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-25-0134-PR Court of Appeals, Division One No. 1 CA-SA 25-0016 ACC Docket No. S-21301A-24-0076 Administrative Law Judge: Yvette Kinsey

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONERS

FILED WITH CONSENT OF ALL PARTIES

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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); *State v. Mixton*, 250 Ariz. 282, 291 ¶ 35 (2021). 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 Agency, LLC v. Arizona Corp. Comm'n* (No. CV-25-0148-PR), which raises identical issues.

INTRODUCTION

Whether administrative agencies can evade the Constitution's "inviolate" guarantee of the right to a jury trial (Ariz. Const. art. II § 23) by bringing charges in an administrative proceeding instead of a courtroom is a critical constitutional question—one that warrants this Court's review. As explained below, the Court of Appeals' decision misconstrues the Constitution and grants agencies the power to bypass one of the most important of our constitutional rights. Amicus GI therefore urges the Court to grant review both in this case and in *Sync Title Agency v.*

Arizona Corporation Commission (Case No. CV-25-0148-PR), which raises the same issue, and consolidate them.

ARGUMENT

I. The Arizona Constitution preserves the jury trial right for the types of claims and offenses that would have been triable to a jury at statehood.

The Constitution's pledge that "the right of trial by jury shall remain inviolate" guarantees the right to a jury "as it existed … at the time when the Constitution was adopted." *State v. Strasburg*, 110 P. 1020, 1022 (Wash. 1910); *accord, Derendal v. Griffith*, 209 Ariz. 416, 419 ¶ 9 & n.2 (2005). The question, therefore, is whether the kind of juryless administrative proceeding at issue here was contemplated by the Constitution in 1910-12. The answer is no.

Nothing resembling today's administrative hearing system existed when our Constitution was adopted. The closest analogue was rate-setting by administrative agencies—which was the primary reason the Corporation Commission was established.[1] Rate-setting, however, is entirely different from the garden-variety fraud case presented here. The theory behind rate-setting was that an agency like the Commission could establish a price for a service, and anyone who charged more would fall within the Commission's contempt powers. Because contempt was considered an equitable matter, the violator wasn't entitled to a jury. *See*

[1] *See* Ralls, *Arizona Corporation Commission: Fourth Branch of Government*, Ariz. Atty. (Nov. 2012).

Pioneer Tel. & Tel. Co. v. State, 138 P. 1033, 1036 ¶¶ 19, 23 (Okla. 1914); *Vogel v. Corp. Comm'n of Okla.*, 121 P.2d 586, 588–90 (Okla. 1942). But a regulated entity still had options: it could appeal the rate when promulgated, petition for an exception, or seek an injunction against the enforcement of that rate. *Pioneer Tel. & Tel. Co.*, 138 P. at 1036 ¶ 19.

None of that bears any resemblance to this case, which isn't a rate-setting case, but an "in-house" prosecution of an ordinary common law crime. And administrative adjudication of such matters was simply unheard-of at the time of statehood. In fact, even in cases that by today's standards would appear obviously "administrative" in nature, courts in the early twentieth century would typically empanel juries to review an agency's findings to avoid intruding on the realm of the jury. *See, e.g., Penn Refin. Co. v. W. N.Y. & Penn. R.R. Co.*, 208 U.S. 208, 219 (1908).

Not until decades later, in cases such as *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442 (1977), did the U.S. Supreme Court fashion a theory of administrative enforcement for situations that mimic common-law trials—a theory that "arguably fail[s] the historical test and certainly contradict[s] the legislative history behind the Seventh Amendment's enactment." Gibbons, *Why Judicial Deference to Administrative Fact-Finding Is Unconstitutional*, 2016 B.Y.U. L. Rev. 1485, 1499 (2016).

Arizona courts have never expressly adopted *Atlas Roofing*,[2] nor should they. The wording of our jury clause differs from the wording of the Seventh Amendment—which is alone sufficient reason not to employ parrot jurisprudence. *State v. Gunwall*, 720 P.2d 808, 812 (Wash. 1986). And the history reveals that Arizona's framers were particularly concerned with preserving the jury trial right against innovations.

That history begins in the mid-nineteenth century, when western territories and states experimented with changes to the longstanding unanimity requirement for jury verdicts. *See* Bakken, *Rocky Mountain Constitution Making, 1850-1912* at 25–28 (1987); Phillips, *Modification of the Jury System*, 16 Green Bag 514 (1904); Lindsey, *The Unanimity of Jury Verdicts*, 5 Va. L. Reg. 133 (1899). The first to do this was Nevada, where many people thought the unanimity requirement paralyzed justice rather than facilitating it. Its 1864 constitution allowed the waiver of a jury trial and non-unanimous verdicts in civil trials. Nev. Const. art. I § 3. The reason was that much litigation in the west centered on mining (property claims, personal injury suits, etc.), and many people thought the unanimity requirement rendered

[2] The only Arizona case to cite it is *Highway Prods. Co. v. Occupational Safety & Health Rev. Bd.*, 133 Ariz. 54, 58 (App. 1982), which held that the regulated party waived the right to a hearing by failing to request one in time, and that this did not offend due process. The court went on to say in dicta that "the constitutional rights of a criminal defendant have nothing to do with proceedings before administrative agencies which may result in the imposition of civil penalties," *id.* at 57—which isn't true. *See, e.g., Korangy v. FDA*, 498 F.3d 272, 277 (4th Cir. 2007).

the judicial system inefficient, because a single holdout could cause an expensive and frustrating mistrial. Nevada's framers hoped that allowing less-than-unanimous verdicts would cure this problem. *See* *Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada* 53–54 (1866).

Other western states soon adopted the reform, including California in 1879, Idaho in 1889, and Utah in 1895. *See* Lindsey, *supra* at 390. Some constitutions also allowed non-unanimous jury verdicts in non-felony *criminal* cases, too. Montana's 1889 Constitution did so,[3] and in 1890, Minnesotans amended their Constitution to allow this to a limited extent.[4]

Many Territorial Arizonans shared these qualms about juries. *See, e.g.,* *A Needed Reform*, Arizona Silver Belt (Aug. 10, 1895) at 2 (complaining that "[t]rial by jury is too firmly engrafted on our judicial system ever to hope that it will be abolished and superseded."). In 1891, Arizona Territory allowed non-unanimous verdicts in civil and misdemeanor cases. *See* An Act to Regulate the Trial of Causes Before a Jury (Session Law No. 51, 16th Assemb.).[5] A few months later,

[3] Mont. Const. of 1889 art. III § 23.
[4] Minn. Const. art. I § 4.
[5] This was largely due to labor unrest; because strikers risked contempt liability, for which they could be jailed without a jury trial, politicians and labor leaders complained that laborers were subjected to unconstitutional criminal penalties. *See, e.g.,* *Look Under It*, Ariz. Republican, Oct. 11, 1908 at 4; *Vote $2500 for Defense Mine Leaders*, Ariz. Silver Belt, Jan. 23, 1909 at 1.

the proposed 1891 constitution incorporated this provision. *See* Ariz. Const. of 1891 art. II § 10.

That constitution was not approved, however, and in the years that followed, public opinion shifted back toward preserving the jury right, in Arizona and elsewhere. Prominent lawyer Joseph Choate told the American Bar Association in 1898 that the worldwide controversy sparked by the Zola trial[6] had "led especially those sagacious theorists who have never tired of denouncing trial by jury … to reconsider the matter." Choate, *Trial by Jury*, American Bar Ass'n at 4 (1898). Nobody, Choate said, could "read the account of [that] trial without contrasting it with our own trial by jury, or without the pious utterance from every lip, 'Thank God! I am an American.'" *Id.* at 5.

Another factor reviving concern for the jury right was increasing labor unrest. Since strikes could be enjoined through a court's *equitable* jurisdiction, striking laborers were subject to the contempt power and could thus be jailed without a jury. This led William Jennings Bryan to demand greater jury protections. *See* Lindsey, *supra* at 392; *see also Mr. Bryan's Speech*, Ariz. Republican, Aug. 31, 1906 at 1; *Bryan Replies to Van Cleave on Labor Plank*,

[6] Émile Zola was convicted for libel in France after publishing his attack on the handling of the Dreyfus Affair.

Bisbee Daily Rev., Aug. 7, 1908 at 1; *The Labor Planks of Bryan's Platform*, Ariz. Republican, Aug, 7, 1908 at 1.

In 1894, the Territorial Supreme Court held that western territories were constitutionally forbidden from dispensing with the common-law jury trial right. *Carroll v. Byers*, 4 Ariz. 158 (1894). The U.S. Supreme Court agreed three years later. *See Am. Pub. Co. v. Fisher*, 166 U.S. 464, 467–68 (1897). The following year, that Court held that neither states nor territories could deprive people of life, liberty, or property "except by the joint action of the court and the *unanimous* verdict of a jury of twelve persons," *Thompson v. Utah*, 170 U.S. 343, 351 (1898) (emphasis added). And a year after that, the Territorial Supreme Court held that these precedents allowed the Territory to establish alternatives to a jury trial only where "[the] particular action is [not] a common-law action." *Providence Gold-Min. Co. v. Burke*, 6 Ariz. 323, 329 (1899).

All this shows that when the Constitution's framers began their work in 1910, they had plenty of options to choose from, and instead of diminishing the jury trial right, as had previously been attempted, they chose to preserve and extend it. When it was suggested that less-than-unanimous juries be empowered to convict for crimes, that proposal was rejected in part because it was viewed as violating the U.S. Constitution. *See The Records of the Arizona Constitutional Convention of 1910* at 670–71 (Goff ed. 1991). The framers not only declined to

reduce jury-trial protections, but actually *forbade* such proposals, by mandating unanimous verdicts in criminal cases. *See* Ariz. Const. art. II § 23. They did allow non-unanimous jury verdicts in civil cases and in courts not of record—but otherwise left the jury trial right unaltered.

In fact, they went even further and secured the jury trial right in another provision that demonstrates not only the value they placed on jury trials but also their hostility to what in today's parlance would be called "administrative hearings." Specifically, in Article II Section 17, which relates to eminent domain, they specified that property may not be taken until after compensation has been "ascertained by a jury, unless a jury be waived." They chose this wording because during the nineteenth century, some states employed commissions made up of "experts" to ascertain just compensation in eminent domain cases, instead of juries.

Under that procedure, a governmental entity attempting to exercise eminent domain would appoint commissioners to survey the property and decide on a compensation award, which would be offered to the owner, who could then sue for more if it was inadequate. *See* Monea, *Bulwark of Equality: The Jury in America*, 122 W. Va. L. Rev. 513, 544–47 (2019); Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 188 (1996).

The commissioner system proved extremely unpopular in some states, as railroad construction boomed and land was increasingly taken through eminent domain. Starting with Ohio at its 1850–51 Constitutional Convention, some state constitution-makers abolished the commissioner system because it was perceived as unjust toward property owners. As a delegate at Illinois's 1869–70 convention explained,

> when commissioners are to be appointed … [they] are selected by the railroad corporation itself, or by the agents of the corporation. [Those choosing the commissioners] do not go to the body of the people, but they select three men, after having learned their opinions, their habits, their sympathies and their influence in society, so that they know precisely what their verdict will be … and [they] say "we want these men appointed to assess the damages we have to pay"…. The consequence is that men lose their property … and without remedy, except on appeal; and even then, all the chances are against them, by having the verdict of these commissioners rendered and the court committed against their cause.

2 Debates and Proceedings of the Constitutional Convention of the State of Illinois 1575–76 (1870). Requiring a jury, said an Ohio framer, would "put it out of the power of any corporation to condemn property for their use, through the intervention of two or three commissioners." *1 Reports of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio* 444 (1851).

Note how the same could be said of today's administrative hearings. Commissioners were supposed to be experts, who could objectively assess the

value of property, just as administrative agencies are supposed to be disinterested experts today. But in reality, *jurors* are preferable precisely because they "are laymen who are free to voice disagreement without fear of professional repercussions," whereas "the same is not true for government-appointed commissioners." Su, *What Is Just Compensation?*, 105 Va. L. Rev. 1483, 1533 (2019). The fact that commissioners are so closely connected to the state leads them to "withhold disagreeable information and echo the views of their colleagues," resulting in the "systematic[] misvalu[ation]" of property. *Id.*[7] *See also* Grant, *supra* at 155 ("Unlike judges, jurors are not associated with the government; unlike 'commissioners' or other professional appraisers (as well as judges), jurors share with the private party an interest in the security of property in their local community.").

Distrust of the commissioner system led Ohio, Illinois, and other states to replace it with a jury trial requirement in the years before Arizona statehood. *See* Ill. Const. of 1870 art II § 13; Ohio Const. of 1851 art. XIII § 5; Cal. Const. of 1879 art. I § 14; Wash. Const. art. I § 16. Arizona, of course, followed suit. Ariz. Const. art. II § 17.

[7] Consequently the U.S. Justice Department has for almost a century officially opposed the use of commissioners. *Id*. at 1530.

This shows that by the time the Arizona Constitution was drafted, experiments with the jury trial right had been tried in several states, and the framers had several options to choose from—including the commissioner system—but chose to expand and preserve the jury right instead. They rejected the possibility of less-than-unanimous criminal law verdicts and discarded the commissioner system in which "experts" would render decisions, because they viewed that as unduly biased toward entrenched interests.

II. Neither the contempt nor "public rights" exceptions apply here.

Atlas Roofing's "public rights" theory emerged 65 years *after* our Constitution was ratified, making it anachronistic and an improper lens through which to interpret our Constitution. *Cf. Penick v. State*, 440 So.2d 547, 552 (Miss. 1983) ("The words of our [State] Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution.").

Also, federal "public rights" jurisprudence is infamously underdeveloped and confusing. In *SEC v. Jarkesy*, 603 U.S. 109 (2024),[8] the Supreme Court

[8] *Jarkesy* is instructive, but not binding, because the question here concerns the Arizona Constitution's jury trial right. This Court should apply the state Constitution before considering federal constitutional issues. *Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n*, 160 Ariz. 350, 356 (1989) ("we first consult our constitution.").

acknowledged that it "is an area of frequently arcane distinctions and confusing precedents"—and that the Court "has not definitively explained the distinction between public and private rights," *id.* at 130-31 (cleaned up)—before going on to hold that a person accused of securities fraud is entitled to a jury trial and cannot be tried in an administrative hearing. Thus, even if it were appropriate for Arizona courts to mimic federal court interpretations of a 1787 constitution that's worded entirely differently than our 1910-12 constitution, they should *still* reject the "public rights" theory as poorly reasoned.

What's more, *Jarkesy* made clear that whatever the "public rights" exception means, it doesn't apply to "traditional legal claims," meaning matters that "from [their] nature, [they are] the subject[s] of … suit[s] at the common law." *Id.* at 140 (cleaned up). Obviously, fraud is an archetypical subject for common-law suits.

True, there was a rudimentary form of "public rights" theory when our Constitution was written, but it didn't apply to cases like this. *Burke, supra*, held that no jury was required in a case involving whether land claimants could obtain a federal patent for their mining claims. 6 Ariz. at 329. That was because such a proceeding wasn't a common-law action, given that "[t]he [only] effect of a verdict in favor of the government would prevent either party from proceeding further in the land office in obtaining patent." *Id.* at 332. Because "[n]o execution would issue for the possession of the land, and *no other effect would have been given to*

the judgment than to have cleared away the obstructions which had been placed against the application for patent in the land office," the case wasn't a common-law-type adjudication, so no jury was required. *Id.* (emphasis added).

Obviously, *Burke* bears no resemblance to this case, which (like *Jarkesy*) is an ordinary fraud case dressed up in administrative law clothing. That means the law cannot "draw" into the Commission's "equity jurisdiction" what is actually a legal case, and then try it without a jury. *Westerlund v. Peterson*, 197 N.W. 110, 112 (Minn. 1923). Claims of core private rights hang in the balance in a prosecution of this sort, so it's not a "public rights" case; it's a fraud case well within the traditional boundaries of the jury trial right.

Another way of viewing the "public rights" exception is that government can create new entitlements unknown to the common law, which aren't subject to the jury requirement. That, too, was a familiar concept at the time Arizona became a state. But that, too, has no connection to this case.

In 1912, Illinois's Supreme Court held that its legislature could "creat[e] new rights unknown to the common law and provide for their determination without a jury." *Standidge v. Chicago Rys. Co.*, 98 N.E. 963, 965 (Ill. 1912). That case involved a statute that gave lawyers a lien on damages recovered in lawsuits, to protect them from defaulting clients. The court held that this was a right unknown at common law and, therefore, the defaulting client was not entitled to a

jury trial. Yet, as the Minnesota Supreme Court explained a decade later, while "[*Standidge*] is good law," it does not allow the legislature to "confer equity jurisdiction … in matters in respect to which such jurisdiction did not exist before the adoption of the Constitution, and *draw to it a legal cause of action cognizable exclusively in a law court and triable by jury*, and have both tried by the court without a jury." *Westerlund*, 197 N.W. at 112 (citation modified; emphasis added).

In other words, courts quickly caught on to the risk that the legislature might exploit the "public rights" theory to over-write jury-eligible common law crimes or torts with purportedly "new" (but actually synonymous) statutory offenses. And they did not permit it.

CONCLUSION

The petition should be *granted*, along with the petition in *Sync Title,* and the cases consolidated.

Respectfully submitted August 6, 2025 by:

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