# EQUITABLE DEFENSES UNDER ARIZONA SECURITIES LAW

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Nearly all states refuse to read non-statutory, equitable defenses into their securities statutes. Early Arizona blue-sky cases also refused to consider equitable defenses. These state cases contrast with cases under the Securities Exchange Act of 1934, § 10(b), and the Securities Exchange Commission Rules under this section, including 17 C.F.R. § 240.10b-5 ("Rule 10b-5"). Because liability under § 10(b) and Rule 10b-5 is implied, neither the elements of proof nor the defenses are statutorily defined. Consequently, it was left to the courts to judicially define the elements and defenses. On the other hand, express-liability statutes like Ariz. Rev. Stat. § 44-1991(A) and § 44-2001(A) define the elements of proof by their words. These statutes are accompanied by other statutes that provide defenses like the statutes of limitation, reasonable care under § 44-2001(B), and failure to tender. After introducing the treatment of equitable defenses under state securities law, the article analyzes the Arizona Court of Appeals 2014 *Caruthers* decision. *Caruthers* broke with the near-uniform body of modern-state-securities law decisions that decline to recognize equitable defenses to statutory claims.

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## I. INTRODUCTION

State and federal securities laws diverge considerably on the availability of common-law defenses.[1] Because the Rule 10b-5 cause of action was judicially implied, the federal courts were required to create defenses to define the action.[2] They did so by drawing on common-law defenses like waiver, ratification, estoppel, and failure to mitigate.[3]

On the other hand, blue-sky decisions under Arizona's pre-1951 securities laws refused to recognize equitable defenses.[4] These blue-sky decisions are part of what has become a growing

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[1] *See* Legacy Res., Inc. v. Liberty Pioneer Energy Source, Inc., 322 P.3d 683, 693 ¶ 42 (Utah 2013) (discussing the difference); Richard G. Himelrick, *The Importance of Statutory Text: From Scienter to Nonstatutory Defenses under Arizona Securities Law*, 41 ARIZ. ST. L.J. 49, 81-84 (2009) (same).

[2] Compare Royal Air Props., Inc. v. Smith, 312 F.2d 210, 213 (9th Cir. 1962) (reasoning that because liability under Rule 10b-5 was judicially implied, it is appropriate to permit common-law defenses like waiver and estoppel), *with* Louis Loss, *The Assault on Securities Act § 12(2)*, 105 HARV. L. REV. 908, 910 (1992) (explaining that the Rule 10b-5 elements of scienter, reliance, and causation were judicially created).

[3] *See, e.g.*, Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1207-09 (9th Cir. 1970) (upholding findings of estoppel, laches, and waiver in a Rule 10b-5 action); *Royal Air Props., Inc.*, 312 F.2d at 213 (holding that waiver and estoppel are defenses in a Rule 10b-5 action); Van Syckle v. C.L. King & Assocs., Inc., 822 F. Supp. 98, 101-04 (N.D.N.Y. 1993) (recognizing ratification and failure to mitigate as defenses to claims under Rule 10b-5).

[4] *See* United Bank & Trust Co. v. Joyner, 11 P.2d 829, 832 (Ariz. 1932) (rejecting ratification by estoppel and *in pari delicto* defenses to securities-registration violation); Reilly v. Clyne, 234 P. 35, 39-40 (Ariz. 1925) (same); Dale C. LaPorte, *Voidability Provisions Under State Blue Sky Laws*, 17 W. RES. L. REV. 1148, 1162-63 (1966) (describing the Arizona Supreme Court's decision in *United Bank* as representing the majority view under which a contract for the sale of securities that violates a statute's blue-sky law is unenforceable in an action against the investor).

body of state securities law that rejects non-statutory defenses.[5]

These decisions typically reason that reducing investor protection through equitable defenses is inconsistent with the legislature's intent to increase public protection in securities transactions.[6] The cases also commonly note that unlike implied actions under Rule 10b-5, state securities acts include express,

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[5] *See, e.g., Legacy Res., Inc.*, 322 P.3d at 692-93 (holding that violations of a Utah securities statutes requiring registration of brokers are not subject to equitable defenses like waiver, estoppel, and *in pari delicto*); Go2Net, Inc. v. FreeYellow.com, Inc., 143 P.3d 590, 591 (Wash. 2006) (holding that the equitable defenses of waiver and estoppel are not available in an action for violations of the Washington Securities Act's antifraud statute); Duperier v. Tex. State Bank, 28 S.W.3d 740, 753 (Tex. Ct. App. 2000) (holding that common-law ratification is not a defense to statutory-securities fraud under Texas law); Gowdy v. Richter, 314 N.E.2d 549, 557-58 (Ill. App. Ct. 1974) (rejecting estoppel and *in pari delicto* defenses to a registration violation because "[t]he law in Illinois is clear in allowing only statutory, not equitable, defenses to be raised by a defendant in a case involving a blue sky violation."); *cf.* Henderson v. Hayden, Stone Inc., 461 F.2d 1069, 1072-73 (5th Cir. 1972) ((a) rejecting the trial court's conclusion that because the Florida registration "statute made the sale voidable, the court was vested with equitable discretion to deny rescission" and (b) finding that estoppel was inapplicable on the facts); *contra* Logan v. Panuska, 293 N.W.2d 359, 363-64 (Minn. 1980) (holding that equitable estoppel is a defense to a statutory-rescission action based on a registration violation (three judges dissenting). *See generally* 12A JOSEPH C. LONG, BLUE SKY LAW § 9:126 (updated to Nov. 2015) (collecting cases and stating, "there is a substantial body of case law which holds that the equitable defenses have no place when construing statutory claims under the securities acts").

[6] *See, e.g., Go2Net, Inc.*, 143 P.3d at 593 ("[P]ermitting a seller to assert equitable defenses is contrary to the [Washington] Act's primary purpose of protecting investors."); *United Bank,* 11 P.2d at 831-32 (observing that the blue-sky laws are intended to protect the public and rejecting ratification, estoppel, and *in pari delicto* as defenses).

statutory defenses.[7] They therefore reject arguments that the courts are free to read additional defenses into the securities statutes.[8] Anti-waiver statutes—like the one in the Arizona Securities Act[9]—have also been cited as a reason for refusing to recognize equitable defenses.[10] The courts reason that allowing equitable defenses like waiver and estoppel is inconsistent with the statutory ban on waivers.[11]

## II. *CARUTHERS V. UNDERHILL*

In *Caruthers v. Underhill*,[12] a 2014 decision, the Court of Appeals broke with this line of reasoning. *Caruthers* held that equitable defenses are proper when rescissionary relief is sought.[13] It also concluded that when equitable relief is sought for a securities violation, the plaintiff is not entitled to a jury trial.[14]

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[7] *Legacy Res., Inc.*, 322 P.3d at 692-93 (concluding that recognizing equitable defenses was inconsistent with the Utah legislature's listing of specific statutory defenses); *Go2Net, Inc.*, 143 P.3d at 593 ("[B]ecause the [Washington] Act is intended to deter a seller's presale misrepresentations and omissions, a seller should not be permitted to avoid statutory liability by shifting the focus to the post-sale conduct of the uninformed investor.").

[8] *See Legacy Res., Inc.,* 322 P.3d at 692-93; *Go2Net, Inc.*, 143 P.3d at 593.

[9] The Arizona statute, ARIZ. REV. STAT. § 44-2000 (2013), provides, "Any condition, stipulation or provision binding any person acquiring any security to waive compliance with this chapter or chapter 13 of this title or of the rules of the commission is void."

[10] *See Legacy Res., Inc.*, 322 P.3d at 693; *Go2Net, Inc.*, 143 P.3d at 593.

[11] *See Legacy Res., Inc.*, 322 P.3d at 693; *Go2Net, Inc.*, 143 P.3d at 593.

[12] Caruthers v. Underhill, 326 P.3d 268, 277-78 (Ariz. Ct. App. 2014).

[13] *Id.* at 277-78 ¶¶ 38-40.

[14] *Id*. at 275-76 ¶¶ 30-34.

Unlike most securities cases, the plaintiffs in *Caruthers* were sellers.[15] They sold stock in a closely held corporation to one of the company's insiders, a man named Clinton.[16] After the sale, plaintiffs alleged that Clinton had misled them about their stock's value.[17] When Clinton refused to return the stock, plaintiffs sued on fraud theories including securities fraud under § 44-1991(A).[18] Their pleadings requested rescission or, alternatively, damages.[19] During trial, they elected rescission as their remedy.[20]

A central issue on appeal concerned the scope of the plaintiffs' rights on their securities claim. Under the Arizona Securities Act, a defrauded seller may elect to void the sale and sue for damages. The statute reads:

> A purchase or contract for purchase from a seller of securities made in violation of section 44-1842, 44-1991 or 44-1994 is *voidable at the election of the seller* of the securities, *and the seller may bring an action* in a court of competent jurisdiction *to recover the amount of the seller's damages*, with interest, taxable court costs and reasonable attorney fees.[21]

The parties in *Caruthers* disagreed about whether statutory rescission was governed by equitable principles.[22] But both par-

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[15] *Id.* at 270 ¶ 2.
[16] *Id.* at 271 ¶¶ 4-5.
[17] *Id.* at 271 ¶ 4.
[18] *Id.* at 271 ¶ 5.
[19] *Id.*
[20] *Id.* at 271 ¶ 9.
[21] ARIZ. REV. STAT. § 44-2002(A) (2013) (emphasis added).
[22] *See* Appellants' Opening Brief, Caruthers v. Underhill, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2012 WL 6743704, at *26-36 (arguing that

ties assumed that the statute permitted either rescission or damages.[23] The Court of Appeals also reached that conclusion. The court interpreted the statute's use of the word "voidable" to mean, "that the sale is subject to rescission or ratification at the seller's option."[24]

This is one way to interpret the statute, but it is hardly a matter of plain meaning. The substance of what the court did was to imply a rescission remedy from the voidability language—for the statute nowhere expressly provides for rescission.

The federal courts have been more candid when interpreting similar voidability provisions. They have interpreted voidability language in the federal securities laws as *implying* a private right to sue for damages or rescission.[25] But none of the federal cases have suggested that a voidability provision is plain enough to expressly provide for either damages or rescission.[26]

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rescission under § 44-2002(A) is a statutory remedy and that equitable defenses cannot be read into the statute); Answering Brief, Caruthers v. Underhill, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2013 WL 955586, at *38-42 (arguing that rescission under § 44-2002(A) is governed by common-law equitable principles).

[23] *See* briefs cited *supra* note 22.

[24] *Caruthers*, 326 P.3d at 276 ¶ 33.

[25] *See* 9 LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, SECURITIES REGULATION 369-81 (4th ed. 2013) (discussing federal interpretations of the voidability provisions).

[26] *See, e.g.,* Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 18-19 (1979) (concluding that § 215 of the Investment Adviser's Act of 1940, which provides that contracts that violate the Act are void, implies a right to rescind an investment adviser's contract that violates the Act); Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 386-88 (1970) (concluding that § 29(b) of the 1934 Act, which declares a contract that violates the Act void, implies a right to rescind where a materially misleading proxy statement has been used to complete a merger).

If limited to its words, § 44-2002(A) could reasonably have been interpreted to give the seller the option of rejecting the sale and suing for damages but not to provide for rescission. "Voidable" means only that a transaction is "capable of being affirmed or rejected at the option of one of the parties."[27] It is only by implying a remedy that voidability can be expanded to provide for rescission.[28]

The language of similar securities statutes also suggests that § 44-2002(A) was not drafted with rescission in mind. Unlike § 44-2002(A), securities statutes that expressly contemplate rescission require the plaintiff to tender what was received in the transaction. The Arizona Securities Act's statute on buyers' remedies is an example. It allows a defrauded buyer to recover the consideration that was paid but only upon tender of the securities.[29] Similarly, in states that allow a defrauded seller to

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[27] BLACK'S LAW DICTIONARY 1805 (10th ed. 2014); *see Caruthers*, 326 P.3d at 276 (citing BLACK'S LAW DICTIONARY 350 (8th ed. 2004)); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2562 (1969) (defining "voidable" as "capable of being voided; *specif* : capable of being adjudged void, invalid, and of no force ("a ~ contract . . . may be set aside at the option of one party—S. B. Ackerman" (emphasis original)).

[28] *Cf. supra* notes 25-26 and accompanying text.

[29] *See* ARIZ. REV. STAT. § 44-2001(A) (2013) (emphasis added):

> A sale or contract for sale of any securities to any purchaser in violation of § 44-1841 or 44-1842 or article 13 of this chapter is voidable at the election of the purchaser, and the purchaser may bring an action in a court of competent jurisdiction to recover the consideration paid for the securities, . . . *on tender of the securities purchased or the contract made*, or for damages if the purchaser no longer owns the securities.

While tender is mandatory, the courts have been flexible in finding that the plaintiff's tender was sufficient. *See, e.g.,* Grand v. Nacchio, 214 Ariz. 9, 23 ¶¶ 45-46, 147 P.3d 763, 777 ¶¶ 45-46 (Ct. App. 2006) (stating that the

rescind, the statutes are explicit in requiring the plaintiff to tender the consideration received in the sale.[30] Section 44-2002(A), on the other hand, does not mention tender—an omission that suggests the legislature did not contemplate rescission for sellers.

Another hallmark of securities statutes that allow rescission is that they explicitly provide for the recovery of what the plaintiff parted with in the sale. Arizona's statute on buyers' remedies is again on point. It is worded to give the buyer a choice of recovering "the consideration paid" or suing for damages.[31] In addition, in states that allow a seller to obtain rescission, the statutes are clear in stating that the seller may sue for damages or to recover the securities that were sold.[32] By contrast, § 44-2002(A), while explicitly allowing the seller to sue for damages, says nothing about allowing the seller to recover the securities that were sold.

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securities laws should be liberally construed and allowing substitute tender of replacement securities); Rose v. Dobras, 128 Ariz. 209, 214, 624 P.2d 887, 892 (Ct. App. 1981) (holding that tender at commencement of suit was timely); Bullard v. Garvin, 1 Ariz. App. 249, 251, 401 P.2d 417, 419 (1965) (stating that § 44-2001 is to be liberally construed and rejecting the defendants' strict-tender argument).

[30] *See, e.g.,* MICH. COMP. LAWS ANN. § 451.2509(3)(a) (2009) ("*The seller may maintain an action to recover the security*, any income received on the security, costs, and reasonable attorney fees determined by the court, *on the tender of the purchase price*, or for actual damages . . . ." (emphasis added)); MINN. STAT. ANN. § 80A.76(c)(1) (2008) (same); N.M. STAT. ANN. § 58-13C-509(C)(1) (2010) (same).

[31] ARIZ. REV. STAT. ANN. § 44-2001(A) (2013) (quoted *supra* note 29).

[32] *See, e.g.,* MICH. COMP. LAWS ANN. § 451.2509(3)(a) (2009) ("*The seller may maintain an action to recover the security*, any income received on the security, costs, and reasonable attorney fees determined by the court, on the tender of the purchase price, *or for actual damages* . . . ." (emphasis added)); MINN. STAT. ANN. § 80A.76(c)(1) (2008) (same); N.M. STAT. ANN. § 58-13C-509(C)(1) (2010) (same).

Differences in § 44-2002(A)'s text and those statutes that expressly allow rescission suggest that *Caruthers* read more into the statute than the legislature intended. This judicial expansion of the statute's text is even more apparent in the court's analysis of the defenses to rescission. *Caruthers* implied a right to rescind and then limited the implied remedy by reading equitable defenses into § 44-2002(A). The court did so even though it recognized that the text of the Arizona Securities Act does not provide for equitable defenses.[33] The court also acknowledged other state-court decisions that have refused to add equitable defenses to their state's securities statutes.[34] *Caruthers*, however, found those cases unpersuasive and concluded that the existence of express, statutory defenses in the Arizona Securities Act was insufficient to, "demonstrate legislative intent to exclude other defenses to the *remedies* provided by § 44-2002(A)."[35]

*Caruthers* focused upon its view that a rescission remedy, even when it arises under a statute, is governed by equitable principles.[36] With this equitable characterization as the cornerstone of its reasoning, the court cited the interpretative principle that the legislature does not ordinarily change the common law unless the legislature manifests an intent to make a change.[37] The court found no indication that the legislature intended such

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[33] *See* Caruthers v. Underhill, 326 P.3d 268, 277-78 (Ariz. Ct. App. 2014). The court listed examples of express defenses that the legislature had enacted. *See id.* It also cited the Arizona Securities Act's statute that prohibits waivers of compliance with the Act. *See id.* (citing ARIZ. REV. STAT. ANN. § 44-2000 (2013)).

[34] *See id.* at 277-78.

[35] *Id.* (court's emphasis).

[36] *See id.* at 276 ("rescission is governed by equitable principles."); *id.* at 277-78 (distinguishing between defenses to liability and defenses to remedies).

[37] *See id.* at 276.

a change.[38] On that basis, the court concluded that the statutory right to rescission that it had implied was an equitable remedy subject to equitable defenses.[39]

This conflicts not only with other states' court decisions[40] but also with Arizona decisions that *Caruthers* did not discuss.[41] Section 44-2002(A) was originally enacted as part of the 1951 Securities Act.[42] The 1951 Act was enacted because the existing laws did not adequately protect the public.[43] Unlike *Caruthers*, other Arizona cases have recognized that the legislature intended securities statutes to change the common-law by making securities fraud easier to prove.[44] Adding non-statutory, equitable defenses has the opposite effect. Even under the securities

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[38] *Id.*

[39] *See id.* at 276-78; *cf.* Rose v. Dobras, 624 P.2d 887, 893 (Ariz. Ct. App. 1981) (affirming judgment awarding full rescission without reduction for equitable offsets asserted by defendant).

[40] *See* cases cited *supra* note 5 (collecting contrary decisions in other states).

[41] *See infra* notes 44-45 and accompanying text.

[42] *See* Richard G. Himelrick, *A Historical Introduction to Arizona's Securities Laws*, 7 ARIZ. SUMMIT L. REV. 679, 707 (2014) (discussing the background to the statute on seller's remedies).

[43] *See* Richard G. Himelrick, *Turning 60: Bud Jacobson, Earl Hastings, and Arizona's 1951 Securities Act*, ARIZ. ATTY., Dec. 2011, at 22, 23-27 [hereinafter Himelrick, *Turning 60*] (discussing the events leading to the Act's passage).

[44] *See* Trump v. Badet, 327 P.2d 1001, 1005 (Ariz. 1958) (stating that liability under § 44-1991 may exist "even though [the] evidence falls short of the necessary ingredients of common law fraud . . . ."); Aaron v. Fromkin, 994 P.2d 1039, 1042 (Ariz. Ct. App. 2000) ("The legislature made the task of proving securities fraud much simpler than proving common-law fraud."); *Rose*, 624 P.2d at 892 ("A presence of the nine elements of common law fraud are not essential to establishing a violation of this section [ARIZ. REV. STAT. § 44-1991].").

statutes that preceded the 1951 Act, Arizona's courts had refused to allow securities violators to diminish public protection through equitable defenses.[45] There was, therefore, a considerable body of Arizona case law that supported the reasoning of state courts that refused to read equitable defenses into their securities statutes.

## III. JURY TRIALS When RESCISSIONARY RELIEF IS SOUGHT

*Caruthers*' holding on the equitable nature of statutory rescission led to another significant change in Arizona securities law. The plaintiff in an equitable action does not have a right to a jury trial.[46] *Caruthers* thus held that there is no right to a jury trial when a securities plaintiff seeks rescissionary relief. [47] It accredited its holding by citing federal securities cases rejecting the right to a jury trial when the plaintiff seeks rescissionary relief.[48]

A district court independently reached that same conclusion two months later in *In re Allstate Life Insurance Co. Litigation*, interpreting Arizona's securities statutes.[49] *Allstate* held, without citing *Caruthers* or discussing contrary authority that

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[45] *See* United Bank & Trust Co. v. Joyner*,* 11 P.2d 829, 832 (Ariz. 1932) (rejecting ratification by estoppel and *in pari delicto* defenses to securities-registration violation); Reilly v. Clyne, 234 P. 35, 39-40 (Ariz. 1925) (same).

[46] *See* Caruthers v. Underhill, 326 P.3d 268, 276 (Ariz. Ct. App. 2014); *cf.* Mill Alley Partners v. Wallace, 341 P.3d 462, 463, 465 (Ariz. Ct. App. 2014) (holding in a nonsecurities case that parties do not have a right to a jury trial on equitable defenses like laches and estoppel).

[47] *Caruthers,* 326 P.3d at 276.

[48] *See id.* at 276 n.5 (citing Royal Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1019 n.4 (2d Cir. 1989) and Arber v. Essex Wire Corp., 490 F.2d 414, 422-23 (6th Cir. 1974)).

[49] *See* In re Allstate Life Ins. Co. Litig., 2014 WL 2804004, at *4 (D. Ariz. June 20, 2014) (holding in an action under the Arizona Securities Act

*Caruthers* found unpersuasive, that the defendants were entitled to present evidence on an equitable defense they had raised.[50]

## IV. CARUTHERS AND THE UNCERTAINTY OF STATUTORY INTERPRETATION

Securities cases commonly turn on statutory interpretation—a fact that, by itself, creates uncertainty in securities law.[51] This occurs because Arizona courts, like all courts, lack a consistent theory of statutory interpretation.[52] Instead, they pick and choose from an array of interpretative principles including textual analysis, legislative intent and purpose, canons of construction, and prior interpretations of the same or arguably similar statutes under state and federal case law.[53] Two canons used in *Caruthers* illustrate the lack of predictability that results.

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that claims by bond purchasers for rescission or rescissionary damages are equitable claims on which a Seventh Amendment right to a jury trial does not exist).

[50] *See id.* at *3. According to an earlier decision in the *Allstate* litigation, the equitable defense was based on defendants' allegations that the indenture trustee and one of the plaintiffs had damaged the bonds' value by diverting funds for debt service to litigation fees. *See* In re Allstate Life Ins. Co. Litig., 2013 WL 5161688, at *49 (D. Ariz. Sept. 13, 2013).

[51] *See* True v. Stewart, 18 P.3d 707, 712 (2001) ("It sometimes seems that in interpreting a statute, one can reach almost any result simply by selecting the rule of construction to be applied." (Feldman, J. concurring)).

[52] *See id.*; HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (stating that American courts have no "generally accepted and consistently applied theory of statutory interpretation."); *accord* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14 (1997) ("We American judges have no intelligible theory of what we do most.").

[53] *See generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRET, LEGISLATION AND STATUTORY INTERPRETATION 9 (2000)

The first is the canon that unless the legislature clearly expresses an intent to change the common law, a court will presume that the statute did not change the common law.[54] *Caruthers* cited this principle to justify its conclusion that statutory rescission under § 44-2002(A) is subject to discretionary, equitable principles.[55] But a year earlier, in *Sell v. Gama,* the Arizona Supreme Court rejected the argument that common-law liability for aiding and abetting a securities violation was part of the Arizona Securities Act.[56] *Caruthers* could reasonably have cited *Sell* as authority for refusing to read common-law defenses into the Arizona Securities Act's remedies statutes.[57]

The second canon is the principle of *expressio unius est exclusio alterius;* that is, the expression of one thing implies the exclusion of others.[58] *Caruthers* realized that other state courts had concluded that their legislature's enactment of statutory de-

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(suggesting that practitioners should "craft their arguments as cumulative rhetoric, taking the most convincing pieces of whatever approaches best fit their side of the case . . . ."); ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 44-51 (2008) (explaining the importance of collectively using textual analysis, canons of construction, and legislative history to make persuasive arguments).

[54] *See generally* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 52 (2012) [hereinafter SCALIA & GARNER, READING LAW] (discussing the canon).

[55] *See* Caruthers v. Underhill, 326 P.3d 268, 276 (Ariz. Ct. App. 2014).

[56] *See* Sell v. Gama, 295 P.3d 421, 427 (Ariz. 2013) (concluding that decisions recognizing common-law liability for aiding torts "do not persuade, let alone compel us to extend common-law aiding and abetting liability to the ASA [Arizona Securities Act].").

[57] The plaintiffs made this argument. *See* Appellants' Reply Brief, Caruthers v. Underhill, 326 P.3d 268 (2014) (No. 1 CA-CV 12-0618), 2013 WL 1564981, at *11.

[58] *See generally* SCALIA & GARNER, READING LAW, *supra* note 54, § 10 (discussing the canon).

fenses to securities fraud implied the legislature's intent to exclude non-statutory defenses.[59] *Caruthers* listed examples of defenses and limits on waiver that the legislature enacted as part of the Arizona Securities Act.[60] Even so, *Caruthers* dismissed the existence of these express defenses as an unpersuasive reason for applying the *expressio unius* canon to exclude non-statutory, equitable defenses. This contrasts with the same court's decision in an opinion less than four months later that refused to add equitable exceptions to a statute.[61] In that case, the court supported its reasoning with the principle that the legislature's enactment of statutory exceptions implied the exclusion of equitable exceptions.[62]

## V. CONCLUSION

By reading equitable defenses into securities statutes, *Caruthers* represents a major change in Arizona securities law. The decision is questionable on several grounds. From the statutory text alone, it is far from clear that the legislature intended the reference to "voidable" in § 44-2002(A) to create a right to rescission, much less to imply equitable defenses. Early blue-sky decisions in Arizona refused to permit equitable defenses,

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[59] *Caruthers*, 326 P.3d at 277.

[60] *See id.* at 277-78; *see generally* RICHARD G. HIMELRICK, ARIZONA SECURITIES LAW: CIVIL LIABILITY, DEFENSES, AND REMEDIES § 4.1.10.1 (4th ed. 2014) (discussing defenses under § 44-1991(A)).

[61] Rogone v. Correia, 335 P.3d 1122, 1128 (Ariz. Ct. App. 2014) (holding that "a homestead is exempt from sale under a judgment except in certain expressly enumerated circumstances, none of which includes discretionary equitable considerations.").

[62] *Id.* (explaining that "[g]enerally, when items are expressly articulated in a statute, the legislature is presumed to have intended to exclude those not listed.").

and a near-uniform body of modern-securities-law decisions rejects equitable defenses.[63] These decisions reason that implied equitable defenses should not be used to reduce the public protection that the enacted securities laws provide.[64] The cases also commonly note that implying equitable defenses on top of expressly enacted defenses is inconsistent with the way the legislature wrote the statutes.[65]

Apart from the persuasiveness of these contrary decisions, *Caruthers* fails to offer a compelling reason for its own conclusion. *Caruthers'* reasoning centers on an assumption of logic in construing the word "voidable" to necessarily include equitable defenses. Beyond that, *Caruthers's* use of the presumption against changing the common law seems dubious. After all, Arizona's securities laws were enacted precisely because the existing statutes and common-law rules did not adequately protect the public.[66]

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[63] *See* cases cited *supra* note 5.

[64] *See supra* note 6 and accompanying text.

[65] *See supra* notes 7-8 and accompanying text.

[66] *See* cases cited *supra* note 44; Himelrick, *Turning 60, supra* note 43, at 23-27.