned” in a partial taking is itself land. [Op. ¶¶ 19-20](#).

This is the most sensible reading of subsection (A)(2)’s text. *See* [Op. ¶¶ 19-21](#); *see also* [Symms v. City of Mountain Home, 493 P.2d 387, 391 \(Idaho 1972\)](#) (analyzing statutory provision identical to § 12-1122(A)(2) and concluding that “[p]arcel . . . means a consolidated body of land”). It is logical that a part of a whole will be of the same kind as the whole itself. Indeed, a “part” is defined by reference to the whole. *See, e.g., Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/part>* (last visited Sept. 12, 2024) (“part” means “one of the . . . subdivisions into which something is or is regarded as divided *and which together constitute the whole*” (emphasis added)). Here, the “whole” is “a larger parcel.” Thus, a part of a larger parcel of land logically refers to a smaller parcel of land.

The surrounding provisions also support reading “property” in subsection (A)(2) to refer to land. For example, subsection (A)(1) likewise describes “property”

in a way that makes clear it is comprised of parcels of land. Section 12-1122(A)(1) directs valuation of “the property sought to be condemned . . . and of each and every separate estate or interest in the property, and if it [the property] consists of different parcels, the value of each parcel and each estate or interest in the parcel separately.” In other words, subsection (A)(1) requires a separate valuation of property (made up of a parcel or parcels) and the estates and interests therein (for example, easements).

Subsection (A)(3) similarly reinforces reading “property” in (A)(2) to refer to parcels of land. This subsection directs that any severance damages accruing to the portion of property not condemned under (A)(2) must be offset with any benefits received from constructing the improvement proposed by the State on the condemned portion. [A.R.S. § 12-1122\(A\)\(3\)](#). In doing so, it specifically refers to compensation payable to “the owner of *the parcel*”—i.e., the owner of the portion of property not condemned. *Id.* (emphasis added).

Surrounding statutes also support this reading. For example, [A.R.S. § 12-1116\(H\)](#) refers to “property” and “parcel of land” interchangeably. *Id.* (“if it appears that the use for which *the property* is sought to be condemned is a necessary use, the court shall receive evidence as to the probable damages to each owner, possessor or person having an interest in each *parcel of land sought to be condemned*” (emphases added)); *see also* [A.R.S. § 12-1117\(5\)](#) (complaint for condemnation should include “[a] description of each *piece of land* sought to be taken, and whether *the land*

includes *the whole* or *only a part of an entire parcel or tract*” (emphases added)).

Meanwhile, the homeowners offer no meaningful critique of the court of appeals’ textual analysis. (See Pet. at 6-10.)<sup>2</sup> They generally posit (at 10) that the court of appeals should not have relied on the negative implication canon, but fail to provide any alternative analysis of subsection (A)(2)’s actual text.

**B. Arizona caselaw confirms that § 12-1122(A)(2) applies only when the property partially taken is land.**

The appellate court’s reading of § 12-1122(A)(2)’s text also is consistent with Arizona caselaw. Several courts (including this one) have commented that severance damages require a taking of *land*. See, e.g., [City of Phoenix v. Garretson](#), 234 Ariz. 332, 334 ¶ 7 (2014) (“Because the City did not permanently take any of Garretson’s land, this case does not involve a ‘taking’ or ‘severance damages’”); [City of Scottsdale v. Eller Outdoor Advert. Co.](#), 119 Ariz. 86, 93 (App. 1978) (“under A.R.S. § 12-1122, severance damages are only collectible for the partial taking of a whole parcel of real property”).

The homeowners contend, however, that “decades of established precedent” recognize severance damages for the taking of easements. (Pet. at 10-14.) That is

---

<sup>2</sup> The homeowners primarily argue that § 12-1122(A)(2) must authorize severance damages here because the Constitution protects easements as property rights. But as discussed further below (**Arg. § IV**), the constitutionality of § 12-1122(A) is not before the Court, and even if it were, this argument relies on a mischaracterization of the court of appeals’ ruling.

simply wrong. *None* of the Arizona cases they cite involve the payment of severance damages for the extinguishment of an easement on *someone else's* land.

For example, they claim that *Catalina Foothills Unified Sch. Dist v. La Paloma Prop. Owners Ass'n*, 238 Ariz. 510 (App. 2015) held that the homeowners there were entitled “to prove severance damages to their homes” in relation to “the taking of private roadway easements in adjoining common area land.” (Pet. at 11.) But that is false. In *Catalina*, the school district condemned a private road—not just an easement—belonging to the HOA, 238 Ariz. at 513 ¶¶ 3-5, and the HOA was able to seek severance damages because the private road was only part of the HOA’s larger property, *id.* at 516-17 ¶¶ 21-24. *See also id.* ¶ 28 (although homeowners had a non-exclusive easement to use the common areas, “[t]he property to be taken ... was owned not by the lot owners but by La Paloma, which holds title to Campo Abierto, along with other common areas”). So not only does that case involve a partial taking of land, it also does not suggest that third-party homeowners can recover severance damages when no part of their land has been condemned.

The State is not aware of any reported case anywhere in the country finding that incidentally extinguishing an easement on another’s land constitutes a partial taking entitling the easement-holder to severance damages. To the contrary, all of the Arizona decisions cited by the homeowners in support of their contention involve severance damages claimed by the owner of a larger piece of land after the

government took a smaller piece out of that owner's land:

- In *State ex rel. Miller v. Filler*, 168 Ariz. 147, 148, 150 (1991), the “action involve[d] the partial taking of two commercially-zoned parcels of land owned by Title USA”; Title USA sought severance damages for the “value of the remaining commercially-zoned property.”
- In *State ex rel. Ordway v. Buchanan*, 154 Ariz. 159, 161 (1987), a landowner sought severance damages after the State took “an 80’ x 330’ portion of a five-acre rectangular parcel” that he owned.
- In *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318, 322 (1960), the landowners sought severance damages after the State “condemned an irregularly-shaped strip of land . . . across the south boundary of [their] property” to construct a frontage road.
- In *Catalina Foothills*, 238 Ariz. at 513 ¶¶ 3, 5, an HOA that owned several “private roads and common areas within [a] subdivision” sought severance damages for harm to its remaining land after the school district condemned one of its roads.
- In *State ex rel. Miller v. Wells Fargo Bank of Arizona, N.A.*, 194 Ariz. 126, 128 ¶ 2, 130 ¶ 18 (App. 1998), the State condemned four of several parcels of land belonging to a bank, and the court “allowed the jury to consider the loss of value resulting from the proximity of the freeway to the remaining portion of the Bank’s parcels when determining severance damages.”
- In *State ex rel. Miller v. J.R. Norton Co.*, 158 Ariz. 50, 51 (App. 1988), a landowner sought severance damages after the State took “a portion of the land” he owned “to allow space for a [freeway] ramp.”
- In *Selective Res. v. Superior Ct. In & For Pinal Cnty.*, 145 Ariz. 151, 152-53 (App. 1984), several landowners sought severance damages for the devaluation of their remaining property after a public utility condemned a 28-foot strip across their lots to establish easement for the construction of an electrical transmission line.
- In *State ex rel. Herman v. Wilson*, 4 Ariz. App. 420, 424-25 (1966), *vacated*, 103 Ariz. 194, 195 (1968), two landowners sought severance damages for the harm to their remaining property after ADOT condemned the frontage portions of each of their parcels to construct a traffic interchange. (This Court also subsequently vacated that opinion.)

(*See generally* Pet. at 11-13.)<sup>3</sup> This is consistent with the court of appeals’ decision, which recognizes that “severance damages are available only if the claimant owns the larger parcel from which a smaller parcel is condemned.” [Op. ¶ 23](#).

In sum, the plain text of § 12-1122(A) and related statutes, as well as the relevant caselaw, all support the appellate court’s conclusion that severance damages are available only for partial takings of land. It is undisputed that the State did not take any of the homeowners’ land. Accordingly, under all controlling authority, the homeowners are not entitled to any severance damages under § 12-1122(A)(2). This Court should affirm.

### **III. Even if § 12-1122(A)(2) applies to partial takings of property other than land, there is no partial taking here.**

The homeowners argue that subsection (A)(2)’s references to “property” cannot include only land and must be read to include other kinds of property interests. But even if that were true, it would not change the result here because there has been no partial taking of the homeowners’ interests in any larger parcel.

Assuming this Court agrees that subsection (A)(2) must be read to apply to property interests other than land, then established caselaw provides the test for

---

<sup>3</sup> The other two Arizona cases the homeowners cite (*City of Phoenix v. Garretson*, 234 Ariz. 332 (2014) and *City of Yuma v. Lattie*, 117 Ariz. 280 (App. 1977)) do not involve direct condemnation actions under A.R.S. § 12-1122. And as explained in **Argument § IV.C**, below, they address a distinct legal issue (the value of ingress and egress rights) not present here.

assessing when such an interest is part of a “larger parcel.” “[T]he concern of the larger parcel principle is with consequential damages to the residue of the condemned property.” *Ariz. State Land Dep’t*, 113 *Ariz.* at 128. Thus, severance damages may be recovered when the property taken and the property remaining were “held and used by one party for a common purpose.” *Id.*

To determine whether property taken is part of a “larger parcel,” courts examine “the unities of [1] use, [2] ownership and [3] contiguity.” *Id.* Here, this test confirms what § 12-1122’s plain text and common sense already dictate—that 589 individual homes and common areas subject to nonpossessory easements in favor of the homes are not a consolidated body of land supporting severance damages.

**Unity of use.** Unity of use contemplates whether “the ‘larger parcel’ at the time of the condemnation is . . . used by one party for a common purpose.” *State ex rel. LaPrade v. Carrow*, 57 *Ariz.* 429, 433 (1941). Unity of use means that two pieces of property share an integrated economic purpose such that considering one of them separately deprives the other of its highest and best value. *See State ex rel. Morrison v. Jay Six Cattle Co.*, 88 *Ariz.* 97, 107 (1960). “[I]t is not the identity of uses of the condemned and remaining land which is significant, but the dependency of the value of the remaining land upon its use together with the use of the condemned land.” *Id.*

In *Jay Six*, for example, the State condemned portions of land belonging to two private landowners to expand a highway. *Id.* at 100. The State argued that the

landowners were not entitled to severance damages “because the highest and best use of the condemned land, allegedly as commercial property, was different from that of the remaining land, allegedly as residential property.” *Id.* at 107. This Court disagreed, explaining that “[t]here was considerable testimony at the trial to demonstrate that the value of the remaining land was *dependent upon* the availability of commercial land having access to the highway; that is, that the remaining land was valuable for residential development because the property between it and the highway was usable for commercial purposes and because both parts of the land had free access to the highway.” *Id.* (emphasis added)

Unlike *Jay Six*, the homeowners’ residential property values are not *dependent upon* having an open space easement in the common areas. Of course, an easement may add to a residence’s value. But where, like here, the homes have substantial independent value with or without the easements, they lack a unity of use.

**Unity of ownership.** This factor concerns whether “the property is held . . . by one party.” *Ariz. State Land Dep’t*, 113 *Ariz.* at 128. The interests held in each property need not be identical, but the party claiming damages must demonstrate that he has functional ownership of both parts. *See id.* (“Severance damage may be awarded where title to the property varies both in quality and quantity, provided the property is held and used by one party for a common purpose.”).

Here, the HOA held fee title in the common areas, while the homeowners held

fee title to their homes. There is no ownership overlap, much less ownership unity.

Nor did the homeowners' nonpossessory easement rights in the HOA's common area parcels give the homeowners any "ownership" rights. The right to exclude is central to property ownership. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072-73 (2021). The easements simply gave the homeowners limited rights to use and preserve the common areas for specified purposes. And even then, those rights were subject to the HOA's right to charge fees, suspend rights to use, dedicate, or transfer to public agencies or utilities, regulate use, change use, and change size, shape, or location of the common areas. (IR-169 at SOF Ex. 4.)

For that reason, the easements stand in contrast to leasehold interests, for example. "The major distinction between a lease and lesser interests in land devolves upon the element of possession which, in turn, is dispositive of whether an estate in land is created." *Town of Kearny v. Mun. Sanitary Landfill Auth.*, 363 A.2d 390, 394 (N.J. Super. Ct. Law. Div. 1976) ("The creation of interests in land less than a leasehold do not [sic] give rise to an estate in land."). This explains why a larger parcel may include a leasehold interest: a lease includes the right of possession even against the owner. Similarly, condominium cases may allow severance damages because the homeowners each own an undivided interest in the common area taken. *See, e.g., Andrews v. City of Greenbelt*, 441 A.2d 1064, 1070-71 (1982).

Those scenarios stand in contrast to the situation here, where the homeowners

own their individual home parcels in fee and held nonpossessory interests in the easements. Again, the homeowners fail to identify any caselaw finding a larger parcel consisting of land owned in fee and a nonpossessory easement in another tract.

**Contiguity.** Arizona courts take a strict view of contiguity. *See Ariz. State Land Dep't*, 113 Ariz. at 129 (weighing fact that 640-acre tracts in checkerboard pattern were “contiguous with each other only at their corners” in determining that tracts could not be treated as consolidated in severance analysis). While a small number of the residential lots are physically contiguous to the common area, the vast majority of them are not (*see* IR-1 at Ex. B); and in any event, homeowners offer zero authority suggesting that an easement interest could ever be credited in contiguity analysis. *Cf. People ex rel. Dep't of Pub. Works v. Dickinson*, 41 Cal. Rptr. 427, 430 (Dist. Ct. App. 1964) (easement running between two parcels was “not adequate to make the . . . parcels contiguous” for severance damage purposes).

#### **IV. The homeowners’ position rests entirely on mischaracterization.**

##### **A. The homeowners have been compensated for their easements.**

The homeowners repeatedly suggest that the court of appeals determined that easements are not property protected by the Constitution. (*See, e.g.*, Pet. at 2 (“The COA ignored the Constitution and decades of established precedent protecting and defining easements as ‘property.’”)).) Not so. In fact, the decision explicitly states that easements are a form of private property that “cannot be taken, destroyed or

substantially impaired without just compensation.” Op. ¶ 12. Further, the homeowners have in fact been paid millions of dollars in compensation for their easements’ value. Op. ¶ 8 (stipulated judgment entitles homeowners to \$6 million to compensate “for the value of their condemned positive and negative easements”).

To the extent the homeowners contend that the Constitution requires payment of severance damages for the taking of an easement, *see* Pet. at 6-9, that issue was not before the court of appeals, Op. ¶ 24, nor is it before this Court. What *is* before the Court is whether extinguishing an appurtenant easement qualifies as taking “property ... constitut[ing] part of a larger parcel” under § 12-1122(A)(2). For all the reasons already discussed, it does not.

**B. The State did not concede that the homeowners are entitled to severance damages.**

The homeowners continue to assert that the State conceded that “their homes suffered severance damages as a result” of the condemnation. (Pet. at 1.) Also false. As the court of appeals correctly recited (Op. ¶ 7), the State “conceded that compensation was due for the value of the easement interests lost, measured by the market value of the home before (with the easement) and after (without the easement),’ but argued that the homeowners could not claim proximity damages.”

Nevertheless, the homeowners continue to suggest that the State conceded that it must pay severance damages because it acknowledged the need for a “before and after” valuation of the easement’s value. (Pet. at 4.) That misunderstands and

conflates the calculation of an easement's value under § 12-1122(A)(1) and the calculation of severance damages under § 12-1122(A)(2).

Both parties in this case agreed that determining an easement's value under subsection (A)(1) is measured by the difference in the dominant estate's value with and without the easement. (IR-202 at 7-8.) *See also Redevelopment Agency v. Tobriner*, 200 Cal. Rptr. 364, 367 (Ct. App. 1984) (“The well-established legal standard for evaluating an easement requires an analysis of the decrease in value of the dominant estate ... resulting from the taking of the easement.”). The homeowners extrapolate from the fact that the reduction in a dominant estate's value is used to calculate an appurtenant easement's value to conclude that severance damages must be available because such damages are concerned with reduction in value to remaining land. That is incorrect.

An easement appurtenant provides a benefit to the dominant estate with which it runs. *Ammer v. Ariz. Water Co.*, 169 Ariz. 205, 209 (App. 1991). That benefit to the dominant estate *is* the easement's value. But as the Ninth Circuit has explained, “That the value of the easement is measured by reference to the dominant estate does not render the value analysis a severance inquiry.” *United States v. 10.0 Acres*, 533 F.2d 1092, 1095 n.1 (9th Cir. 1976). The value analysis measures the value of the easement standing alone, while the severance analysis looks at the public work project's impact on the remaining land, including any proximity harm. *See A.R.S.*

§ 12-1122(A). The homeowners ignore this fundamental distinction.

**C. The homeowners misrepresent the caselaw.**

Most problematically, the homeowners consistently and repeatedly mischaracterize the relevant caselaw. As discussed in **Argument § II.B**, the homeowners fail to identify a single Arizona decision holding that the homeowners are entitled “to prove severance damages to their home” when the State extinguishes their non-exclusive easements on someone else’s land.

The homeowners also overstate their non-Arizona authority. Introducing the long string cite at the end of the petition, they assert that “California . . . recognizes a claim for severance damages when restrictive easements are taken.” (Pet. at 13.) But that is wrong. For example, *Hemmerling v. Tomlev, Inc.*, expressly *rejects* severance damages for the incidental taking of an appurtenant easement. 432 P.2d 697, 700 (Cal. 1967) (parties compensated for condemned easements based on the easements’ value; no severance damages given lack of unity of interests).

Further, the homeowners provide no parentheticals or any other reason to believe that their other scattershot cases (at 13-14) hold what they claim, or that (for example) a 1928 Michigan case has any application to the interpretation of Arizona’s statute. Most of these cases do not even mention severance damages. And the only one that discusses severance at length, *United States v. 57.09 Acres of Land*, 706 F.2d 280, 281 (9th Cir. 1983) is inapposite because it concerns a condemnation that

impaired a property's access.

**D. The ingress and egress cases are inapposite.**

Finally, the homeowners incorrectly rely on inapposite caselaw involving public improvements that impair ingress and egress to a property. (Pet. at 11-12 (citing, among others, *City of Phoenix v. Garretson*, 234 Ariz. 332 (2014), *State ex rel. Herman v. Wilson*, 4 Ariz. App. 420 (1966), *State ex rel. Morrison v. Thelberg*, 87 Ariz. 318 (1960), and *City of Yuma v. Lattie*, 117 Ariz. 280 (App. 1977)).)

As this Court explained in *City of Phoenix v. Garretson*, the “common thread” in these cases is that “the government may not *completely remove or substantially impair* a property’s existing access to an abutting roadway without providing just compensation to the owner.” 234 Ariz. at 334 ¶ 5 (internal quotation marks omitted and emphasis added); *see also Thelberg*, 87 Ariz. at 321 (same); *Lattie*, 117 Ariz. at 285 (same); *Wilson*, 103 Ariz. at 197 (holding that government cannot force alternative route that is “unreasonably circuitous” without compensation).. *Garretson*, moreover, observed that “[b]ecause the City did not permanently take any of Garretson’s *land*, th[e] case d[id] not involve a ‘taking’ or ‘severance damages’ as traditionally understood in eminent domain or inverse condemnation actions.” 234 Ariz. at 334, ¶ 7 (emphasis added).

As these cases also make clear, “where a new highway is constructed, moved, or traffic is re-routed, landowners are generally not entitled to compensation even if

they are adversely affected by the changes.” *Garretson*, 234 Ariz. at 237, ¶ 20 (cleaned up). Here, the homeowners did not allege—much less demonstrate—any impairment to their access. Rather, their claimed harm is based purely on alleged “adverse[.]” effects” like loss of “natural beauty,” increased lighting, fumes, and noise. (Pet. at 4.)

*Garretson* and the other access cases therefore help show why the homeowners’ position makes no sense. The homeowners have already been compensated for the loss of their easement interests, placing them in exactly the same position as homeowners who live adjacent to a new freeway but do not happen to hold any easement interest in the condemned land. To illustrate, if the State builds a new freeway next to Homeowner 1 without impairing his ingress and egress (and without condemning any of his property interests), he will not be entitled to compensation based on the freeway’s adverse impact. Yet under the homeowners’ approach, Homeowner 2 down the street—who happens to hold an easement interest in a walkway that the State condemned to build the freeway—is entitled to be compensated not only for the loss of the easement, but also to bootstrap the condemnation into consequential damages that are unavailable to his neighbor. That makes no legal or equitable sense, which is why it is not the law.

## **CONCLUSION**

The Court should affirm.

RESPECTFULLY SUBMITTED this 12th day of September, 2024.

KRISTIN K. MAYES, ARIZONA  
ATTORNEY GENERAL

By */s/ Hayleigh S. Crawford* \_\_\_\_\_

Hayleigh S. Crawford

Deputy Solicitor General

Clinton N. Garrett

Senior Appellate Counsel

Michelle Burton

Assistant Attorney General

Joe Acosta, Jr.

Assistant Attorney General

2005 N. Central Ave.

Phoenix, AZ 85004

*Attorneys for Plaintiff/Appellant State of  
Arizona*