

IN THE SUPREME COURT OF THE  
STATE OF ARIZONA

**EFG AMERICA, LLC** a Delaware  
limited liability company;

**DOUGLAS ELROY FIMRITE**, a  
married man;

**MARK BOYD AND GINGER BOYD**,  
spouses;

**DONALD CARROLL AND SONIA  
CARROLL**, spouses,

Petitioners,

v.

**ARIZONA CORPORATION  
COMMISSION; COMMISSIONERS  
JIM O'CONNER,  
LEA MARQUEZ PETERSON,  
ANNA TOVAR,  
KEVIN THOMPSON, and  
NICK MYERS,**

Respondents.

Case No. CV-25-0134-PR

Court of Appeals  
Division One  
No. 1 CA-SA 25-0016

ACC Docket No.  
S-21301A-24-0076  
ALJ Yvette Kinsey

**Petition for Review of  
Special Action Decision of  
the Court of Appeals**

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## **Issues Presented to and Decided by the Court of Appeals**

Whether a jury trial in superior court is required under Arizona Constitution article II, § 23, or United States Constitution amendment VII, in cases initiated by the Arizona Corporation Commission where a jury demand is made by a Commission enforcement target.

### **Additional Issues: None**

### **Introduction**

The Court should grant review to secure the right to jury trial under both the Arizona and United States constitutions. The court of appeals (1) incorrectly aggrandized the Arizona Corporation Commission's (Commission) power at the expense of Petitioners' constitutional rights, (2) disregarded the Arizona Constitution's carefully drawn checks and balances, and (3) rendered juries unavailable for a significant portion of civil cases.

This case presents an issue of first impression, as the court of appeals correctly noted. Opinion ¶ 5. The issue is also one of exceptional statewide importance, and Arizona courts have already started to rely on the court of appeals' decision here.<sup>1</sup>

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<sup>1</sup> *Sync Title Agency, LLC v. Ariz. Corp. Comm'n*, No. 1 CA-CV 23-0606, 2025 WL 1304213 (App. May 6, 2025) (unpublished).

## Facts

### A. Constitutional and Regulatory Background

The Arizona Jury Clause, in relevant part, states, “The right of trial by jury shall remain inviolate.” Ariz. Const. art. II, § 23.

The Seventh Amendment to the United States Constitution states, “In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”

Arizona Corporation Commission adjudicates civil cases alleging violations of state securities law in front of the Commission-employed “hearing officers,” also called administrative law judges or ALJs. A.A.C. § R14-3-110. Through such in-house proceedings, the Commission has the power to levy monetary fines of “not less than one hundred dollars nor more than five thousand dollars.” Ariz. Const. art. XV, § 16.

Neither the Commission nor its ALJs are vested with the “judicial power” of the state, which is vested in “a supreme court, ... intermediate appellate courts, ... a superior court, ... courts inferior to the superior court ..., and justice courts.” Ariz. Const. art. VI, § 1. The state’s superior courts have the power to empanel and preside over juries. Ariz. Const. art. VI, § 17.

## **B. Commission and Court of Appeals Proceedings**

In April 2024, the Commission initiated in-house proceedings against Petitioners alleging violations of state securities law (A.R.S. §§ 44-1841–44-1999) and requesting from the Commission’s ALJ, *inter alia*, an award of monetary penalties. Opinion ¶ 2.

Petitioners requested change of venue to superior court, claiming they were entitled to jury trial in superior court under *Securities and Exchange Commission v. Jarkesy*, 603 U.S. 109 (2024). The Commission’s ALJ denied the motion, so Petitioners asked the court of appeals for special-action relief. Petitioners argued: (1) Arizona Constitution article II, § 23 requires a jury trial here, (2) as does the U.S. Constitution’s Seventh Amendment under *Jarkesy*. Opinion ¶¶ 4, 7, 9.

The court of appeals accepted special-action jurisdiction but denied relief. Opinion ¶ 15. First, the court held that because the U.S. Supreme Court has yet to incorporate the Seventh Amendment against the states, *Jarkesy* does not apply. Opinion ¶ 8. Second, it held that Article II, § 23 jury trials are also not available under the Arizona Constitution because Article XV, which establishes the Commission, is silent as to jury trials. Opinion ¶¶ 12–13.

The court of appeals denied rehearing. This Court granted Petitioners’ timely request for additional time to submit this petition.

## Reasons for Granting Review

### I. Arizona's Jury Clause mandates a jury trial here.

The court of appeals erred when it concluded that the Jury Clause does not apply to Commission actions. Opinion ¶ 12 (discussing Ariz. Const. art. II, § 23). The text of the Jury Clause does not contain a Commission exception. And nothing in Article XV, which establishes the Commission, indicates otherwise. Settling this question is vitally important.

The court of appeals held that because Article XV does not include a jury guarantee, that omission could only mean that the Jury Clause (Article II, § 23) is inapplicable to Commission-initiated enforcement actions. Opinion ¶¶ 9, 12–13. The Court should grant review and hold that Article II, § 23 requires a jury trial in superior court here for four reasons.

**First**, the Commission is not “unique”; it “remain[s] subject to constitutional constraints and requirements, both general (such as due process) and those specific to the entity.” *Sun City Home Owners Ass’n v. Ariz. Corp. Comm’n*, 252 Ariz. 1, 5 ¶ 16 (2021) (referring to Ariz. Const. art. II, § 4). “[G]eneral” “requirements,” *id.*, such as the Declaration of Rights (Ariz. Const. art. II) apply to the Commission; indeed they *must* apply for Arizona to maintain any semblance of its separation of powers and the rule of law. *See* Ariz. Const. art. III; *Johnson Utilities, LLC v.*

*Ariz. Corp. Comm'n*, 249 Ariz. 215, 233–34 ¶¶ 91–94 (2020) (Bolick, J., concurring) (discussing same).

The Jury Clause is one such provision of the Declaration of Rights and should apply here. But the court of appeals said, “If our constitutional framers had intended to confer a jury-trial right for Commission enforcement actions, they would have done so.” Opinion ¶ 12. The decision of the court of appeals, thus, switches off the right to jury trial in a significant swath of civil actions. Opinion ¶ 10. This Court has never blessed the uncommon interpretive approach of the court of appeals; this Court has expressed “a general reluctance” to presume that “silence” amounts to “approval” or disapproval. *Roberts v. State*, 253 Ariz. 259, 270 ¶ 42 (2022). There is no Arizona case that uses Article XV’s silence to silence an express provision of the Constitution.

**Second**, Article II, § 23, is not in tension with Article XV, § 16. The former states: the right to trial by jury “shall remain inviolate” and does not attach any exceptions to those words. The latter says, if the Commission seeks monetary penalties, they are “to be recovered before any court of competent jurisdiction.” That is, if the Commission’s enforcement target so demands, the trial of the Commission’s allegations must occur in superior court with juries. The court of appeals’ contrary conclusion rests exclusively on its mistaken notion that Article XV must repeat the words of the Jury Clause.

Article XV’s silence is insufficient to dampen the scope of the Jury Clause. After stating that the right to jury trial “shall remain inviolate,” the Jury Clause provides for juries “of twelve persons” in “criminal cases in which a sentence of death or imprisonment for thirty years or more is authorized by law,” and that “unanimous consent of the jurors” is necessary in “all criminal cases.” Ariz. Const. art. II, § 23. It then states in no uncertain words: “In *all* other cases, the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.” *Id.* (emphasis added). That last sentence means that the legislature can set the number of jurors and decide whether jury unanimity is necessary in “all other cases.” But neither the legislature nor the Commission has the power to declare that the right to jury trial is unavailable in some categories of civil cases. The Jury Clause only makes two qualifications pertaining to the number of jurors and the number required to render verdict; it does not create any categories based on subject or type of claim to which the jury right would not apply. This Court must decide whether the court of appeals was correct in concluding that Article XV carves out Commission-initiated proceedings from the Jury Clause.

**Third**, Petitioners’ position is not that the Commission’s ALJ or the Commission itself should empanel and preside over a jury trial. Rather, their position is that if the Commission wants to proceed against them to levy fines for alleged violations of the state securities law, it must do so

in the superior court when an enforcement target so demands. The superior court is an Article VI court vested with the state's judicial power to empanel juries and conduct jury trials. Ariz. Const. art. VI, § 17 (establishing superior courts' power to "dra[w]" and "summo[n]" a jury to conduct jury trials).

Arizona Constitution article XV, § 16, on which the court of appeals relied, Opinion ¶ 12, is not to the contrary. It provides that fines for violating state securities law are "to be recovered before any court of competent jurisdiction." The court of appeals seems to have cabined its analysis to "the Commission's internal enforcement proceedings, and not a situation in which the Commission initiates suit in the superior court." Opinion ¶ 12. That is, the court correctly identified that the Commission can either proceed with "internal enforcement" or with a "suit in the superior court." Opinion ¶ 12. But then the court seems to have mistakenly assumed that Petitioners had asked for a jury trial *in* Commission enforcement actions.<sup>2</sup>

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<sup>2</sup> Opinion ¶ 1 ("[T]he Arizona Constitution does not provide a jury-trial right *in* Commission enforcement actions" (emphasis added)); Opinion ¶ 13 ("Petitioners do not argue that the legislature has granted a jury-trial right *in* Commission proceedings." (emphasis added)); Opinion ¶ 13 ("Given the framers' omission of such a right, and the absence of a statutory grant, we conclude that Arizona law does not grant a jury-trial right *for* Commission enforcement actions." (emphasis added)).

In short, the court of appeals props up a strawman. Petitioners asked for “change of venue to the superior court for a jury trial,” Opinion ¶ 1; they did not ask the Commission to empanel and preside over a jury trial. If allowed to stand, the court of appeals’ decision would leave no recourse to the Commission’s enforcement targets because the Commission could simply not file suit in superior court ever and thereby nullify the enforcement target’s right to trial by jury. This Court should take the case to clarify this crucial point.

**Fourth**, the court of appeals focused on *Derendal v. Griffith*, 209 Ariz. 416 (2005). Opinion ¶ 9. But *Derendal* is inapposite here. *Derendal* is a criminal-jury case about whether to interpret the state Jury Clause in lockstep with the Sixth Amendment’s Criminal Jury Clause. This Court seems to have taken great care before it has interpreted the state’s jury provision to be “in lockstep with” the federal constitutional counterpart. *State v. Mixton*, 250 Ariz. 282, 300 ¶ 78 (2021) (Bolick, J., joined by Brutinel, C.J., and Timmer, V.C.J., dissenting); *see also id.* at 302 ¶ 91 (“[W]e should be loath to interpret the language the framers chose in lockstep with language the framers consciously rejected[.]”); *State v. Hernandez*, 244 Ariz. 1, 8 ¶ 30 (2018) (Bolick, J., concurring) (calling out the oddity of construing the Arizona Constitution article II, § 8 “in lockstep with the [United States] Supreme Court’s ever-evolving Fourth Amendment jurisprudence”).

Concurring and dissenting justices invariably make the justices in the majority take the extra step of justifying adopting the lockstep approach. Indeed, when a concurring justice “urge[d]” the Court “to fall into lockstep with federal courts on the issue of jury entitlement,” this Court declined to so hold because “Arizona has a long history of providing its citizens with jury trials beyond those minimally required by the federal courts’ interpretation of the federal constitution.” *State ex rel. McDougall v. Strohson (Cantrell)*, 190 Ariz. 120, 126 (1997). *Derendal* itself declined to lockstep the Jury Clause with the Sixth Amendment as interpreted by the U.S. Supreme Court. 209 Ariz. at 425 ¶ 37 (adopting “a modified” Sixth Amendment criminal-jury test).

But even if *Derendal* applies in civil cases because it interprets Article II, § 23, Petitioners would be plainly entitled to a jury trial here because the Commission’s allegation of wrongdoing against them has a straightforward “common law antecedent that guaranteed a right to trial by jury at the time of Arizona statehood,” 209 Ariz. at 425 ¶ 36: the common law of misrepresentation, fraud, and vicarious and respondeat superior liability. *See* ACC Compl. ¶¶ 59–68.

Granting review is, therefore, imperative in this case of unusual importance.

## **II. The Seventh Amendment guarantees a jury trial here.**

If Arizona Constitution article II, § 23 does not provide a jury trial right here, the Court must decide whether the state’s Jury Clause should

be read to be “consistent with the Seventh Amendment.” *Fisher v. Edgerton*, 236 Ariz. 71, 81 ¶ 33 (App. 2014).

The court of appeals correctly noted that the U.S. Supreme Court “has not incorporated the Seventh Amendment’s civil jury-trial rights to the States.” Opinion ¶ 8 (citing *Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) (“A trial by jury [under the Seventh Amendment] is not … a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendments [sic] to abridge.”) (relying on the Fourteenth Amendment’s Privileges or Immunities and Due Process Clauses)); *see also Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (The Seventh Amendment is “not concerned with state action, and deal[s] only with Federal action.”). This Court cannot incorporate the Seventh Amendment, because that would require this Court to interpret the Fourteenth Amendment’s Privileges or Immunities Clause or the Due Process Clause contrary to how the U.S. Supreme Court has interpreted those clauses in *Walker* and *Bombolis*. U.S. Const. amend. XIV, § 1.

Petitioners expressly preserve the question of overruling *Walker* and *Bombolis* for the U.S. Supreme Court. This Court should grant review and note that it is powerless to overrule U.S. Supreme Court precedent because of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

Short of incorporation, Arizona courts have “interpret[ed] Arizona’s constitutional provisions protecting the right to a jury trial consistent

with the Seventh Amendment.” *Fisher*, 236 Ariz. at 81 ¶ 33.<sup>3</sup> Call it lockstep or consistency, the U.S. Supreme Court set the federal constitutional floor in *Jarkesy*, 603 U.S. at 121–26, 140–41, to require jury trials when a suit alleges securities law violations, and the government prosecutor demands civil penalties for those alleged violations. That is what this Court can and should hold here.

Petitioners would be plainly and unquestionably entitled to a jury trial here because this case is on all fours with *Jarkesy*. The claim is “legal in nature,” that is, Petitioners are facing “monetary penalties” for a cause of action with a common-law analog. Opinion ¶ 7; *Jarkesy*, 603 U.S. at 121–26. If *Jarkesy* is the floor, Arizona Constitution article II, § 23’s guarantee of a jury trial cannot be debased lower than that federal floor if the Court construes Article II, § 23 to be in lockstep or consistent with the Seventh Amendment.

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<sup>3</sup> The lockstep approach assumes the federal constitutional provision at issue has already been incorporated. *Derendal* (Sixth Amendment); *Mixton* (Fourth Amendment); *Hernandez* (Fourth Amendment); *Cantrell* (Sixth Amendment). The lockstep approach is, therefore, inapt with respect to provisions such as the Seventh Amendment that have not been incorporated. In those circumstances, the *Fisher* approach requires the court to evaluate whether the state provision should be read as “consistent with” the not-yet-incorporated “Seventh Amendment.” 236 Ariz. at 81 ¶ 33. Despite this difference, lockstep and consistency have the same practical effect. See *Cantrell*, 190 Ariz. at 129 (Martone, J., concurring) (discussing “consistency” interchangeably with lockstep).

### **III. This case has compelling state and nationwide importance.**

This case presents a question of critical importance to the state, and indeed, to the nation. *See Thomas v. County of Humboldt*, Cert. Petn., No. 24-1180, 2025 WL 1448713, at \*i (U.S. May 15, 2025) (asking the U.S. Supreme Court to decide “[w]hether the Seventh Amendment ... is incorporated against the States”); *id.* at \*24 (citing the court of appeals’ decision here for the proposition that “some [states] have explicitly declined to follow *Jarkesy* until the Seventh Amendment is incorporated”). “The right of trial by jury is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right has always been and should be scrutinized with the utmost care.” *Jarkesy*, 603 U.S. at 121 (collecting historical sources; simplified). As scholars and jurists have noted, “no nonincorporation theory is defensible under the [U.S. Supreme] Court’s jurisprudence.” Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 Notre Dame L. Rev. 159 (2012) (discussing Seventh Amendment incorporation); Hon. Jennifer Walker Elrod, *W(h)ither the Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3 (2011) (same). But the incorporation argument is for the U.S. Supreme Court to address.

What this Court can address is the following: Before the advent of the federal incorporation doctrine, an Arizona territorial statute required juries to decide factual issues in “all cases, both at law and in equity,”

Rev. Stat. Ariz. 1901, ¶ 1389, which demonstrates the central importance of trial by jury before Arizona statehood. Against this backdrop, the framers of the Arizona Constitution eschewed the law–equity, criminal–civil distinctions and wrote in the state’s founding charter: “The right of trial by jury shall remain inviolate.” “[A]t the time of Arizona statehood,” *Derendal*, 209 Ariz. at 425 ¶ 36, “all cases, both at law and in equity” were tried to a jury, Rev. Stat. Ariz. 1901, ¶ 1389, regardless of what the Seventh Amendment, as interpreted by the U.S. Supreme Court in 1912 (or 1972),<sup>4</sup> had to say on the subject.

The civil jury is one of three indispensable cornerstones of the rule of law that provides a mechanism for the people to participate in all levels of state government. Sheldon Whitehouse, *Restoring the Civil Jury’s Role in the Structure of Our Government*, 55 Wm. & Mary L. Rev. 1241, 1254 (2014); *Jones v. United States*, 526 U.S. 227, 244–48 (1999) (discussing the historical pedigree of the structural checks and balances provided by juries). Participatory government is baked into Arizona’s Constitution with its progressive roots (as well as the U.S. Constitution with its ingrained distrust of unaccountable government) so that the people exercise ultimate control over the workings of all branches of

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<sup>4</sup> Article II, § 23 was amended by the legislature, as approved by the voters, in the fall of 1972. John D. Leshy, *The Arizona State Constitution* 87 (Oxford 2011). Originally, the Jury Clause comprised what is now the first sentence, which has remained unchanged since statehood. But the remaining two sentences were added in 1972. *Id.*

government. We, the people, elect the governor, legislators, and commissioners of the Commission, and thereby exercise an essential check on our elected representatives. And we, the people, sitting as jurors, check both the government prosecutor and corporations. Whitehouse, *supra*, at 1244, 1254, 1270–71; *see also* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 177 (J. Elliot ed. 1836) (discussing how elections for the federal political branches, grand juries as a check on the Executive Branch’s prosecutorial discretion, and criminal and civil juries as arms of the judicial branch are vital to ensure the interlocking checks and balances that we, the people, exercise on all levels of government).

The court of appeals, in dispensing with civil juries here, incorrectly strengthened the Commission’s unilateral power at the expense of Petitioners’ constitutional rights and the Arizona Constitution’s carefully drawn checks and balances. The situation cries out for this Court’s intervention to restore the rule of law. The Court should grant review to clarify whether the state and federal constitutions require trial by jury in superior court when a Commission enforcement target, as here, demands trial by jury.

### **Rule 21(a) Statement**

Petitioners claim attorney fees and costs on appeal under A.R.S. §§ 12-341.01(A), 12-348(A)(4), and the private attorney general doctrine,

*Arnold v. Ariz. Dep't of Health Services*, 160 Ariz. 593, 609 (1989); *Ansley v. Banner Health Network*, 248 Ariz. 143, 153 ¶ 40 (2020).

### **Conclusion**

The Court should grant review, vacate the opinion of the court of appeals, and hold that Petitioners are entitled to trial by jury in superior court.

Respectfully Submitted this 17th day of June, 2025.

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