ARIZONA SUPREME COURT

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'CONNOR, LEA MARQUEZ PETERSON, ANNA TOVAR, KEVIN THOMPSON, and NICK MYERS, Respondents.	Arizona Supreme Court No. CV-25-0134-PR Court of Appeals Division One No. 1 CA-SA 25-0016 Arizona Corporation Commission No. S-21301A-24-0076

COMMISSION'S RESPONSE TO AMICUS BRIEF OF AMICUS CURIAE GOLDWATER INSTITUTE

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INTRODUCTION

The Arizona Corporation Commission ("Commission" or "Respondent") submits this response to the Supplemental Amicus Brief of Amicus Curiae of Goldwater Institute ("Goldwater") pursuant to the Court's Order Granting Petitioners' Petition for Review ("Order") on November 4, 2025. This response focuses on how Goldwater misapplies the *Derendal v. Griffith* test for determining whether a claim has a common law antecedent with a jury trial right preserved by Article II, § 23 of the Arizona Constitution. 209 Ariz. 416 (2005). *Derendal* requires that the elements of a statutory claim be very close to a common law antecedent. There is no authority for finding a common law antecedent here where statutory securities fraud can be proven with none of the elements of common law fraud

SECURITIES FRAUD HAS NO COMMON LAW ANTECEDENT

Goldwater is correct to accept *Derendal* as the applicable authority (which the Petitioners now also concede in their supplemental brief), but its application of *Derendal*'s "substantially similar elements" test is incorrect, and there is no common law antecedent for statutory securities fraud.

I. *Derendal* Requires That the Elements Be Very Close

First, Goldwater does not articulate the *Derendal* standard correctly. While *Derendal* does not require a modern claim and its antecedent to have identical

elements, it requires they be very close ("substantially similar") in ways not true of statutory securities fraud and common law fraud. *See* 209 Ariz. at 425, ¶ 36.

Derendal shows that differing mental state elements can be dispositive. *Derendal* held that the common law reckless driving was not an antecedent of a statute because, "The statute prohibiting drag racing does not include the element of reckless disregard …." 209 Ariz. at 425 ¶ 39. The drag racing offense had its own *mens rea* element of racing a vehicle "for the purpose of making a speed record." *Id.* at 418 ¶ 1, n.1. *Derendal* did not discuss any other elements of the common law offense, so that change in the *mens rea* element was enough to distinguish the offenses. *See Id.* at 425 ¶ 39. Similarly, the lack of a *mens rea* element in common law public nuisance helped distinguish it from statutory recklessly interfering with the passage of a highway. *Mack v. Dellas*, 235 Ariz. 64, 67, ¶ 9 (App. 2014).

Bridgeman v. Certa demonstrates how similar mental state elements must be. *Bridgeman* compared the elements of common law involuntary manslaughter with a statutory offense of causing death by failing to exercise due care to avoid a pedestrian in a roadway. 251 Ariz. 471, 478, ¶ 26 (App. 2021). It noted that the statute's mental state requirement of "failure to act with 'due care'" aligns almost exactly with the common-law mental state of 'without due caution and circumspection.'" *Id.* at 478, ¶ 25. Comparing this result with *Derendal's* holding that "reckless disregard" was too distinct from an intent to race cars shows how

exacting the *Derendal* test is for mental state elements. *Compare* *Bridgeman*, 251 Ariz. at 478, ¶ 25 *with* *Derendal* at 425, ¶ 39.

Different injury elements can also be dispositive. *Phoenix City Prosecutor's Office v. Nyquist* compared the common law offense of dangerous operation of a motor vehicle with the statutory offense of causing death or serious injury by failing to yield the right-of-way in an intersection. 243 Ariz. 227, 232, ¶ 16 (App. 2017). The court found that the two offenses were not of the same character solely because the common law offense did not have the element of causing serious physical injury or death required by the statutory offense. *Id.* at 232, ¶ 17.

A statutory claim is also different in character from a common law claim when a policy shift makes a statutory offense much broader. *State v. Willis* found that common law trespass was not an antecedent of statutory first-degree trespass based entirely on common law trespass including a breach of the peace element, whereas the statutory offense "involves merely unlawful presence." 218 Ariz. 8, 11, ¶ 12 (App. 2008). *Willis* noted that the statutory offense was far broader to serve a different state interest of protecting a landowner's ability to exclude others instead of the common law offense serving only to protect the public from violence. *Id.* "Since current Arizona law applies far more broadly than criminal trespass at the common law, and it reflects a serious policy shift in state law, common law criminal trespass is not an antecedent to modern criminal trespass …." *Id.*

These cases show that mere thematic similarities do not create a common law antecedent. The unsafe driving themes shared by common law reckless driving and a statute prohibiting drag racing and did not show a common law antecedent in *Derendal*. 209 Ariz. at 425, ¶ 39. Similarly, shared unsafe driving themes did not make the common law offense of dangerous operation of a motor vehicle an antecedent of the statutory offense of causing death or serious injury by failing to yield the right-of-way in an intersection. *Nyquist*, 243 Ariz. at 232, ¶ 16. Common law trespass is superficially very similar to statutory first-degree trespass in both the "trespass" name and theme, but a calculated broadening of the elements by the legislature to support broader policy goals was enough to distinguish them. *Willis*, 218 Ariz. at 11, ¶ 12. These examples are all consistent with *Derendal's* focus on elements and not "whether the offense in question relates in some way ...." 209 Ariz. at 425, ¶ 39. Goldwater's arguments fail to compare the elements as *Derendal* requires and instead point to superficial similarities.

II. The Elements Here Differ Greatly, Far Beyond What Any *Derendal* Application Supports

The elements of statutory securities fraud under A.R.S. § 44-1991 ("44-1991") and common law fraud differ greatly, and not by accident: "The legislature made the task of proving securities fraud much simpler than proving common-law fraud." *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 13 (App. 2000).

a. 44-1991 (A)(1) and (3) Share No Elements of Common Law Fraud

The elements of 44-1991(A)(1) and (3) share none of the nine elements of common law fraud. Neither 44-1991(A)(1) nor (3) includes the first common law element of a specific representation because they "police a wider range of fraud" than the untrue statements and misleading omissions prohibited by § 44-1991(A)(2). *See* *Grand v. Nacchio*, 214 Ariz. 9, 26, ¶ 58–59 (App. 2006). To prove a scheme or artifice to defraud "there need not be an actual misrepresentation or even a material omission," and the scheme or artifice can instead be achieved "by a false pretense, including a subterfuge, ruse, trick, or dissimulation." *State v. Johnson*, 179 Ariz. 375, 377 (1994) (analyzing A.R.S. 13-2310(A)). Because no specific representation must be proven for 44-1991(A)(1) and (3), they also lack the common law fraud elements of the falsity, materiality, knowledge, intent, ignorance of the falsity, and reliance and right to rely on a specific representation. The injury element of common law fraud is not shared by 44-1991(A)(1) and (3) either. *Grand*, 214 Ariz. at 24, ¶ 50 ("[plaintiff] may rescind the [securities] sale, despite having suffered no loss"). This lack of a common injury element is dispositive. *See* *Nyquist*, 243 Ariz. at 232, ¶ 16 (offenses were distinct because one lacked injury element).

While 44-1991(A)(1) may have an intent requirement, it is different from the common law fraud intent requirement. A 44-1991(A)(1) violation may cover only knowing or intentional misconduct. *See* *Aaron v. S.E.C.*, 446 U.S. 680, 696 (1980);

State v. Gunnison, 127 Ariz. 110, 113 (1980) (noting scienter "may be an element of A.R.S. § 44-1991(1)" and citing *Aaron*). But an element of knowing or intentional misconduct generally absent any representation is still distinct from the common law fraud requirement of intent that a specific representation be acted upon in a contemplated way. *Echols v. Beauty Built Homes, Inc.*, 132 Ariz. 498, 500 (1982). It is doubtful that 44-1991(A)(3) has an intent requirement because its language about conduct that operates or would operate as a fraud or deceit "plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than upon the culpability of the person responsible." *Aaron*, 446 U.S. at 696–97 (emphasis original). The differing intent requirements alone are enough to give 44-1991(A)(1) and (3) a different character than common law fraud. *See Derendal* at 425, ¶ 39 (relying solely on different mental state requirements).

b. 44-1991 (A)(2) Lacks Seven Elements of Common Law Fraud

Of the nine elements of common law fraud, 44-1991 (A)(2) includes only two: a statement and materiality. A.R.S. § 44-1991(A)(2). The statement does not even need to be false; a true statement that is misleading due to an omission suffices. *Id*.

The most important difference is that 44-1991(A)(2) lacks any scienter requirement. *Fromkin*, 196 Ariz. at 227, ¶¶ 13, 15. This differs from common law fraud's requirements of both an intent that the representation be relied upon plus

knowledge of its falsity and ignorance of its truth. *Echols*, 132 Ariz. at 500. Again, this lack of a common mental state requirement is dispositive. *See Derendal* at 425, ¶ 39 (change in mental state requirement). Unlike common law fraud, 44-1991(A)(2) has no reliance requirement. *Trimble v. American Savings Life Insurance*, 152 Ariz. 548, 552 (1986). Unlike the common law requirement to prove consequent and proximate injury, causation is not an element in 44-1991(A)(2) enforcement actions.[1] *Hirsch*, 237 Ariz. at 463, ¶ 24. Again, this lack of a common injury element is dispositive. *See Nyquist*, 243 Ariz. at 232, ¶ 16 (offenses distinct because one lacked injury element). These major differences in the elements are far greater than in any *Derendal* caselaw finding a common law antecedent.

III. Statutory Securities Fraud Is Part of a Comprehensive Regulatory Scheme That Broadly Protects New State Interests

Claims are distinct under *Derendal* when a statutory claim is part of a comprehensive, post-statehood regulatory scheme. *Williams v. King* found that a statutory claim for diversion, retardation, or obstruction of a watercourse was not similar in character to common law negligence, trespass, or nuisance claims, even though those could be used to recover flood damages. 248 Ariz. 311, 316, ¶¶ 14, 18, 21 (App. 2020), *as amended* (Jan. 29, 2020). *Williams* noted the statutory claim

[1] No such causation requirement existed for private actions either until 45 years after A.R.S. § 44-1991(A)(2) was enacted when the legislature added a loss causation requirement for some private actions. A.R.S. § 44-2082(E).

"was not enacted to codify the common law claims," and "is merely a cog in a comprehensive regulatory scheme of 30-plus statutes that 'establishe[d]' county flood control districts and imbued them with authority to authorize development in a watercourse." *Id.* ¶¶ 20–21. It further noted that the statutory claim and the emergence of flood control districts came decades after statehood. *Id.* ¶ 22.

Securities fraud is likewise different in character from common law fraud because it is part of a comprehensive, regulatory scheme enacted decades after statehood. *See Williams*, 248 Ariz. at 316, ¶ 20–21. Preventing fraud in the securities industry is a core purpose of not just 44-1991 but the Securities Act as a whole, including its registration requirements:

> "Not only is fraud in the sale of a security a violation of A.R.S. § 44-1991, but the *statutes requiring registration of securities and dealers are designed to make the possibility of fraud even more remote*."

State v. Baumann, 125 Ariz. 404, 411–12 (1980) (emphasis added). In fact, the Legislature entitled an entire article of the Securities Act "Fraudulent Practices," which prohibits misleading information in a securities filing with the Commission, a violation that requires no victim and lacks elements of intent, knowledge of falsity, reliance, and injury. *See* Securities Act, Article 13; A.R.S. § 44-1992. The article also prohibits securities dealers and salesmen from soliciting or accepting remuneration for finding a securities client for an attorney, a violation with no victim that requires no representation, no falsity, no materiality, no knowledge, no intent,

no ignorance, no reliance, no right to rely, and no injury. *Compare* A.R.S. § 44-1996 *with* *Echols*, 132 Ariz. at 500. It also includes liability for a person controlling any statutory securities fraud violator in ways that depart significantly from the common law doctrines of aiding and abetting or *respondeat superior* liability. *See* A.R.S. § 44-1999. *Compare* *E. Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 411–412, ¶¶ 41–42 (App. 2003) (Securities Act control liability applies to those with power to directly or indirectly control the activities of the primary violator, but has no participation requirement), *with* *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485, ¶ 34 (2002), *as corrected* (Apr. 9, 2002) (aiding and abetting requires injury, knowledge of the primary tortfeasor's conduct, and substantial assistance or encouragement), *and* *Carnes v. Phoenix Newspapers, Inc.*, 227 Ariz. 32, 35, ¶ 10 (App. 2011) (*respondeat superior* requires employment relationship, conduct within authorized time and space limits, and conduct actuated by a purpose to serve the employer). Securities fraud claims under 44-1991 are thus just one cog in "a comprehensive regulatory scheme" to protect against fraud in the offer and sale of securities. *See* *Williams*, 248 Ariz. at 316, ¶ 21.

The broad remedial nature of securities fraud to protect new interests not served by common law fraud also proves that the claims are different in character. *See* *Willis*, 218 Ariz. at 11, ¶ 12 (statutory trespass "applies far more broadly than

criminal trespass at the common law, and it reflects a serious policy shift"). The Securities Act does not merely relieve common law injuries to individual investors; instead, the legislature expressly described it as a "remedial measure" for the "protection of the public, the preservation of fair and equitable business practices, [and] the suppression of fraudulent or deceptive practices in the sale or purchase of securities ...." *See* 1951 Ariz. Sess. Laws, Ch. 18, § 20 (1st Reg. Sess.) . This reflects a new state "interest in protecting its reputation as not being a center for illegal or questionable securities activity." *See* *Shorey v. Arizona Corp. Comm'n*, 238 Ariz. 253, 263, ¶ 40 (App. 2015).

Reliance is not an element of securities fraud enforcement actions so the Commission can address ongoing fraud before an investor is victimized. Similarly, consequent and proximate injury is not an element, which allows for enforcement actions to prevent attempted fraud before an investor is injured. That is why securities enforcement actions, unlike common law fraud, can prove a securities fraud violation for a securities offer that has not been consummated in a sale. *See* A.R.S. § 44-1991 (covering "a transaction or transactions within or from this state *involving an offer* to sell or buy securities, or a sale or purchase of securities ...") (emphasis added). Even before the modern Securities Act, the Court in 1932 acknowledged the broad scope of the legislature's earlier securities statutes, recognizing their:

> "manifest intention … of preventing the public from being imposed upon by questionable and unsound financial schemes of fortune dreamers and dishonest promoters, and to reach all get rich-quick schemes offering to the general public their stocks and securities …."

United Bank & Tr. Co. v. Joyner, 40 Ariz. 229, 234 (1932). This broad preventive focus reflects a serious policy shift to protect new state interests distinct from common law claims. *See Willis*, 218 Ariz. at 11, ¶ 12.

IV. *Ridlon* Is a Helpful Example of a *Derendal*-like Test Applied to a Securities Fraud Statute

Goldwater's criticism of *Ridlon* is misplaced. *Ridlon v. New Hampshire Bureau of Sec. Regulation*, 172 N.H. 417, 420–421, 214 A.3d 1196, 1999 (2019) (no jury trial right for statutory securities advice fraud claim). *Ridlon* is a useful comparison of the elements of statutory securities advice fraud and common law fraud, even though it is not the only analysis: "After comparing the elements and proofs of the two claims, we concluded that the two actions were dissimilar." *See id.* at 425. The dissent in *Ridlon* did not dispute that conclusion and "[did] not reach the issue of whether the action 'is in essence one for common law fraud.'" *Id.* at 437 (dissent). The dissent instead disagreed with elements being the applicable test due to New Hampshire's jury right preservation being more specific than Arizona's and expressly applying, "In all controversies concerning property, and in all suits between two or more persons" of $1,500 or more. *Ridlon*, 172 N.H. at 429, 437 (dissent). That dissent is not applicable here because the Commission, the

Petitioners, and all three amici acknowledging *Derendal* agree that its elements test is the applicable standard. Goldwater also criticizes *Ridlon* for considering whether a statutory securities scheme was "comprehensive," but that consideration is consistent with *Williams* finding no common law antecedent for a statutory claim in a post-statehood "comprehensive regulatory scheme." *Williams*, 248 Ariz. at 316, ¶¶ 20–22.

V. No Authorities Support Goldwater's *Derendal* Argument

Goldwater (like the Petitioners) fails to offer any authority applying the *Derendal* test supporting a common law antecedent for statutory securities fraud. The three cases it emphasizes are distinguishable.

Goldwater offers *Sulavka v. State* for its common law antecedent argument, but that case supports the Commission's analysis. *Sulavka* states, "The [*Derendal*] inquiry instead looks more generally to whether the modern statutory offense 'is of the same character,' 'comparable,' or 'substantially similar' as the common law crime." 223 Ariz. 208, 212, ¶ 15 (App. 2009). Goldwater presents that statement as a departure from comparing elements, but the sentences immediately before and after do make an elements comparison: "[T]he test under the first step of *Derendal* is not whether elements are identical. … [A]lthough the offense of shoplifting by concealment contains some variations from common law larceny, they are for this purpose, distinctions without legal significance." *Id.* at 211–212, ¶ 15.

The paragraphs following the statement Goldwater relies on are also a detailed comparison of the elements, which the opinion identified as, for statutory shoplifting: 1) knowingly obtain goods of another; 2) in an establishment in which the goods are displayed for sale; 3) with the intent to deprive that person of such goods; 4) by concealment, and for common law larceny: 1) the taking of the thing from the owner; 2) into the possession of the thief; and 3) an asportation thereof. *Id.* at 211, ¶ 14. *Sulavka* noted that merchandise on display in a store is in the possession of the owner, so both offenses have "comparable elements of unlawful taking of property that belongs to another." *Id.* at 211, ¶ 16. It also noted that while the statutory offense does not expressly list asportation as an element, "the act of removing an item from the shelf and concealing it in order to deprive the owner of the item constitutes asportation." *Id.* at 211, ¶ 16. Although not articulated in the opinion, the common law elements of taking an item "from the possession of the owner into the possession of the *thief*" necessarily require an intent to deprive the owner, just like the statutory offense. *See id.* at 211, ¶ 14 (emphasis added). This elements comparison shows that statutory shoplifting effectively *is* common law larceny except for qualifying that the thing taken must be on display in a store and specifying the manner of asportation. Therefore, any facts proving the statutory offense in *Sulavka* would also satisfy all elements of its common law antecedent.

Statutory securities fraud and common law fraud do not have such a relationship. As explained above, statutory securities fraud can be proven without satisfying *any* of the elements of common law fraud. For example, NASAA's *amicus* brief correctly raises market manipulation. Statutory securities fraud by market manipulation in a regulatory proceeding before the Commission would require evidence of 1) manipulative acts, 2) with scienter, 3) in connection with a transaction or transactions within or from Arizona involving an offer to sell or buy securities, or a sale or purchase of securities. *See* A.R.S. § 44-1991(A)(3); *Sec. & Exch. Comm'n v. Lek Sec. Corp.*, 276 F. Supp. 3d 49, 59 (S.D.N.Y. 2017). Common law fraud requires proving "the speaker's intent that [a false representation] be acted upon by the recipient in the manner reasonably contemplated." *Echols*, 132 Ariz. at 500. But scienter for market manipulation can be proven with just knowing or intentional misconduct or even just reckless conduct. *Lek Sec. Corp.*, 276 F. Supp. 3d at 60. The manipulative acts require no representation and could consist of just "trading engineered to stimulate demand [that] can mislead investors into believing that the market has discovered some positive news …." *Id.* at 59. *Sulavka* does not support finding a common law antecedent for a statutory claim that can be established with none of the elements of a common law claim.

Goldwater mentions *Bosworth v. Anagvost*, but that case also supports the Commission's position. 234 Ariz. 453 (App. 2014). *Bosworth* compared common

law larceny with shoplifting by removal (A.R.S. § 13-1805(A)(1)) using the same analysis as *Sulavka* but noting that the concealment element was replaced by the element of removing the stolen goods without paying for them. *Id.* at 456–457, ¶¶ 10–11. Here again, shoplifting by removal is common law larceny except for qualifying that the thing taken must be on display in a store. Removing stolen goods without paying for them is just a plain language way of describing asportation, which means, "The act of carrying away or removing (property or a person)." ASPORTATION, *Black's Law Dictionary* (12th ed. 2024). In fact, the entire shoplifting statute effectively codifies common law larceny when committed in a store, but with a clearer explanation to the public of what actions constitute "asportation" in that scenario, such as moving goods between containers or altering price tags. *See* A.R.S. § 13-1805(A)(1) .

Goldwater also relies on *State v. Kalaluli*, but that case is distinguishable because it uniquely involved a theft statute that effectively codified multiple different common law stealing offenses into one unified offense. 243 Ariz. 521, 524–525, ¶ 10 (App. 2018). That situation of "a statute's unitary nature call[ing] for a unitary jury-eligibility determination" required the court to skip "a strict element-by-element analysis." *Id.* at. 526, ¶ 14. But the Securities Act does not codify common law fraud or unify it with other common law claims, and instead, "The

legislature made the task of proving securities fraud much simpler than proving common-law fraud." *Fromkin*, 196 Ariz. at 227, ¶ 13.

Taken together, *Sulavka*, *Bosworth*, *Kalaluli, Willis*, and *Williams* reflect a common principle. There is a common law antecedent when the legislature effectively codifies one or more common law offenses, even if the new statutory offense narrows the common law offense to a more specific situation, such as larceny of goods from a store. *See* *Sulavka*, 223 Ariz. at 211, ¶ 16; *Bosworth*, 234 Ariz. at 456–457, ¶¶ 10–11; *Kalaluli*, 243 Ariz. 521, 526, ¶ 14. However, there is no common law antecedent when the legislature is not codifying a common law claim, either because the new claim is intentionally broader to serve new state interests, as in *Willis*, or because the new claim is part of a comprehensive post-statehood regulatory scheme, as in *Williams*. *See* *Willis*, 218 Ariz. at 11, ¶ 12; *Williams*, 248 Ariz. at 316, ¶ 20–21.

VI. Statutory Securities Fraud Has a Lineage Distinct from Common Law Fraud

The antecedent of statutory securities fraud in Arizona is not common law fraud but instead a post-statehood securities licensing statute. The modern Securities Act was preceded 30 years earlier by the 1921 Securities-Dealers Act. 1921 Ariz. Sess. Laws, ch. 33, at 38. That law created a permitting system for securities dealers to sell securities. *Id.* at §§ 1–10. That law also created a criminal offense for knowing or willful false statements, representations, or data to the Commission or its staff to

obtain favorable permitting action. *Id.* at § 14. Unlike common law fraud, this offense did not require materiality of the false information, the hearer's ignorance of its falsity, reliance on the information, the right to rely on the information, or injury. *Compare id. with Echols*, 132 Ariz. at 500. As noted above, a similar prohibition against misleading information in a securities filing with the Commission was included in the Securities Act as a regulatory violation. A.R.S. § 44-1992. The same section of the 1921 Securities Dealers Act also created a criminal offense for knowing or willful false statements, representations, or data to "any person for the purpose of influencing such person to purchase … securities …." Ch. 33, Ariz. Sess. Laws 38, § 14. Again, unlike common law fraud, this offense did not require materiality of the false information, the hearer's ignorance of its falsity, reliance on the information, the right to rely on the information, or injury. *Compare id. with Echols*, 132 Ariz. at 500. The legislature later included the same conduct as one of the theories for statutory securities fraud by adding a materially requirement but otherwise preserving all of the other differences from common law fraud. A.R.S. § 44-1991(A)(2). These post-statehood criminal offenses are the antecedents of the Securities Act's anti-fraud provisions, not common law fraud.

VII. The Securities Act References the Plain Meaning of "Fraud"

Goldwater mistakenly points to the use of the word "fraud" in the Securities Act as a reference to the common law claim. In addition to contradicting *Willis,*

which found no common law antecedent where the names of two offense both included the word "trespass," Goldwater's argument misunderstands the usage of the word. *See* 218 Ariz. 8, 11, ¶ 12 (App. 2008). The legislature's use of "fraud" in the Securities Act reflects the word's plain meaning, which long predates the common law claim. "Fraud" has been in English use since the 1300s and includes a variety of deceptions much broader than the 9-element common law claim, including "an *act of deceiving* or misrepresenting," "a person who is *not who they pretend* to be," and "one that is *not what it seems* or is represented to be." *Fraud*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fraud (last visited Dec. 22, 2025) (emphasis added). This plain meaning is further confirmed by the legislature entitling an entire article of the Securities Act "Fraudulent Practices" to prohibit a variety of deceptions including deceptions against the Commission and potentially abusive referral relationships between securities dealers and attorneys. Securities Act, Article 13; A.R.S. §§ 44-1992; 44-1996. These various prohibitions gathered under the label "fraud" but not resembling common law fraud show that the legislature was not invoking the plain meaning of an everyday word.

VIII. Commission Enforcement Actions Are Not an "Abuse" of Equity

Goldwater asserts the Commission's enforcement actions are an "abuse" of equity, but this is incorrect. Goldwater Br. at 12. First, securities enforcement actions before the Commission are not equitable suits brought to sidestep a jury. They are

administrative proceedings to impose statutory remedies and are authorized by the legislature as an extension of the Commission's constitutional decisional authority. A.R.S. § 44-2032(1); Ariz. Const. art. XV, § 6. Second, the authorities Goldwater cites do not support its argument.

La Prade held the State could seek an equitable injunction for violation of a criminal statute against the unlicensed practice of medicine. *State ex rel. La Prade v. Smith*, 43 Ariz. 131, 132 (1934). *La Prade* is inapplicable because the legislature had not otherwise regulated or authorized injunctions of the unlicensed practice of medicine. *Id.* at 137. The Court noted, "[I]f our Legislature had passed such enabling act, it would have removed any doubt of the propriety or legality of this proceeding." *Id.* The proceeding here is proper for that reason; the legislature has regulated securities sales and authorized Commission proceedings to enforce those regulations with specified remedies. A.R.S. § 44-2032(1). *City of Bisbee* is also distinguishable as seeking an equitable injunction based solely on violation of a criminal ordinance. *City of Bisbee v. Arizona Ins. Agency*, 14 Ariz. 313 (1912). Goldwater also refers to the Commission's ability to "pursue a criminal fraud claim at law," but the Commission has no authority to prosecute crimes. *See* A.R.S. § 44-2032.

Sonner does not support Goldwater's argument because in that case the question was whether federal equitable relief in diversity jurisdiction required demonstrating a lack of adequate legal remedy. *Sonner v. Premier Nutrition Corp.*,

971 F.3d 834, 841 (9th Cir. 2020) ("[E]quitable relief when an adequate legal remedy exists … may be unavailable in federal court ….). That question is not at issue here because this case does not involve federal court equitable relief; it involves remedies expressly authorized by statute that merely resemble equitable relief.

CONCLUSION

Statutory securities fraud has no common law antecedent, and thus no jury right. The *Derendal* test of substantial similarity requires the elements of a statutory claim to very closely match its common law antecedent, and *Ridlon* is a useful example of that elements comparison. But statutory securities fraud can be proven without meeting any common law fraud elements. No application of the *Derendal* test has ever found a common law antecedent under such circumstances.

The antecedent of statutory securities fraud is instead the 1921 Securities Dealers Act statutory deception offences. The uses of the word "fraud" in A.R.S. § 44-1991 and Article 13 of the Securities Act reflect its plain meaning and are not references to the common law claim. Commission securities matters are not an abuse of equity but a procedure for remedies expressly provided by statute pursuant to the Constitution.

RESPECTFULLY SUBMITTED this 29th day of December 2025.

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