IN THE SUPREME COURT
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'CONNOR, LEA MARQUEZ PETERSON, ANNA TOVAR, KEVIN THOMPSON, and NICK MYERS, Respondents.	Supreme Court No. CV-25-0134PR Court of Appeals, Division One No. 1 CA-SA 25-0016 ACC Docket No. S-21301A-24-0076 Administrative Law Judge: Yvette Kinsey

SUPPLEMENTAL BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The Goldwater Institute (GI) is well known to this Court as an advocate of individual liberty and constitutionally limited government, particularly with respect to the challenges posed by Administrative Agencies. *See* *Legacy Found. Action Fund v. Citizens Clean Elections Comm'n*, 254 Ariz. 485, 493 ¶ 28 (2023). Through its Scharf-Norton Center for Constitutional Litigation, GI has often appeared before this and other courts representing parties or as amicus curiae in defense of constitutional rights against bureaucratic overreach, *see, e.g.,* *Sun City Home Owners Ass'n v. Arizona Corp. Comm'n*, 252 Ariz. 1 (2021), and is appearing as amicus curiae simultaneously in *Sync Title v. Arizona Corp. Comm'n*, CV-25-1048-PR and *Cellebration Life Sciences v. Arizona Corp. Comm'n*, CV-25-0212-PR, which raise identical issues.

INTRODUCTION

Among its other errors, the court below placed the burden on Petitioners to prove their entitlement to a jury right, when the burden is on the Commission to prove there is no right. It cannot prove such an exemption because if it's exempt from the "inviolate" jury right, then it's also exempt from things like due process, which is obviously not true. Nor can the Commission employ its equitable powers to evade the jury requirement, because the jury process provides an adequate legal remedy. Finally, this Court should reject the Commission's reliance on *Ridlon v.*

New Hampshire Bureau of Securities Regulation, 214 A.3d 1196 (N.H. 2019), which employed an analysis inconsistent with the Arizona Constitution.

ARGUMENT

I. The Court of Appeals erred by presuming against the existence of the jury trial right.

A. The burden is on the Commission not EFG.

The Court of Appeals began its analysis by illegitimately reversing the burden of proof—a step the Corporation Commission repeats here. The court said: "[i]f our constitutional framers had intended to confer a jury-trial right for [Corporation] Commission enforcement actions, they would have done so." *EFG Am., LLC v. Arizona Corp. Comm'n*, 569 P.3d 806, 810 ¶ 12 (Ariz. App. 2025). But the burden should instead be on the Commission to prove that no jury right applies.

The lower court's error is implicit in the verb "confer." Our Constitution does not *confer* the right to a jury, but *preserves* it. It says this right "shall *remain* inviolate," Ariz. Const. art. II § 23 (emphasis added), language this and other courts have interpreted as meaning that the Constitution sustains a preexisting right. *State v. Strasburg*, 110 P. 1020, 1022 (Wash. 1910); *Derendal v. Griffith*, 209 Ariz. 416, 419 ¶ 9 & n.2 (2005).[1] To demand proof that the framers meant to *give*

[1] Actually, it's broader than that. As Justice Lyman observed, "the meaning of the 'right to trial by jury' should [not] be gathered solely from the law of the territory

Arizonans a *new* jury right in these circumstances is to shift the burden of proof onto the wrong party.

That point is reinforced by Article II, Section 2, which says government exists "to *protect* and *maintain* individual rights"—not to give people rights they don't already have. (Emphasis added.)

The jury trial right is one of the oldest and most cherished of Anglo-American legal rights,[2] and was spoken of consistently throughout Arizona's founding period as a preexisting right which the Constitution would secure, not confer. The 1891 proposed constitution spoke of "preserv[ing]" this right, *see* Ariz. Const. of 1891 art. II § 11 (not adopted), and delegates at the 1910 Convention used the same language. *See, e.g.,* Goff, *Records of the Arizona*

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of Arizona as it was at the time of the adoption of the Constitution[.] … Even where the Constitution more pointedly refers to the period immediately preceding its adoption as the source from which this right is to be gathered, it has been construed as referring to the common-law right of trial by jury, and not to that right as limited and circumscribed by local laws." *Miller v. Thompson*, 26 Ariz. 603, 609–10 (1924) (Lyman, J., concurring).

[2] When Congress authorized Arizona to draft a constitution and seek admission to the union, it required that the state constitution "not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." 36 Stat. 557, 558 (1910). The Declaration, of course, specifies the deprivation of jury trial rights as one of the causes for separation from Great Britain. *See* 1 Stat. 1, 2 (1776). Since "[a]dherence to the principles … of the … Declaration of Independence was an express condition of our admission to the Union as a state on equal footing," the inviolability of the jury right cannot be exaggerated. *Larson v. Seattle Popular Monorail Auth.*, 131 P.3d 892, 900 ¶ 43 (Wash. 2006) (Johnson, J. dissenting).

Constitutional Convention 677 (1991) (delegate Ingraham: "the … principle of jury trial which has been a right of English men and women for hundreds of years."). Thus, the court below erred in demanding proof that the framers "intended to confer" the jury trial right in proceedings initiated by the Commission.

That error is further highlighted by the fact that the jury trial right is considered "fundamental," and courts presume against the waiver of fundamental rights. *State v. Ward*, 211 Ariz. 158, 162–63 ¶ 13 (App. 2005). Instead, they require the government to demonstrate the constitutionality of any limitation on such rights. *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 220 Ariz. 587, 595 ¶ 20 n.7 (2009). "[I]f a law burdens fundamental rights ... any presumption in its favor falls away." *Gallardo v. State*, 236 Ariz. 84, 87 ¶ 9 (2014). Further reinforcing this point, courts have always applied strict construction to laws that seem to be "in derogation of … common-law right[s]," *Richardson v. Ainsa*, 11 Ariz. 359, 366 (1908), such as the jury right.

B. The court misapplied the *exclusio alterius* canon.

The court not only ignored these principles of construction, but buttressed its conclusion with a fallacious argument. It observed that "other sections of the Arizona Constitution specify when a jury trial is required" (such as the provision requiring a jury to ascertain compensation in eminent domain cases), and since Article XV—which governs the Commission's operations—doesn't specify a jury

trial, that right must not apply. *EFG Am.*, 569 P.3d at 809-10 ¶ 12. This is an *exclusio alterius* argument—but it misapplies that interpretive rule.

Exclusio alterius says that when a document lists items, and omits some items from that list, those omissions should be viewed as intentional, and thus as positively excluding the omitted things. Thus, if a statute empowers the government to tax oranges, limes, lemons, and tangerines, but doesn't mention grapefruit, this may indicate that the government cannot tax grapefruit.

But the canon is easy to misapply. *See* Scalia & Garner, *Reading Law* 107 (2012). First, it's a "rule of *statutory* construction," *State v. Roscoe*, 185 Ariz. 68, 71 (1996) (emphasis added), and cannot apply the Declaration of Rights, given that Article II Section 33 expressly provides that "[t]he enumeration in this Constitution of certain rights *shall not be construed to deny others retained by the people*." (Emphasis added).

What's more, *exclusio alterius* only applies when there's some indication that the omissions from the list were intentional. *State v. Patel*, 251 Ariz. 131, 136 ¶ 23 (2021). Here, there's no reason to believe that. On the contrary, Article II Section 33 proves otherwise.

Also, most of the examples the lower court cited as instances when the Constitution explicitly requires a jury trial—that is, most of the items on the "list"—don't actually do that. And without a "list," there can be no "omissions"

from which to draw inferences. For example, it cited Article XVIII, Section 5 as an instance when the framers required a jury trial. But that clause only says the defense of contributory negligence is a factual question "left to the jury." It doesn't purport to "specify when a jury trial is required" at all. *EFG Am.*, 569 P.3d at 809 ¶ 12. This means the court didn't even identify a "list" from which things could be "omitted"—and therefore failed to establish the precondition for an *exclusio alterius* inference, let alone show that "omissions" from the purported "list" were intentional.

C. "Inviolate" is as emphatic as it gets.

The court below therefore erred both in shifting the burden of proof and in applying *exclusio alterius*. The only remaining question, therefore, is whether the enforcement proceedings contemplated by Article XV, Section 6, implicitly replaced the presumptive jury trial right. The answer is no, as explained below. But first, consider another, more basic flaw in the lower court's reasoning.

The court said that if the framers had meant the jury right to apply in Commission enforcement actions, "they would have [said] so." *EFG Am.*, 569 P.3d at 810 ¶ 12. But they *did* say so. They used the word "inviolate." That word means "not disturbed or limited,"[3] "freedom from hurt, harm, defilement, profanation, or such other idea connoting partial destruction or substantial

[3] *Rolfs v. Shallcross*, 1 P. 523, 526 (Kan. 1883).

impairment,"[4] "unhurt, uninjured, unpolluted, unbroken … not corrupted, immaculate, unhurt, 'untouched'… [not] impair[ed], abridge[ed], or in any degree restrict[ed]."[5]

"Inviolate" is an exceptionally strong word. Article II, Section 23, is the only time it occurs in the Constitution. Even the rights of speech, religion, and property aren't expressed with such a strong word. *Cf. id*. art. II §§ 6, 12, 17. "Inviolate" is as absolute as it gets. It "connotes deserving of the highest protection," and for that to be accomplished, "it must not diminish over time and must be protected from all assaults to its essential guarantees." *Sofie v. Fireboard Corp.*, 771 P.2d 711, 721-22 (Wash. 1989). If the framers' use of this word did not "say so," *EFG Am.*, 569 P.3d at 810 ¶ 12, it's hard to imagine what would.

II. The Constitution doesn't give the Commission an end-run around the jury trial right.

A. The Commission isn't exempt from the Declaration of Rights.

The Commission argued below that Article XV authorizes it to run hearings without a jury because that article empowers it to "institut[e]" "proceedings … before" the Commission, to "enforce reasonable rules, regulations, and orders," and to impose fines. Ariz. Const. art. XV §§ 6, 3, 19. Yet these are weak reeds on which to base an exception to the jury right.

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[4] *State v. De Lorenzo*, 79 A. 839, 840 (N.J. 1911) (citation omitted).
[5] *Flint River Steam Boat Co. v. Roberts, Allen & Co.*, 2 Fla. 102, 114 (1848).

Article XV, Section 6, lets the Legislature "prescribe rules and regulations to govern [Commission] proceedings." This doesn't imply any exception to the jury requirement. Indeed, since the Legislature is itself bound by that requirement, this section implicitly *requires* the Legislature to preserve the jury right when prescribing rules and regulations for the Commission.

Article XV, Section 3, empowers the Commission to prescribe classifications and rates; adopt rules, regulations, and orders; prescribe the forms of contracts, etc. Again, nothing in this Section implies, let alone clearly exempts, the Commission from the jury requirement.

As for Section 19, it gives the Commission power "to enforce its rules, regulations, and orders by the imposition of such fines as it may deem just, within the limitations prescribed in Section 16 of this article." Section 16, in turn, provides that public service corporations that violate the rules and regulations of the Commission "shall forfeit and pay to the state not less than one hundred dollars nor more than five thousand dollars for each such violation, to be recovered before any court of competent jurisdiction." As this Court said in *Haddad v. State*, 23Ariz. 105, 114 (1921), the Constitution "merely provide[s] for the recovery of a penalty in a civil proceeding for a civil wrong." It says nothing about an exception to the jury requirement.

If these sections exempt the Commission from the "inviolate" jury requirement, then by the same logic, they also exempt the Commission from other provisions of the Declaration of Rights—yet nobody would seriously maintain this.

For example, Section 19 empowers the Commission to levy fines. By the lower court's logic, this would exempt the Commission from the "excessive fines" clause of Article II, Section 15—since, after all, the framers could have specified that the Commission should not impose excessive fines, but didn't say so in Article XV. Such a conclusion would be absurd, of course, because the framers *did* say so, in Article II Section 15.

Likewise, Article XV Section 3 empowers the Commission to "enforce reasonable rules, regulations, and orders." By the court's logic, this would entitle the Commission to ignore due process, because the framers could have required the Commission to abide by that requirement, and didn't say so in Article XV. But obviously the Commission must abide by due process of law. *See, e.g., Johnson Utilities, L.L.C. v. Arizona Corp. Comm'n*, 249 Ariz. 215, 228 ¶ 58 (2020).

Naturally, if the Commission must obey the Excessive Fines and Due Process Clauses, then, *a fortiori*, it must obey the Jury Clause. Indeed, this Court has characterized the idea that the Commission's constitutional status entitles it to ignore constitutional limitations as a "red herring," because "all governmental bodies remain 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. Arizona Corp. Comm'n*, 252 Ariz. 1, 4 ¶ 13, 5 ¶ 16 (2021). That means it's subject to the jury trial requirement.

B. The Commission's "equitable" powers cannot overcome the inviolate jury trial right.

The framers gave the Commission power to set rates for public service corporations. The legal theory behind the Commission's authority was that after establishing such rates, anyone who exceeded them would be subject to the Commission's contempt power, and because contempt is an equitable matter, the Commission could bring an enforcement action in equity, and the violator wasn't entitled to a jury. *See, e.g., Vogel v. Corp. Comm'n of Okla.*, 121 P.2d 586, 588–90 (Okla. 1942). But that theory cannot work here for three reasons.

First, this isn't a contempt case. Contempt means "failing to do something which the contemnor is *ordered by the [Commission] to do* for the benefit or advantage of another party to the proceeding." *State v. Cohen*, 15 Ariz. App. 436, 440 (1971). Contempt is defined by statute as "fail[ing] to observe or comply with any order, rule, or requirement of the commission or any commissioner." A.R.S. § 40-424. But this case concerns a retrospective charge, for violating statutes such as Sections 44-1991, 44-1841, 44-1801, etc., none of which mention the Commission specifically. These are simply statutes against fraud that can be

prosecuted at law before a jury. In other words, this is a garden-variety prosecution of a common-law crime, not a contempt for violating a Commission order. That means this case could and should have been brought before a jury.

Second, if the equity theory were sufficient to trump the "inviolate" jury right, the result would be an obvious loophole whereby the government could always deprive any defendant of that right by a game of semantics. It could relabel any common law crime as an administrative offense and prosecute it as "contempt." *Cf.* Pet. Supp. Br. at 6. But *Derendal* forbids that. It says the applicability of the jury trial right hinges on the *substance* of the offense, not mere semantics. If the offense has a "common law antecedent" to which a jury trial attached in 1910, then the defendant's entitled to a jury trial. 209 Ariz. at 419 ¶ 10. And "antecedence" does not require exact duplication: "the test … is not whether elements are identical, or nearly so. The 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." *Sulavka v. State*, 223 Ariz. 208, 211–12 ¶ 15 (App. 2009) (emphasis added; citations omitted).

Obviously, the statutory fraud alleged here is of the same character as common-law fraud. Common law fraud is a knowingly false material representation with the intent of inducing reliance from a listener ignorant of its falsity, followed by the listener's rightful reliance and proximate injury. *Wells*

Fargo Credit Corp. v. Smith, 166 Ariz. 489, 494 (App. 1990). Securities fraud as set forth in Section 44-1991(A) is a species of this. The statute repeatedly uses the word "fraud" to define the offense, describing it as any artifice to defraud, materially untrue statement, or any transaction that operates as a fraud. Thus the statutory offense has the same essential character as the common law crime, just as statutory shoplifting-by-concealment was of the same character as common-law larceny in *Sulavka*, 223 Ariz. at 211–12 ¶¶ 13-19.[6] Remarkably, even though the Commission agreed that *Derendal* should govern this case, the court below did not apply that test.

Third, equity itself doesn't allow a party to abuse equity to deprive others of their constitutional rights. A party cannot resort to equity if she has "adequate remedy at law," *City of Bisbee v. Arizona Insurance Agency*, 14 Ariz. 313, 314 (1912), and that rule, which applies to the government as well, forbids a party from resorting to equity as a strategy to deprive the other side of the jury right. *Spring v. Domestic Sewing-Machine Co.*, 13 F. 446, 448 (C.C.D.N.J. 1882) ("To entertain a

[6] The Commission has tried differentiating Section 44-1991 fraud from fraud in general by saying the statute specifies equitable remedies which aren't like criminal fraud. But the mere blending of common-law and equitable remedies in the same matter doesn't nullify the jury trial right. *First Nat'l Bank of Globe v. McDonough*, 19 Ariz. 223, 226 (1917).

suit in equity, when the party has a plain and complete remedy at law, is to deprive the defendant of his constitutional right of trial by jury.").[7]

In *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 842 (9th Cir. 2020), the Ninth Circuit held that the "adequate legal remedy" requirement "implicates the well-established federal policy of safeguarding the constitutional right to a trial by jury," and thus forbids a plaintiff from strategically dismissing claims in order to deprive a defendant of a jury trial. Since the plaintiff there could have brought a legal claim before a jury instead of an equitable claim without one, she could not skirt the jury requirement by resorting to equity.

Naturally, Arizona has an even stronger policy of safeguarding the "inviolate" jury trial right than does the federal government. *Cf. CSA 13-101 Loop, LLC v. Loop 101, LLC*, 236 Ariz. 410, 412 ¶ 8 (2014) ("We discern public policy from our constitution."). *Sonner*'s logic thus applies with even more force here.

This Court addressed the interaction of equity and law in *State ex rel. La Prade v. Smith*, 43 Ariz. 131 (1934), a case that indicates how the line between the

[7] *See also Davis v. Forrestal*, 144 N.W. 423, 425 (Minn. 1913) ("[T]he right to jury trial should not be interfered with by an assertion of doubtful equity jurisdiction."); *Turnes v. Brenckle*, 94 N.E. 495, 497 (Ill. 1911) ("A party who directly invokes the jurisdiction of equity … cannot deprive the defendant of his right to a jury trial."); *Biermann v. Guar. Mut. Life Ins. Co.*, 120 N.W. 963, 964 (Iowa 1909) ("To sustain the position of the appellant herein would be to sanction a practice by which the plaintiff in every action … may be deprived of his constitutional right to have his cause submitted to a jury.").

two must be drawn based on substantial justice, not mechanistic formulae. In *La Prade*, the Attorney General sought to enjoin a man from practicing medicine without a license. The court found it difficult to decide whether this was proper, because to "employ its equity powers to prevent a person from committing a crime for which the Legislature has prescribed a punishment" would "deprive the defendant of his constitutional right to a trial by jury." *Id.* at 135. Equity, it said, "is not intended as a substitute for nor as an aid to the criminal process." *Id.* It did say an injunction was available, but only because the unlicensed practice of medicine was a public nuisance posing a *future risk* to public health. That rationale isn't available here, since the Commission isn't seeking merely to enjoin EFG, and EFG isn't endangering public health.

In short, a party who can seek either equitable or legal relief must pursue the latter, and cannot exploit the former to nullify the "inviolate" jury right. Since the Commission could pursue a criminal fraud claim at law, before a jury, it would be inequitable to let it evade the constitution by a semantic trick.

III. The *Ridlon* case is inapplicable.

The Commission urges this Court to adopt the New Hampshire Supreme Court's narrow 3-2 ruling in *Ridlon*, 214 A.3d 1196, which allowed the Secretary of State to bring an administrative enforcement proceeding under the state's

Uniform Securities Act instead of bringing the accused before a jury. But that case is a poor fit for applying Arizona's jury trial right.

For one thing, *Ridlon* employed a legal test entirely different from the *Derendal* analysis. It asked whether the statute at issue was "comprehensive," and concluded that it was, because the act "is comprised of 55 sections contained in seven separate articles," and is highly detailed, including provisions governing the rules of procedure and evidence. *Id.* at 1200. It also asked whether the statutorily defined offense was "equivalent to" the common law offense. *Id.* at 1203. Since the statutory offense was more broadly defined, the court found that they were different, and therefore that the jury trial right did not attach. *Id.* at 1203-04.

But Arizona courts don't use a "comprehensiveness" test, and it's unclear why comprehensiveness should matter. If a statute deprives a person of a constitutionally protected right, it's surely not rendered more constitutional just because the deprivation is embedded in a big, "comprehensive" statute.

In fact, *State v. Kalauli*, 243 Ariz. 521 (App. 2018), rejected that idea. The question there was whether "theft of services" was sufficiently similar to common law larceny to entitle the defendant to a jury. Theft of services fell within Arizona's "'omnibus' theft statute," which superseded common law crimes and substituted a new "unitary" crime called "theft," which was unknown at common law. *Id.* at 524 ¶ 8, 525 ¶ 10-11 (citation omitted). That statute was surely

"comprehensive." But instead of finding that this comprehensiveness justified overriding the jury right, the court found that it warranted *preserving* that right.[8] Because theft of services was of the same general character as the crime of larceny, the defendant was entitled to a jury. *See id.* at 527 ¶ 17.[9]

Ridlon's dissenters rightly observed that "elevating comprehensiveness to the forefront of the analysis … allows the legislature to 'nullify the [c]onstitutional right of trial by jury by mere statutory enactments.'" 214 A.3d at 1211 (Hantz Marconi & Donovan, JJ., dissenting). If a "comprehensive" or "omnibus" criminal code were to include even a single section that violates due process, or allows warrantless searches, or permits forced confessions, or deprives the defendant of the right to confront witnesses, that section would surely be unconstitutional, regardless of how "comprehensive" the framework in which it was embedded. The *Ridlon* majority never explained why "comprehensiveness" somehow makes it

[8] In fact, as *Derendal* noted, "[b]ecause the Arizona legislature abolished all common law crimes more than thirty years ago, many newly minted statutory criminal offenses have no precise analog in the common law." 209 Ariz. at 419 ¶ 10 (citation omitted). The Commission's argument suggests that in doing so, the state has effectively rendered the jury trial right a matter of legislative grace.

[9] *Kalauli* expressly rejected the argument the Commission makes here: that because the statute requires proof of fewer elements, it establishes a "new" crime exempt from the jury requirement. *Id.* at 525 ¶ 12. In fact, to accept such an argument would give the state a perverse incentive to substitute statutory crimes containing fewer elements, which would not only make it easier to convict on the merits, but which would *ipso facto* strip the accused of their jury rights.

okay to deprive people of their right to a jury trial, and this Court should not adopt that case's inadequate analysis.

Ridlon also appeared to interpret "equivalency" far more strictly than the *Derendal* test does. *Derendal* never uses the word "equivalency." It uses the far more rational "substantially similar" test. The *Ridlon* analysis risks empowering the legislature to substitute new statutory offenses for common law ones and thereby nullify the jury trial right piecemeal. Arizona is therefore right to determine jury eligibility by asking whether the common law offense and the statutory offense include the same "general elements." *Bosworth v. Anagnost*, 234 Ariz. 453, 457 ¶ 11 (App. 2014).

CONCLUSION

The decision below should be *reversed.*

Respectfully submitted December 9, 2025 by:

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