

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 AMICI CURIAE
PROFESSOR ILAN WURMAN AND RONALD A. SIMMS**

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INTRODUCTION

The Arizona Corporation Commission (“Commission”) submits this Response to Amicus Brief of Amici Curiae Professor Ilan Wurman and Ronald A. Simms (“Response to Wurman Amicus Brief”) pursuant to the Court’s Order Granting Petitioners’ Petition for Review (“Order”) on November 4, 2025. The Wurman Amicus Brief misinterprets Article II, § 23 of the Arizona Constitution and disregards the Commission’s express grant of enforcement authority under Article XV.

I. The Proper Inquiry Is Whether a Jury-Trial Right Applies Here

The Wurman Brief begins by misconstruing the issue presented. It frames the question as “whether a general provision of the State Constitution relating to the Commission’s power to issue fines implicitly abrogates the State Constitution’s right to trial by jury in cases where that right would otherwise apply.” Wurman Amicus Br. at 1. That formulation assumes the answer to the question in dispute; namely, whether respondents in Commission-initiated statutory securities fraud enforcement actions possess a constitutional right to a jury trial in the first place. Whether such a right attaches here is the threshold question the Court must decide, not a settled premise from which the analysis may proceed. By assuming the existence of a jury-trial right for statutory securities fraud and then asking whether it has been

“implicitly abrogated,” the brief reverses the proper order of constitutional analysis in a way that would predetermine its preferred outcome.

A. The Wurman Brief Fails to Account for the Text of Article XV

The Wurman Brief contends that this case necessarily involves private rights, the resolution of which “rests exclusively with the judicial power,” according to various federal authorities, but this argument fails to engage with the relevant text of the Arizona constitution.

Although the Wurman Brief cites Articles II and VI of the Arizona Constitution for its private rights argument, it fails to reference Article XV, which creates and empowers the Commission. As the State explained in its Amicus Brief, Article II’s preserved jury right must be read in harmony with Article XV, which independently vests the Commission with authority to initiate, conduct, and resolve enforcement proceedings. *See* [Ariz. Const. art. XV](#); State Amicus Br. at 9–10. Article XV, Section 6 provides that the Legislature may enlarge the Commission’s powers, including by prescribing rules to govern “proceedings instituted by and *before* [the Commission].” (emphasis added). The State correctly explains that this text envisions adjudicatory proceedings before the Commission. *See* State Amicus Br. at 2–7.

This constitutional text is significant. When the framers intended specific matters to require a trial by jury, they said so explicitly. They did not do so here.

Instead, Article XV, Section 6 expressly contemplates that enforcement actions would be initiated, heard, and resolved in proceedings before the Commission. Those proceedings are administrative in nature and incompatible with a jury-trial requirement. As the State argues, other provisions of Article XV reinforce that understanding by authorizing the Commission to impose fines and by providing for appellate review of Commission orders in the courts. *See* State Amicus Br. at 3–5. These features would be incoherent if a jury trial were constitutionally required at the outset. *See* [Ariz. Const. art. XV, §§ 17, 19](#); State Amicus Br. at 3–7. When construed in harmony with the rest of the Constitution, Article XV forecloses the Wurman Brief’s attempted rewriting of Commission enforcement authority to require a judicial court.

The Wurman Brief also misstates both the Commission’s constitutionally conferred authority to impose fines and the nature of those fines. Wurman Amicus Br. at 11–17. As articulated by the State, the Commission has inherent constitutional power to levy fines. *See* State Amicus Br. at 5–6. Instead of engaging with what the framers of the Arizona Constitution said about the Commission in Article XV, the Wurman Brief relies on federal precedent and asserts that fines may be imposed only as a condition of access to “shared public rights.” *See* Wurman Amicus Br. at 17. The Wurman Brief advocates for a selective reading of the Arizona Constitution, under which the powers granted explicitly to the Commission apply only to utilities

and inexplicably vanish for securities enforcement. *Id.* at 16–17. Nothing in Article XV supports that limitation, *see* State Amicus Br. at 6–7, and the Wurman Brief identifies no constitutional basis for importing it.

The Wurman Brief argues that the Commission deals “mostly” with “classic public rights” such as access to electricity and water, and then allows that the Commission, “may perhaps impose non-judicial fines if the only consequence is loss of a license to distribute those common resources.” Wurman Amicus Br. at 2. However, Article XV contains no such limit, and the Commission’s constitutional mandate is broader than public utilities scope the Wurman Brief allows for. The Commission’s constitutional duties always included protecting against securities harms, initially through powers of inspection and investigation into the affairs of any corporation whose stock was offered for sale to the public and to require such corporations to make reports and provide information about their acts and operations to the Commission. [Art. XV, §§ 4 and 13](#). The Commission’s fine authority thus always included the power to fine corporations for failing to provide information to the Commission about their stock sales to the public. *See* [Art. XV, § 19](#). The Wurman Brief claims that, “Where the fine is imposed as punishment for violation of the securities laws, however, and the fine is enforceable entirely independently of the retention or loss of a public privilege ... then it ... requires a judicial court.” Wurman Amicus Br. at 2. But that theory is plainly inconsistent with the text of Article XV,

which allows for more than what the “public rights” vision of the Wurman Brief assumes.

The Wurman Brief repeats this mistake, asserting that, “Divesting persons of their ... property is the core of the judicial power; it is the kind of thing that *only* courts vested with the ‘judicial power’ can do” Wurman Amicus Br. at 8 (emphasis original). Again, the framers of the Arizona Constitution decided otherwise, and safety regulation is another example. The Constitution expressly gave the Commission the power to “make *and enforce* reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of the health, of the employees and patrons of [public service] corporations.” [Art. XV, § 3](#). Safety regulation has public benefits (like securities regulation), but the Wurman Brief’s vision of public rights asserts that money penalties always implicate private rights and must be imposed by courts. Wurman Amicus Br. at 8. But the fact that Article XV allows the Commission to create safety regulations and enforce them with fines imposed in proceedings by and before the Commission demonstrates how the Wurman Brief’s vision of “public rights” is not the law in Arizona. *See* [Art. XV, §§ 3, 6, and 19](#).

Finally, the Wurman Brief, in its conclusion about public/private rights, recasts the Commission’s administrative penalties as “punishment for crime.” Wurman Amicus Br. at 20. This is incorrect. Commission enforcement actions

impose administrative sanctions; criminal violations of the Securities Act are prosecuted separately by the State. See [A.R.S. § 44-2032\(5\)](#); [State v. Gunnison, 127 Ariz. 110, 113 \(1980\)](#) (noting the difference between civil and criminal violations).

B. Commission Enforcement Actions Do Not Require a Judicial Court

The Wurman Brief's private-rights analysis misunderstands the nature of securities enforcement actions under Arizona law and conflates the federal jury trial inquiry under the Seventh Amendment with the relevant inquiry under Article II, § 23. The dispositive question is not whether the remedy includes monetary penalties, but whether the proceeding adjudicates a cause of action that historically existed at common law and therefore would have been tried to a jury at the time Arizona adopted its Constitution. See [Life Inv'rs Ins. Co. of Am. v. Horizon Res. Bethany, Ltd., 182 Ariz. 529, 532 \(App. 1995\)](#). The Commission, the Petitioners, and the other three *amici* now agree that the correct standard is whether statutory securities fraud has a common law antecedent within the meaning of *Derendal v. Griffith*, but the Wurman Brief fails to consider *Derendal*. See [209 Ariz. 416 \(2005\)](#).

Securities enforcement actions did not exist at common law. These actions implement the Commission's constitutional mandate to protect the public from fraud and represent the exercise of the Commission's constitutionally sanctioned regulatory authority over participation in securities markets. The ability to offer and sell securities is not a natural or common-law entitlement, but a statutorily

conditioned privilege subject to administrative enforcement. *See, e.g., Jennings v. Woods*, 194 Ariz. 314, 317, n.4 (1999) (characterizing participation in securities sales and marketing as a “privilege”).

The fact that an enforcement action may result in a monetary penalty does not alter the analysis. If the payment of money alone converted regulatory enforcement into a private-rights dispute, virtually all administrative regulation would require jury trials, resulting in an outcome incompatible with Arizona’s constitutional structure and practice. In this case, any potential monetary liability arises solely from Petitioners’ conscious decision to engage in a heavily regulated activity governed by statutory conditions.

Wurman’s argument is essentially a reiteration of the issue discussed by the United States Supreme Court in *Sec. & Exch. Comm’n v. Jarkesy*. The *Jarkesy* Court found that the civil penalties levied by the Securities & Exchange Commission (“SEC”) involved matters of private, rather than public, rights because the SEC’s civil penalties were “a punitive remedy,” that “target the same basic conduct as common law fraud” and “operate pursuant to similar legal principles.” [603 U.S. 109, 134 \(2024\)](#). Arizona courts have consistently emphasized that the Securities Act is a remedial public protection scheme and not a substitute for common-law causes of action, therefore this Court should decline the Wurman Brief’s invitation to import federal doctrine to the contrary. *See, e.g., Eastern Vanguard Forex, Ltd. v. Arizona*

[Corp. Commission, 206 Ariz. 399, 412 \(App. 2003\)](#) (declining to follow federal precedent that would undermine the Securities Act’s remedial purpose), *superseded by statute on other grounds*, [A.R.S. § 12-910\(F\)](#); [Siporin v. Carrington, 200 Ariz. 97, 104, ¶ 35 \(App. 2001\)](#), (rejecting “inflexible and formalistic” federal approaches that do “not serve the prophylactic and remedial purposes of [the Securities Act].”) Commission enforcement actions are rooted in Arizona’s constitutional and statutory framework committed to protecting the public and do not require adjudication in a judicial court.

C. Even Under the Incorrect “Remedies” Test, a Jury Trial Is Not Required

Like with the previous section, the Wurman Brief once again urges this Court to adopt federal case law by asserting that jury trials are required when the remedy is legal. Wurman Amicus Br. at 9. First, as the Commission discussed at length in its Supplemental Brief, the proper test in Arizona is the *Derendal* test, which compares the character of the statutory offense to a proposed common law antecedent. *See* Respondent’s Supp. Br. at 2–4 *citing* [Derendal v. Griffith, 209 Ariz. 416 \(2005\)](#). Second, even if the “remedies” test applied to the Commission’s securities enforcement actions, a jury trial would not be required. *See* Respondent’s Supp. Br. at 15–17.

Relying entirely on federal case law, the Wurman Brief asserts that when civil penalties are punitive, they are legal in nature and therefore belong before a jury.

Wurman Amicus Br. at 10. Yet it completely disregards the nature of the Commission’s remedies, an analysis that would reveal the stark differences between those remedies and the federal remedies on which the Wurman Brief relies.

As discussed in Section I(A), *supra*, the Securities Act is fundamentally a “remedial measure that should be liberally construed for the protection of the public.” [*Hirsch v. Arizona Corp. Comm’n*, 237 Ariz. 456, 466 \(2015\)](#), *superseded by statute on other grounds*, [A.R.S. § 12-910\(F\)](#). The Commission’s restitution and cease-and-desist orders are statutory remedies that are equitable in nature. *See* [John Norton Pomeroy, *A Treatise on Equity Jurisprudence* 126–27 \(John Norton Pomeroy Jr., ed., 4th ed. 1918\)](#) (explaining equitable remedies traditionally include both preventive relief, such as injunctions, and restorative relief, such as rescission and accounting—categories into which cease-and-desist orders and restitution naturally fall). Administrative penalties in Commission enforcement actions are fixed, statutorily capped penalties that differ fundamentally from the culpability-tiered, discretionary civil penalties issued by federal agencies such as the SEC. While the SEC’s civil penalties are tied to culpability and deterrence, the Commission’s statutory authority to collect restitution exists “to correct the conditions resulting from [violations of the Act].” [A.R.S. § 44-2032\(1\)](#).

Additionally, the Commission’s ability to order restitution is based on a clear calculation directly tied to restoring the status quo to the victim, and it must be

distributed to investors. *See, e.g.,* [A.A.C. R14-4-308](#) (restitution rule tying calculation to amount originally paid by buyer and stating it is payable to the investors); [In re Dan E. Droeg and Evelyn R. Droeg, 2025 WL 439914 at *24–25 \(Ariz. Corp. Comm. Jan. 22, 2025\)](#) (ordering the Commission to “disburse the restitution funds . . . to investors” and ordering that any administrative penalties “be subordinate to the restitution obligations ordered.”). The Wurman Brief, in its analysis, fails to mention the Commission’s primary enforcement mechanisms, instead choosing to focus solely on administrative penalties, which are statutorily limited and secondary to restitution. *See* [A.R.S. § 44-2037\(A\)](#).

D. There Is No Implicit Repeal of a Right That Does Not Apply Here

The Wurman Brief finally argues the right to a jury trial should not be repealed by implication. Wurman Amicus Br. at 17. That argument again assumes the answer to the question presented as its premise. As explained above, no jury right applies here or in other Commission enforcement proceedings. The Commission does not argue that Article XV repeals the right to a jury trial, and that was not the holding of the Court of Appeals. Instead, Article XV reflects the framers’ understanding that the common law jury right preserved in Article II was never applicable to Commission enforcement proceedings authorized in Article XV.

CONCLUSION

Whether there is a jury trial right for administrative enforcement proceedings brought by the Commission is the threshold question the Court must decide, not a premise to assume. A jury trial in superior court is not required under the Arizona Constitution, Article II, § 23, in Commission enforcement actions. The Commission is created, and its authority granted, by Article XV of the Arizona Constitution. The jury trial inquiry under Article II, § 23 and *Derendal* concludes statutory securities fraud has no common law antecedent and therefore no right to a jury trial.

RESPECTFULLY SUBMITTED this 29th day of December 2025

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