**IN THE SUPREME COURT**

**STATE OF ARIZONA**

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| EFG AMERICA, et al.,<br><br>Petitioners<br><br>v.<br><br>ARIZONA CORPORATION COMMISSION, et al.,<br><br>Respondents. | Supreme Court Case No. CV-25-0134-PR<br><br>Court of Appeals Division One No. 1 CA-SA 25-0016<br><br>ACC Docket No. S-21301A-24-0076<br><br>ALJ Yvette Kinsey |

# AMICUS BRIEF OF AMICI CURIAE PROFESSOR ILAN WURMAN AND RONALD A. SIMMS ON BEHALF OF PETITIONERS

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Ilan Wurman is the Julius E. Davis Professor of Law at the University of Minnesota Law School. He was previously associate professor of law at the Sandra Day O'Connor College of Law at Arizona State University. He teaches administrative law and is the author of the casebook Administrative Law Theory and Fundamentals: An Integrated Approach (Foundation Press, 3d. ed. 2025). He is the author of numerous law review articles on administrative law, including articles on judicial power and public and private rights. Professor Wurman is interested in the sound development of administrative law. Ronald A. Simms is an individual with a case pending before this Court regarding statutory amendments relating to judicial review of agency action. He is interested in establishing the baseline constitutional right of de novo decision or review by judicial courts (and, where applicable, juries). No party participated in the drafting or financing of this brief.

## Introduction

The question in this case is whether a general provision of the State Constitution relating to the Arizona Corporation Commission (ACC)'s power to issue fines implicitly abrogates the State Constitution's right to trial by jury in cases where that right would otherwise apply. This brief

makes three interventions on behalf of petitioners. First, it explains that, whether a jury trial is required or not, a judicial court is required where the matter involves private rights as opposed to public rights. A jury trial is then further required if the remedy is legal in nature (as it is here).

Second, it argues that the provision empowering the ACC to impose fines can be interpreted consistently with the jury provision if the only consequence of a failure to pay is the loss of a public right or privilege. This is sometimes called the doctrine of unconstitutional conditions. The ACC deals mostly with classic public rights: access to common resources such as electricity and water. It may perhaps impose non-judicial fines if the only consequence is loss of a license to distribute those common resources. 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—as here—then it involves a matter of private right that requires a judicial court and, where appropriate, a jury.

Third, in cases where the jury right would otherwise apply, other constitutional provisions should not be read as implicitly repealing that right. Repeal would be of such consequence that it cannot be left to

implication. According to standard rules of interpretation, such repeal must be stated clearly and unequivocally. Here, the relevant provision of the Constitution relating to ACC's power to impose fines is general and can apply to the matters of public right over which ACC exercises jurisdiction. It does not clearly and unequivocally apply also to matters of private right where a jury trial would normally be required.

## I. A judicial court is required for matters of private right.

### a. The public rights exception to judicial power.

The Arizona Constitution provides, "The judicial power shall be vested in an integrated judicial department consisting of a supreme court, such intermediate appellate courts as may be provided by law, a superior court, such courts inferior to the superior court as may be provided by law, and justice courts." Ariz. Const. art. VI, § 1. And it provides that "[t]he right of trial by jury shall remain inviolate." *Id.* art. II, § 23. These provisions are thus similar to the provisions of the U.S. Constitution providing that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1, and that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved," *id.* amend. VII.

The judicial power provisions require that in adjudicating disputes under existing law, courts (or juries) must decide all relevant questions of law and of fact. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that, in " particular cases," "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *United States v. Irving*, 42 U.S. (1 How.) 250, 260-63 (1843) (the government's statement of accounts is not "conclusive" and "[t]he jury will determine what effect is shall have").

As numerous scholars have demonstrated, the core of the judicial power is to establish the scope of a subject's rights to life, liberty, and property under existing law, and lawfully to divest subjects of these rights. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007); William Baude, *Adjudication Outside Article II*, 133 HARV. L. REV. 1511 (2020); *see also, e.g.*, *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70 (1982) ("Private-rights disputes . . . lie at the core of the historically recognized judicial power."); *id.* at 90 (Rehnquist, J., concurring in the judgment) (noting that "the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" are within the core of the judicial power). "Private rights" are rights

that persons would have had in the state of nature, as modified by the civil law, such as the rights to life, liberty, and to acquire and possess property, as well as fundamental positive rights (like trial by jury and due process of law) created to protect and secure private rights. *See* Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 90-91 (2017). When a dispute involves a subject's "private" rights, whether in a case between two private citizens or between the citizen and the government, the definitive resolution of such matters rests exclusively with the judicial power. Such matters can never be resolved by the executive branch (or by the legislature).

When a citizen is seeking something *from* the government, however—such as a welfare benefit, a patent, or a public land grant—the matter involves not private rights that existed in the state of nature, but rather "public rights," which belong to the public as a whole or are entitlements private individuals can claim from the public. The classic examples of public rights are rights of way, such as public roads and waterways, and public privileges like welfare benefits, public employment, and land grants. Nelson, *Adjudication in the Political Branches*, 107 COLUM.

L. REV. at 565-68; Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1020-21 (2006).

As a historical matter, public rights did not have to be determined by a court at all. As the U.S. Supreme Court explained, although Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," there are other matters "involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee v. Hoboken Land & Imp. Co.*, 59 U.S. 272, 284 (1856).

No court was necessary because, at a minimum, sovereign immunity would have barred suits in which a citizen was wrongfully denied a claim for public benefits. *See* Ilan Wurman, *Nonexclusive Functions and Separation of Powers Law*, 107 MINN. L. REV. 735, 764-68 (2022); *N. Pipeline*, 458 U.S. at 67 ("This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued."). If such

matters need not be determined by a court at all, then the legislature can authorize limited judicial review, including deferential judicial review.

Additionally, the resolution of public rights fits comfortably within the definition of executive or even legislative power. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1246 (1994) ("Much adjudicative activity by executive officials—such as granting or denying benefits under entitlement statutes—is *execution* of the laws by any rational standard, though it also fits comfortably within the concept of the judicial power if conducted by judicial officers."). As Justice Clarence Thomas has explained, some public rights can be resolved by any of the three branches exercising its respective power:

> The allocation of powers in the Constitution is absolute, but it does not follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. Resolution of claims against the Government is the classic example. At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. Or Congress may resolve the claims itself, legislating by special Act.

*Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring).

Private rights, however, are different. Divesting persons of their rights to life, liberty, and property is the core of the judicial power; it is the kind of thing that *only* courts vested with the "judicial power" can do, at least as a historical matter. *See* Wurman, *Nonexclusive Functions*, 107 MINN. L. REV. at 760; *see also* discussion *supra* p. 4. On the other hand, "public rights" may be adjudicated "exclusively" by Congress or the executive branch. *SEC v. Jarkesy*, 603 U.S. 109, 128 (2024); *Stern v. Marshall*, 564 U.S. 462, 493 (2011); *N. Pipeline*, 458 U.S. at 68.

The present case involves private, not public, rights. It involves civil money penalties, which deprive the individual of *private property*. The money belongs to *petitioners*. They even earned that money through private employment that in no way depended on government. There is simply no plausible way to describe someone's own, hard-earned money as a public privilege or a public right.

The money penalty alone makes this a matter of private rights. But the underlying claims are also unquestionably on the "private" side of the ledger. As the U.S. Supreme Court recently held, an enforcement action for violating the securities laws was a matter of private right because Congress had "created claims whose causes of action are modeled on

common law fraud and that provide a type of remedy available only in law courts." *Jarkesy*, 603 U.S. at 135-36. "Even when an action 'originate[s] in a newly fashioned regulatory scheme,' what matters is the substance of the action, not where Congress has assigned it." *Id.* at 134 (citation omitted). If the statutory offense "target[s] the same basic conduct as [the] common law…, employ[s] the same terms of art, and operate[s] pursuant to similar legal principles," then the public rights exception is inapplicable. *Id.* The cause of action need not be identical but must merely "trace[] [its] ancestry to the common law." *Id.* at 137.

Just as in *Jarkesy*, which also involved securities violations, the cause of action here traces its ancestry to the common law, and the remedy sought is a classic legal remedy involving private rights. Thus, a judicial court is required to resolve it.

**b. Jury trials are required where the remedy is legal.**

Once it is determined that a judicial court is required, a jury trial does not always follow. Historically, juries did not apply in admiralty or equity. Courts must therefore "examine both the nature of the action and of the remedy sought." *Tull v. United States*, 481 U.S. 412, 417 (1987). At the federal level, this requires courts to "compare the statutory action to

18th-century actions brought in the courts of England prior to the merger of the courts of law and equity," and to determine whether the remedy "is legal or equitable in nature." *Id.* at 417-18. The nature of the remedy is more consequential: "the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of action." *Id.* at 421 (quoting *Curtis v. Loether*, 415 U.S. 189, 196 (1974)).

In *Tull*, the Court concluded: "A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity." *Id.* at 422. The agency had sought a several-million-dollar penalty for violations of the Clean Water Act; the Court held a jury was required.

More recently in *Jarkesy*, the Court held that a $300,000 monetary penalty for violation of the securities laws required a jury. The Court found the remedy "all but dispositive" because the SEC sought "civil penalties, a form of monetary relief," which is a "prototypical common law remedy." 603 U.S. at 123. Because the monetary penalty was "designed to punish or deter the wrongdoer" rather than to "restore the status quo,"

it was legal rather than equitable. *Id.* The Court observed that several of the statutory factors governing monetary penalties "concern[ed] culpability, deterrence, and recidivism." *Id.* at 123-24.

As noted, the Court also looks to the origins of the cause of action. Here the cause of action is rooted in common-law fraud.

## II. Fines may be imposed without juries or courts if the only consequence is loss of a public right or privilege.

In a series of turn-of-the-century cases—just prior to the adoption of this State's constitution—the Supreme Court upheld the imposition of small regulatory fines without judicial courts and without juries, notwithstanding the apparent requirements of the respective constitutional provisions. The only consequence for failure to pay the fines, however, was loss of a public privilege. In other words, the payment of fines without a jury was a "condition" on the receipt of a public benefit. To the extent the ACC's authority in the State Constitution drew inspiration from these cases, that authority should be limited to the same context: conditions on public rights.

Such conditions are governed by what has been called the doctrine of unconstitutional conditions. The doctrine arises when the government offers a benefit that it is "permitted but not compelled to provide"—such

as direct subsidies, other welfare benefits, or public employment, for example—on condition that the recipient perform or forgo an activity over which he has free choice and which "a preferred constitutional right normally protects from government interference." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1421-27 (1989).

In other words, the greater power to deny a public right or privilege for a good reason includes a lesser power to grant it on a condition that advances that same purpose, including a condition that the recipient forgo a constitutional right. The test for what conditions are appropriate is "germaneness" and "coerciveness." In the federalism context, the Court has explained that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *S. Dakota v. Dole*, 483 U.S. 203, 207 (1987) (citation omitted). The Court described this condition as "germaneness." *Id.* at 208 & n.3. And the condition must not be unduly coercive; it must leave the recipient with a genuine choice whether to accept or refuse. *Id.* at 211; *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 581 (2012).

The unconstitutional conditions doctrine has featured in many individual rights cases. For example, the government can condition public

employment—a public privilege—on employees' forgoing First Amendment rights to engage in partisan political activity. *United Public Workers v. Mitchell*, 330 U.S. 75 (1947); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17 (1973); 5 U.S.C. §§ 7321–7326. In this context, the Court upheld conditions on the ground that efficiency, integrity, and neutrality among government servants was an important and legitimate "purpose" of legislation relating to such employment. *Ex parte Curtis*, 106 U.S. 371, 373 (1882); *Mitchell*, 330 U.S. at 97-98. That is, such restrictions were germane to the public benefit.

Congress can also condition the receipt of welfare benefits on recipients' forgoing Fourth Amendment rights—specifically on their agreeing to welfare searches of their homes. *Wyman v. James*, 400 U.S. 309, 317-18 (1971). In this context, the Court has explained that the state has an "appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman*, 400 U.S. at 319. Home visits are also central to the "service" and "rehabilitative" orientation of the program. *Id.* at 320. Again, these conditions are germane to the public benefit. Crucially, in both the public employment and welfare

context, the *only* consequence of refusing the condition was loss of the public employment or welfare benefits. *See, e.g.*, *id.* at 325 ("The only consequence of [a] refusal is that the payment of benefits ceases.").[1]

This doctrine explains the few cases in which the U.S. Supreme Court has upheld small monetary penalties in administrative enforcement schemes. In *Passavant v. United States*, 148 U.S. 214 (1893), the Court upheld the contemporaneous imposition of non-judicial penalties on importers who did not accurately describe the value of their goods. Importation of goods (and foreign commerce) had always been understood to be a public right. *Jarkesy*, 603 U.S. at 129 (citing cases).

In *Passavant*, the penalty was germane: the Court explained that the government's tariff legislation provided "for a speedy and equitable adjustment" of the value, and if judicial review were available then "the prompt and regular collection of the government's revenues would be

[1] Importantly, the doctrine is disfavored. Although the government can impose conditions that trench on constitutional rights if germane to a public benefit or privilege, it has generally become disfavored to burden constitutional rights in this manner. Thus the Court has often said that the rule is the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interest." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). Yet the Court routinely approves precisely such conditions—so long as they are germane and not coercive. The conditions must, however, be examined rigorously.

seriously obstructed and interfered with." 148 U.S. at 220. More importantly, the only consequence of failure to pay was the loss of the right to import the goods. *Id.* at 222. In a much earlier case, Justice Joseph Story upheld precisely such penalties on the ground that Congress could determine "the condition upon which alone the importation of goods should be allowed." *Tappan v. United States*, 23 F. Cas. 690, 691 (C.C.D. Mass. 1822) (Story, J.). Forgoing a judicial court and jury was germane to the public right and the only consequence of a failure to pay was loss of the public right.

In *Oceanic Steam Navigation Company v. Stranahan*, the Supreme Court addressed the constitutionality of a money penalty imposed for bringing in aliens with "loathsome" or contagious diseases that could have been detected at the port of departure. 214 U.S. 320, 330 (1909). The determination of the customs and immigration officials at the port of entry was conclusive. *Id.* at 333. Critically, however, the only consequence for failing to pay the penalty was the loss of the public privilege: no clearance papers would be given to any vessel from the company while the fines remained unpaid. *Id.* at 332. As Professor John Harrison has explained, "clearance was a privilege, not a right," and therefore Congress

"could create a form of executive adjudication by conditioning a benefit on compliance with the result of the adjudication." John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 183 (2019).

The Court stated: "We think . . . the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement." *Oceanic Steam*, 214 U.S. at 333. And the Court stated later in its opinion that because of the "absolute power of Congress over the right to bring aliens into the United States," it would be "constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and," therefore, "as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease." *Id.* at 342. That is classic germaneness analysis: the greater power to deny for a good reason includes a lesser power to condition for the same reason.

This analysis is relevant here because the ACC deals quintessentially with matters of public right: privileged access to and distribution of natural resources belonging in common to the public as a whole, such

as electricity and water. The constitutional grant of power to impose fines may mean no more than it can impose monetary penalties on private entities as a condition of privileged access to shared public rights, so long as the money penalties are germane and non-coercive. The constitutional grant of power hardly need be interpreted to include the abrogation of trial by jury in matters of private right. It is likely that the drafters of the Arizona Constitution in 1910 and 1912 were familiar with these recent cases—and their grant of power to the ACC should be limited to the same contexts.

In this case, no public right is at issue and the fines would be enforceable entirely independently of whether a public benefit continues or ceases. That makes this a matter of private rights, and the unconstitutional conditions doctrine inapplicable.

## III. Repeal of the jury right should not be left to implication.

That leads to the final point: repeals by implication, particularly of great and important rights, are usually not left to implication. That is a standard rule of interpretation. *See, e.g.*, *United States Forest Service v. Cowpasture River Preservation Ass'n*, 590 U.S. 604, 621 (2020) ("[W]hen Congress wishes to alter the fundamental details of a regulatory scheme

. . . , we would expect it to speak with the requisite clarity to place that intent beyond dispute.") (cleaned up); *Gonzalez v. Oregon*, 546 U.S. 243, 274 (2006) ("[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power.") (cleaned up); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes."); *Jackson v. S.S. Archimedes*, 275 U.S. 463, 470 (1928) ("such a sweeping provision was not specifically made in the statute," and had Congress so intended, "a few words would have stated that intention, not leaving such an important regulation to be gathered from implication") (cleaned up).

James Madison made the very point in an early debate interpreting the scope of the Necessary and Proper Clause: "In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to [be] regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction." 2 ANNALS OF CONG. 1896 (1791) (1834). In the revolutionary era debates, one commentator observed that Great Britain's assertion of authority to impose taxation without representation could not

be sustained "by ambiguous Words, that may be taken either Way, nor by dark Riddles, nor by Explanation made on one Side of the Question only: But such Compact must be plain and easily understood, it being of such vast Consequence." JOHN PHILIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 148 (1986).

There is still much more authority for this proposition. *See generally* Ilan Wurman, *Importance and Interpretive Questions*, 110 VA. L. REV. 909 (2024). As for the importance of the right to trial by jury, that cannot seriously be questioned. Abrogating that right is a great and important prerogative that cannot be left to implication. *See* Ilan Wurman, *The Necessary and Proper Clause and the Law of Administration*, 93 GEO. WASH. L. REV. 1196, 1223-31 (2025) (making this point); *see also* REID, CONSTITUTIONAL HISTORY, *supra* at 47-59, 169-83, 209-17 (emphasizing how the jury and admiralty court grievance fueled the American Revolution).

## Conclusion

The petitioners in this case are entitled to a judicial trial and more specifically to a trial by jury. Their case is one of private, not public, rights. Although the ACC can impose fines without a court or jury where

the consequence of failing to pay is the loss of a public privilege, the fines to be imposed here are for punishment for crime and are enforceable entirely independently of the retention or loss of any public right or privilege. That means the right to trial by jury applies, and any repeal of that right should not be left to implication.

Respectfully submitted,

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