IN THE COURT OF APPEALS OF THE STATE OF ARIZONA
DIVISION ONE

SYNC TITLE AGENCY, LLC, Appellant, v. ARIZONA CORPORATION COMMISSION, Appellee.	1 CA-CV 23-0606 Maricopa County Superior Court No. LC2022-000275-001 (Hon. Joseph Mikitish) Arizona Corporation Commission No. S-21131A-20-0345 (Filed with consent of the parties and per invitation of Order herein dated August 8, 2024)

BRIEF OF *AMICUS CURIAE* THE NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION IN SUPPORT OF THE APPELLEE, ARIZONA CORPORATION COMMISSION

Daryl Manhart, SBA #005471
Burch & Cracchiolo, P.A.
Firm #00016600
1850 N. Central Ave., Suite 1700
Phoenix, AZ 85004
(602) 234-9908
dmanhart@bcattorneys.com

Dylan White (Of Counsel)
Associate General Counsel
North American Securities Administrators Association, Inc.
750 First Street, NE, Suite 900
Washington, DC 20002
Tel: 202-683-2309
dwhite@nasaa.org

Attorneys for *Amicus Curiae* North American Securities Administrators Association, Inc

TABLE OF CONTENTS

TABLE OF CITATIONS ii

ARGUMENT 3

I. This Court should not import *Jarkesy*'s analysis into Arizona law. 3

A. There are substantial differences between securities antifraud statutes like A.R.S. § 44-1991 and common law fraud. 5

i. Regulatory antifraud claims like those at issue here cover different conduct and require different elements from common law fraud. 6

ii. Regulatory antifraud claims serve different purposes, and provide different remedies, from common law fraud. 10

iii. Securities antifraud statutes are necessary because the common law is inadequate to protect investors and police the securities markets. 12

iv. The substantial differences between statutory securities fraud and common law fraud are directly relevant to this Court's analysis. 16

B. A decision stifling the ACC's administrative enforcement authority would harm investors and undermine the purpose of the Act. 20

II. The non-public offering exemption in the Act must be construed narrowly in order to assure broad investor protection. 24

CONCLUSION 32

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF CITATIONS

Cases

Aaron v. Fromkin, 196 Ariz. 224 (Ct. App. 2000) 8, 9

Aaron v. SEC, 446 U.S. 680 (1980) 9, 12

Andrews v. Blue, 489 F.2d 367 (10th Cir. 1973) 28

APA Excelsior III, L.P. v. Premiere Techs., Inc., No. 03-15552, 2004 WL 6064402 (11th Cir., Sept. 23, 2004) 28

Berko v. SEC, 316 F.2d 137 (2d Cir. 1963) 10

Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) 13

Butler v. Am. Asphalt & Contracting Co., 25 Ariz. App. 26 (1975) 28, 29

Carey v. Soucy, 245 Ariz. 547 (Ct. App. 2018) 19

Derendal v. Griffith, 209 Ariz. 416 (2005) 17, 18

Doran v. Petroleum Mgmt. Corp., 545 F.2d 893 (5th Cir. 1977) 28

FHFA v. HSBC N. Am. Holdings Inc., 988 F. Supp. 2d 363 (S.D.N.Y. 2013) 10

Hill York Corp. v. Am. Int'l Franchises, Inc., 448 F.2d 680 (5th Cir. 1971) 26, 29

Hirsch v. Ariz. Corp. Comm., 237 Ariz. 456 (Ct. App. 2015) 9, 24

Jackson v. Robertson, 90 Ariz. 405 (1962) 24

Kokesh v. SEC, 581 U.S. 455 (2017) 11

Lowery v. Ford Hill Inv. Co., 556 P.2d 1201 (Colo. 1976) 26

Mack v. Dellas, 235 Ariz. 64 (Ct. App. 2014) 17, 18

Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC, 55 F. Supp. 3d 235 (D. Mass. 2014) 10

Merrick v. N.W. Halsey & Co. et al., 242 U.S. 568 (1917) 10

Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co., No. 13-6705, 2014 WL 1673351 (S.D.N.Y., Apr. 28, 2014) 10

People v. Humphreys, 4 Cal. App. 3d 693 (1970)..26

Pinter v. Dahl, 486 U.S. 622 (1988) 27

Ridlon v. N.H. Bur. of Sec. Reg., 214 A.3d 1196 (N.H. 2019) 20

Rose v. Dobras, 128 Ariz. 209 (Ct. App. 1981) 9

SEC v. Blavin, 760 F.2d 706 (6th Cir, 1985)..9

SEC v. Jarkesy, 144 S. Ct. 2117 (2024) .... passim

SEC v. Murphy, 626 F.2d 633 (9th Cir. 1980).. 25, 27, 29

SEC v. Ralston Purina Co.,346 U.S. 119 (1953) 26

SEC v. Sunbeam Goldmines Co., 95 F.2d 699 (9th Cir. 1938) 25

Sell v. Gama, 231 Ariz. 323 (2013)..3, 4

State ex rel. Darwin v. Arnett, 235 Ariz. 239 (Ct. App. 2014)................................18

State v. Agnew, 132 Ariz. 567 (Ct. App. 1982) 8

State v. Shepherd, 989 P.2d 503 (Utah Ct. App. 1999) 26

Trimble v. American Sav. Life Ins. Co., 152 Ariz. 548 (Ct. App. 1986).....................8

Tull v. U.S., 481 U.S. 412 (1987) 17

Wells Fargo Credit Corp. v. Smith, 166 Ariz. 489 (1990)...9

Western Federal Corp. v. Erickson, 739 F.2d 1439 (9th Cir. 1984) 26

Williams v. King, 248 Ariz. 311 (Ct. App. 2020) 18, 19

Statutes

1951 Ariz. Sess. Laws, ch. 18, § 20 4

Ariz. Const. art. II, § 23 17

A.R.S. § 44-1841..24

A.R.S. § 44-1844 .... 2, 25
A.R.S. § 44-1991 .... passim
A.R.S. § 44-2001 11
A.R.S. § 44-2002 11
A.R.S. § 44-2031 22
A.R.S. § 44-2032 .... 11, 19, 22
A.R.S. § 44-2033 24
A.R.S. § 44-2036 .... 11, 19, 22
A.R.S. § 44-2037 22
A.R.S. § 44-2082 11
A.R.S. § 44-2085 11
A.R.S. §§ 44-1871 to 44-1878 24
A.R.S. §§ 44-1891 to 44-1902 24
A.R.S. §§ 44-1961 to 44-1964 11
15 U.S.C. § 77d 2, 25
15 U.S.C. § 77q 6, 7
15 U.S.C. § 78j 6
Jumpstart Our Business Startups Act of 2012,
Pub. L. 112-106, § 201 (Apr. 5, 2012) 25

Regulations

17 C.F.R. § 240.10b-5 .... 6, 7

Other Authorities

2021 NASAA Enforcement Report (Sept. 2021) 23
2022 NASAA Enforcement Report (Sept. 2022) 23

2023 NASAA Enforcement Report (Feb. 2024)... 23, 30

Andrew K. Jennings, *State Securities Enforcement*,
47 B.Y.U L. Rev. 67 (2021).. 21, 22, 23

Billionico Academy AKA Billionico et al., Emergency Cease and Desist Order,
Order No. ENF-24-CDO-1882 (Tex. State Sec. Bd., Apr. 22, 2024)..................22

Columbia Square Wealth Mgmt., LLC et al., Summary Order and Statement of
Charges and Notice of Intent to Enter Order, Order No. S-24-3778-24-TO01
(Wash. Dept. of Fin. Inst., May 31, 2024)..22

Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*,
12 Sedona Conf. J. (2011)..15

Joanna C. Schwartz, *The Cost of Suing Business*,
65 DePaul L. Rev. 655 (2016) 15

Harry Shulman, *Civil Liability and the Securities Act*,
43 Yale L. J. 227, 227 (1933).. 8, 13, 14, 15, 16

Louis Loss and Edward Cowett, *Blue Sky Law*
(Little, Brown and Co., 1958) 6, 7, 8

Mark Totten, *The Enforcers & the Great Recession*,
36 Cardozo L. Rev. 1611 (2015)...20

Miriam H. Baer, *Corporate Compliance's Achilles Heel*,
78 Bus. Law. 791 (2023)...21

NASAA, *Informed Investor Advisory: Affinity Fraud* (Nov. 2019) 30

Roy L. Brooks, *Rule 10b-5 in the Balance: An Analysis of the Supreme Court's
Policy Perspective*, 32 Hastings L. J. 403 (1980) 13, 14

SEC.gov, Private Placements - Rule 506(b), "Section 4(a)(2)" 28

Scott J. Croteau, MassLive.com, *Charles Leif Erickson of Uxbridge ordered to pay
$1.6 million in restitution after pleading guilty to 'Holy Spirit' guided Ponzi
scheme* (June 28, 2016) 30

Sync Title Agency, LLC et al., Docket No. S-21131A-20-0345, Opinion and Order
(Ariz. Corp. Comm., July 27, 2022)..9

Unif. Sec. Act (1956), § 101 .... 6, 7, 10

Other Authorities (Cont'd.)

Unif. Sec. Act (1956), § 204 11

Unif. Sec. Act (1956), § 401 6

Unif. Sec. Act (1956), § 408 ....11, 22

Unif. Sec. Act (2002), § 102 6

Unif. Sec. Act (2002), § 412 11

Unif. Sec. Act (2002), § 501 .... 6, 7, 10

Unif. Sec. Act (2002), § 603 ....11, 22

Unif. Sec. Act (2002), § 604 ....11, 22

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Formed in 1919, the North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and México. NASAA has 68 members, including the securities regulators in all 50 U.S. states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and Guam. The Arizona Corporation Commission (the "ACC"), the Appellee in this proceeding, is a NASAA member.

The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse. NASAA supports its members in carrying out their investor protection and regulatory duties by, *inter alia*, promulgating model rules and statutes, coordinating examination sweeps and multi-state enforcement actions, and commenting on legislative and rulemaking processes. NASAA also offers its legal analyses and policy perspectives to state and federal courts as *amicus curiae* in cases involving the interpretation of state and federal securities laws.

---

[1] This brief is being filed separately from any other *amicus* brief and is appropriate because NASAA has a unique perspective and expertise on the relevant legal issues that will assist the Court in determining the matter before it. No person or entity other than NASAA and its counsel authored this brief, in whole or in any part, and no person or entity other than amicus or its counsel has made a monetary contribution to the preparation and submission of this brief.

NASAA submits this brief to address two issues that are of profound importance to NASAA and its members in their mission to protect investors from fraud and abuse:

> **(1)** the preservation of state securities regulators' legislatively-granted authority to bring administrative actions to enforce the uniquely statutory antifraud provisions in state securities laws, after the recent U.S. Supreme Court decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024); and
>
> **(2)** the proper scope of exemptions from the securities registration requirements, specifically the non-public offering exemption in Arizona Revised Statutes ("A.R.S.") § 44-1844(A)(1) and 15 U.S.C. § 77d(a)(2).

Regarding the first issue, the Court ordered the parties to file supplemental briefs regarding the impact, if any, of *Jarkesy* in this action and to be prepared to discuss at oral argument the extent to which statutory securities fraud is comparable to common law fraud. The U.S. Supreme Court's analysis in *Jarkesy* should not be imported into Arizona law because of the *Jarkesy* majority's failure to appropriately heed the significant differences between securities antifraud statutes and the common law, and how the enforcement procedures available to regulators are necessary to effectively enforcement those statutes. Importing that analysis into state law would undermine Arizona's legislative intent, and investor protection more broadly, by impairing state regulators' ability to enforce the law as authorized under the relevant statutes.

Regarding the second issue, exemptions from the securities registration requirements must be construed narrowly in light of the remedial objectives of such laws to protect the public by ensuring their access to critical information about potential investments. If the Court adopts Sync's vision of the non-public offering exemption under Arizona law, it would undermine the purpose of the registration requirements. While a decision from this Court interpreting Arizona law would not be binding on courts in other states interpreting their own state laws, such a decision could still undermine other states' ability to protect investors because state courts regularly look for guidance in decisions from other states interpreting similar provisions. Therefore, it is exceptionally important that these provisions are interpreted properly, consistent with the purposes of the legislation.

ARGUMENT

I. This Court should not import *Jarkesy*'s analysis into Arizona law.

The Securities Act of Arizona (the "Act") was intended to be "a remedial measure for the protection of the public" and "liberally construed" to effect the legislature's "broad intent to sanction wrongdoing in connection with the purchase and sale of securities." *Sell v. Gama*, 231 Ariz. 323, 325-26, ¶ 8 (2013).[2] Among

[2] The legislature more fulsomely explained its intent to sanction wrongdoing broadly, not limited only to fraud, as follows:

> The intent and purpose of this Act is for the protection of the public, the preservation of fair and equitable business practices, the suppression of

other prophylactic and remedial provisions, the Act establishes broad antifraud protections in connection with the offer, purchase, and sale of securities, A.R.S. § 44-1991, and empowers the ACC to enforce these provisions in administrative proceedings. In *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), the U.S. Supreme Court held that the Seventh Amendment to the U.S. Constitution requires a jury trial when the Securities and Exchange Commission ("SEC") seeks civil penalties for violations of the antifraud provisions of the federal securities laws. However, as the ACC explains in its supplemental brief,[3] *Jarkesy* is not binding on the states, and state courts should instead rely on state law to decide similar questions. In this case, there is "good reason to depart from" the U.S. Supreme Court's view of the antifraud provisions in the federal securities laws. *Sell*, 231 Ariz. at 327, ¶ 18.

This Court should not import the *Jarkesy* court's analysis into Arizona law for two reasons, in addition to those provided by the ACC in its supplemental brief. First, there are substantial differences between statutory securities fraud and common law fraud. Although the *Jarkesy* court failed to appropriately heed these

---

> fraudulent or deceptive practices in the sale or purchase of securities, and the prosecution of persons engaged in fraudulent or deceptive practices in the sale or purchase of securities. This Act shall not be given a narrow or restricted interpretation or construction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

1951 Ariz. Sess. Laws, ch. 18, § 20.

[3] *See* Supplemental Brief of Appellee Arizona Corporation Commission ("ACC Supp. Br."), 3-5 (July 29, 2024).

significant differences,[4] they are directly relevant to the question before *this* Court under existing Arizona case law. Second, a *Jarkesy*-like decision from this Court stifling the ACC's ability to enforce the law as expressly authorized by the legislature would harm investors and undermine the purposes of the Act.

A. **There are substantial differences between securities antifraud statutes like A.R.S. § 44-1991 and common law fraud.**

In *Jarkesy*, the U.S. Supreme Court concluded that the punitive nature of the civil penalties at issue is "all but dispositive" and "effectively decides . . . that a defendant would be entitled to a jury on these claims" *under the Seventh Amendment*. 144 U.S. at 2129, 2130. The majority then declares that conclusion "confirm[ed]" by the historical relationship between statutory securities fraud and common law fraud, *i.e.*, that the latter informs certain aspects of the former. *Id*. at 2130-31. But the majority's dicta belies the substantial differences between these two legal concepts. These differences exist in every significant facet of a regulatory action to enforce the antifraud provisions: covered conduct, elements, regulatory purpose, and remedies. These differences exist because the common law is inadequate to protect investors and police the securities markets. Under existing Arizona case law, these

---

[4] *See* 144 S. Ct. at 2162-63 (Sotomayor, J., dissenting) (discussing the differences between the common law and the federal antifraud provisions).

differences are directly relevant to this Court's analysis, notwithstanding any shared conceptual underpinnings between statutory securities fraud and common law fraud.

i. Regulatory antifraud claims like those at issue here cover different conduct and require different elements from common law fraud.

Modern securities antifraud statutes were crafted with the understanding that "[s]ecurities are intricate merchandise, and the business of trading in them is one in which opportunities for dishonesty are of constant occurrence and ever present." Louis Loss and Edward Cowett, *Blue Sky Law* ("Loss & Cowett"), 3 (Little, Brown and Co., 1958) (internal quotations and citations omitted). In order to combat the myriad forms of dishonesty, deception, and information asymmetry, state and federal legislatures enacted broad antifraud protections. *See*, *e.g.*, A.R.S. § 44-1991; Unif. Sec. Act (1956), § 101, https://bit.ly/3P4WSme; Unif. Sec. Act (2002), § 501, https://bit.ly/46XlFOY; 15 U.S.C. § 77q(a); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.[5] While these statutes share certain conceptual underpinnings with common law fraud, they were designed out of necessity to sweep much more broadly than common law fraud. *See* Unif. Sec. Act (1956), § 401(d) ("'Fraud,' 'deceit,' and 'defraud' are not limited to common-law deceit."); Unif. Sec. Act (2002), § 102(9)

---

[5] Although most states had enacted so-called "blue sky" laws well before Congress enacted the federal securities laws, most modern state antifraud provisions are modeled on the federal provisions.

(same); Loss & Cowett at 251 (noting that clause (2) regarding misrepresentations and omissions "was presumably inserted . . . to emphasize that the fraud aspects of the statute are not limited to common-law deceit and to remove any lingering doubt whether a half-truth is a lie"); *id*. (referencing "the repeated holdings to the [same] effect").

The most readily apparent difference is the scope of conduct that these provisions cover. Like its state and federal counterparts, A.R.S. § 44-1991 applies to "a[ny] person" who acts "in connection with a [securities] transaction" in or from Arizona, not merely the seller of a particular security. A.R.S. § 44-1991(A) follows the same pattern as other like statutes, generally prohibiting:

(1) "any device, scheme or artifice to defraud";

(2) an "untrue statement of material fact, *or omi[ssion] to state any material fact* necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading" (emphasis added); and

(3) conduct "which operates or would operate as a fraud or deceit."

A.R.S. § 44-1991(A). *Accord* Unif. Sec. Act (1956), § 101; Unif. Sec. Act (2002), § 501; 15 U.S.C. § 77q(a); 17 C.F.R. § 240.10b-5.

Clause (2) above differs from the common law by providing an avenue to relief for statements that are technically true but are nonetheless misleading in the

absence of other information.[6] Clause (3) deviates even further from the common law, as it provides a remedy for conduct that "*would operate* as a fraud or deceit," regardless of whether or not any person has actually been defrauded or harmed. (Emphasis added.)[7] Furthermore, while the statutes typically require that the alleged wrongdoing occur "in connection with" an offer, purchase, or sale of securities, *see* A.R.S. § 44-1991(A), the accused does not need to be the offeror, purchaser, or seller, or to cause the offer, purchase, or sale to happen. *See State v. Agnew*, 132 Ariz. 567, 579 (Ct. App. 1982).

State and federal antifraud statutes also differ substantially from common law fraud in the elements that must be proven. As this Court has already recognized regarding A.R.S. § 44-1991, "[t]he legislature made the task of proving securities fraud much simpler than proving common-law fraud." *Aaron v. Fromkin*, 196 Ariz. 224, 227, ¶ 13 (Ct. App. 2000). The legislature did this so thoroughly that most, if not all, of the nine core elements of common law fraud are unnecessary to establish

---

[6] *See* Harry Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227, 242 (1933) (noting that the federal Securities Act of 1933 "requires a picture not simply of the show window, but of the entire store"); Loss & Cowett, *supra*, 251.

[7] *See also Trimble v. American Sav. Life Ins. Co.*, 152 Ariz. 548, 552 (Ct. App. 1986) (quoting A.R.S. §§ 44-1991 and 44-1992, and acknowledging without objection the trial court's finding that life insurer violated both sections through "a sophisticated scheme to defraud [investors] through, among other things, improper accounting practices, financial statements which greatly inflated the company's assets, and the use of stock dividends to project the illusion of growth").

a violation of A.R.S. § 44-1991, depending on which subsection is alleged to have been violated. *See id*.; *Wells Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 494 (1990) (listing the nine elements of common law fraud in Arizona). Like its state and federal counterparts, the Act does not require the ACC to prove scienter, reliance, or loss causation to establish liability for material misrepresentations and omissions, as it did in its enforcement action against Sync. *See, e.g.*, *Sync Title Agency, LLC et al*., Docket No. S-21131A-20-0345, Opinion and Order, 72 (Ariz. Corp. Comm., July 27, 2022) (noting that the ACC Securities Division alleged violations of A.R.S. § 44-1991(A)(2)); *Hirsch v. Ariz. Corp. Comm.*, 237 Ariz. 456, 462, ¶¶ 20-21 (Ct. App. 2015) (holding that loss causation is not required); *Rose v. Dobras*, 128 Ariz. 209, 214 (Ct. App. 1981) (holding that scienter and reliance are not required). Further, as noted above A.R.S. § 44-1991(A)(2) does not require actual falsity, let alone "the speaker's knowledge" or "the hearer's ignorance" of falsity, *see Wells Fargo Credit Corp.*, 166 Ariz. at 494, and A.R.S. § 44-1991(A)(3) does not require that any person has actually been defrauded before the ACC initiates an enforcement action. These fundamental differences from common law fraud are enduring and intentional features of state and federal securities antifraud statutes.[8]

[8] **Federal antifraud statutes:** *See*, *e.g.*, *Aaron v. SEC*, 446 U.S. 680, 696-97 (1980) (noting that 15 U.S.C. § 77q(a)(2) "is devoid of any suggestion whatsoever of a scienter requirement" and holding that there is no such requirement under 15 U.S.C. §§ 77q(a)(2) and (3)); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir, 1985) (holding that

ii. Regulatory antifraud claims serve different purposes, and provide different remedies, from common law fraud.

Finally, securities antifraud statutes differ from common law fraud in that the statutes are enforced primarily by securities regulators, not private individuals or entities. This is significant because changing the nature of the parties fundamentally changes the nature of the action itself; regulatory enforcement actions generally seek to vindicate distinct interests from private suits. Securities fraud not only harms the individuals defrauded; it also undermines the integrity and fairness of the markets themselves, harming all who rely on them. It has long been recognized that the harms addressed by the securities laws are harms inflicted "upon the community," notwithstanding that "[t]he first incidence of any evil from a business or conduct is upon some individual." *Merrick v. N.W. Halsey & Co. et al.*, 242 U.S. 568, 585

SEC is not required to prove loss causation); *Berko v. SEC*, 316 F.2d 137, 143 (2d Cir. 1963) (same, because the "[SEC's] duty is to enforce the remedial and preventive terms of the statute in the public interest, and not merely to police those whose plain violations have already caused loss or injury"). **State antifraud statutes:** *See*, *e.g.*, Unif. Sec. Act (1956), § 101, Official Comment ("This section is substantially . . . modeled upon § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) . . . ."); Unif. Sec. Act (2002), § 501, Official Comment 6 ("The culpability required to be pled or proved under Section 501 is addressed in the relevant enforcement context," including "civil and administrative enforcement actions [by a securities regulator], where no culpability is required to be pled or proven."); *Mass. Mut. Life Ins. Co. v. Residential Funding Co., LLC*, 55 F. Supp. 3d 235, 245 (D. Mass. 2014) (holding that loss causation is not an affirmative defense under the Massachusetts Uniform Securities Act); *FHFA v. HSBC N. Am. Holdings Inc.*, 988 F. Supp. 2d 363, 367-68 (S.D.N.Y. 2013) (same, under the Virginia and District of Columbia securities laws); *Nat'l Credit Union Admin. Bd. v. Morgan Stanley & Co.*, No. 13-6705, 2014 WL 1673351 (S.D.N.Y., Apr. 28, 2014) (same, under the Texas and Illinois securities laws).

(1917). Securities regulators therefore enforce the securities laws not as representatives of harmed investors, but as representatives of the public interest. "The violation for which the remedy is sought is committed against the [government] rather than an aggrieved individual" and "a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Kokesh v. SEC*, 581 U.S. 455, 463 (2017).

This distinction is reflected in the available remedies. While private plaintiffs are generally limited to damages and rescission, *see*, *e.g.*, A.R.S. §§ 44-1991(B), 44-2001, 44-2002, 44-2082, 44-2085, regulators have access to a much wider array of tools from which they can choose the remedies that most effectively protect the public's right to fair, transparent, and orderly markets. The latter includes remedies like industry bars and suspensions, fines, and injunctions against violative conduct. *See*, *e.g.*, A.R.S. §§ 44-1961 to 44-1964, 44-2032, 44-2036. *Accord* Unif. Sec. Act (1956), §§ 204, 408; Unif. Sec. Act (2002), §§ 412, 603, 604.[9] These remedies are exclusively government prerogatives, intended to protect investors and the markets generally by deterring and preventing conduct that has been deemed unacceptable by the government on behalf of the public. Regulators thus have many tools to enforce the law to protect the rights of the public to fair, orderly, and efficient

[9] *See* ACC Supp. Br. at 6-11 for a discussion of the differences between the remedies sought and obtained by the ACC here and those underlying the majority opinion in *Jarkesy*.

markets. The curtailment of these tools could cause significant harm to our markets and leave investors more vulnerable.[10]

iii. Securities antifraud statutes are necessary because the common law is inadequate to protect investors and police the securities markets.

The enduring need for state and federal securities statutes is rooted in the inadequacy of preexisting legal remedies to address the problems that led to their enactment. The U.S. Supreme Court recognized this inadequacy early on, observing that Ohio's original blue sky law was "made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures." *Hall v. Geiger-Jones Co.*, 242 U.S. 539, 550 (1917). That remains true today.

The common law prior to the enactment of the federal securities laws "was not consciously and especially moulded for the flotation of securities," Harry Shulman, *Civil Liability and the Securities Act* (hereinafter cited as "*Civil Liability*"), 43 Yale L. J. 227, 227 (1933), and many common law claims contained shortcomings that left them ineffective in protecting investors and the markets. For instance, the

[10] *See Aaron*, 446 U.S. at 704 (Blackmun, J., concurring in part and dissenting in part) ("If the Commission is denied the ability effectively to nip in the bud the misrepresentations and deceptions that its investigations have revealed, honest investors will be the ones who suffer. Often they may find themselves stripped of their investments through reliance on information that the Commission knew was misleading but lacked the power to stop or contain.")

utility of contract law "was severely limited because recovery was unavailable unless the defendant had breached some express covenant with the plaintiff." Roy L. Brooks, *Rule 10b-5 in the Balance: An Analysis of the Supreme Court's Policy Perspective* (hereinafter cited as "*10b-5 in the Balance*"), 32 Hastings L. J. 403, 406 (1980). Further, the law of warranty, "[t]he greatest adaptation in the shift of risks of purchase away from the buyer," was a poor fit because securities were bought and sold differently from other products. *Civil Liability*, 43 Yale L. J. at 229-30. In cases of fraud, "[t]here is no 'same security minus the defect' with which to make comparison" to determine the plaintiff's loss. *Id.* at 230. The law of rescission was similarly lacking because it could only be invoked against the immediate seller, meaning that "the investor who buys a security in the market, either directly on the strength of representations in a prospectus or circular or at a price in which such representations were obviously factors, cannot invoke this remedy either against his seller or the issuers of the prospectus or circular." *Id*. at 231; *see generally id*. at 231-33.

As a result, plaintiffs were forced to rely on the tort theories of deceit and general fraud, which had developed in the context of a variety of transactions and did not lend themselves to the peculiarities of securities transactions. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 744-45 (1975) ("[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light

years away from the world of commercial transactions to which Rule 10b-5 is applicable."); *Civil Liability*, 43 Yale L. J. at 233-42; *10b-5 in the Balance*, 32 Hastings L. J. at 405-10. These actions were limited in several ways that made it difficult for plaintiffs to recover for securities fraud. In other words, securities laws were needed to allow the government to address circumstances that common law causes of action could not.

For instance, common law causes of action generally did not permit recovery for statements that were unintentionally false, or statements that were technically true, but nonetheless misleading. *See Civil Liability*, 43 Yale L. J. at 233-34, 238; *10b-5 in the Balance*, 32 Hastings L. J. at 406-07 ("In cases of omission, there was no general common law duty to disclose material, nonpublic information" except where there was "some confidential or fiduciary relationship."). Consequently, issuers could easily insulate themselves from liability by couching their statements as being "made on the authority of others and in terms of opinion, belief or prediction," *Civil Liability*, 43 Yale L. J. at 238, without disclosing other information that might change a reasonable person's interpretation of those statements or the weight given to them. Plaintiffs also generally had to prove privity between themselves and the defendant (*i.e.*, a direct buyer-seller relationship) and reliance. *See id.* at 238-39. Plaintiffs who had bought securities on exchanges or in other secondary transactions generally could not prevail in a suit based on false statements

in a prospectus. The privity requirement also meant that buyers generally could not sue third parties who were involved in preparing a false prospectus (such as accountants, lawyers, appraisers, and others) or inactive directors in the company that issued the false statement. *See id*. at 239-40.

Relying on the common law to police the securities markets was also untenable because it required individual investors, who necessarily would have already lost money to some "fly-by-night concern," *Hall*, 242 U.S. at 550, to cover the cost of enforcement. Even in 1933, it was understood that "litigation in America is too expensive" and "[i]f experience is any kind of a teacher, we can confidently expect that most investors will not bring suit." *Civil Liability*, 43 Yale L. J. at 251. Further, well-heeled defendants generally have two built-in advantages over individual investors: first, they typically have far more money than the investors they have harmed and, second, they generally possess most of the relevant documents and information that are essential to the success of the claims brought by those injured investors. *See* Joanna C. Schwartz, *The Cost of Suing Business*, 65 DePaul L. Rev. 655, 672 (2016). As a result of this information asymmetry and their superior resources, leverage, and the size of potential liability, large defendants have an incentive to engage in "tactics of attrition designed to fend off claims by making them too costly to pursue[.]" *See* Elizabeth J. Cabraser & Katherine Lehe, *Uncovering Discovery*, 12 Sedona Conf. J. 1, 4 (2011).

Although, in theory, issuers and sellers "lived under great risks of liability [under the common law] . . . the reality was not so harsh." *Civil Liability*, 43 Yale L. J. at 242. Investors rarely sued, courts "made many allowances for the practices of the time," and liability could be avoided "by omitting mention of a variety of matters and confining circular and prospectus to truthful description of the show window without taking the investor through the store behind it." *Id*. Thus, state and federal legislatures found it necessary to create a framework for government regulation of matters involving securities and investment advice, including broad antifraud protections like A.R.S. § 44-1991.

iv. The substantial differences between statutory securities fraud and common law fraud are directly relevant to this Court's analysis.

Although the *Jarkesy* majority superficially acknowledged that statutory securities fraud and common law fraud are not identical and that statutory claims are indeed broader and more permissive than the common law in terms of the showing required to establish a violation, the majority failed entirely to grapple with the significance of these distinctions. *See* 144 S. Ct. at 2131. However, this Court cannot simply dismiss these substantial differences because they are directly relevant to its analysis of Arizona law.

Under Arizona law, "[t]o determine whether Article 2, Section 23 [of the Arizona Constitution] assures the right to a trial by jury, [Arizona courts] consider

whether a modern [offense] has a common law antecedent" and "a jury-eligible common law offense [is] an antecedent of a modern statutory offense when the modern offense contains elements comparable to those found in the common law offense." *Derendal v. Griffith*, 209 Ariz. 416, 419, ¶ 10 (2005). This is a substantially different analysis from the one applied in federal courts under the Seventh Amendment. *Compare id. with Tull v. U.S.*, 481 U.S. 412, 420-21 (1987) (cautioning that the Seventh Amendment may require "trial by jury in actions unheard of at common law" and noting that "the relief sought is more important than finding a precisely analogous common-law cause of action") (internal quotations and brackets omitted). Arizona courts have repeatedly held, under circumstances similar to those in this case, that statutes lack the necessary connection to preexisting common law claims to implicate the right to a jury trial under the Arizona Constitution. *See* Ariz. Const. art. II, § 23.

In one illustrative case,[11] this Court held that the statutory offense of obstructing a highway or other public thoroughfare does not share substantially similar elements with the common law public nuisance offense of highway obstruction. *Mack v. Dellas*, 235 Ariz. 64, 67-68, ¶¶ 11-12 (Ct. App. 2014). Although the offenses shared certain characteristics and elements, the Court focused

[11] For examples of other illustrative cases, including a memorandum decision issued by this Court, see ACC Supp. Br. at 3-5.

on the lack of a shared *mens rea* and the fact that the statutory offense included a "regulatory aspect" that was not present in the common law offense. *Id*. Applying a similar analysis in another case, the Supreme Court of Arizona held that no jury is required under an Arizona statute prohibiting drag racing. *Derendal*, 209 Ariz. 425, ¶¶ 38-39. Although the statutory offense of reckless driving required a jury because the recklessness element made it comparable to a jury-eligible common law offense, the *Derendal* court recognized that the drag racing statute did not require proof of recklessness. *Id.* at 425, ¶ 39. These decisive considerations are mirrored in the relationship between securities antifraud statutes and common law fraud.

In another case, this Court held that the Arizona Constitution did not require a jury when an Arizona state regulator sued, seeking civil penalties, remediation costs, and other relief based on violations of regulations issued under a statute that did not exist prior to Arizona statehood. *State ex rel. Darwin v. Arnett*, 235 Ariz. 239, 245, ¶ 37 (Ct. App. 2014). Like the Act, the statute at issue expressly authorized the agency to enforce its provisions and collect penalties for violations while saying nothing of a right to a jury trial. *Id*. More recently, this Court considered statutory and common law claims that "both offer paths to recover flood damages." *Williams v. King*, 248 Ariz. 311, 316, ¶ 21 (Ct. App. 2020). This Court found no right to a jury trial for the statutory claim, despite the fact that damages were available. *Id.* at 315-16, ¶¶ 18-24. Like the Act, the statute (and indeed the entire regulatory scheme) at

issue in *Williams* was enacted after statehood "by decades," "was not enacted to codify the common law claims," and "differs in character and proof requirements from the common law tort claim." *Id.* at 316, ¶¶ 20-22. Further mirroring the Act and A.R.S. § 44-1991, this Court also noted that the applicable section of the statute at issue "[wa]s merely a cog in a comprehensive regulatory scheme[.]" *Id*. at 316, ¶ 21.

In yet another case, the Court held that the Arizona Constitution does not require a jury for a garnishment claim under Arizona's Uniform Fraudulent Transfer Act because the claim "is a creature of statute [and is] necessarily governed by the terms of those statutes." *Carey v. Soucy*, 245 Ariz. 547, 551, ¶ 15 (Ct. App. 2018). Regulatory actions to enforce A.R.S. § 44-1991 are likewise "creatures of statute" and "governed by the terms of" the Act. *See*, *e.g.*, A.R.S. §§ 44-2032, 44-2036. Even if the ACC could bring an action under the common law to stop or redress fraud in connection with securities transactions,[12] the contours of that action would be materially different from an action under A.R.S. § 44-1991, as discussed above.

In sum, there are substantial, and intentional, differences between securities antifraud statutes like A.R.S. § 44-1991 and common law fraud, which this Court cannot simply dismiss in its analysis. Instead, the Court should recognize the

---

[12] This assumes the ACC's continued existence and operations in the absence of the Act.

material differences between statutory securities fraud and common law fraud, as well as the different purposes that they serve, and decline to import *Jarkesy*'s analysis into Arizona law.[13]

B. A decision stifling the ACC's administrative enforcement authority would harm investors and undermine the purpose of the Act.

Maintaining investors' trust in the fairness and efficiency of the securities markets is essential to the Nation's economic wellbeing and relies on effective regulation – including enforcement. A decision by this Court preventing the ACC from enforcing the antifraud provisions in administrative proceedings would harm investors by undermining the enforcement scheme that the legislature established in the Act.

State regulators are essential to effective securities enforcement. *See*, *e.g.*, Mark Totten, *The Enforcers & the Great Recession*, 36 Cardozo L. Rev. 1611, 1612 (2015) ("Even after the feds began exercising their powers, the states were a critical force on the front lines and positively shaped the quality of enforcement *in ways not*

[13] This is not untrod ground in state jurisprudence. The Supreme Court of New Hampshire recently held that an administrative enforcement proceeding alleging antifraud violations under the New Hampshire Uniform Securities Act "is not analogous to common law fraud or deceit because it requires proof of significantly different elements and satisfaction of a different standard of proof." *Ridlon v. N.H. Bur. of Sec. Reg.*, 214 A.3d 1196, 1204 (N.H. 2019). Nothing in *Jarkesy* requires changing the *Ridlon* analysis, particularly where, as in Arizona, the New Hampshire test is different from the test applied by federal courts under the Seventh Amendment.

replicated by their federal counterparts.") (emphasis added); Miriam H. Baer, *Corporate Compliance's Achilles Heel*, 78 Bus. Law. 791, 795 (2023) ("Today, [the historical reliance on federal enforcers] is quickly yielding to more local enforcement efforts . . . ."). State regulators typically bring substantially more enforcement actions in the aggregate than the SEC. *See*, *e.g.*, Andrew K. Jennings, *State Securities Enforcement*, 47 B.Y.U L. Rev. 67, 70 (2021). And state regulators' proximity to their citizens makes them "better situated than federal counterparts to detect highly localized frauds and to work directly with the victims of those frauds." *Id.* at 129. As a result, state regulators are vital to protecting investors in cases just like this one, which might otherwise never be pursued by federal enforcers or private plaintiffs. *See id*. at 72 ("Typical local violations include affinity-group, real-estate, and private-placement frauds whose victims might lose $5,000, $50,000, or $500,000," which "are relatively small sums in the scale of the capital markets, but they are significant – potentially life altering – for individuals."), 127-32. Although these kinds of fraud are no less significant to those affected, they might otherwise fall into an "enforcement gap" when there are insufficient investor losses to justify the use of resources by a federal enforcer and there is insufficient economic incentive to attract private attorneys. *Id*. at 127-28.[14]

[14] The latter point could be true because the investor losses, and therefore the resulting damages, are too small. It could also be the case that a private suit is not

In order to empower state regulators to enforce state securities laws efficiently and effectively, state legislatures have almost universally given them latitude to determine the appropriate venue, *i.e.*, administrative or civil. *See*, *e.g.*, A.R.S. §§ 44-2031, 44-2032, 44-2036, 44-2037; Unif. Sec. Act (1956), § 408; Unif. Sec. Act (2002), §§ 603, 604. Just as legislatures created the causes of action necessary to address the nature of securities violations, they also created the procedures necessary to pursue those causes of action effectively.

The administrative forum is an essential tool for state regulators like the ACC to efficiently deter, prevent, and punish regulatory violations and maintain investors' trust in the markets. For instance, the ability to quickly issue an administrative cease and desist order can be a powerful tool in stopping ongoing frauds before more investors are harmed. *See*, *e.g.*, *State Securities Enforcement*, 47 B.Y.U. L. Rev. at 92 n.98 and accompanying text; *Billionico Academy AKA Billionico et al.*, Emergency Cease and Desist Order, Order No. ENF-24-CDO-1882 (Tex. State Sec. Bd., Apr. 22, 2024), https://bit.ly/3X6in99; *Columbia Square Wealth Mgmt., LLC et al.*, Summary Order and Statement of Charges and Notice of Intent to Enter Order, Order No. S-24-3778-24-TO01 (Wash. Dept. of Fin. Inst., May 31, 2024),

feasible because a defendant is insolvent and therefore no amount can be collected, regardless of the damages. *See id.* at 128. In these cases, it is especially important that the wrongdoer's business or investment failure not turn into a get-out-of-jail-free card.

https://bit.ly/3T2fxRq. State regulators routinely use administrative proceedings to protect investors from fraud and other abuses. According to data reported annually by NASAA members, such proceedings consistently make up the vast majority of state enforcement actions taken in a given year. *See* 2023 NASAA Enforcement Report, 3-4 (Feb. 2024), https://bit.ly/3Iitd4P (825 administrative actions out of 1,163 total enforcement actions taken in 2022); 2022 NASAA Enforcement Report, 3 (Sept. 2022), https://bit.ly/47RbtJs (1,284 administrative actions out of 1,661 total enforcement actions taken in 2021); 2021 NASAA Enforcement Report, 3 (Sept. 2021) https://bit.ly/3T5uLVw (1,788 administrative actions out of 2,202 total enforcement actions taken in 2020); *id*. at 14 (table showing similar data for enforcement activity in 2016-2019).

"[F]or each Enron, countless fraudulent oil-and-gas investment contracts are sold, and . . . for each Madoff, there are a hundred Ponzi schemes next door." *State Securities Enforcement*, 47 B.Y.U. L. Rev. at 72. Any decision curtailing the use of expressly-provided administrative enforcement authority would harm investors and legitimate market participants alike by hindering the ability of state regulators to quickly pursue these important cases. Such a decision by this Court would likely force the ACC to pile cases onto the undoubtedly-crowded dockets of superior court judges, resulting in lengthy delays in which fraud continues to go unpunished and unremediated. It would also incentivize wrongdoers, who could more easily avoid

liability in Arizona by keeping the dollar values small and dispersing them quickly, causing immense harm to the integrity of Arizona's securities markets and the businesses that rely on them to raise capital.

This Court can and should avoid that result by recognizing the significant differences between statutory securities fraud and common law fraud, applying the law to those facts consistently with Arizona case law, and declining to import *Jarkesy*'s superficial analysis into Arizona law.

II. The non-public offering exemption in the Act must be construed narrowly in order to assure broad investor protection.

Like other state and federal securities laws, the Act is "a remedial measure that should be liberally construed for the protection of the public." *Hirsch*, 237 Ariz. at 466, ¶ 40. One of the key ways in which securities laws protect the public is by requiring the registration of securities offerings and the attendant disclosure of critical information necessary for investors to make informed investment decisions. *See* A.R.S. §§ 44-1841, 44-1871 to 44-1878, 44-1891 to 44-1902. The Act permits securities to be sold without registration in certain circumstances, but these exemptions must be interpreted and applied in a way that furthers, rather than undermines, the purposes of the Act. Thus, it is well-established that (1) the person claiming an exemption from those requirements has the burden to establish that the exemption applies (A.R.S. § 44-2033) and (2) exemptions must be strictly and narrowly construed against the person claiming them (*e.g.*, *Jackson v. Robertson*, 90

Ariz. 405, 410 n.6 (1962) ("The exempting provisions should be and have been strictly construed."); *SEC v. Murphy*, 626 F.2d 633, 641 (9th Cir. 1980) (same); *SEC v. Sunbeam Goldmines Co.*, 95 F.2d 699, 701 (9th Cir. 1938) (same)). Sync therefore has the obligation to prove that the non-public offering exemption in A.R.S. § 44-1844(A)(1) applies and this Court must construe the exemption narrowly, against Sync's interests and consistent with the remedial objectives of the Act.

Arizona's non-public offering exemption is identical to the equivalent federal exemption. *Compare* A.R.S. § 44-1844(A)(1) *with* 15 U.S.C. § 77d(a)(2).[15] Relying on the plain text of the federal statute, Congress's stated objectives for the legislation, as well as the English and state-law antecedents to the federal securities laws, the U.S. Supreme Court explained the proper interpretive framework for the federal exemption as follows:

> The design of the statute is to protect investors by promoting full disclosure of information thought necessary to informed investment decisions. The natural way to interpret the private offering exemption is in light of the statutory purpose. Since exempt transactions are those as to which 'there is no practical need for * * * (the bill's) application,' the applicability of [the exemption] *should turn on whether the particular class of persons affected need the protection of the Act*. An

---

[15] Subparagraph (b) was added to 15 U.S.C. § 77d as part of the Jumpstart Our Business Startups Act of 2012. *See* Pub. L. 112-106, § 201, 126 Stat. 314-15 (Apr. 5, 2012). Prior references to, *e.g.*, 15 U.S.C. § 77d(2) or "section 4(2)" now refer to subparagraph (a)(2) of the same section.

> offering to those who are shown to be able to fend for themselves is a transaction 'not involving any public offering.'

SEC v. Ralston Purina Co., 346 U.S. 119, 124-25 (1953) (emphasis added, ellipsis and parentheses original). Whether the offerees need the protection that registration provides is not a detour from the question before this Court; it is *the fundamental question* that this Court must decide when determining whether an exemption from the general policy of the securities laws applies. *Cf. State v. Shepherd*, 989 P.2d 503, 508, ¶ 14 (Utah Ct. App. 1999) ("The key inquiry [under the Utah exemption] is whether a potential investor would be in a position to 'have access to the same kind of information that the Act would make available in the form of a registration statement.'"); *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1207 (Colo. 1976) ("The private offering exemption [under Colorado law] was designed principally to permit the issuance of securities in transactions in which the remedial purposes of registration were satisfied by independent factors."); *People v. Humphreys*, 4 Cal. App. 3d 693, 701 (1970) ("It would appear that the offerees, as a class, were the type who needed the protection of the [California] Corporate Securities Law."); *Western Federal Corp. v. Erickson*, 739 F.2d 1439, 1443 (9th Cir. 1984) ("Lack of need [for the protection of the law] exists only if all of the offerees have available the sort of information about the issuer that registration reveals."); *Hill York Corp. v. Am. Int'l*

Franchises, Inc., 448 F.2d 680, 689 (5th Cir. 1971)[16] ("Even an objective testing of these factors without determining whether a more comprehensive and generalized prerequisite has been met, is insufficient."). Put differently, if a claimant's analysis under the four-factor *Murphy* test[17] would result in offerees who need the protections provided by the Act being denied those protections, the claimant's analysis cannot be correct.

The parties' briefs outline the relevant four-factor test in *Murphy* that should guide this Court's analysis and demonstrate that the sophistication and relationship/access factors are the most significant points of contention before this Court. To the extent that the *Murphy* test is the appropriate test under the Act, this Court should interpret the relevant factors narrowly, against Sync as the claimant of the exemption and in light of the objectives of the statute.

Although NASAA is aware of no domestic rule defining "sophisticated investor" or similar terms for purposes of the various non-public offering exemptions, the SEC defines sophistication for the purposes of the federal exemption as (1) having knowledge and experience in finance and business matters to evaluate

---

16 Abrogated on other grounds by *Pinter v. Dahl*, 486 U.S. 622 (1988). *See id.* at 649 n.25 (discussing the scope of liability in private claims under 15 U.S.C. § 77*l*, which is comparable to A.R.S. § 44-1998).

17 The four-factor *Murphy* test, *see* 626 F.2d at 645-47, is discussed extensively in the parties' briefs and will not be repeated in its entirety here.

the risks and merits of the investment, or (2) having the financial wherewithal to bear the investment's economic risk. SEC.gov, Private Placements - Rule 506(b), "Section 4(a)(2)," https://bit.ly/3YTPbod (last visited Aug. 28, 2024). The Court should apply these criteria narrowly, with a primary focus on the *actual*, *demonstrated* ability of the offerees to evaluate the risks and merits of the investment in question.

Thus, for example, professional investment firms like hedge funds, venture capital funds, and private equity funds would likely be considered sophisticated investors. *See APA Excelsior III, L.P. v. Premiere Techs., Inc.*, No. 03-15552, 2004 WL 6064402, at *4 (11th Cir., Sept. 23, 2004). So too would a professional stockbroker who holds a corporate leadership position within the company, *Butler v. Am. Asphalt & Contracting Co.*, 25 Ariz. App. 26, 27 (1975), as well as those with specialized degrees relevant to the investment, significant net worth, and significant holdings in similar or related investments, *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 902 (5th Cir. 1977). However, an investor's experience or expertise in one area does not necessarily make that person sophisticated for the purposes of the investment at issue in this case. As applicable here, "sophistication" for the purpose of real estate flipping should not be deemed to show sophistication for the purpose of an equity investment in a startup business. *See*, *e.g.*, *Andrews v. Blue*, 489 F.2d

367, 370-73 (10th Cir. 1973); Answering Brief of Appellee Arizona Corporation Commission ("ACC Answering Br."), 26 (Apr. 8, 2024) (discussing *Andrews*).

Sophistication, however, is meaningless if the offerees do not have access to the critical information required by the Act – or if that information does not yet exist to be disclosed. As explained in *Murphy*, "[a] court may only conclude that the investors do not need the protection of the [Securities] Act [of 1933] if all the offerees have relationships with the issuer affording them access to or disclosure of the sort of information about the issuer that registration reveals." 626 F.2d at 647. *Accord Hill York*, 448 F.2d at 689. The Court should apply this factor narrowly as well and turn to its decision in *Butler*, 25 Ariz. App. 26, for guidance. In that case, the Court found that a professional stockbroker had access to the necessary information because he consulted with the issuer about its financial situation and later assumed the duties of the company's president. *Id*. at 27, 29. Without firmly limiting this factor to those circumstances, the issuer-offeree relationship in *Butler* is a strong example of the kinds of relationships contemplated within the non-public offering exemption.

Sync leans heavily on its characterization of its relationship with the offerees in this case as "personal, close, trusting, and obviously very open to information exchange." Appellants' Opening Brief, 35 (Dec. 28, 2023). NASAA takes no position on the underlying facts of this case but, even if true, Sync's characterization

of the relationship is irrelevant to the remedial purposes of the Act. For example, affinity frauds are a common type of fraud wherein someone preys upon family, friends, neighbors, or members of a shared ethnic, cultural, or religious group. *See, e.g.*, NASAA, *Informed Investor Advisory: Affinity Fraud* (Nov. 2019), https://bit.ly/4fRB5d7; 2023 NASAA Enforcement Report, 4, 7, 13 (reflecting that affinity fraud is one of the most common schemes involved in state enforcement investigations and describing illustrative cases); Scott J. Croteau, MassLive.com, *Charles Leif Erickson of Uxbridge ordered to pay $1.6 million in restitution after pleading guilty to 'Holy Spirit' guided Ponzi scheme* (June 28, 2016), https://bit.ly/4eaRYxZ (Massachusetts man guilty of $3.5 million Ponzi scheme, including victims who were members of the church where he was an elder). It is precisely the "personal," "close," or "trusting" nature of the relationship that, unfortunately, enables the fraud. But while investment by strangers might suggest a public offering, and investment limited exclusively to close friends and family might conversely suggest a non-public offering, the nature of the relationship in those terms can only plausibly take the inquiry so far. The legislature did not include a friends-and-family exemption in the Act and this Court should not read the non-public offering exemption in a way that would turn it into one, thereby severely undermining the objectives of the Act.

Furthermore, even the closest and most trusting relationship serves no purpose under the Act when, as the ACC contends, Sync "failed to prove that some of the required information even existed." ACC Answering Br. at 29 (noting that Sync "never had [or] made available" important information such as certified balance sheets, how invested funds will be used, and compensation to officers). Sync's contention that the exemption "merely requires that the issuer afford access to the underlying information and data of the sort that could be used to create formal registration items," Appellants' Opening Brief, 37 (Dec. 28, 2023) – *e.g.*, certified balance sheets – places far too heavy a burden on the investing public. Surely, the legislature did not intend that the Act would countenance unregistered offerings in which investors are must review raw data, crunch the numbers, and create the very disclosures and information that the Act otherwise requires issuers to provide for investors' benefit.

In sum, the non-public offering exemption in the Act must be construed narrowly in order to assure broad investor protection. The Court's analysis of the *Murphy* test should be focused on whether the particular class of persons affected need the protection of the Act. The Court should reject Sync's effort to expand the non-public offering exemption beyond what can be reconciled with the remedial objectives of the Act.

CONCLUSION

For the foregoing reasons, *amicus curiae* the North American Securities Administrators Association respectfully asks the Court to affirm the Commission's decision finding that Sync committed securities fraud and violated the securities registration requirements of the Act.

Respectfully Submitted August 30, 2024,

Daryl Manhart
Burch & Cracchiolo, P.A.
1850 N. Central Ave., Suite 1700
Phoenix, AZ 85004

Dylan White (Of Counsel)
Associate General Counsel
North American Securities
Administrators Association, Inc.
750 First Street, NE, Suite 900
Washington, DC 20002

By: /s/Daryl Manhart
Daryl Manhart (SBA #005471)
Co-Counsel for *Amicus Curiae* North American Securities Administrators Association, Inc.