FILED
21-1063
3/31/2022 9:18 AM
tex-63128227
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 21-1063

IN THE SUPREME COURT OF TEXAS

In re Christopher S. Kappmeyer and Roxana P. Kappmeyer,
Relators.

Original Proceeding from the Thirteenth Court of Appeals at Corpus Christi, No. 13-21-00344-CV

RELATORS' BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Relators: Christopher S. Kappmeyer and Roxana P. Kappmeyer, a married couple, residents of Texas.

Respondent: The Honorable Starr Bauer, Aransas 36th District Court, P.O. Box 700, Sinton, TX 78387.

Real Party In interest: Key Allegro Canal and Property Owners' Association, Inc., a Texas nonprofit corporation

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STATEMENT OF THE CASE

Nature of the case:	The relators are homeowners who sued a nonprofit corporation which asserts it is a mandatory homeowners association over 700 homes in 5 different subdivisions. Decades after the subdivision was created, the nonprofit board – without a homeowner vote – recorded new restrictive covenants. The relators sued to prevent enforcement of the new restrictive covenants against them. The nonprofit's board sought to force the relators to join all 700 other owners as a precondition to maintaining suit.
Respondent:	Honorable Starr Bauer, 36th District Court of Aransas County, Texas.
Ruling assailed:	The trial court ordered the homeowner relators to sue 700 other homeowners or else suffer dismissal.
Subsequent events in the court of appeals:	The relators sought mandamus relief in the court of appeals to avoid having to sue 700 people. The court of appeals denied relief. 2021 WL 5577761. Justice Tijerina authored the memorandum opinion, joined by Justices Benavides and Longoria.

STATEMENT OF JURISDICTION

This Court has jurisdiction to issue writs of mandamus under article V, section 3 of the Texas Constitution and Texas Government Code section 22.002(a).

ISSUE PRESENTED

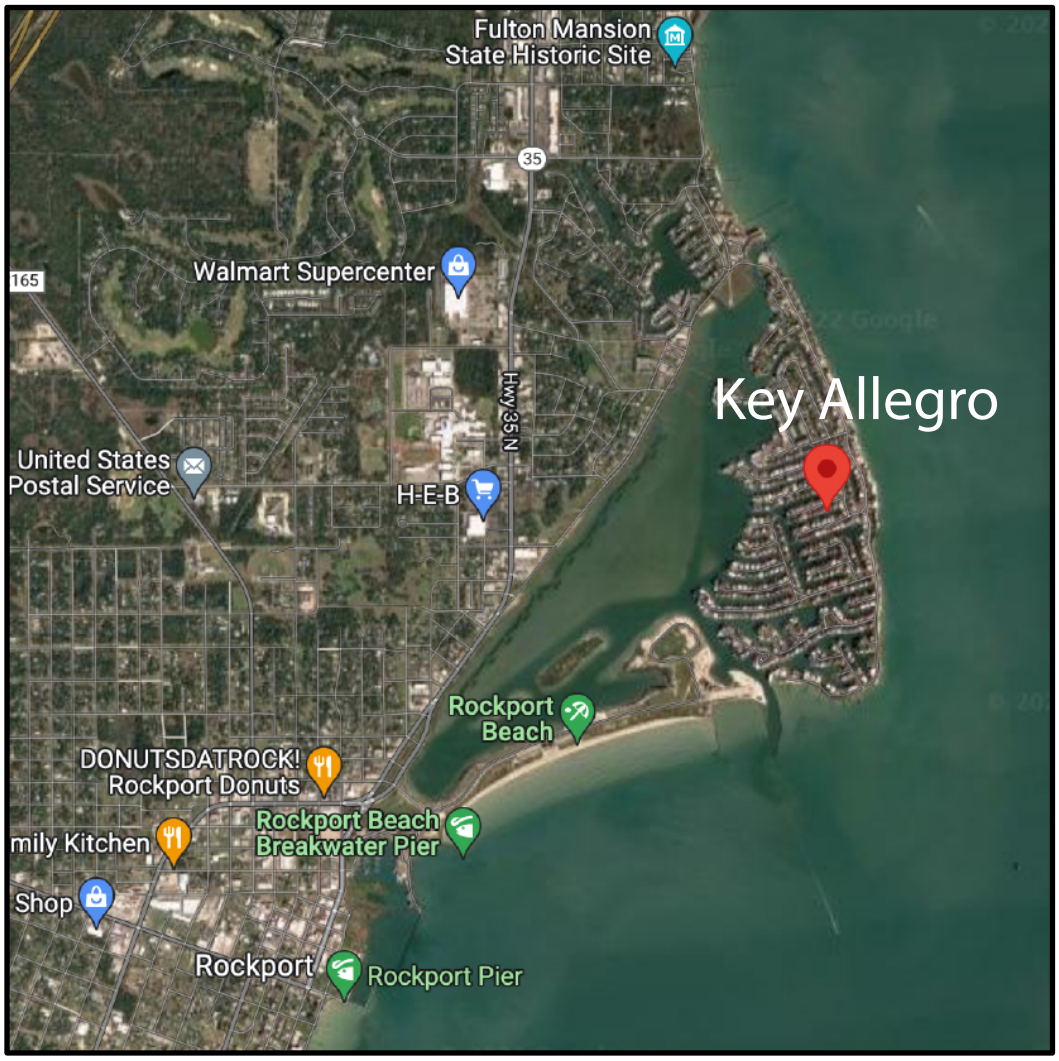
A nonprofit corporation' board adopted and recorded new restrictive covenants purporting to make nonprofit the mandatory homeowners association over all 700 owners in all five subdivisions – without any vote by the 700 affected owners to amend the existing restrictive covenants. The new instrument adopted unilaterally by the nonprofit's board gives the nonprofit association new assessment, collection, and foreclosure powers.

> If a homeowner challenges a nonprofit's board's unilateral action in endowing itself with new powers, does the homeowner have to sue all the other subdivision homeowners?
>
> > Is it not, in fact, affirmatively *improper* for a homeowner to sue other homeowners for the unilateral actions of an association board?

STATEMENT OF FACTS[1]

I. Key Allegro is five subdivisions, split between lots facing open water and lots on canals.

The Key Allegro community lies near Rockport. There are lots facing bays (inner and outer), and lots on canals crisscrossing the island:[2]



[1] The facts are not in dispute.

[2] Pet'n Appendix B (Amended Motion to Abate at 2 (¶¶ 2-4)).

Key Allegro is actually five subdivisions (or "units"), each with its own restrictive covenants recorded during the 1960's and 1970's; the individual unit restrictions are largely identical.[3] There are about 200 homes in Unit 1 (the Relators' subdivision),[4] and about 700 homes in total.[5]

The original restrictive covenants distinguish between bay-adjacent lots and canal-adjacent lots in a critical respect: owners of canal-adjacent lots are required to maintain the canals, and if they don't, the "Key Allegro Canal Owners Association" will do it for them and then bill them:

> All channels and canals shall at all times be kept free of debris, trash, rubbish, garbage or other unsightly or unsanitary articles or hazards to navigation. None of the foregoing or any other foreign matter shall be at any time deposited, dumped or left in any such canal or channel, nor shall any hazard to navigation, or boats, hulks, derelicts, or other floating objects other than properly tended or moored boats be at any time permitted in any such channel. The owner of each lot shall be responsible for the maintenance of the portion of any channel contiguous to his property in accordance with the provisions hereof. The KEY ALLEGRO CANAL OWNERS ASSOCIATION shall have the privilege of curing any default of the owner of such property in connection with the foregoing at any time and any reasonable expense incurred in so doing shall be paid by the owner of such property.[6]

Bay-adjacent owners were not subject to any such requirements.

In additional side-agreements from the 1970's, canal-adjacent

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[3] Pet'n Appendix B (Amended Motion to Abate at 2 (¶ 4); Pet'n Appendix D (1962 restrictions for Unit 1)).

[4] Pet'n Appendix B (Amended Motion to Abate at 4 (¶ 9); Pet'n Appendix B (Response to Motion Exhibit A)); Pet'n Appendix G (RR at 13).

[5] Pet'n Appendix C (Relators' Resp. to Motion Exhibit A (Declar. of Sutton authenticating Aransas CAD data download)); Pet'n Appendix G (RR at 11).

[6] Pet'n Appendix E (restrictions pp. 9-10)

owners simplified the canal-maintenance process. They agreed to subject themselves to a successor entity – real-party-in-interest "Key Allegro Canal and Property Owners' Association, Inc." – which was given the power to preemptively levy canal-related assessments and assume responsibility for repairs.[7]

Until 2017, bay-adjacent owners were not required to be members of any association; nor were they required to pay assessments. And while canal-adjacent owners have always been required to pay for canal repairs, they too were never, before 2017, subject to assessments for other purposes. The main things both sorts of owners had in common were: (1) they had to submit building plans to an architectural control committee, and (2) they could vote as part of a majority to "nullify" individual unit restrictions.[8]

II. "One association to rule them all . . . ."

As of July 10, 2017, everything changed when the board consolidated various documents and added new terms. The Association's board, without a vote of the ownership, recorded an instrument for each of the five units entitled "Amended and Restated Deed Restrictions, Covenants, and Conditions."[9] The new instrument recited that the board had "satisfied all requirements of

[7] Corr'd Pet'n in 13th Court at 5; Pet'n at 5. Pet'n Appendix B (Amended Motion to Abate at 2, fn. 2).

[8] Pet'n Appendix E at "-2-" (1962 restrictions for Unit 1) (paragraph beginning "All restrictions and covenants herein set forth . . .").

[9] Pet'n Appendix B (Am. Motion to Abate ¶ 5); Pet'n Appendix F (new restrictions).

law for amending the original restrictions" and then interwove portions of the original restrictive covenants with completely new restrictions plus other concepts or terms borrowed from the canal-owner-related side agreements in the 1970's.

Among the new restrictions were provisions which morphed the narrow canal-adjacent repair entity into a full-fledged, mandatory homeowners' association over all 700 lots. The Association declared itself "the lawful home owners association" for all units. It recited that the "intent" of the new restrictions was that they "be managed and enforced uniformly by the Association with the other Units in the Association." The Association also gave itself broad rulemaking power.[10] Finally, the Association gave itself broad assessment power unrestricted by subject matter, along with the power to foreclose on homes for nonpayment.[11]

III. The Kappmeyers protest the board's power grab.

Chris and Roxana Kappmeyer, who own three homes in Unit 1, took issue with the board's unilateral action.[12] In December 2020, they filed suit to have the 2017 restrictive covenants declared unenforceable against them.[13] Their lawsuit contends that a vote of the owners was necessary to amend the restrictive covenants, and

[10] Pet'n Appendix F (new restrictions ¶ 27).

[11] Pet'n Appendix F (new restrictions ¶ 28).

[12] Pet'n Appendix D (lawsuit); Appendix B (Amended Motion to Abate at 2 (¶¶ 2-4)).

[13] Pet'n Appendix B (Amended Motion to Abate at 3 (¶6)).

that amendment requires approval by at least 2/3 of the owners of each section.[14] In the alternative, they seek to quiet title since the 2017 restrictive covenants encumber their property and would allow claims against them under color of the 2017 restrictions.[15] They also included a claim for breach of restrictive covenant by the Association, for exceeding its powers.[16]

IV. The Association says everyone "affected" has to be joined even if there is no evidence they claim any interest.

The Association filed a motion to abate the suit or dismiss it unless the Kappmeyers joined all 700 owners and served each one individually.[17] It contended that since all owners are affected by the board's action and could separately sue the Association like the Kappmeyers did, all owners had to be sued. At the hearing, in addition to relying on the various recorded instruments at issue, the Association put on the stand its president, Lynn Powers. She offered no evidence that any other homeowner – including herself – wished to be brought into the suit and admitted that the Association had no such evidence.[18] The Association's only other evidence was an affidavit showing that Key Allegro's five units comprise about 700

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[14] *See* Tex. Prop. Code § 209.0041(h-2) (if Chapter 209 applies and restrictions contain no amending clause, a 67% owner vote is required).

[15] Pet'n Appendix D at 8-9; (Pet'n Appendix B (Amended Motion to Abate at 3 (¶6)).

[16] Pet'n Appendix D at 9-10.

[17] Pet'n Appendix B.

[18] Pet'n Appendix G (RR at 11-14 (direct), 14-20 (cross)).

lots.[19]

For their part, the Kappmeyers, in addition to pointing out that their suit only sought a declaratory judgment as to their rights, contended that the Association was using joinder as a pretext to slam shut the courthouse doors given the exorbitant expense and practical difficulties in finding and serving everyone.

Following a hearing, the trial court agreed with the association and ordered the Kappmeyers to sue all 700+ people within 90 days or else face dismissal.[20] The court of appeals affirmed, though, without explanation, it cited cases rejecting joinder of all homeowners in cases like this one.[21]

SUMMARY OF ARGUMENT

This Court and every other court to have addressed a case like this holds that in a declaratory judgment case to have rights declared under restrictive covenants, it is not necessary for all homeowners in a subdivision to be joined. The Declaratory Judgment Act expressly states that the rights of non-parties are not prejudiced by declaratory relief granted by the court.

Going further, there is persuasive intermediate appellate precedent to the effect that when a homeowner sues a homeowners'

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[19] Assoc. Resp. to Pet'n Appendix at 125-153 (affid. of records custodian attaching list of owners).

[20] Pet'n Appendix A.

[21] *In Re Kappmeyer*, No. 13-21-00344-CV, 2021 WL 5577761 (Tex. App. – Corpus Christi Nov. 30, 2021) (citing *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163-164 (Tex. 2004) and *In re Corcoran*, 401 S.W.3d 136, 138–40 (Tex. App.—Houston [14th Dist.] 2011, orig. proceeding)) .

association challenging the homeowners' association's powers, no other homeowners can be joined: the actions of individual homeowners have nothing to do with the unilateral actions of the homeowners' association.

The Association had to prove that other homeowners claim an interest in the litigation which necessitates their joinder. The Association not only failed to make that showing, but its own president claimed no personal interest and went so far as to admit that the Association had no evidence that any other homeowners claimed an interest.

The trial court analogized this case to oil-and-gas royalty cases, but that analogy is false. The Kappmeyers never agreed to or voted upon the new restrictive covenants which the Association's board adopted unilaterally, so they are strangers to the contract. The better analogy is this Court's *Crawford* precedent, where joinder of non-parties to a mineral lease was found to be improper where it was the party seeking joinder whose unilateral acts generated the dispute in the first place.

The Association's sole authority for joinder of all 700 homeowners is a case where the owners in a subdivision voted collectively to adopt new restrictive covenants. Since this case involves the unilateral act of the Association, not the owners collectively, the Association's authority is irrelevant.

This Court has consistently held that appeal is not an adequate

remedy where a party must pay punitive sums to initiate or maintain suit. The trial court has made it all but impossible for homeowners to challenge homeowners' association overreach since they must either (1) sue everyone in the subdivision at exorbitant expense, or (2) immediately after filing suit face an expensive ordinary appeal if their case gets dismissed for failing to join everyone.

ARGUMENT

Mandamus relief is appropriate where joinder of hundreds of homeowners at huge expense is ordered at pain of dismissal.

Mandamus relief is appropriate when a trial court clearly abuses its discretion and ordinary appeal is not an adequate remedy.[22] The adequacy of appeal is determined by balancing the benefits of mandamus review against the detriments.[23]

I. The trial court abused its discretion in requiring one homeowner to sue 700 other homeowners at inordinate expense.

A trial court abuses its discretion when it reaches a decision that is arbitrary and unreasonable such that it amounts to a clear and prejudicial error of law or when it fails to correctly analyze or apply the law.[24]

Concerning joinder specifically, a trial court ordinarily has

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[22] *In re Team Rocket, L.P.*, 256 S.W.3d 257, 262 (Tex. 2008).

[23] *Id.*

[24] *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 888 (Tex. 2010) (orig. proceeding).

great discretion in requiring third parties to be sued.[25] "However, mandamus relief is appropriate if the trial court abuses that discretion."[26]

The trial court clearly abused its discretion in ordering an ordinary homeowner to sue 700 people. Its order amounts to punishing the homeowners for challenging the unilateral actions of the association. Worse, it gives the association a procedural advantage in litigation.

A. Joinder of all homeowners is not necessary where a homeowner sues based on an association's unilateral actions.

This Court and every other court which has addressed a case like this one holds that where a homeowner challenges the unilateral actions of a homeowners' association, joinder of all homeowners is not necessary.[27]

The analysis begins with Rule 39, which governs joinder under

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[25] *See In re Arthur Andersen, L.L.P.,* 121 S.W.3d 471, 483 (Tex. App. -Houston [14th Dist.] 2003, orig. proceeding).

[26] *Id.*

[27] *See Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163-164 (Tex. 2004); *Twin Creeks Golf Grp., L.P. v. Sunset Ridge Owners Ass'n, Inc.*, 537 S.W.3d 535, 547 (Tex. App. – Austin 2017, no pet.) (where complete relief can be afforded between owner and HOA, abatement not proper); *In re Corcoran*, 401 S.W.3d at 138–40; *Epernay Cmty. Ass'n, Inc. v. Shaar*, 349 S.W.3d 738, 747 (Tex. App. - Houston [14th Dist.] 2011); *Indian Beach Prop. Owners' Ass'n v. Linden*, 222 S.W.3d 682, 698 (Tex. App. – Houston [1st Dist.] 2007, no pet.) (internal citations omitted); *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 559-560 (Tex. App.-Houston [1st Dist] 2005); *see also Long Island Vill. Owners Ass'n, Inc. v. Berry*, No. 13-14-00363-CV, 2016 WL 1072856, at *4 (Tex. App. – Corpus Christi Mar. 17, 2016, pet. denied) (in joinder challenge dressed as jurisdiction challenge, joinder of all homeowners in subdivision not required).

this case brought under the Declaratory Judgment Act.[28] Rule 39(a), formatted for clarity, mandates joinder in two situations:

> A person who is subject to service of process shall be joined as a party in the action if –
>
> (1) in his absence complete relief cannot be accorded among those already parties,
>
> *or*
>
> (2) he claims an interest relating to the subject of the action
>
> *and*
>
> is so situated that the disposition of the action in his absence may –
>
> (i) as a practical matter impair or impede his ability to protect that interest or
>
> (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

1. Complete relief is available because this is a declaratory judgment action to have a homeowner's rights declared.

The first prong – complete relief – does not present an issue in this case. This Court's *Brooks* decision held that "the Declaratory Judgment Act, which provides that a trial court's declaration does not prejudice the rights of any person not a party to the proceeding, dispenses with the first of these concerns."[29] Thus, in a case

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[28] *See* Tex. R. Civ. P. 39; *Brooks*, 141 S.W.3d at 162; *Clear Lake City Water Auth. v. Clear Lake Util.*, 549 S.W.2d 385, 390 (Tex. 1977) (applying Rule 39 to actions under the Declaratory Judgment Act); Tex. Civ. Prac. & Rems. Code Ch. 37 (DJA).

[29] *Brooks*, 141 S.W.3d at 163; *see* Tex. Civ. Prac. & Rem. Code § 37.006(a) ("A

challenging a homeowners' association's actions, "[a]ny non-joined homeowner would be entitled to pursue individual claims . . . notwithstanding the trial court's judgment in the current case."[30] Just so in this case, where the Kappmeyers, for themselves alone, seek to be declared not subject to the board's 2017 recorded instrument.

2. It is affirmatively improper for one homeowner to sue another homeowner to correct the unilateral action of an association board.

There is authority for an even stronger proposition: a homeowner challenging the actions of an association's board *cannot* sue individual homeowners:

> [A] declaratory judgment action to invalidate either governing documents or actions taken by an association board pursuant to governing documents *must* be brought against the association, *not* individual board members.[31]

Arnold is functionally equivalent to this case. It addresses whether individual homeowners are necessary parties to a suit challenging the powers of a homeowners' association. The homeowner there sued both her HOA and its individual officers to invalidate an amendment to restrictive covenants and bar the HOA from operating under it.[32] The association's officers sought

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declaration does not prejudice the rights of a person not a party to the proceeding.").

[30] *Id*.

[31] *Arnold v. Addison*, No. 05-20-00001-CV, 2021 WL 5984875 (Tex. App. – Dallas Dec. 17, 2021, no pet.) (emph. added).

[32] *Id*., at *1-2, 11 ("Essentially, Arnold sought a declaration that the Association was operating under invalid governing documents.").

dismissal, arguing that a declaratory judgment against them individually would do nothing to prevent the association from operating under the amended restrictive covenants.[33] The court of appeals agreed and dismissed the officers from the case. It held that the HOA was the *sole* necessary party in a suit challenging the HOA's authority to operate under invalid governing documents.[34]

Arnold is persuasive here. While there it was only a handful of officers who got the case against them dismissed (as opposed to the 700 people whom the Kappmeyers insist should not be parties), that is a distinction without a difference: the officers, after all, are also homeowners. In both that case and this one, the suing homeowner challenges an association's power to operate under a particular recorded instrument. The only necessary party in such a case is the association because winning the requested declaratory relief against the individual homeowners – whether ten or ten thousand of them – would not stop the association from continuing to operate. *Arnold* illuminates not only why the individual homeowners *need not* sue everyone, but, more emphatically, why they *cannot*.

3. The Association admitted it has no evidence that any other homeowner claims an interest in the suit.

The second situation also does not pose an issue in this case. The Association put in no evidence that any other homeowner "claims an interest" in the Kappmeyers' lawsuit.

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[33] *Id.* at *11.

[34] *Id.*

The Association bore the burden of proof as to whether another homeowner claimed an interest.[35] The trial court was required to accept the facts alleged in the Kappmeyers' petition as true unless the Association affirmatively disproved them.[36]

This Court has previously addressed what "claims an interest" means under Rule 39:

> The verb "claim" means "to demand recognition of (as a title, distinction, possession, or power) esp. as a right"; "to demand delivery or possession of by or as if by right"; "to assert or establish a right or privilege." Claim, Webster's Third New Int'l Dictionary (2002); *see also* Claim, The American Heritage Dictionary of the English Language (5th ed. 2016) (defining claim in pertinent part as "[t]o demand, ask for, or take as one's own or one's due"; "[t]o state to be true, especially when open to question; assert or maintain").[37]

Multiple cases have held that joinder is not required if the movant does not demonstrate that others claim an interest.[38]

In this case, the Association submitted no evidence at all concerning other owners except that there are 700 of them. The Association's president, Lynn Powers, testified in her official

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[35] *Flowers v. Steelcraft Corporation*, 406 S.W.2d 199 (Tex. 1966).

[36] *Brazos E. P. Coop., Inc. v. Weatherford Ind. Sch. Dist.*, 453 S.W.2d 185, 189 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.) (citing long line of cases).

[37] *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 912 (Tex. 2017).

[38] *See, e.g.*, *id.* at 912 ("no record evidence shows or even suggests that a single one of the adjacent landowners has ever demanded or asserted ownership of or a royalty interest in those minerals"); *Epernay*, 349 S.W.3d at 747 (where homeowners' association submitted no "evidence as to the identity, number, or interests of . . . other homeowners," joinder was not proper); *In re Boyaki*, 587 S.W.3d at 484 (where there was no evidence that third parties claimed an interest, joinder was not required).

capacity. Yet she stood to be sued personally by the Kappmeyers should joinder be ordered, and she did not claim any personal interest even for herself, much less testify that any other homeowner had claimed a personal interest:

> *Q. (*[by counsel for the Kappmeyers' *MR. RODRIGUEZ)* Have you submitted to the Court any evidence as to the identity, number, or interests -- or whether there is homeowners to join in this case?
>
> *A.* No.

This testimony establishes affirmatively that the Association had no proof concerning other homeowners' interests. For that reason, the remainder of Rule 39(a)(2), concerning the risk of inconsistent obligations, need not be reached.

B. The trial court's analogy to joinder in oil-and-gas royalty cases was flawed.

The trial court analogized this case to a mineral lease dispute, reasoning "if one [oil and gas royalty owner] is getting sued, they are all getting sued."[39] That analogy is flawed, however, because this dispute is not between parties who agreed to be bound by a contract. This suit involves a party who never signed or approved the contract adopted unilaterally by the other party.

This Court has rejected mandatory joinder in cases involving strangers to a mineral lease. In *Crawford v. XTO Energy, Inc.*,[40] a lessor sued a lessee over royalties the lessee unilaterally decided to

[39] Pet'n Pet'n Appendix at 19, ll. 22-24.

[40] 509 S.W.3d at 912-13 (Tex. 2017).

pay to neighboring landowners who were strangers to the lease. The lessee demanded that the lessor join neighboring landowners even though those owners were not demonstrated to have an interest in the litigation. The lessee's arguments for joinder were almost identical to the association's in this case – in essence, that the neighbors would be "affected" by the outcome.[41] This Court rejected that, contrasting mandatory joinder in typical mineral-lease situations from cases involving strangers to the lease.:

> The court of appeals found significant the undisputed fact that the adjacent landowners are being paid royalties attributable to the Crawford tract and thus 'have a pecuniary interest in the outcome of this litigation.' But the record reflects that [lessee seeking joinder] XTO unilaterally made the determination to credit the Crawford-tract royalties to the adjacent landowners.
>
> . . .
>
> XTO reasonably expresses concern that a judgment in [Lessor] Crawford's favor in the absence of the adjacent landowners would subject XTO to the risk of incurring multiple or otherwise inconsistent obligations. Tex. R. Civ. P. 39(a)(2). Noting that a judgment for Crawford would diminish the adjacent landowners' future royalties, XTO claims "it can be reasonably expected and anticipated" that the landowners will sue XTO and assert a right to royalties attributable to the Crawford tract. While this concern is logical, it does not alter our conclusion.
>
> . . .
>
> XTO's risk of incurring inconsistent obligations has arisen not "by reason of" the adjacent landowners'

[41] *Id*. at 909.

> "claimed interest" in the Crawford-tract minerals—they have claimed no such interest—but because XTO might reduce their royalty payments after unilaterally determining that they should encompass the Crawford tract. That determination does not make the adjacent landowners necessary parties under Rule 39(a).[42]

Just as in *Crawford*, in this case it is the unilateral action of one party which gave rise to the dispute. The Association's board recorded new restrictive covenants in 2017 without owner participation. No other owners have been demonstrated to claim an interest in the suit. Thus, even more emphatically than in *Crawford*, the unilateral acts of a party cannot form the basis for requiring joinder of everyone potentially "affected."

Crawford, it bears noting, took the occasion to address the potential for inconsistent adjudications. If, as the Association here contends, a risk arises of the Association having inconsistent obligations to different owners, the Association can, before trial, invoke Rule 37 "to bring in the adjacent landowners itself in order to avoid the risk of future lawsuits and inconsistent judgments. But it may not, before the fact, force [joinder] . . . or face dismissal . . . under Rule 39."[43]

C. The Association's sole case authority is not analogous because it involved a challenge to the actions of other homeowners, not to the unilateral actions of an HOA.

While the court of appeals did not address it, the Association

[42] *Id.* at 913-14.

[43] *Id.* at 914.

relies on a single case in support of its position, *Dahl v. Hartman*, 14 S.W.3d 434, 435 (Tex. App. – Houston [14th Dist.] 2000, pet. denied). However, the *Epernay* case, already cited, rejected the result in *Dahl* in a case like this one, concluding as follows:

> In *Dahl,* the plaintiff sought declarations that the property owners' association for a subdivision was not validly formed and that . . . all of the subdivision's deed restrictions had not been validly extended beyond their original expiration date. This relief was much broader than the relief sought by the Shaars when the trial court denied Association One's plea in abatement.[44]

Thus, in situations where a homeowner challenges *the actions of all the other homeowners*, then joinder of those homeowners may be appropriate.

Dahl has other problems which limit it to its facts. It does not recite enough facts for one to discern how many owners voted on the new restrictive covenants, stating merely that "The [Tex. Prop. Code Ch. 201 petition] Committee was successful in organizing the Association and the deed restrictions were extended." Chapter 201 authorizes a process whereby 2/3 of the owners in a subdivision can "extend, renew, create, add, or modify" restrictive covenants.[45] However, the statute allows dissenters to opt out, leaving open the question why the dissenter in *Dahl* did not do that.[46] Besides all that, as the *Dahl* court itself noted, *Chapter 201 expressly requires*

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[44] *Epernay*, 349 S.W.3d at 747.

[45] Tex. Prop. Code § 201.004.

[46] *See* Tex. Prop. Code § 201.009(b)(2), (4).

an owner to sue all other owners when challenging the result of the petition process authorized by the statute.[47] That, in and of itself, appears to have been dispositive on the joinder question in that case. Chapter 201, however, is not at issue in this case. *Dahl* is irrelevant.

II. The Kappmeyers have no adequate remedy by appeal because the onerous toll for maintaining suit radically skews the case in the Association's favor.

"[W]hether an appellate remedy is 'adequate' so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules."[48]

Ordinary appeal is not adequate to address the harms and abuse in a situation like this one. The Association has misused joinder to erect insurmountable hurdles for homeowners challenging AWOL HOA boards.

The Court may take judicial notice of certain salient facts concerning suing people and obtaining service of process.[49] Clerk's and service of process charges apply for every person served.[50] The Aransas district clerk's published fees[51] list citations as $8 and

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[47] *Dahl*, 14 S.W.3d at 437 (citing Tex. Prop. Code § 201.010(b)).

[48] *In re Prudential Ins. Co. of Amer.*, 148 S.W.3d 124, 137 (Tex. 2004).

[49] The Association did not object in the court of appeals to the Kappmeyers' request for judicial notice of these facts. Corr'd Petn. for Writ of Mandamus at 7, n. 14.

[50] *See* Tex. R. Evid. 201(b)(1) (facts not subject to dispute because generally known); *see also* Tex. Gov't Code §51.318 (district clerk fees authorized).

[51] Doc. accessed March 28, 2022 at: https://www.aransascountytx.gov/districtclerk/e-docs/District%20Clerk%20Fees%20Effective%2001-01-20.pdf

service of process as $150.[52] That amounts to over $110,000 in citations and service of process charges for 700 defendants. Even if a private process server were employed, which is normally $75-$100, service of process would readily exceed $60,000.[53] Those baseline fees do not account for the added expense and difficulty of *finding* 723 people to serve (in a vacation area, no less), to say nothing of the extended process of seeking and pursuing substituted service for people who can't be found, problems to which this Court is no stranger.[54]

The trial court's order in this case, ordering joinder of over 700 people, is a penalty which effectively deters homeowners from seeking to vindicate their rights. This Court has held, in an analogous case involving an order placing a large financial burden on a party during litigation, that mandamus relief is appropriate "where the trial court's error vitiates or severely compromises a party's ability to present a viable claim or defense."[55] In that case, *Travelers v. Mayfield*, the trial court required a party to advance the attorney's fees of the *other* party on a monthly basis. This Court

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[52] *See* Tex. R. Evid. 201(b)(2) (judicial notice allowed of facts which can be accurately and readily determined from reliable sources).

[53] *See*, *e.g.*, *In re Corcoran*, 401 S.W.3d at 140 fn. 2 (Tex. App. – Houston [14th Dist.] 2011, orig. proceeding) (noting similar expenses to serve 2500 homes, granting mandamus).

[54] *See*, *e.g.*, *Spanton v. Bellah*, 612 S.W.3d 314, 318 (Tex. 2020) (default judgment vacated for spelling error in order for substitute service).

[55] *Travelers Indem. Co. of Connecticut v. Mayfield*, 923 S.W.2d 590, 595 (Tex. 1996).

granted mandamus relief, holding that a financial penalty of that kind "so skews the litigation process that any subsequent remedy by appeal is inadequate."[56]

The Court addressed a similar problem in *Braden v. Downey*, 811 S.W.2d 922 (Tex. 1991). The trial court ordered a party to pay pre-judgment sanctions of such magnitude that the party's ability to continue litigating was seriously impaired.[57] Remarked the Court in a later case:

> A penalty imposed on a party's prospective exercise of legal rights is a different situation. It is as if a court required a party to pay a penalty if the party attempted to conduct any discovery. The penalty directly impacts the party's exercise of its rights under the rules of procedure.[58]

The analogy to this case is clear, since the expense required to comply with the trial court's order directly threatens the Kappmeyers' ability to maintain a lawsuit.

This Court's reasoning in *Travelers v. Mayfield* and *Braden* has been applied in a case factually similar to this one. In *In re Corcoran*, homeowners in a subdivision got HOA approval to build a basketball court and batting cage on their property. The HOA, when sued over its decision to approve the construction, obtained an order requiring joinder of thousands of other homeowners. Mandamus relief was granted. The court of appeals, tallying the

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[56] *Id.* (citing precedent).

[57] 811 S.W.2d at 929.

[58] *In re Ford Motor Co.*, 988 S.W.2d 714, 722 (Tex. 1998).

inordinate costs to serve everyone, did not countenance effectively barring the courthouse doors to individual homeowners seeking to vindicate their rights:

> In this case, ordering joinder of all homeowners from seven subdivisions will delay the trial and greatly increase costs. The increased costs are significant enough to place the Corcorans in danger "of succumbing to the burden of litigation." The trial court's order has "'radically skew[ed] the procedural dynamics of the case.'"[59]

In sum, if one party can force the other party to pay hundreds of thousands of dollars just to maintain a lawsuit, the party prevailing in the joinder dispute has all but prevented the suit from ever reaching trial. This Court has consistently frowned on that.

Another reason mandamus relief is appropriate is jurisprudential. The aforementioned *In re Corcoran* case is just one of the numerous cases in which HOA's seize on joinder to effectively bar suits by individual homeowners seeking declaratory relief to vindicate their rights under restrictive covenants.[60] And while *In re Corcoran* was an original proceeding, most of the cases are not. This Court has not addressed in a mandamus context the joinder question it resolved in the relator homeowner's favor in *Brooks v. Northglen*. The court of appeals, for its part, denied mandamus relief even though, under its own precedent, joinder was not

[59] *In re Corcoran*, 401 S.W.3d at 139–40 and fn. 2 (citing *Travelers v. Mayfield, supra*, and other Texas Supreme Court mandamus precedent).

[60] *See* cases cited *supra* at n. 14.

required.[61] Without guidance from this Court, these cases will recur.

In sum, if this Court allows homeowners' associations to impose mandatory joinder in homeowner challenges to association actions, the consequences for individual homeowners will be grievous. Association boards will act with impunity knowing that most homeowners cannot, as a practical matter, pursue a challenge. On the one hand, most homeowners lack the wherewithal to risk hundreds of thousands of dollars in costs merely to initiate a suit. On the other hand, they could not risk filing suit knowing that, when they do not comply with a financially-oppressive joinder order, they will immediately have to pursue an expensive ordinary appeal of a judgment dismissing their case – yet another crushing toll on the right to seek legal redress. In sum, without mandamus relief in cases like this, ordinary homeowners will be thwarted at every turn from challenging the unilateral actions of HOA boards.

PRAYER FOR RELIEF

This Court should grant the Kappmeyers' petition for a writ of mandamus and direct the trial court to vacate its order of September 21, 2021 mandating joinder of over 700 people at pain of dismissal. The Court should remand the case consistent with the above and grant any other relief to which the relators may be entitled.

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[61] *See Long Island Village*, 2016 WL 1072856, at * 4 (relying on *Brooks v. Northglen* in holding that joinder of all subdivision homeowners was not required).

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that on March 31, 2022, a true and correct copy of this petition was served by efiling on Gregory B. Godkin, *ggodkin@rmwbh.com* and Kristin K. Reis, *kreis@rmwbh.com*.

/s/ *J. Patrick Sutton*

CERTIFICATE OF COMPLIANCE

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/s/ *J. Patrick Sutton*

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