COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SYNC TITLE AGENCY, LLC, et al. Appellants, v. ARIZONA CORPORATION COMMISSION, Appellee.	No. 1 CA-CV 23-0606 Maricopa County Superior Court No. LC2022-000275 Arizona Corporation Commission No. S21131A-20-0345

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE

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INTRODUCTORY STATEMENT

Amicus Curiae Goldwater Institute thanks the Court for its invitation to file this brief. The Court acted correctly in raising these questions *sua sponte*, because the Mandatory Clause of the Arizona Constitution (Ariz. Const. art. II § 32) imposes on each branch of the government an independent duty to enforce constitutional guarantees—even where a party fails to raise a constitutional issue. *See* *Seattle Sch. Dist. No. 1 of King Cnty. v. State*, 585 P.2d 71, 85–86 (Wash. 1978) (the Mandatory Clause imposes a "judicially enforceable affirmative duty" to "go to any length within the limits of judicial procedure, to protect … constitutional guaranties."); *cf.* *Hale v. Morgan*, 584 P.2d 512, 516 (Cal. 1978) (Mandatory Clause means party is not barred by waiver from raising constitutional issues for the first time on appeal); *see further* Timothy Sandefur, *The "Mandatory" Clauses of State Constitutions*, 59 Gonzaga L. Rev. __ (forthcoming, 2025).

Amicus answers the Court's three questions as follows: 1) A jury trial is required here because the alleged wrongdoing is analogous to a common law wrong triable to a jury at statehood, and the "public rights" exception is inapplicable; 2) The statutory charge, while not literally identical to common law fraud, is of the same character or grade, and that is all this Court need determine; 3) Nothing in Section 12-910 bars this Court from looking to federal jurisprudence

when interpreting Arizona securities laws, so long as the Court, in its own independent judgment, believes federal jurisprudence offers the best interpretive tools for understanding those laws.

ARGUMENT

I. When does the Arizona Constitution require a jury trial for a statutory claim or offense?

A. The Arizona Constitution preserves the jury trial right for the *types* of claims and offenses that would have been triable to a jury at statehood.

The Arizona Constitution's pledge that "[t]he right of trial by jury shall remain inviolate," was modeled, like much else in Arizona's Constitution, on that of Washington State. *Compare* Ariz. Const. art. II § 23 *with* Wash. Const. art. I § 21. Only two months before the Arizona Constitutional Convention began its work, the Washington Supreme Court explained that this phrase meant "that the right of trial by jury as it existed in the territory at the time when the Constitution was adopted should be continued unimpaired and inviolate." *State v. Strasburg*, 110 P. 1020, 1022 (Wash. 1910). Arizona courts and many others have said the same. *See Derendal v. Griffith*, 209 Ariz. 416, 419 ¶ 9 n.2 (2005) (citing cases).

The locution "[shall] remain inviolate" actually originated in the Georgia and New York Constitutions of 1777. *See* Ga. Const. of 1777 art LXI; N.Y. Const. of 1777 art. XLI. In other words, they are a decade older than the federal Seventh Amendment. As Justice Gorsuch recently explained, the authors of these

eighteenth-century jury clauses were particularly concerned with the British government's use of Vice Admiralty Courts, which are "strikingly similar" to today's administrative agency hearings, in that they were presided over by administrative functionaries who lacked impartiality. *SEC v. Jarkesy*, 144 S. Ct. 2117, 2142–43 (2024) (Gorsuch, J., concurring). Also, parties in Vice Admiralty Courts were not entitled to procedural protections such as counsel or the presumption of innocence. *See United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453, 464 (7th Cir. 1980). Thus, as the Georgia Supreme Court explained in 1848, the "shall remain inviolate" language was intended to ensure that "by making every citizen a member of the Court … the administrators of justice [do not experience] that isolation from the people, which is the first step toward secret proceedings and arbitrary tribunals." *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 205–06 (1848).

The reason these state clauses use wording that differs from the wording of the Seventh Amendment is not only that they are older, but also because the federal Constitution had to accommodate existing admiralty jurisdiction, which state constitutions do not. More importantly, the Arizona and Washington clauses use different wording because in the mid-nineteenth century, western territories and states started experimenting with changes to the unanimity requirement for verdicts. *See* Gordon Morris Bakken, *Rocky Mountain Constitution Making, 1850-*

1912 at 25–28 (1987); John Burton Phillips, *Modification of the Jury System*, 16 Green Bag 514 (1904); Ben B. Lindsey, *The Unanimity of Jury Verdicts, and the Recent Law Abolishing Same*, 2 Legal Adv. 389 (1899).

The first state to do this was Nevada, where many people thought the unanimity requirement was paralyzing justice rather than facilitating it.[1] Its 1864 Constitution allowed the waiver of a jury trial,[2] and allowed non-unanimous verdicts in civil trials. Nev. Const. art. I § 3. Much litigation in the American west centered on mining (property claims, personal injury suits, etc.), and many viewed the unanimity requirement in civil cases as rendering the judicial system inefficient, particularly because a single holdout could cause an expensive and frustrating mistrial.[3] The framers of Nevada's Constitution hoped that allowing less-than-unanimous verdicts would cure this problem. *See* *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada*

[1] Notable among those leveling this charge was humorist Mark Twain, who lived in Virginia City during this time and wrote, not entirely in jest, that the city's juries were made up of "fools and rascals." *Roughing It* 341 (1873).

[2] This was a controversial idea at the time, because it was generally held that the jury trial was not a right belonging to the defendant, but a right belonging to the general public. Some courts consequently held that defendants could not waive the right to a jury. *See, e.g.*, *Cancemi v. People*, 18 N.Y. 128 (App. 1858).

[3] As one member of the Idaho Constitutional Convention of 1889 put it, "hung jury after hung jury" had caused a "total failure of so many state and territorial governments to answer the purposes for which governments are created." 1 *Proceedings and Debates of the Constitutional Convention of Idaho* 150–51 (1912).

53–54 (1866). Other western states and territories soon adopted the reform, allowing civil juries to reach a verdict with less that unanimity. *See* Lindsey, *supra* at 390. These include California in 1879, Idaho in 1889, and Utah in 1895.

Many Territorial Arizonans shared the qualms about juries that were expressed throughout western America. Thus, in 1895, the *Arizona Silver Belt* editorialized with regret that "[t]rial by jury is too firmly engrafted on our judicial system ever to hope that it will be abolished and superseded …. The difficulties … of doing away with trial by jury—if it were deemed advisable to do so—are obvious and formidable, requiring the annulment of … sections of the Constitution." *A Needed Reform*, Arizona Silver Belt (Aug. 10, 1895) at 2. But some constitution-makers of the era did propose to allow non-unanimous jury verdicts even in non-felony *criminal* cases. Montana's 1889 Constitution included a provision to this effect,[4] and in 1890, Minnesotans amended their Constitution to allow it to a limited extent.[5]

Beginning in April 1891, Arizona Territory allowed non-unanimous verdicts in both civil cases and in misdemeanor criminal cases. *See* An Act to Regulate the Trial of Causes Before a Jury (Session Law No. 51, 16th Assemb.).[6] A few months later, when Arizona held a constitutional convention, the drafters of the

[4] Mont. Const. of 1889 art. III § 23.
[5] Minn. Const. art. I § 4.
[6] Codified at Territorial Civil Code § 1413; Penal Code § 970 (1901).

proposed constitution incorporated this provision into their proposal. *See* Ariz. Const. of 1891 art. II § 10 (allowing non-unanimous verdicts for "crimes, not felonies.").

That constitution, of course, was not approved, and in the years that followed, concern for protecting the jury trial right increased, both in Arizona and elsewhere.[7] The prominent lawyer Joseph Choate, speaking before the American Bar Association in 1898, observed that the worldwide controversy sparked by the trial of Émile Zola[8] in France had "led especially those sagacious theorists who have never tired of denouncing trial by jury … to reconsider the matter." Joseph Choate, *Trial by Jury*, American Bar Ass'n at 4 (1898). Nobody, Choate said, could "read the account of [that]] trial without contrasting it with our own trial by jury, or without the pious utterance from every lip, 'Thank God! I am an American." *Id.* at 5.

Another reason for the revival of concern for jury trial rights was increasing labor unrest. Since strikes could be enjoined through a court's *equitable* jurisdiction, striking laborers were subject to the contempt power and could thus be

[7] This was largely due to labor unrest; because strikers risked contempt liability, for which they could be jailed without a trial by jury, politicians and labor leaders complained that laborers were subjected to criminal penalties without trial by jury. *See, e.g.*, *Look Under It*, Ariz. Republican (Oct. 11, 1908) at 4; *Vote $2500 for Defense Mine Leaders*, Ariz. Silver Belt (Jan. 23, 1909) at 1.

[8] Zola was tried and convicted for libel after publishing his attack on the French bureaucracy's handling of the Dreyfus Affair.

jailed without a jury. This led William Jennings Bryan and his supporters to demand greater jury protections. *See* Lindsey, *supra* at 392; *see also* *Mr. Bryan's Speech*, Ariz. Republican (Aug. 31, 1906) at 1; *Bryan Replies to Van Cleave on Labor Plank*, Bisbee Daily Rev. (Aug. 7, 1908) at 1; *The Labor Planks of Bryan's Platform*, Ariz. Republican (Aug, 7, 1908) at 1.

In 1894, the Arizona Supreme Court held that the western territories were constitutionally forbidden from dispensing with the common-law jury trial right. *Carroll v. Byers*, 4 Ariz. 158 (1894). The U.S. Supreme Court agreed three years later. *See* *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 467–68 (1897). The following year, the Court held that neither states nor territories could deprive a person of life, liberty, property "except by the joint action of the court and the *unanimous* verdict of a jury of twelve persons," *Thompson v. Utah*, 170 U.S. 343, 351 (1898) (emphasis added), and a year after that, the Arizona Supreme Court held that these precedents allowed the Territory to establish alternatives to the jury trial requirement only where "[the] particular action is [not] a common-law action." *Providence Gold-Min. Co. v. Burke*, 6 Ariz. 323, 329 (1899).

All of this demonstrates that when the Arizona Constitution's framers began their work in 1910, they had plenty of options to choose from, and instead of diminishing the jury trial right, as had previously been attempted, they chose to preserve and even extend it. When it was suggested that less-than-unanimous

juries be empowered to convict for crimes, that proposal was rejected in part because it was viewed as violating the U.S. Constitution. *See* John S. Goff, *The Records of the Arizona Constitutional Convention of 1910* at 670–71 (1991).

The framers thus not only rejected the reduced jury-trial protections that had been proposed in the 1891 draft Constitution—and that had actually been the law in Arizona Territory for two decades by that point—but they actually *forbade* such proposals, by mandating unanimous verdicts in criminal cases. Ariz. Const. art. II § 23 ("In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."). They did allow non-unanimous jury verdicts in civil cases and in courts not of record—but otherwise left the jury trial right unaltered (indeed, "inviolate").

In fact, they went even further, and secured the jury trial right in another provision that demonstrates their hostility to what in today's parlance would be called "administrative hearings." Specifically, in Article II § 17, which relates to eminent domain, they specified that property may not be taken through eminent domain until after compensation has been "ascertained by a jury, unless a jury be waived as in other civil cases in courts of record." They chose this wording—which originated in Ohio, was then copied by Illinois, and then by many other states—because during the nineteenth century, some states had employed

commissioners instead of juries to ascertain just compensation in eminent domain cases.

Under that commission procedure, when a taking was contemplated, the taking entity would appoint commissioners (typically three) to survey the property and decide upon a compensation award, which would be offered to the owner; the owner could then sue for more if the offer was inadequate. *See* Nino Monea, *Bulwark of Equality: The Jury in America*, 122 W. Va. L. Rev. 513, 544–47 (2019); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 188 (1996). The U.S. Supreme Court held in 1883 that the Seventh Amendment did not prohibit this use of "commissioners or special boards … without the intervention of a jury." *United States v. Jones*, 109 U.S. 513, 519 (1883).

The commissioner system, however, proved extremely unpopular in some states, as railroad construction boomed and more and more land was taken through eminent domain. Starting with Ohio at its 1850–51 Constitutional Convention, some state constitution-makers chose to abolish the commissioner system because it had come to be perceived as unjust toward property owners. As a delegate at Illinois's 1869–70 Convention explained,

> when commissioners are to be appointed … [they] are selected by the railroad corporation itself, or by the agents of the corporation. [Those choosing the commissioners] do not go to the body of the people, but they selected three men, after having learned their opinions, their

> habits, their sympathies, and their influence in society, so that they know precisely what their verdict will be … and they say "we want these men appointed to assess the damages we have to pay"…. The consequence is that men lose their property … and without remedy, except on appeal; and even then, all the chances are against them, by having the verdict of these commissioners rendered and the court committed against their cause. They have not the least chance for justice.

2 *Debates and Proceedings of the Constitutional Convention of the State of Illinois* 1575–76 (1870).[9] Requiring a jury, said a delegate to Ohio's Convention, would "put it out of the power of any corporation to condemn property for their use, through the intervention of two or three commissioners." 1 *Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 444 (1851).

Commissioners were supposed to be experts, who could dispassionately assess the value of property, just as administrative agencies are supposed to be disinterested experts today. But in reality, jurors are preferable precisely because they "are laymen who are free to voice disagreement without fear of professional repercussions," whereas "the same is not true for government-appointed commissioners." Wanling Su, *What Is Just Compensation?*, 105 Va. L. Rev. 1483, 1533 (2019). The fact that commissioners are so closely connected to the state leads them to "withhold disagreeable information and echo the views of their

[9] Note how the same could be said of today's administrative hearings!

colleagues," resulting in the "systematic[] misvalu[ation]" of property. *Id.*[10] *See also* Grant, *supra* at 155 ("In proceedings to assess such compensation, juries would provide security against the encroachments of official power. Unlike judges, jurors are not associated with the government; unlike 'commissioners' or other professional appraisers (as well as judges), jurors share with the private party an interest in the security of property in their local community.").

Although some states still use the commissioner system,[11] distrust of that system led Ohio, Illinois, and other states to replace it in their constitutions with a jury trial requirement. *See* Ill. Const. of 1870 art II § 13 ("[C]ompensation … shall be ascertained by a jury, as shall be prescribed by law.")[12]; Ohio Const. of 1851 art. XIII § 5 ("compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."). This includes California, Washington, and Arizona, all of which omitted the commissioner system in favor

[10] Consequently the U.S. Justice Department has for almost a century officially opposed the use of commissioners. *Id.* at 1530.

[11] *See, e.g.*, Colo. Const. art. II § 15 (entitling property owner to choose between commissioners and a jury); Tex. Prop. Code § 21.014. In Texas, however, the property owner is entitled to appeal the commissioners' decision and receive *a de novo* trial in court, "in which the entire case is presented as if there had been no previous trial." *Sibley v. Port Freeport*, No. 01-22-00860-CV, 2024 WL 791612, at *3 (Tex. App. Feb. 27, 2024) (citation omitted).

[12] Illinois' eminent domain reforms proved extremely influential in nineteenth century constitution-making. *See* Timothy Sandefur, *Eminent Domain in the Washington and Arizona Constitutions*, 18 NYU J. L. & Liberty __ (forthcoming, 2024).

of a jury. Cal. Const. of 1879 at art. I § 14; Wash. Const. art. I § 16; Ariz. Const. art. II § 17.

Again, this shows that by the time Arizona's Constitution was drafted, experiments with the jury trial right had been tried in several states, and the framers had a variety of options to choose from—including the commissioner system where facts would be found by purported experts to whom courts would defer on appeal. Yet the framers chose to expand and preserve the jury trial right instead. They rejected the possibility of less-than-unanimous criminal law verdicts, and they rejected the commissioner system in which "experts" would decide what property was worth, because that had come to be viewed as unduly biased toward entrenched interests.

B. Neither the contempt nor the "public rights" exception applies here.

It goes without saying that at the time Arizona's Jury Clause was written, nothing like today's administrative hearing system existed. The Administrative State was then in its infancy, and the best-known model was the Interstate Commerce Commission. In cases such as *Illinois Cent. R.R. Co. v. Interstate Com. Comm'n*, 206 U.S. 441 (1907), the U.S. Supreme Court had created the principle of judicial deference to agency fact-finding, but only with respect to matters such as rate-setting. *See generally* Thomas Merrill, *Article III, Agency Adjudication, and*

the Origins of the Appellate Review Model of Administrative Law, 111 Colum. L. Rev. 939, 959–63 (2011).

Rate-setting—which was the primary reason the Arizona Corporation Commission was created[13]—is an entirely different matter from that presented here. The theory in rate-setting at the time of Arizona statehood was that an agency like the Corporation Commission could establish a rate, and then anyone who exceeded that rate would fall within the Commission's contempt powers—and since contempt is an equitable matter, the violator was not entitled to a jury with respect to the contempt proceeding. *Pioneer Tel. & Tel. Co. v. State*, 138 P. 1033, 1036 ¶¶ 19, 23 (Okla. 1914). By that rationale, it was held that a corporation commission could enforce its rate-setting orders without a jury. *See further Vogel v. Corp. Comm'n of Okla.*, 121 P.2d 586, 588–90 (Okla. 1942). But a regulated entity still had options: anyone affected by a rate set by a corporation commission had to either appeal it when promulgated, or petition for an exception, or seek an injunction against the enforcement of that rate. *Pioneer Tel. & Tel. Co.*, 138 P. at 1036 ¶ 19.

This case is not a rate-setting case, of course. It's simply an "in-house" prosecution without a jury of a person accused of an infraction that is akin to a

[13] *See* William Ralls, *Arizona Corporation Commission: Fourth Branch of Government*, Ariz. Atty. (Nov. 2012).

common law crime. And that was simply unheard-of at the time of statehood. In fact, even in cases that by today's standards would appear to be obviously "administrative" in nature, courts would typically empanel juries to review an agency's findings. *See, e.g.*, *Penn Refin. Co v. W. N.Y. & Penn. R.R. Co.*, 208 U.S. 208, 219 (1908).

It was not until the mid-twentieth century, and cases such as *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), that the U.S. Supreme Court fashioned a theory of administrative enforcement in situations that mimic ordinary common-law trials—a theory that "arguably fail[s] the historical test and certainly contradict[s] the legislative history behind the Seventh Amendment's enactment." John Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 B.Y.U. L. Rev. 1485, 1499 (2016).

Atlas Roofing and other late-twentieth century cases relied on the so-called "public rights" exception to the jury right, thereby effectively empowering the government to bypass jury trials by prosecuting "regulatory offenses" in agency tribunals lacking juries. And some state courts copied this theory into their own state law. For example, in *Nat'l Velour Corp. v. Durfee*, 637 A.2d 375 (R.I. 1994), the Rhode Island Supreme Court held that the state could establish an administrative procedure lacking a jury to enforce environmental rules through the

imposition of civil penalties. It did so by adopting federal jurisprudence, which, the court said, allowed the legislature to "assign the adjudication of certain rights to an administrative forum in which no jury-trial right adheres" without offending the jury requirement. *Id.* at 378–79.

Durfee took the wrong path, and this Court should take the opposite path, for two reasons.

First, the Rhode Island court was wrong to parrot federal jurisprudence, and Arizona courts have no basis for doing so.[14] For one thing, the wording of the Seventh Amendment is entirely different from that of Article II Section 23 of the Arizona Constitution, so there's no basis for employing a theory adopted for interpreting the former when interpreting the latter. *State v. Mixton*, 250 Ariz. 282, 301 ¶¶ 86–88 (2021) (Bolick, J., dissenting). On the contrary, the Arizona Constitution, *not* the Seventh Amendment, is the primary source of jury rights for Arizonans; for one thing, the incorporation of the Bill of Rights was still at a rudimentary stage when the Arizona Constitution was ratified. *See* Rebecca White

[14] The only Arizona case ever to cite *Atlas Roofing* was *Highway Prods. Co. v. Occupational Safety & Health Rev. Bd.*, 133 Ariz. 54, 57 (App. 1982), which held that the regulated party had waived the right to a hearing by failing to request one in time, and that this waiver did not offend due process. In dicta, the court went on to say that "the constitutional rights of a criminal defendant have nothing to do with proceedings before administrative agencies which may result in the imposition of civil penalties." *Id.* at 57. This statement is plainly untrue. *See, e.g.*, *Korangy v. U.S. FDA*, 498 F.3d 272, 277 (4th Cir. 2007).

Berch et. al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 Ariz. St. L.J. 461, 468–69 (2012).

What's more, the *Atlas Roofing* theory of "public rights" post-dates ratification of the Arizona Constitution by 65 years, making it anachronistic and inappropriate to read the state constitutional language through the *Atlas Roofing* lens, *even if* the *Atlas Roofing* theory were a correct interpretation of the Seventh Amendment. *Cf. Penick v. State*, 440 So.2d 547, 552 (Miss. 1983) ("The words of our [State] Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution.").

Also, federal "public rights" jurisprudence is infamously underdeveloped and confusing.[15] Just two months ago, in *Jarkesy*,[16] the Supreme Court acknowledged that it "is an area of frequently arcane distinctions and confusing

[15] It's also just wrong as a matter of Seventh Amendment jurisprudence. *See generally* Kenneth Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013 (1994) (explaining why "[t]here is no basis for a public rights exception to the Seventh Amendment, and our courts should abandon any position to the contrary." *Id.* at 1048).

[16] ***Jarkesy* is instructive here, but not binding, because the question in this case concerns the jury trial right under *Arizona's* Constitution.** This Court should apply the state Constitution before considering federal constitutional issues. *State v. Gunwall*, 720 P.2d 808, 812–13 (Wash. 1986).

precedents"—and that the Court "has not definitively explained the distinction between public and private rights," 144 S. Ct. at 2133 (cleaned up)—before going on to hold that a person accused of fraud in the sales of securities *is* entitled to a jury trial and *cannot* be tried in an administrative hearing. Thus, even if it were appropriate for Arizona courts to mimic federal court interpretations of a constitution that is worded entirely differently, they should still reject the *Atlas Roofing* "public rights" theory as poorly reasoned on its own merits.

In short, for state courts to force the square peg of federal jurisprudence into the round hole of their state constitutions, as *Durfee* did, is totally inappropriate. *See Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 (1989) ("the methodology whenever a right that the Arizona Constitution guarantees is in question [is]: we first consult our constitution."); *see also Gunwall*, 720 P.2d at 812–13 (setting forth a test for when state courts should apply their own constitutional jurisprudence rather than parroting federal doctrines).

Second, as *Jarkesy* made clear, the "public rights" exception—whatever it actually means—does not apply to "traditional legal claims," meaning matters that "from [their] nature, [are] the subject[s] of … suit[s] at the common law." 144 S. Ct. at 2137, 2139 (cleaned up). In his separate opinion in *Jarkesy*, Justice Gorsuch explained that the Seventh Amendment was intended to preserve the right to a jury trial in, *at a minimum*, all those matters of the "sort … historically adjudicated

before common-law courts." *Id.* at 2145 (Gorsuch, J., concurring). Obviously fraud—or what the Superior Court here called "violat[ions] [of] the antifraud provisions" of Arizona law, Minute Entry at 1–2—are archetypical subjects of common law suits.

It's true that there was a "public rights" theory when the Arizona Constitution was written. In *Burke*, *supra*, the Territorial Supreme Court held that no jury was required in a case involving whether land claimants could obtain a federal patent for their mining claims. 6 Ariz. at 329. That was because such a proceeding was not a common-law action, given that "[t]he [only] effect of a verdict in favor of the government would prevent either party from proceeding further in the land office in obtaining patent." *Id.* at 332. Because "[n]o execution would issue for the possession of the land, and no other effect would have been given to the judgment than to have cleared away the obstructions which had been placed against the application for patent in the land office," the case was not a common-law-type adjudication, and that meant no jury was required. *Id.*

Burke is typical of what Professor Nelson has called "the most important field of federal administrative law [in the nineteenth century]," namely, land claims before a commission or administrative tribunal. Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 577 (2007). No jury was required in these cases, because "only public rights were at stake and no private individual had

yet acquired any vested right to the land," which meant that no deprivation of a person's life, liberty, property, or other vested rights was at risk. *Id.* But "[o]nce [a] private individual[] could claim vested rights in the land," the rules became different, because any action after that point—for example, any effort to revoke or cancel a land grant, even if issued due to fraud—"because claims of core private rights now hung in the balance." *Id.* at 578. Such a subsequent proceeding, therefore, *would* require a jury.

Obviously, *Burke* bears no resemblance to this case, which (like *Jarkesy*) is an ordinary fraud case dressed up in administrative law clothing. That means the law cannot "draw" into the Commission's "equity jurisdiction" what is actually a legal case, and then try it without a jury. *Westerlund v. Peterson*, 197 N.W. 110, 112 (Minn. 1923). Claims of core private rights hang in the balance in a prosecution of this sort, so it's not a "public rights" case; it's a run-of-the-mill fraud case well within the traditional boundaries of the jury trial right.

Another way of viewing the "public rights" exception is that it allows the government to create new entitlements unknown to the common law, which are not subject to the jury trial requirement. This, too, was a familiar concept at the time Arizona became a state. In 1912, the Illinois Supreme Court held that its legislature could "creat[e] new rights unknown to the common law and provide for their determination without a jury." *Standidge v. Chicago Rys. Co.*, 98 N.E. 963,

965 (Ill. 1912). That case involved a statute that gave lawyers a lien on damages recovered in lawsuits, to protect them from defaulting clients. The court held that this was a right unknown at common law and, therefore, that the defaulting client was not entitled to a jury trial. Yet as the Minnesota Supreme Court explained a decade later, while "[*Standidge*] is good law," it does *not* allow the legislature to "confer equity jurisdiction … in matters in respect to which such jurisdiction did not exist before the adoption of the Constitution, and draw to it a legal cause of action cognizable exclusively in a law court and triable by jury, and have both tried by the court without a jury." *Westerlund*, 197 N.W. at 112 (cleaned up). In other words, courts quickly caught on to the risk that the legislature might exploit the "public rights" theory to over-write jury-eligible common law crimes or torts with purportedly "new" (but actually synonymous) statutory offenses—thereby evading the jury-trial right. And they would not permit it.

II. To what extent, if at all, is securities fraud under A.R.S. § 44-1991 comparable to common law fraud?

The question of whether a jury trial is required is answered by considering the "character or grade" of the case—that is, its substance, not its form. *Derendal*, 209 Ariz. at 419 ¶ 10 (citation omitted). Or, as the Minnesota Supreme Court has written, the "focus [is] not on whether the exact cause of action existed [at statehood], but on the *type* of action … [on] '[t]he nature and character of the

controversy.'" *Schmitz v. U.S. Steel Corp.*, 831 N.W.2d 656, 675 (Minn. App. 2013), *aff'd*, 852 N.W.2d 669 (Minn. 2014) (citation omitted).

"Crimes that are of the same 'character or grade' include those common law crimes that may be equated to a statutory offense, although the elements of the crime are not precise matches." *State v. Le Noble*, 216 Ariz. 180, 182 ¶ 10 n.4 (App. 2007). The offense specified in Section 44-1991 is plainly the type of action which would entitle a person to a jury at common law. True, it is not literally *synonymous* with common law fraud, because the elements of common law fraud differ from the elements needed to establish the statutory offense here. *State v. Cook*, 185 Ariz. 358, 364 (App. 1995). Nevertheless, Section 44-1991 sets out an ordinary common-law wrong: it prohibits a scheme or artifice to defraud in a securities transaction, and provides a private cause of action for such fraudulent transactions. *Sell v. Gama*, 231 Ariz. 323, 325 ¶ 7 (2013).

That's a textbook common law civil and criminal wrong to which the jury right attaches, *regardless* of whether the statute merely codified pre-existing law. *See further Neder v. United States*, 527 U.S. 1, 22 (1999) (noting "the well-settled meaning of 'fraud' … [at] common law."). After all, Arizona statutes define, e.g., arson as the knowing and unlawful damage of a structure by knowingly causing a fire, A.R.S. § 13-1703, which differs from common law arson (which concerned only the malicious burning of a dwelling, John Poulos, *The Metamorphosis of the*

Law of Arson, 51 Mo. L. Rev. 295, 299 (1986)). Yet a jury trial is still required for statutory arson.

The Commission cannot argue that Section 44-1991 differs from common law fraud to such a degree as to render it a "public right" exempt from the jury trial requirement.

III. In 2018 and 2021, the Arizona legislature amended Section 12-910 removing judicial deference to certain agency decisions. Also in 2021, the legislature brought previously exempt Corporation Commission actions such as those here within Section 12-910. To what extent, if any, do these changes impact this Court's reliance on state and federal caselaw regarding statutory securities sales regulations decided under a framework of judicial deference to agency determinations?

A. Why Arizona abolished administrative deference.

Section 12-910(C) provides that in cases reviewing decisions by agencies that enjoy a Section 41-1092.02 exemption—which includes the Commission—"the trial [on appeal to the Superior Court] shall be de novo." A de novo trial means, of course, that the court reviews the evidence independently and non-deferentially. *See Duncan v. Mack*, 59 Ariz. 36, 40 (1942) ("What is meant under our statutes by a trial 'de novo'? The literal meaning of the word is a second time. Or in the same manner; with the same effect." (citations omitted)). Thus "[T]he law of Arizona [is] that on a trial de novo, where by our statute an appeal is allowed from the action of an administrative board … the case should be tried in

all manners as though the superior court were the court of original jurisdiction." *Id.* at 40–41.

The non-deferential nature of Sections 12-910(C) and 12-910(F) is reinforced by contrasting them with Section 12-910(G), which says that in *other* types of cases, the reviewing court must presume in favor of affirming the agency's action, and that it should consult "the administrative record and supplementing evidence presented at the evidentiary hearing," but *not* conduct a trial de novo. The differences between these provisions show that when the Legislature intended to require deferential review on appeal from an agency action, it knew how to provide for that—and chose not to do so in Sections 12-910(C) and (F).

The anti-deference language in Section 12-910 was adopted out of a growing concern over the power and anti-democratic nature of administrative agencies, which in the past several decades have increasingly exercised authority to *write* rules, *interpret* rules, *enforce* rules, and *adjudicate* alleged infractions of those rules, in violation of the crucial principle of separation of powers. *See* Jon Riches & Timothy Sandefur, *Confronting the Administrative State* 2-3 (Goldwater Institute, 2020). This concern has been shared not only by federal courts, *see, e.g.*, *Jarkesy*, *supra; Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024); *Sackett v.EPA*, 598 U.S. 651 (2023); *City of Arlington, Tex. v. FCC*, 569 U.S. 290,

312 (2013) (Roberts, C.J., dissenting), but by state courts, too. *See, e.g.*, *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 254 Ariz. 485, 493–94 ¶¶ 30–36 (2023); *In re Certified Questions*, 958 N.W.2d 1 (Mich. 2020); *Vasquez v. State*, 468 P.3d 886 (Nev. App. 2020) (Tao, J., concurring); *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 914 N.W.2d 21 (Wis. 2018); *King v. Miss. Mil. Dep't*, 245 So.3d 404 (Miss. 2018).

Such authority is especially problematic in a state with an explicit separation-of-powers clause in its Constitution. Ariz. Const. art. III.

As relevant here, it's plainly unjust to deprive a person of an adjudication before a neutral decision-maker that incorporates all constitutional guarantees that due process demands, by letting an enforcement agency initiate an "in-house" proceeding *not* governed by the legal rules of evidence and procedure, and presided over by an officer who isn't a judge—and then to let the agency head override any adverse decision by that presiding officer. *Cf.* *Horne v. Polk*, 242 Ariz. 226 (2017); *Phillip B. v. Arizona Dep't of Child Safety*, 253 Ariz. 295 (App. 2022).

It's even more unjust to effectively bar the individual who loses such an adjudication from any meaningful appeal—which is just what judicial deference to agency decisions accomplishes in practice. *See, e.g.*, *Pres. Responsible Shoreline Mgmt. v. City of Bainbridge Island*, 24 Wash. App.2d 1047 (2022), *rev. denied*,

530 P.3d 186 (Wash. 2023), *and cert. denied* 144 S. Ct. 556 (2024) (administrative agency rules barred property owners from introducing evidence to show agency's actions were unconstitutional—and court was then barred from accepting any additional evidence to review unconstitutionality claim).

Of course, that doesn't mean cases such as *Wales v. Arizona Corp. Comm'n*, 249 Ariz. 263 (App. 2020), are to be disregarded *per se*. As long as Arizona courts, exercising their own independent judgment, find federal precedent interpreting federal securities law to reflect the best interpretation of that law, and also that this is the best interpretation of *Arizona* law, nothing in Section 12-910 or any other statute bars courts from adopting those interpretations. *Wales* concerned a statutory exception to certain securities rules; that exception was "identical" to a federal statute, and the Legislature expressly encouraged state courts to consult federal interpretations of "substantially similar provisions in the federal securities laws." 249 Ariz. at 270 ¶ 30. So the court consulted the four-factor test for that exception established in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980). Nothing in Section 12-910 prohibits that. (And, notably, the *Wales* court did not simply defer to agency interpretation or to the general notion of agency expertise; on the contrary, it examined the factual record for itself. *See* 249 Ariz. at 271 ¶ 34.)

B. An important final note about deference.

The Commission argues that the requirement for de novo review of facts "applies only to new findings of fact made on appeal by the Superior Court and does not apply to reviewing facts found by the agency." Answering Br. at 17. That is incorrect and incoherent. Regardless of what this Court's review of factual questions may be,[17] it's quite clear that Section 12-910(F) does require the Superior Court to apply de novo review to the facts found by the agency when a regulated party appeals. There's nothing else that the phrase "the court shall decide all questions of fact without deference to any previous determination that may have been made on the question by the agency" could possibly mean.

What's more, Sections 12-910(A) and 12-910(E) make clear that the statute contemplates the Superior Court "reviewing facts found by the agency." The former provides that the Superior Court "shall hold an evidentiary hearing, including testimony and argument, to the extent necessary to make the

[17] The Commission cites *Phillip B.* and *Craven Constr., LLC v. Arizona Registrar of Contractors*, No. 1 CA-CV 22-0011, 2022 WL 17592079 (Ariz. App. Dec. 13, 2022), to support its argument that the Superior Court does not independently weigh evidence, but that's not what those cases said. *Phillip B.* said "*[w]e* do not independently weigh the evidence," 253 Ariz. at 298 ¶ 8 (emphasis added), and *Craven Construction* said "*[w]e* do not independently weigh the evidence," 2022 WL 17592079, at *2 ¶ 12 (emphasis added). In both cases, "we" obviously referred to the Court of Appeals, not the Superior Court.

determination required by subsection F of this section," and the latter says "[t]he record in the superior court shall consist of the record of the administrative proceeding, and the record of any evidentiary hearing, or the record of the trial de novo." These provisions would be rendered ineffectual surplusage if the Corporation Commission's argument were correct. It must therefore be incorrect. *City of Phoenix v. Phoenix Emp. Rels. Bd.*, 207 Ariz. 337, 340 ¶ 11 (App. 2004).

It's impossible to understand how Section 12-910(F)'s de novo review requirements could possibly "appl[y] only to new findings of fact made on appeal by the Superior Court." Answering Br. at 17. The Commission seems to imagine that the statute requires the *Superior* Court to defer to the *agency's* factual findings, and then once the Superior Court's decision is appealed, for *this* Court to apply de novo review to *those* factual findings. It's not clear how such a scheme of *non*-deferential review of *deferential* review would even work in practice. But it's certainly not what the statute contemplates. Section 12-901 *et seq.* makes clear that a regulated individual can appeal an agency's final decision *to the Superior Court* (Section 12-904(B))[18] and that the Superior Court then applies de novo review to both the facts[19] and the law, (Section 12-910(F)), Then the Superior

[18] In which jurisdiction is vested, *id.* § 12-905(A), and where the record consists of the administrative record and the record of any evidentiary hearing or trial de novo. *Id.* § 12-910(E).

[19] Thus the unreported decision *Flores v. La Paz Cnty. Sheriff's Off. Loc. Ret. Bd.*, No. 1 CA-CV 23-0653, 2024 WL 2722073, at *2 ¶ 13 (Ariz. App. May 28, 2024),

Court affirms, modifies, or reverses the administrative decision based on whether it believes that decision is supported by substantial evidence, (*id.*), whereupon the regulated party can then appeal either to the Supreme Court or to this Court. (*Id.* § 12-913; *Svendsen v. Arizona Dep't of Transp.*, 234 Ariz. 528, 533 ¶ 13 (App. 2014)).

One potential source of confusion here is the phrase "substantial evidence." Some courts have defined this phrase in *extremely* broad and deferential terms. California courts, for example, interpret it as "highly deferential" to the agency, *People ex rel. Brown v. Tri-Union Seafoods, LLC*, 90 Cal. Rptr.3d 644, 654 (2009)—so deferential, in fact, that it means a reviewing court must affirm "even if other evidence supports a contrary conclusion," *In re L.Y.L.*, 124 Cal. Rptr.2d 688, 692 (App. 2002), and "even if [the evidence in question is] *contradicted*" by other evidence in the record. *Gillotti v. Stewart*, 217 Cal. Rptr.3d 860, 878 (App. 2017) (emphasis added). But that understanding of the phrase is plainly unacceptable under Arizona law, given Section 12-910(F)'s explicit repudiation of "deference to any previous determination … by the agency." The better interpretation of

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erred when it said that "the superior court … defer[s] to the [agency]'s factual findings if they are supported by substantial evidence." On the contrary, the Superior Court does *not* defer to factual findings, but examines them anew—"as though the superior court were the court of original jurisdiction," *Duncan*, 59 Ariz. at 40–41—in order to determine whether the agency's *ultimate conclusion* is supported by substantial evidence.

Arizona's statute is that our courts reexamine the facts to determine whether the record provides "such proof that reasonable persons could accept as adequate and sufficient to support [the] conclusion [that the agency reached]." *State v. Landrigan*, 176 Ariz. 1, 4 (1993) (citation and marks omitted).

The bottom line for purposes of this case is that de novo review applies to both facts and law at the Superior Court stage, under Section 12-910(F). As this Court said last year, "in reviewing the evidence, no deference can be given to the agency's factual findings." *Marsh v. Atkins*, 536 P.3d 811, 814 ¶ 10 (App. 2023). The Commission's argument to the contrary must be rejected.

CONCLUSION

Arizona's constitutional jury trial protection evinces a suspicion toward what are now referred to as agency determinations. The protections for that right apply to any cause of action *of the type* that would have entitled the accused to a jury trial in 1912. To the extent that the "public rights" exception existed at statehood, it was so limited as to be inapplicable here. The statutory fraud offense here is of the same character or grade as common law fraud, meaning that a jury would have been available in such a trial at the time of statehood, and that means it is available here. Nothing about Section 12-910 requires the Court to abandon reliance on federal precedent regarding federal securities law if and when that precedent provides the best possible interpretation of identical Arizona law. This Court

defers to the Superior Court's factual findings, but the Superior Court engages in de novo review—i.e., a brand-new look—with respect to the agency's factual and legal determinations.

Respectfully submitted this 29th day of August 2024.

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