IN THE SUPREME COURT
STATE OF ARIZONA

CELLEBRATION LIFE SCIENCES, INC., a Wyoming Corporation; and ANAND SRIVASTAVA, Petitioners, v. ARIZONA CORPORATION COMMISSION, an agency of the state of Arizona; BRIAN D. SCHNEIDER, in his official capacity as Administrative Law Judge of the Arizona Corporation Commission, Respondents.	Supreme Court No. CV-25-0212-PR Court of Appeals, Division One No. 1 CA-SA 24-0236 ACC Docket No. S-21302A-24-0079 ALJ Brian D. Schneider

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), *Sun City Home Owners Ass'n v. Arizona Corp. Comm'n*, 252 Ariz. 1 (2021). Through its Scharf-Norton Center for Constitutional Litigation, GI has often appeared before this and other courts representing parties or as amicus curiae to defend constitutional rights against bureaucratic overreach, and GI is currently appearing as amicus curiae in support of two other pending petitions for review—in *Sync Title Agency, LLC v. Arizona Corp. Comm'n* (No. CV-25-0148-PR), and *EFG America v. Arizona Corp. Comm'n* (No. CV-25-0134-PR)—which raise the same issues as this one

INTRODUCTION

This petition, like the petitions in *EFG* and *Sync Title*, involves the validity of the Constitution's promise that the right to a jury trial is "inviolate." Ariz. Const. art. II § 23. For the reasons given in amicus Goldwater's briefs in support of those petitions, the Court should grant review in this case also, and consolidate all three for resolution.

Instead of repeating the points it made in those briefs, amicus Goldwater focuses here on the Corporation Commission's argument that because the elements

of statutory securities fraud differ from those of common law fraud, the Constitution's jury trial promise does not apply. Opp. at 12-15. In *Derendal v. Griffith*, 209 Ariz. 416 (2005), this Court rejected the analysis the Commission offers here, and rightly so. It should adhere to the *Derendal* test instead of adopting the New Hampshire Supreme Court's approach, upon which the Commission relies.

ARGUMENT

I. The two types of fraud are "substantially similar."

The Commission argues that common law fraud and statutory securities fraud are not substantially similar, and, consequently, that the constitutional promise of "inviola[bility]" is inapplicable here. Ariz. Const. art. II § 23. That is wrong.

Before applying the legal test for similarity, it is worth recalling that the jury trial right is a fundamental right, *State v. Ward*, 211 Ariz. 158, 162 ¶ 13 (App. 2005), and courts should exert their strength to preserve fundamental rights against dubious statutory interpretations or legal constructions that would rob those rights of their force. *Cf. Lo v. Lee*, 231 Ariz. 531, 534 ¶ 11 (App. 2012); *Madison v. Groseth*, 230 Ariz. 8, 14 ¶ 18 (App. 2012); *State v. Gulbrandson*, 184 Ariz. 46, 64–65 (1995). Indeed, the Constitution itself instructs that "governments … are established to protect and maintain individual rights," and that "[a] frequent

recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." Ariz. Const. Art. 2, §§1, 2. Statutes in derogation of common law rights, such as the jury right, must be strictly construed. *Walker v. City of Scottsdale*, 163 Ariz. 206, 211 (App. 1989).[1]

A year before Arizona statehood, the Illinois Supreme Court applied the strict construction rule and held that the Illinois Constitution, which included a provision almost identical to ours,[2] meant that "[t]he right of trial by jury in respect to matters wherein such right existed at the time the Constitution was adopted cannot be taken away, directly or indirectly, by transferring the jurisdiction to try purely legal cases to a court of chancery, where, according to the usual practice, juries are not demandable as a matter of right." *Turnes v. Brenckle*, 94 N.E. 495, 497 (Ill. 1911).

Simply put, the jury trial is one of those rights that "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-

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[1] *See also State ex rel. Owens v. Brown*, 351 S.E.2d 412, 415 (W.Va. 1986) (where statute interfered with defendant's right of jury summoned from vicinage, it was "in derogation of a defendant's general common law rights and it must be narrowly construed."); *J. Purdy Cope Hotels Co. v. Liverpool & London & Globe Ins. Co.,* 18 Pa. D. & C. 712, 714 (Com. Pl. 1932) (where statute might had the "effect of … depriv[ing] the parties of their right of trial by jury," it was "in derogation of the common law must be strictly construed.").

[2] *See* Ill. Const. of 1870 art. II § 5 ("The right of trial by jury as heretofore enjoyed, shall remain inviolate…").

intentioned, but mistakenly overzealous, executive officers." *Gouled v. United States*, 255 U.S. 298, 304 (1921).

As for the test to apply, *Derendal* made clear that while Article II Section 23 guarantees the jury trial right as it existed at statehood, that does not mean a modern crime or tort must be *exactly identical* to a common-law crime or tort before a jury is required. *Derendal* used broad terms for just that reason, saying that a modern statutory offense need only have "the same character as a common law offense," and need only "share[] substantially similar elements with the common law offense" for the guarantee to apply. 209 Ariz. at 425 ¶ 39.

Thus, *Sulavka v. State*, 223 Ariz. 208 (App. 2009)—a case the Corporation Commission conspicuously ignores in its brief—held that "shoplifting by concealment," an entirely statutory crime not found in the common law, was triable to a jury, because it was substantially similar to the common law crime of larceny. *Id.* at 208-09 ¶ 1, 210–11, ¶ 11. Shoplifting by concealment *was* different from common law larceny, because the former, but not the latter, required the defendant to be in an establishment where the merchandise is displayed for sale, which is not an element of common law larceny. *Id.* at 212 ¶ 16. The former also required that the person hide the item, whereas larceny only requires asportation, not concealment. *Id.* ¶ 17. Nevertheless, both crimes were theft-of-personal-property crimes and were therefore "sufficiently comparable" that the

jury guarantee applied. *Id.* at 211 ¶ 13, 212 ¶ 18. The test doesn't require identity or even synonymity. "The inquiry instead looks more generally to whether the modern statutory offense 'is of the same character,' [or is] 'comparable,' or 'substantially similar' [to] the common law crime." *Id.* at 212 ¶ 15.

Bosworth v. Anagnost, 234 Ariz. 453 (App. 2014), which the Commission also ignores, held that ordinary shoplifting, even if not by concealment, was sufficiently similar to common law larceny to entitle the defendant to a jury trial. Again, there were significant differences between the two crimes: larceny requires a trespassory taking, whereas shoplifting occurs after the defendant enters a premises lawfully. But the court still found that the "the two offenses have substantially similar elements" because they "contain the same two *general elements*." *Id*. at 457 ¶ 11 (emphasis added). That is all the *Derendal* test requires.

Here, the Commission argues that statutory securities fraud and common law fraud differ because the statutory crime "lacks at least six of the nine elements" of the latter. Opp. at 13. Yet the two obviously overlap, to such a degree that the statute uses the word "fraud" in its definition: "It is a fraudulent practice and unlawful for a person … directly or indirectly to … [e]mploy any device, scheme or artifice to defraud" or to "[e]ngage in any transaction … which operates or would operate as a fraud." A.R.S. § 44-1991(A)(1), (3). As this Court noted in *State v. Haas*, 138 Ariz. 413, 418 (1983), "[t]his element is not defined according

to any technical standard." It must therefore be interpreted by reference to the pre-existing common law of fraud. *State v. Bridgeforth*, 156 Ariz. 60, 64 (1988) (where legislature adopted statute codifying common law crime and reused existing legal terms without changing them, "we assume that they intended that they continue to have the same meaning formerly ascribed to them.").

In other words, the fact that a statute defines a crime with different or fewer elements than apply at common law does *not* make the jury right inapplicable. *State v. Kalauli*, 243 Ariz. 521, 525 ¶ 12, 527 ¶ 17 (App. 2018).

Consider the implications of the Commission's argument to the contrary. The Commission contends that because the statute requires the state to prove *less* than it would have to prove at common law, the jury trial right doesn't apply. But that would have a perverse result: the state could substitute new crimes by statute that *reduce* the state's burden of proof, by including fewer elements, and thereby *escape* the jury trial guarantee. It could supersede any common law crime with a purportedly new statutory crime that requires evidence of *fewer* elements—and the defendant would not be entitled to a jury.

To use a simple hypothetical: the Howell Code originally defined burglary as the unlawful entering of "any house whatever, or tent, or vessel, or other water craft," "in the night time" with the intent of committing a felon therein. Howell Code, chap. 10 § 58 (1864). After statehood, this was changed; the 1913 Penal

Code dropped the nighttime requirement, and added offices, warehouses, garages, and railroad cars, among other things. A.R.S. ch. 11 § 459 (1913). By the Commission's logic, statutory burglary would thus be exempt from the jury guarantee.

That might seem like an unusual example, but consider *Kalauli*. The question there was whether "theft of services" is sufficiently similar to common law larceny to entitle a defendant to a jury. The court observed that the legislature had passed an "omnibus" criminal statute that superseded previous common law crimes such as larceny and substituted a new "unitary" crime called "theft," which was unknown at common law. 243 Ariz. at 524 ¶ 8, 525 ¶¶ 10-11. This new "theft" crime lacks the element of asportation, and applies to things such as embezzlement, which was not a common law crime. *Id.* 524 ¶ 9, 525 n.4. Neither, of course, was theft of services.

Nevertheless, the jury trial right applies, because "the character of the crime is the same—stealing property (tangible or intangible) that the person does not have a right to acquire, control, or convert." *Id*. at 525 ¶ 12. Even though the "unified statutory scheme of theft adopted by our legislature" was unknown at common law, it was nevertheless "comparable and substantially similar crime to common-law larceny in that the foundation of both crimes is the unlawful

deprivation of property," *id.* at 527 ¶ 17, with the consequence that the jury trial right applies.

The Court observed that the omnibus theft statute "makes prosecution easier because the State can file charges and proceed to trial on any theory supported by the evidence, without regard to technical distinctions." *Id*. at 526 ¶ 15. Of course, the statute's simplicity would be undermined if the determination of jury eligibility depended on a technical comparison of statutory elements. But, more relevant here, it also creates an incentive for the state to substitute statutory crimes with fewer elements, of which it would be easier to convict people, and simultaneously, strip them of their jury rights. 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 would suggest that in doing so, the state has effectively rendered the jury trial right a matter of legislative grace.

The whole point of the jury system is to protect the innocent and to ensure public confidence in convictions. But a rule of law that would empower the state to eliminate the jury requirement by ipse dixit when it adopts any statute that is less protective of defendants would undermine these purposes.

II. The two types of fraud are "substantially similar."

The Commission bases its argument on the New Hampshire Supreme Court's narrow 3-2 ruling in *Ridlon v. New Hampshire Bureau of Sec. Regulation*, 214 A.3d 1196 (N.H. 2019), which held that the Secretary of State could bring an administrative enforcement proceeding under the state's Uniform Securities Act without having to bring 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," 214 A.3d at 1200, 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 than the common law offense, 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, *Kalauli* rejected just such an idea; that case involved Arizona's "'omnibus' theft

statute," 243 Ariz. at 525 ¶ 10 (citation omitted)—surely comprehensive—but rather than finding that this comprehensiveness justified overriding the jury trial right, the court found that it warranted *preserving* that right.

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

Ridlon also appeared to interpret "equivalency" far more strictly than the *Derendal* test does. *Derendal*, in fact, never uses the word "equivalency." It uses the far more rational "substantially similar" test. The *Ridlon* analysis risks the consequence noted in Section I above: 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*, 234 Ariz. at 457 ¶ 11.

III. Arizonans have a presumptive right to a jury trial.

Finally, the Commission argues against the proposition that Arizonans are presumptively entitled to a jury trial. Opp. at 9. But on the contrary, such a presumption is plainly warranted by the text. The jury clause refers to the right "*remain[ing]* inviolate." Ariz. Const. art. II § 23 (emphasis added). To *remain*, of course, means to persist or stay, which implies that it pre-exists, and will not be changed. This parallels the Constitution's declaration that governments "are established to *protect and maintain* individual rights." *Id.* art. II § 2 (emphasis added). Most significantly, the Constitution declares that its provisions are mandatory unless expressly declared otherwise. *Id.* art. II § 32. That Clause, combined with the word "inviolate" in the jury clause, logically results in a presumption in favor of a jury right.[3]

CONCLUSION

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

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[3] *Derendal*, in fact, observed that federal courts had abandoned a presumption in favor of a jury right—and that Arizona courts have repeatedly refused to go along with that because our Constitution "requires greater protection of the right to trial by jury than does the federal constitution." 209 Ariz. at 419 ¶ 6.

Respectfully submitted October 1, 2025 by:

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Pursuant to Ariz. R. Civ. App. P. 16 and 23(g), I certify that the body of the attached Brief Amicus Curiae of Goldwater Institute in Support of Petitioners appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and is 2,696 words in length, excluding table of contents and table of authorities.

Respectfully submitted this 1st day of October 2025 by:

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The undersigned certifies that on October 1, 2025, she caused the attached Brief Amicus Curiae of Goldwater Institute in Support of Petitioners to be filed via the Court's Electronic Filing System and electronically served a copy to:

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