IN THE SUPREME COURT
STATE OF ARIZONA

SYNC TITLE AGENCY, an Arizona limited liability company, Petitioner, v. ARIZONA CORPORATION COMMISSION, Respondent.	Supreme Court No. CV-25-0148-PR Court of Appeals, Division One No. 1 CA-CV 23-0606 Maricopa County Superior Court No. LC2022-00275-001 The Honorable Joseph Mikitish ACC Docket No. S-21311A-20-0345 ALJ Yvette Kinsey

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

FILED WITH CONSENT OF ALL PARTIES

Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

Attorneys for Amicus Curiae Goldwater Institute

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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 *EFG America, LLC v. Arizona Corp. Comm'n* (No. CV-25-0134-PR), which raises identical issues.

INTRODUCTION

Amicus Goldwater Institute (GI) urges the Court to grant review both in this case and the parallel case of *EFG America LLC v. Arizona Corporation Commission*, No. CV-25-0134, for consolidated review.

GI's brief in support of the *EFG* petition explored the reasons why the lower court erred in holding that the defendant in a fraud case is not constitutionally guaranteed a jury trial. Because the Court of Appeals here simply endorsed the *EFG* holding (see Opinion ¶ 23), GI refers the Court to the brief it filed in support of the *EFG* petition, and will add here only a few additional observations regarding why the Court should review both.

ARGUMENT

I. The Court of Appeals misapplied basic rules of interpretation.

A. The court erred by presuming against the existence of the jury trial right.

The petition points to a strange aspect of the Court of Appeals' reasoning in Paragraph 12 of *EFG Am., LLC v. Arizona Corp. Comm'n*, 569 P.3d 806, 810 ¶ 12 (Ariz. App. 2025), in which that 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." That got the analysis entirely backwards.

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

[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 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).

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, 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 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 *EFG* court 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), *aff'd*, 218 U.S. 289 (1910), such as the jury right.

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

The *EFG* 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. 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 *EFG* 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 to begin with. And without a "list," there can be no "omissions" from which to draw inferences. For example, the court cited Article XVIII, Section 5 as an instance when the framers required a jury trial. But that clause only says that 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., LLC*, 569 P.3d at 809 ¶ 12. This means the court didn't even identify a "list" from which things could be "omitted" in the first place—and therefore failed to establish the precondition for an *exclusio alterius* inference, let alone establish that purported "omissions" from the purported "list" were intentional.

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

EFG therefore erred both in shifting the burden of proof onto the wrong side 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 there's another, more basic flaw in the 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." 569 P.3d at 810 ¶ 12. But they *did* say so. They used the word "inviolate." That word means "not

disturbed or limited,"[2] "freedom from hurt, harm, defilement, profanation, or such other idea connoting partial destruction or substantial impairment,"[3] "unhurt, uninjured, unpolluted, unbroken … not corrupted, immaculate, unhurt, 'untouched'… [not] impair[ed], abridge[ed], or in any degree restrict[ed]."[4] "Inviolate" is an exceptionally strong word. Article II, Section 23, represents its only occurrence 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. "Involate" is as absolute as it gets. It "connotes deserving of the highest protection," and for that to be accomplished means "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*, 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.

[2] *Rolfs v. Shallcross*, 1 P. 523, 526 (Kan. 1883).
[3] *State v. De Lorenzo*, 79 A. 839, 840 (N.J. 1911) (citation omitted).
[4] *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 114 (1848).

Article XV, Section 6, lets the Legislature "prescribe rules and regulations to govern [Commission] proceedings." Nothing in this language implies any exception to the jury trial requirement. Indeed, since the Legislature is bound by that requirement when it prescribes rules or regulations, this section implicitly *requires* the Legislature to preserve that right when prescribing rules 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 even implies, let alone clearly exempts, the Commission from the jury trial right.

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*, 23 Ariz. 105, 114 (1921), that "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 *EFG* 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 *EFG* 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.

As noted in GI's brief supporting the Petition in *EFG,* the framers gave the Commission power to set rates for railroads and other 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 Sync Title and its principals weren't charged with that, or with *currently* violating any law. They were charged *retrospectively*, for having violated 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. The Commission's July 27, 2022, Opinion and Order also makes no mention of contempt or of any Commission order of which Sync Title and its principals showed contempt. It just says Sync Title violated these statutes.

In other words, this is a garden-variety prosecution of a common-law crime, not a contempt for violating any 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 trial 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 re-label any common law crime as an administrative offense and prosecute it as "contempt."

But *Derendal, supra*, 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 is entitled to a jury trial. 209 Ariz. at 419 ¶ 10. And "antecedence" does *not* require literal synonymity: "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. In doing so, it reflects 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.[5]

Remarkably, even though the Commission agreed that *Derendal* should govern this case, neither the court below nor the *EFG* court applied that test. That alone warrants review.

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 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.").[6]

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[5] The Commission has tried differentiating Section 44-1991 fraud from fraud in general by saying the statute provides for 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*, 168 P. 635, 637 (Ariz. 1917).

[6] *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.").

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."). The logic of *Sonner* 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 two must be resolved 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, however, since the Commission isn't seeking merely to enjoin Sync Title, and Sync 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 trial 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.

CONCLUSION

The petitions in this case and *EFG* should be *granted*, and consolidated.

Respectfully submitted August 6, 2025 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE