

*Arizona Securities Law: How  
Relevant is Federal Securities Law?*

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Both the Arizona Supreme Court and the Arizona legislature have approved using federal securities cases to interpret Arizona's securities statutes when federal law is settled and the Arizona and federal statutes are substantially the same. In practice though, federal law has limited utility. One reason is the U.S. Supreme Court's small volume of securities-law precedent. The Supreme Court averages only 1.3 securities cases per term. This leaves swaths of federal securities law on which the Supreme Court has not spoken and on which the lower-federal courts often disagree. The Supreme Court's decisions involve one or more of nine federal securities acts that frequently turn on uniquely federal issues of little or no relevance to state securities law. Differences in Supreme Court and Arizona securities-law policy and approaches to statutory interpretation further reduce the number of relevant federal cases. This article analyzes the fifty state and federal decisions interpreting Arizona securities law that have been reported since 1980. Through these cases, the article identifies the patterns and reasoning that have guided the courts in deciding when to rely on federal interpretations to interpret Arizona's securities statutes. The article concludes by presenting a set of interpretative principles through which truly relevant federal securities law can be identified.

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### I. INTRODUCTION

In *Sell v. Gama*,<sup>1</sup> a 2013 decision, the Arizona Supreme Court expressed a preference for following settled federal securities law. The Court stated that when federal and Arizona securities statutes are substantially the same, “we will interpret the ASA [Arizona Securities Act] by following settled federal securities law unless there is a good reason to depart from that authority.”<sup>2</sup> The Court made a similar statement in an earlier 1980 decision.<sup>3</sup> And in 1996, the Arizona legislature enacted a statute that authorized Arizona courts to use as a guide interpretations by state and federal courts, as well as the Securities and Exchange Commission (“SEC”), of substantially similar federal securities laws.<sup>4</sup>

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<sup>1</sup> *Sell v. Gama*, 295 P.3d 421 (Ariz. 2013).

<sup>2</sup> *Id.* at 425 ¶ 18.

<sup>3</sup> *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) (“Unless there is a good reason for deviating from the United States Supreme Court’s interpretation, we will follow the reasoning of that court in interpreting sections of our statutes which are identical or similar to federal securities statutes.”).

<sup>4</sup> The 1996 statute reads:

Federal securities law is therefore potentially relevant in any case involving Arizona securities law. But how relevant? In many respects, Arizona's securities statutes are substantially different than Rule 10b-5 and the other federal statutes and rules enacted as part of the 1933 Securities Act ("1933 Act") and 1934 Securities Exchange Act ("1934 Act").<sup>5</sup> *Sell* itself identified Arizona's statute on participant-and-inducement liability as a statute that has no federal counterpart.<sup>6</sup> *State v. Gunnison*, the 1980 decision, refused to apply

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C. It is the intent of the legislature that in construing the provisions of title 44, chapter 12, Arizona Revised Statutes, the courts may use as a guide the interpretations given by the securities and exchange commission and the federal or other courts in construing substantially similar provisions in the federal securities laws of the United States.

Private Securities Litigation Act, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023.

<sup>5</sup> Arizona decisions rely almost exclusively on decisions under the 1933 and 1934 Acts. *See, e.g., Sell*, 295 P.3d at 425 ¶¶ 17-19 (relying upon U.S. Supreme Court decision eliminating aiding-and-abetting liability under § 10(b) and Rule 10b-5 of the 1934 Act); *Gunnison*, 618 P.2d at 606-07 (following the U.S. Supreme Court's interpretation of scienter under § 17(a)(2) of the 1933 Act); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 977 P.2d 826, 830-35 (Ariz. Ct. App. 1998) (relying on federal case law under the 1933 and 1934 Acts to decide whether LLC memberships were investment contracts); *Rose v. Dobras*, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981) (relying on (a) federal interpretation of investment contracts under 1933 Act; (b) the U.S. Supreme Court's interpretation of materiality under the 1934 Act; and (c) federal case law regarding reliance under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act); *cf. State v. Tober*, 841 P.2d 206, 208-09 (Ariz. 1992) (noting but declining to follow cases under the 1933 Act regarding treatment of promissory notes as securities).

<sup>6</sup> *See Sell*, 295 P.3d at 426 ¶ 24 (referring to A.R.S. § 44-2003(A) (2013)); *see also, Standard Chartered, PLC v. Price Waterhouse*, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (making the same point and refusing to consider federal case law).

the U.S. Supreme Court's interpretation of scienter under Rule 10b-5 to claims under Arizona Revised Statutes (A.R.S.) § 44-1991(A).<sup>7</sup> These cases alone show that caution is required when relying on federal securities law to interpret Arizona's statutes.

## II. THE UNRULY NATURE OF FEDERAL SECURITIES LAW

To those unfamiliar with securities law, the U.S. Supreme Court's volume of securities-law precedent may seem surprisingly low. Since 1933, when Congress began enacting comprehensive federal securities legislation,<sup>8</sup> the U.S. Supreme Court has averaged only 1.3 securities decisions a year.<sup>9</sup> The

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<sup>7</sup> See *Gunnison*, 618 P.2d at 606-07 (declining to follow *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) as interpreted in *Greenfield v. Cheek*, 593 P.2d 293 (Ariz. Ct. App. 1978), *opinion adopted*, 593 P.2d 280 (Ariz. 1979).

<sup>8</sup> The first of these laws was the Securities Act of 1933. See generally, 1 LOUIS LOSS ET AL., *SECURITIES REGULATION* 268-71 (5th ed. 2014) (discussing the events leading to enactment of the 1933 and 1934 Acts). The first permanent federal securities legislation was enacted in 1920. In that year, Congress enacted federal legislation regulating securities in the narrow area of securities issues involving railroads. See *id.* at 266; John F. Turney, *Federal Regulation of Carrier Securities*, 25 *LAW & CONTEMP. PROBS.* 106, 107 (1960) (explaining that the legislation was enacted after the collapse of railroad credit and was intended to establish "a soundly-capitalized transportation industry, capable of adequate service at reasonable rates"). See generally, RICHARD G. HIMELRICK, *ARIZ. SEC. L.: CIV. LIAB., DEFENSES, & REMEDIES* § 2.3 (5th ed. 2017) (discussing early attempts at federal legislation).

<sup>9</sup> A study of securities-law decisions issued from 1946 through 2014 shows that the average number of cases decided per year was 1.3. See John C. Coates IV, *Securities Litigation in the Roberts Court: An Early Assessment*, 57 *ARIZ. L. REV.* 1, 8 tbl.2 (2015). An earlier study covering the 90 securities decisions issued between 1933 and 2004 also found that the number of decisions per year averaged 1.3. E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 *EMORY L.J.* 1571, 1578-80 (2004).

opinions that resulted involve not only substantive securities-law issues, like whether an investment is a security<sup>10</sup> or whether a statement is material,<sup>11</sup> but an array of issues that are largely unique to federal securities law.<sup>12</sup> These issues may arise under any of the nine federal securities acts.<sup>13</sup> Recent examples include cases concerning procedural issues in class certification under Rule 10b-5;<sup>14</sup> the constitutionality of the Sarbanes-Oxley Act;<sup>15</sup> the scope of the federal courts' exclusive jurisdiction under the 1934 Act;<sup>16</sup> federal preemption of state-law class actions involving covered securities (i.e., nationally traded securities that are listed on a regulated national ex-

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<sup>10</sup> See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56 (1990) (regarding when promissory notes are securities); *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (regarding the definition of investment contracts).

<sup>11</sup> See, e.g., *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38-47 (2011) (regarding materiality under Rule 10b-5).

<sup>12</sup> See *infra* notes 14-21 and accompanying text (providing examples).

<sup>13</sup> See *infra* notes 29-35 and accompanying text (describing the nine acts).

<sup>14</sup> See *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (holding that defendants may introduce price-impact evidence at the class-certification stage to rebut the presumption of reliance under the fraud-on-the-market theory); *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184 (2013) (holding that proof of an alleged misrepresentation's materiality is not a prerequisite to class certification in a Rule 10b-5 action based on the fraud-on-the-market theory); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) (holding that in an action under Rule 10b-5 the plaintiff need not prove loss causation to obtain class certification). See generally Donald C. Langevoort, *Judgment Day for Fraud-on-the-Market: Reflections on Amgen and the Second Coming of Halliburton*, 57 ARIZ. L. REV. 37 (2015) (describing the major procedural issues in Rule 10b-5 class certification that have occupied the federal courts).

<sup>15</sup> See *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010) (generally upholding with one exception the constitutionality of the Sarbanes-Oxley Act's scheme for the Public Company Accounting Oversight Board).

<sup>16</sup> See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016) (holding that exclusive jurisdiction under the 1934 Act is defined by the same test as that used to decide if a case "arises under" a federal law).

change);<sup>17</sup> the extraterritorial reach of the federal securities laws;<sup>18</sup> the standard for determining excessive fees under the Investment Company Act of 1940;<sup>19</sup> the accrual date on the statute of limitations applicable to civil-penalty actions by the SEC under the Investment Advisers Act of 1940;<sup>20</sup> and whistleblower issues regarding securities violations.<sup>21</sup> With the Supreme Court issuing so few securities-law decisions and so many of the decisions turning on uniquely federal issues, much of the Supreme Court's precedent has no relevance to substantive state securities law.

Another consequence of the Supreme Court's limited securities-law precedent—and the sweeping mix of federal statutes and issues the decisions address—is that federal securities law is frequently unsettled.<sup>22</sup> Often the Supreme Court has

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<sup>17</sup> See *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006) (holding that a district court's order is not appealable when the order remands a securities case that is allegedly precluded from being filed in state court by the Securities Litigation Uniform Standards Act).

<sup>18</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (holding that § 10(b) of the 1934 Act applies only to transactions in securities listed on domestic exchanges and to domestic transactions in other securities).

<sup>19</sup> See *Jones v. Harris Assocs. L.P.*, 559 U.S. 335 (2010) (holding that an excessive fee under § 36(b) of the Investment Company Act of 1940 is one that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arms-length bargaining).

<sup>20</sup> See *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (holding that the discovery rule does not extend the five-year statute of limitations when the SEC brings an enforcement action for civil penalties under the Investment Advisers Act of 1940).

<sup>21</sup> See *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014) (holding that whistleblower-protection under the Sarbanes-Oxley Act extends to employees of private contractors and subcontractors serving public companies).

<sup>22</sup> See, e.g., *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101-04 (2d Cir. 2015) (rejecting the Ninth Circuit's contrary view and holding that Item 303, an SEC regulation, imposes a duty to speak that can give rise to liability under Rule 10b-5 and § 10(b)); *Oregon Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 604-05 (9th Cir. 2014) (describing conflicting deci-

settled an issue only at a general level.<sup>23</sup> For example, the Supreme Court's three-part *Howey* definition of investment con-

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sions on whether heightened pleading is required for Rule 10b-5 loss causation); John P. Flannery and James D. Hopkins, Exchange Act Release No. 3981, 2014 WL 7145625, at \*14 & n.69 (Dec. 15, 2014) (disagreeing with decisions from the Second, Eighth, and Ninth Circuits on the scope of liability under Rule 10b-5(a) and (c)), *vacated on other grounds sub nom.* Flannery v. SEC, 810 F.3d 1 (1st Cir. 2015); Rome v. HEI Res., Inc., No. 13CA2090, 2014 WL 6486488, at \*6 ¶¶ 33-35 (Colo. App. Nov. 20, 2014) (discussing the different tests used by the federal circuits to decide when general-partnership and joint-venture interests are securities); Wendy Gerwick Couture, Remarks, *Around the World of Securities Fraud in Eighty Motions to Dismiss*, 45 LOY. U. CHI. L.J. 553, 560-63, 565-69 (2014) (describing conflicting decisions and confusion in the lower-federal courts on a variety of issues including scienter; the core-operations inference; puffery; and cases ignoring the federal counterpart of A.R.S. § 44-2083, which requires trial judges to make Rule 11 findings when a securities-fraud case concludes); Charles W. Murdock, *Janus Capital Group, Inc. v. First Derivative Traders: The Culmination of the Supreme Court's Evolution from Liberal to Reactionary in Rule 10b-5 Actions*, 91 DENV. U. L. REV. 369, 434-35 (2014) (describing confusion in district-court decisions applying the ultimate-authority test for misrepresentations announced in *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)).

<sup>23</sup> See generally Coates, *supra* note 9, at 4 ("This Article's main takeaway is that the Court can be expected to continue to have both marginal and lottery-like effects on substantive securities law."); A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 144 (2011) ("The debates that engage the Justices in these cases do not come from the field of securities laws, but rather, are more general: statutory interpretation, the use of legislative history, the presumption against the extraterritorial application of legislation, etc."); William K. Sjoström, Jr., *Direct Private Placements*, 102 KY. L.J. 947, 949-50 (2014) (describing the mishmash of law created in the lower courts under the rules for private-placement exemptions formulated by the U.S. Supreme Court in *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953)); Sullivan & Thompson, *supra* note 9, at 1573 ("The dearth of securities and antitrust cases decided by the current Court during a decade [1994-2004] in which its membership has not changed suggests a lack of interest in these areas. The securities and antitrust cases that are taken and decided are less important and the decisions seem less coherent than in the earlier period.").

tracts has long been the law in federal courts.<sup>24</sup> But substantial disagreement exists about the meaning of *Howey's* common-enterprise and effort-of-others elements.<sup>25</sup> Similarly, the Supreme Court has definitively ruled that material facts are those that a reasonable investor would consider important.<sup>26</sup> But what this means from case to case is far from settled.<sup>27</sup> And considerable confusion exists because of materiality-based doctrines like the bespeaks caution, truth-on-the-market, puffery, and price-movement doctrines that the lower-federal courts use in ruling on dismissal motions.<sup>28</sup> With federal law on these and

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<sup>24</sup> See *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) (regarding the definition of investment contracts).

<sup>25</sup> See 2 LOUIS LOSS ET AL., *SECURITIES REGULATION* 1067 (5th ed. 2014) (“At the current time, there are three cognate approaches.”); James D. Gordon III, *Defining a Common Enterprise in Investment Contracts*, 72 OHIO ST. L.J. 59, 61 (2011) (describing the different definitions of common enterprise in the federal courts). Compare *SEC v. Shields*, 744 F.3d 633, 647 (10th Cir. 2014) (holding regarding the efforts-of-others’ element that the relevant experience is the investor’s experience in the particular business, not the investor’s general business experience), with *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (“The proper inquiry is whether the partners [the investors] are inexperienced or unknowledgeable ‘in business affairs’ generally, not whether they are experienced and sophisticated in the particular industry or area in which the partnership engages and they have invested.”).

<sup>26</sup> See, e.g., *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (regarding materiality under Rule 10b-5).

<sup>27</sup> See, e.g., *Hogle v. Smestad*, No. CV-13-01057-PHX-GMS, 2014 WL 554202 (D. Ariz. Feb. 12, 2014) (interpreting the Arizona Securities Act and reversing the bankruptcy court’s materiality findings), *rev’g* In re *Hogle*, Nos. 11-bk-08991-SSC, 12-bk-00046-GBN, Adv. Nos. 11-ap-1205-SSC, 12-ap-183, 2013 WL 1001652 (Bankr. D. Ariz. Mar. 13, 2013). Compare *Caruthers v. Underhill*, 287 P.3d 807, 818 ¶¶ 44-47 (Ariz. Ct. App. 2012) (relying on federal cases to hold that opinions of value and appraisals were not material), with *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131, 1136 (Ariz. Ct. App. 1986) (citing a Ninth Circuit decision in support of the materiality of misrepresentations regarding a stock’s value).

<sup>28</sup> See Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 161-65, 179 (2010) (discussing these doctrines (at 161-65) and noting their tendency to create

many other issues conflicting or undeveloped in the area of securities law, identifying a federal statute that is substantially similar to an Arizona securities statute is no assurance that clear federal case law on the statute's meaning exists.

Citing federal securities law can also be problematic because of the number and overlap of potentially relevant federal statutes. Since 1933, Congress has enacted nine securities acts that are administered by the SEC.<sup>29</sup> The most important of these in Arizona securities litigation are the 1933 and 1934 Acts.<sup>30</sup> Under these two Acts alone, eight statutes expressly provide for civil liability.<sup>31</sup> These statutes cover registration

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“unnecessary confusion about the definition of materiality” (at 179)); *see also* Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 119-26 (2002) (discussing the puffery, bespeaks caution, zero-price change, and trivial-matters doctrines as materiality-based heuristics (shortcuts) used in securities-law opinions).

<sup>29</sup> *See* 1 LOSS ET AL., *supra* note 8, at 342 (listing as currently administered by the SEC the following statutes: the 1933 Act, the 1934 Act, the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, to some extent the Securities Investor Protection Act of 1970, the Sarbanes-Oxley Act of 2002, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, and the Jumpstart Our Business Startups, or JOBS Act of 2012).

<sup>30</sup> *See supra* note 5.

<sup>31</sup> *See* Securities Act of 1933, ch. 38, § 11, 48 Stat. 74, 82 (codified as amended at 15 U.S.C. § 77k (2006) (amended 2012)) (regarding liability for misrepresentations or omissions in registration statements); *id.* § 12, 15 U.S.C. § 77l (regarding liability for registration violations and misrepresentations or omissions in prospectuses or oral communications); *id.* § 15, 15 U.S.C. § 77o (regarding control liability); Securities Act of 1934, ch. 404, § 9, 48 Stat. 881, 889 (codified as amended at 15 U.S.C. § 78i) (2006) (amended 2012) (regarding liability for manipulation of securities prices); *id.* § 16(b), 15 U.S.C. § 78p(b) (regarding liability for short-swing profits by officers, directors, and certain shareholders); *id.* § 18(a), 15 U.S.C. § 78r(a) (regarding liability for misrepresentations or omissions in documents filed

violations, misrepresentations, omissions, market manipulation, and other types of securities fraud.<sup>32</sup> In addition, under the 1934 Act, § 10(b) (and SEC Rule 10b-5),<sup>33</sup> § 14(a),<sup>34</sup> and § 29(b)<sup>35</sup> have been held to create implied-civil liability. Deciding whether any of these statutes are analogous to an Arizona securities statute can be challenging.<sup>36</sup> This is especially so because as causes of action under the federal securities statutes are cumulative,<sup>37</sup> that is, the statutes may provide overlapping remedies even when the statutes “involve distinct causes of action and were intended to address different types of wrongdoing.”<sup>38</sup> It is possible, for example, for a defendant to simultaneously make misrepresentations or misleading omissions that

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with the SEC); *id.* § 20(a), 15 U.S.C. § 78t(a) (regarding control liability); *id.* § 20A, 15 U.S.C. § 78t-1 (regarding insider-trading liability).

<sup>32</sup> See statutes cited *supra* note 31.

<sup>33</sup> See, e.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (regarding implied liability for securities fraud under § 10(b) and Rule 10b-5).

<sup>34</sup> See, e.g., *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1086-87 (1991) (regarding implied liability under § 14(a) for misleading statements in proxy solicitations).

<sup>35</sup> See, e.g., *Reg'l Props., Inc. v. Fin. & Real Estate Consulting Co.*, 678 F.2d 552, 558 (5th Cir. 1982) (holding that § 29(b) creates an implied right to rescind contracts that violate the 1934 Act).

<sup>36</sup> See, e.g., *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) (relying upon § 17(a) of the 1933 Act to interpret state-of-mind requirements under § 44-1991(2) and (3) (now § 44-1991(A)(2) and (3)) and overruling case that relied upon Rule 10b-5 precedent); *Grand v. Nacchio*, 147 P.3d 763, 780 ¶¶ 57-60 (Ariz. Ct. App. 2006) (relying upon § 12(a)(2) to interpret loss-causation requirements under § 44-1991(A)(2) but relying upon § 10(b) and Rule 10b-5 to interpret loss causation under § 44-1991(A)(1) and (3)).

<sup>37</sup> See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-90 (1983) (describing the “cumulative construction of the remedies under the 1933 and 1934 Acts” and holding that “the availability of an express remedy under Section 11 of the 1933 Act does not preclude defrauded purchasers of registered securities from maintaining an action under Section 10(b) of the 1934 Act”).

<sup>38</sup> *Id.* at 381.

violate §§ 11(a) and 12(a)(2) of the 1933 Act, as well as § 10(b) of the 1934 Act,<sup>39</sup> even though § 10(b) requires scienter and reliance while §§ 11(a) and 12(a)(2) do not.<sup>40</sup> Since Arizona's primary antifraud statute, A.R.S. § 44-1991(A), also prohibits misrepresentations and omissions,<sup>41</sup> §§ 11(a), 12(a)(2), and 10(b) (as well as Rule 10b-5) are potentially relevant in cases under the Arizona Securities Act. But unlike many other courts,<sup>42</sup> Arizona's courts have largely overlooked

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<sup>39</sup> See, e.g., *In re Bank of Am. Corp. Sec., Derivative, & Emp. Ret. Income Sec. Act (ERISA) Litig.*, 757 F. Supp. 2d 260, 322-24, 332-33, 346 (S.D.N.Y. 2010) (denying motion to dismiss overlapping claims against a bank for misleading statements under §§ 10(b) and 14(a) of the 1934 Act and §§ 11 and 12(a)(2) of the 1933 Act).

<sup>40</sup> See *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 146 (2d Cir. 2012) (“Neither scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims . . . .”); *In re Bank of Am. Corp. Sec.*, 757 F. Supp. 2d at 320, 322-23, 332-33, 346 (denying motion to dismiss overlapping claims under § 10(b) and § 12(a)(2) and noting that § 10(b) requires scienter while § 12(a)(2) requires only negligence). Compare, e.g., *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (listing reliance and scienter as elements of § 10(b) and Rule 10b-5), with *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323 (2015) (holding that a securities purchaser suing under § 11(a) need not prove that “the defendant acted with any intent to deceive or defraud”).

<sup>41</sup> See, e.g., *Aaron v. Fromkin*, 994 P.2d 1039, 1042 ¶¶ 14-15 (Ariz. Ct. App. 2000); *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986).

<sup>42</sup> See, e.g., *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/Am. Express, Inc.*, 886 F.2d 1249, 1255-57 (10th Cir. 1989) (distinguishing Rule 10b-5 precedent and following § 12(2) (now § 12(a)(2)) case law as to Oklahoma's counterpart of § 44-1991(A)(2)); *Kronenberg v. Katz*, 872 A.2d 568, 595-99 (Del. Ch. 2004) (relying upon § 12(a)(2) to interpret Pennsylvania's counterparts of §§ 44-1991(A) and 44-2001(A) and concluding that reliance is not required under the Pennsylvania statutes); *Marram v. Kobrick Offshore Fund, Ltd.*, 809 N.E.2d 1017, 1026-27 (Mass. 2004) (citing authority under § 12(a)(2) and holding that under the Massachusetts Securities Act the plaintiff does not need to prove either scienter or reliance); *DMK Biodiesel, LLC v. McCoy*, 859 N.W.2d 867, 872-75 (Neb. 2015) (citing § 12(a)(2) cases and holding that the Nebraska Securities Act does not require plaintiffs to prove reliance or to investigate a seller's statements); *Geodyne*

§ 12(a)(2).<sup>43</sup>

Differences in Arizona and federal approaches to statutory interpretation are another factor that must be considered. Federal interpretations of § 10(b) and Rule 10b-5 do not always involve normal statutory interpretation. The U.S. Supreme Court does not consider itself bound by the language of § 10(b) or Rule 10b-5.<sup>44</sup> Instead, the Court sometimes interprets the private action under § 10(b) and Rule 10b-5 more narrowly than what would result from the plain or fair meaning of the

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Energy Income Prod. P'ship I-E v. Newton Corp., 97 S.W.3d 779, 785 (Tex. Ct. App. 2003) (looking to § 12(2) (now § 12(a)(2)) as a guide in interpreting the Texas Securities Act and holding that the Texas Act “does not require the buyer to prove reliance”), *rev'd in part on other grounds*, 161 S.W.3d 482 (Tex. 2005); Gohler v. Wood, 919 P.2d 561, 565 (Utah 1996) (citing authority under § 12(a)(2) and holding that reliance is not required under the Utah Securities Act); *see also* 9 LOUIS LOSS ET AL., SEC. REG. 168-69 nn.21, 23 (4th ed. 2012) (explaining that § 410(a)(2) of the 1956 Uniform Securities Act was modeled on § 12(2) (now § 12(a)(2)) and was intended to create liability for materially misleading statements without proof of reliance).

<sup>43</sup> *See* Richard G. Himelrick, *Arizona Securities Fraud Liability: Charting a Non-Federal Path*, 32 ARIZ. ST. L. J. 203, 210-12 (2000) (discussing Arizona decisions' reliance on Rule 10b-5 rather than § 12(a)(2)). *But see* Grand v. Nacchio, 147 P.3d 763, 776 ¶¶ 41-42, 779 ¶ 51, 780 ¶ 58 (Ariz. Ct. App. 2006) (discussing damage and rescission remedies under the Arizona Securities Act and describing § 12(a)(2) as the federal counterpart to § 44-1991(A)(2)).

<sup>44</sup> *See, e.g.*, Chadbourne & Parke LLP v. Troice, 134 S. Ct. 1058, 1063 (2014) (“The scope of the private right of action [under § 10(b) and Rule 10b-5] is more limited than the scope of the statutes upon which it is based.”); *see also* *Halliburton Co.*, 134 S. Ct. at 2425-26 (Thomas, J. concurring) (contending that the fraud-on-the-market presumption of reliance under § 10(b) is not based on statutory interpretation but Supreme Court policy).

statute's words.<sup>45</sup> This approach has resulted in the Court reading requirements into Rule 10b-5 like reliance, which the Rule's text does not require.<sup>46</sup> It has also led to interpretations that are contrary to ordinary English, for example, that the only persons who make Rule 10b-5 statements are those with the "ultimate authority" to speak.<sup>47</sup> Similarly, although prospectuses are statutorily defined to include all written offers,<sup>48</sup> the Supreme Court has held that the only prospectuses under § 12(a)(2) of the 1933 Act are those used in public offerings.<sup>49</sup> These decisions have been widely criticized.<sup>50</sup> If applied to

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<sup>45</sup> See, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142-44 (2011) (limiting "make" in Rule 10b-5 to situations in which a statement's maker is the person with "ultimate authority" to make the statement and stating, "[o]ur holding also accords with the narrow scope that we must give the [Rule 10b-5] implied private right of action").

<sup>46</sup> See A.C. Pritchard, *Stoneridge Inv. Partners v. Scientific-Atlanta: The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 241-42 ("Rule 10b-5's reliance element is nowhere to be found in the language of § 10(b) or Rule 10b-5; the [U.S. Supreme] Court borrowed it from the common law of deceit.").

<sup>47</sup> See *Janus*, 564 U.S. at 142-43 (limiting the "make" in Rule 10b-5 to situations in which a statement's maker is the person with "ultimate authority" to make the statement).

<sup>48</sup> See Stephen M. Bainbridge, *Securities Act Section 12(2) After the Gustafson Debacle*, 50 BUS. LAW. 1231, 1235, 1246-50 (1995) (arguing that "prospectus" is a defined term under § 2(10) of the 1933 Act and there is no legitimate reason not to give "prospectus" in § 12(2) (now 12(a)(2)) the broad interpretation for which § 2(10) provides); Louis Loss, *The Assault on Securities Act § 12(2)*, 105 HARV. L. REV. 908, 916-17 (1992) (arguing that "prospectus" includes all written offers and that liability under § 12(2) (now § 12(a)(2)) extends to ordinary trading).

<sup>49</sup> See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) (holding that "a prospectus under § 10 [of the 1933 Act] is confined to documents related to public offerings by an issuer or its controlling shareholders").

<sup>50</sup> See, e.g., Bainbridge, *supra* note 48, at 1231-1232 ("[T]he [*Gustafson*] majority issued the most poorly-reasoned, blatantly results-driven securities opinion in recent memory."); Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933, 934 (2013) ("There is nothing in the language or history of Rule 10b-5, a straight-forward prohibition against securities fraud, to suggest that

Arizona's securities statutes, this interpretative approach would undermine the plain-meaning rule at the forefront of Arizona statutory interpretation.<sup>51</sup> The approach is also contrary to the Supreme Court's normal practice of looking to the statute's words and giving those words their ordinary meaning.<sup>52</sup>

Policy differences are another reason that federal securities law may be inapposite. *Sell* noted that deferring to federal cases may be inappropriate when the Arizona and federal policies underlying the statutes "materially differ."<sup>53</sup> The Supreme Court sometimes justifies its narrow interpretations of Rule 10b-5 on the basis of policy arguments about curbing vexatious litigation, protecting business, and encouraging capital formation.<sup>54</sup> The narrow-liability rulings that result from

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the SEC intended for its words to be limited so that the person or entity with the greatest causal responsibility for a misrepresentation or actionable omission [the speaker] escapes its reach."); Murdock, *supra* note 22, at 429-30 (describing the *Janus* majority's reasoning as "dead wrong" and "irrational"); Steve Thel, *Free Writing*, 33 J. CORP. L. 941, 943 (2008) ("Gustafson is the most important authority on section 12(a)(2), and by all accounts the worst [U.S. Supreme Court] securities law opinion ever written.").

<sup>51</sup> See, e.g., A.R.S. § 1-213 (2002) ("Words and phrases shall be construed according to the common and approved use of the language."); *Sell v. Gamma*, 295 P.3d 421, 425 ¶ 16 (Ariz. 2013) ("When the plain text of a statute is clear and unambiguous, it controls unless an absurdity or constitutional violation results." (quoting *State v. Christian*, 66 P.3d 1241, 1243 (Ariz. 2003))).

<sup>52</sup> See, e.g., *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165 (2014) ("In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." (citation and internal quotation marks omitted)).

<sup>53</sup> *Sell*, 295 P.3d at 425 ¶ 18.

<sup>54</sup> See, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163-65 (2008) (stating that "the § 10(b) private right should not be extended beyond its present boundaries" and noting that the "practical consequences" of an expanded interpretation might allow plaintiffs to "extort settlements" that might raise the costs of domestic business and deter

these policies reduce investor protection.<sup>55</sup> This contrasts with legislative policy under Arizona's securities laws, whose purpose has consistently been described as protecting the public.<sup>56</sup>

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overseas firms from doing business in the U.S.); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (limiting standing under Rule 10b-5 and referring to discovery abuse, groundless claims, and settlements induced by a claims *in terrorem* value); *Central Bank v. First Interstate Bank*, 511 U.S. 164, 175, 188-90 (1964) (noting that the text of § 10(b) provides no support for aiding-and-abetting liability, expressing concern about vexatious litigation, and reasoning that the uncertainty created by such expanded liability might increase the cost of professional services by accountants and others and deter these professionals from representing newer or smaller companies); *see also* *Musick, Peeler & Garrett v. Emp'rs Ins. of Wausau*, 508 U.S. 286, 295 (1993) (stating that the Court's goals include "establishing limits for the 10b-5 action . . . to promote clarity, consistency, and coherence for those who rely upon, or are subject to, 10b-5 liability").

<sup>55</sup> *See* *Langevoort*, *supra* note 50, at 935 (observing that in recent U.S. Supreme Court decisions "interpreting Rule 10b-5 . . . [t]here are repeated references to unnecessary litigation and preserving the competitiveness of American business, which infuriates those who instinctively look to the courts to help advance the cause of investor protection").

<sup>56</sup> *See, e.g.,* *R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC*, 729 F. Supp. 2d 1110, 1114 (D. Ariz. 2010) (stating that the Arizona Securities Act establishes "substantive safeguards that Arizona's legislators have crafted to protect its investing citizenry"); *Grand v. Nacchio*, 236 P.3d 398, 401 ¶ 16 (Ariz. 2010) (beginning its discussion by explaining that the 1951 legislature intended the securities laws to be liberally construed for public protection); *State v. Baumann*, 610 P.2d 38, 45 (Ariz. 1980) ("Regulation of transactions in securities, commonly known as 'blue sky laws,' are designed to protect the public from fraud and deceit arising in those transactions."); *Jackson v. Robertson*, 368 P.2d 645, 648 (Ariz. 1962) ("It is the capacity for harm and danger to the public as well as accomplished fraudulent transactions to which the Securities Act is directed. The Act is designed to be prophylactic if possible, remedial only if necessary."); *Shorey v. Ariz. Corp. Comm'n*, 359 P.3d 997, 1001 ¶ 12 (Ariz. Ct. App. 2015) (Arizona's "[b]lue-sky laws 'are designed to protect the public from fraud and deceit arising in [securities] transactions.'" (quoting *Baumann*, 610 P.2d 45)); *Hirsch v. Ariz. Corp. Comm'n*, 352 P.3d 925, 935 ¶ 40 (Ariz. Ct. App. 2015) (noting "the stated intent of the ASA as a remedial measure that

With all these differences between Arizona and federal securities law, how is a court to decide when to rely upon federal precedent? Although an easy answer does not exist, it is possible through analysis of the cases to identify the major factors that determine federal precedent's relevance. After first summarizing the published decisions on Arizona securities law, Part IV presents a series of questions and comments that lead to a set of interpretative principles through which relevant federal precedent can be identified.

### III. ARIZONA CASES: 1980-2017

Since 1980, Arizona's appellate courts have issued thirty-three reported securities decisions.<sup>57</sup> In the same period,

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should be liberally construed for the protection of the public"); *Grand v. Nacchio*, 147 P.3d 763, 777 ¶ 45 (Ariz. Ct. App. 2006) (explaining that Arizona's securities laws are designed to protect investors from financial schemes); *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow certain cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); *Siporin v. Carrington*, 23 P.3d 92, 98 ¶ 28 (Ariz. Ct. App. 2001) ("We will depart from those federal decisions that do not advance the Arizona policy of protecting the public from unscrupulous investment promoters."); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 77 P.2d 826, 832-33 ¶¶ 27-28 (Ariz. Ct. App. 1998) (adopting the Fifth Circuit rather than the Ninth Circuit's interpretation of *Howey*'s efforts-of-others prong and explaining that the Fifth Circuit's approach advances the Arizona legislature's intent to protect investors); *Butler v. Am. Asphalt & Contracting Co.*, 540 P.2d 757, 760 (Ariz. 1975) ("The purpose of the Securities Act of 1933 . . . from which the Arizona Act governing the sale of securities, A.R.S. § 44-1801 et seq., was derived, is to safeguard the investing public from fraudulent devices and tricks in the sale of securities by requiring publication of certain information concerning securities before they are offered for sale.")

<sup>57</sup> The cases and their holdings are listed in the Appendix A.

federal courts published an additional seventeen opinions interpreting Arizona's securities laws.<sup>58</sup> Of these fifty decisions, nine (eighteen percent) rejected or refused to be bound by federal securities decisions on one or more issues.<sup>59</sup> In addition, fourteen (twenty-eight percent) were issued without citing a federal securities case to interpret the Arizona Securities Act.<sup>60</sup>

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<sup>58</sup> The cases and their holdings are listed in the Appendix B. Where it adds perspective, the article also discusses unpublished federal decisions that interpret Arizona securities statutes. *See, e.g., infra* notes 103 and 107 and accompanying text.

<sup>59</sup> *See State v. Tober*, 841 P.2d 206 (Ariz. 1992) (refusing to apply a U.S. Supreme Court decision concerning when promissory notes are securities); *State v. Gunnison*, 618 P.2d 604 (Ariz. 1980) (refusing to follow a U.S. Supreme Court decision regarding scienter under Rule 10b-5 and instead relying on a U.S. Supreme Court decision interpreting § 17(a) of the 1933 Act); *Hirsch*, 352 P.3d at 936 ¶ 41 (refusing to follow federal law on disgorgement to interpret restitution in enforcement actions by the Corporation Commission because of differences in statutory language); *Grand*, 147 P.3d at 776 ¶¶ 41-42, 778-79 ¶ 51 (refusing to follow federal authority on loss-causation and tender requirements when statutory rescission is sought under § 44-2001(A)); *Eastern Vanguard*, 79 P.3d at 97 ¶ 36, 101 ¶ 50 (refusing to follow certain Ninth Circuit decisions and a U.S. Supreme Court decision to interpret control liability); *Siporin*, 23 P.3d at 103-04 ¶¶ 28-35 (refusing to follow a D.C. Circuit decision holding that investments in viatical settlements were not securities); *Carrington v. Ariz. Corp. Comm'n*, 18 P.3d 97, 99 ¶ 10 (Ariz. Ct. App. 2000) (holding that in actions to enforce Securities Division's subpoenas Arizona courts look to federal securities decisions for guidance; but "when interpreting Arizona law, Arizona courts are not bound even by the United States Supreme Court's interpretation of federal securities laws"; and that a federal interpretation that viaticals were not securities was not binding Arizona law); *Nutek*, 977 P.2d at 832-33 ¶¶ 27-28 (refusing to follow a Ninth Circuit decision regarding the third element of *Howey's* investment-contract test and instead relying upon a Fifth Circuit decision addressing the issue); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (refusing to consider federal cases regarding the meaning of § 44-2003 (now § 44-2003(A))).

<sup>60</sup> *See Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197 (9th Cir. 2012); *Garvin v. Greenbank*, 856 F.2d 1392 (9th Cir. 1988); *Facciola v. Greenberg Traurig LLP*, 281 F.R.D. 363 (D. Ariz. 2012); *Grand*, 236 P.3d 398; *State ex rel. Corbin v. Pickrell*, 667 P.2d 1304 (Ariz. 1983); *Baumann*, 610 P.2d 38; *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821 (Ariz. Ct.

On the other hand, twenty-one decisions by Arizona appellate courts<sup>61</sup> and twelve decisions by federal courts<sup>62</sup> (sixty-six per-

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App. 2001); *Aaron v. Fromkin*, 994 P.2d 1039 (Ariz. Ct. App. 2000); *Standard Chartered*, 945 P.2d at 328-34; *Hernandez v. Superior Court*, 880 P.2d 735 (Ariz. Ct. App. 1994); *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11 (Ariz. Ct. App. 1994); *Ariz. Corp. Comm'n v. Media Prods., Inc.*, 763 P.2d 527 (Ariz. Ct. App. 1988); *London v. Green Acres Trust*, 765 P.2d 538 (Ariz. Ct. App. 1988); *State v. Agnew*, 647 P.2d 1165 (Ariz. Ct. App. 1982). Although *Baumann* cites a Sixth Circuit securities-law decision, the Sixth Circuit opinion relies upon its interpretation of Ohio securities law—not federal securities law. See *Baumann*, 610 P.2d at 46 (citing *United States ex rel. Shott v. Tehan*, 365 F.2d 191, 194-95 (6th Cir. 1966) (interpreting Ohio securities law)).

<sup>61</sup> See *Sell v. Gama*, 295 P.3d 421, 426-27 ¶¶ 19-29 (Ariz. 2013); *Gunnison*, 618 P.2d at 606-07; *Baumann*, 610 P.2d at 46; *Hirsch*, 352 P.3d at 931-32 ¶ 22; *Shorey*, 359 P.3d at 1003 ¶ 21; *Caruthers v. Underhill*, 326 P.3d 268, 276 ¶ 34 n.5 (Ariz. Ct. App. 2014); *Caruthers v. Underhill*, 287 P.3d 807, 818 ¶¶ 43-45, 819 ¶¶ 51-52 (Ariz. Ct. App. 2012); *Grand*, 147 P.3d at 773-75 ¶¶ 30-36; *Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 41-42, 100-01 ¶¶ 46, 48-50; *Siporin*, 23 P.3d at 96-99 ¶¶ 19-35; *Nutek*, 977 P.2d at 832-33 ¶¶ 26-28; *Foy v. Thorp*, 920 P.2d 31, 38 (Ariz. Ct. App. 1996); *MacCollum v. Perkinson*, 913 P.2d 1097, 1104-06 (Ariz. Ct. App. 1996); *DeJonghe v. E.F. Hutton & Co.*, 830 P.2d 862, 866 (Ariz. Ct. App. 1991); *Vairo v. Clayden*, 734 P.2d 110, 114-15 (Ariz. Ct. App. 1987); *Daggett v. Jackie Fine Arts, Inc.*, 733 P.2d 1142, 1148-50 (Ariz. Ct. App. 1986); *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986); *State ex rel. Corbin v. Goodrich*, 726 P.2d 215, 223-24 (Ariz. Ct. App. 1986); *Sullivan v. Metro Prods. Inc.*, 724 P.2d 1242, 1245-46 (Ariz. Ct. App. 1986); *State v. Barber*, 653 P.2d 29, 32-33 (Ariz. Ct. App. 1982); *Rose v. Dobras*, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981).

<sup>62</sup> See *Warfield v. Alaniz*, 569 F.3d 1015, 1019 n.5 (9th Cir. 2009); *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 522-23 & n.10, 524-25 (9th Cir. 1989); *Shivers v. Amerco*, 670 F.2d 826, 831 (9th Cir. 1982); *Little v. Valley Nat. Bank of Ariz.*, 650 F.2d 218, 220, 223 (9th Cir. 1981); *In re Allstate Life Ins. Co. Litig.*, 971 F. Supp. 2d 930, 938-44 (D. Ariz. 2013); *In re Nat'l Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828, 888-90 (S.D. Ohio 2012); *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 920-23 (D. Ariz. 2011); *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1157-61 (D. Ariz. 2010); *R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC*, 729 F. Supp. 2d 1110, 1113-14, 1116-17 (D. Ariz. 2010); *In re*

cent of the total dataset) affirmatively relied on federal securities precedent to interpret Arizona securities law. Of these, three by the Ninth Circuit assumed (without independently analyzing Arizona's securities laws) that Arizona would follow federal law.<sup>63</sup> Several of the Arizona appellate decisions relied on federal securities precedent to support one point while refusing to follow federal securities law on another point.<sup>64</sup>

Some patterns appear in the cases. At the most general level, statutory interpretation under the Arizona Securities Act is the same as statutory interpretation overall. Neither Arizona's courts nor other American courts have a "generally ac-

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Nat'l Century Fin. Enters., Inc. Inv. Litig., 541 F. Supp. 2d 986, 1011 (S.D. Ohio 2007); *Wojtunik v. Kealy*, 394 F. Supp. 2d 1149, 1157 n.4, 1170 (D. Ariz. 2005); *McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc.*, 528 F. Supp. 152, 166-67 (D. Ariz. 1981).

<sup>63</sup> See *Warfield*, 569 F.3d at 1019 n.5; *Shivers*, 670 F.2d at 831; *Little*, 650 F.2d at 220.

<sup>64</sup> See, e.g., *Hirsch*, 352 P.3d at 931-32 ¶ 22, 935 ¶ 41 (relying on federal cases to hold that loss causation does not apply to enforcement actions by the Corporation Commission but refusing to follow federal law to interpret restitution under § 44-2032(1)); *Grand*, 147 P.3d at 773-75 ¶¶ 30-36, 776-77 ¶¶ 41-45, 778-79 ¶¶ 49-51 (relying upon a U.S. Supreme Court decision to explain loss causation but refusing to follow federal case law regarding loss causation and tender requirements for statutory rescission); *Eastern Vanguard Forex*, 79 P.3d at 98-99 ¶¶ 40-42, 101 ¶ 50 (relying on federal cases to define "control" but refusing to follow certain Ninth Circuit decisions and a U.S. Supreme Court decision on other aspects of control liability); *Nutek*, 977 P.2d at 832-33 ¶¶ 26-28 (relying on a Fifth Circuit decision interpreting *Howey* and rejecting a contrary Ninth Circuit decision); *MacCollum*, 913 P.2d at 1104-06 (interpreting notes as securities; refusing to use the Ninth Circuit's risk-capital test; and applying the U.S. Supreme Court's *Reves* test to define notes as securities for purpose of the Arizona Securities Act's fraud statutes); see also *Gunnison*, 618 P.2d at 606-07 (refusing to follow a U.S. Supreme Court decision regarding scienter under Rule 10b-5 and instead relying on a U.S. Supreme Court decision interpreting § 17(a) of the 1933 Act).

cepted and consistently applied theory of statutory interpretation.”<sup>65</sup> Instead, all American courts use a mix of interpretative tools including textual analysis; legislative history, intent, and purpose; canons of interpretation; and precedent, both judicial and administrative.<sup>66</sup> Arizona securities decisions follow the same pattern.<sup>67</sup>

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<sup>65</sup> Henry M. Hart, Jr. & Albert M. Sacks, *THE LEGAL PROCESS: BASIC PROBS. IN THE MAKING AND APPLICATION OF L.* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); *accord* Antonin Scalia, *A MATTER OF INTERPRETATION: FED. CTS. AND THE L.* 14 (1997) (“We American judges have no intelligible theory of what we do most.”); *see also* *True v. Stewart*, 18 P.3d 707, 712 ¶ 24 (Ariz. 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)). *But see* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750, 1775-85 (2010) (describing the three-step methodology used to control statutory interpretation in Oregon).

<sup>66</sup> *See generally* William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garret, *LEGIS. AND STATUTORY INTERPRETATION* 9 (2000) (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).

<sup>67</sup> *See, e.g.,* *Sell v. Gama*, 295 P.3d 421, 424-27 (Ariz. 2013) (using legislative intent and history (¶¶ 15, 17-18), textual analysis (¶ 16-17, 20), federal precedent (¶ 18-19, 21), and Arizona precedent (¶ 29) to decide statutory aiding-and-abetting issues); *Grand v. Nacchio*, 236 P.3d 398, 401-03 (Ariz. 2010) (interpreting A.R.S. § 44-2003(A) and using statutory purpose (¶ 16), textual analysis (¶¶ 17-18, 23), Arizona precedent (¶ 19), the canon against superfluity (¶ 22), and statutory structure (¶ 23)); *Caruthers v. Underhill*, 326 P.3d 268, 275-76 (Ariz. Ct. App. 2014) (interpreting statutory rescission issues and using Arizona precedent (¶¶ 30-31), textual analysis (¶ 33), dictionary meaning (¶ 33), federal precedent (¶ 34 n.5), and the presumption against changing the common law (¶ 33)); *see also True*, 18 P.3d at 712 ¶ 24 (“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)).

Second, because of this interpretative mix, Arizona cases frequently cite federal securities cases to accredit an interpretation supported in other ways—for example, by existing Arizona cases or other by principles of statutory interpretation.<sup>68</sup> *Sell*, for instance, supported its holding on aiding and abetting not only by relying on a U.S. Supreme Court decision eliminating aiding and abetting under Rule 10b-5 but through analysis of the Arizona Securities Act’s text and legislative intent.<sup>69</sup>

Third, Arizona cases cite not only U.S. Supreme Court decisions but those in the lower- federal courts.<sup>70</sup> The U.S. Supreme Court has issued at least thirty-two decisions interpret-

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<sup>68</sup> See, e.g., *State v. Baumann*, 610 P.2d 38, 46 (Ariz. 1980) (citing federal cases to accredit the court’s holding that the text of § 44-2033 places the burden of proving a registration exemption on the defendant); *Caruthers*, 326 P.3d at 276 ¶ 34 n.5 (citing federal cases and an Arizona case in concluding that rescission under § 44-2002(A) is an equitable claim on which plaintiffs are not entitled to a jury trial); *DeJonghe v. E.F. Hutton & Co.*, 830 P.2d 862, 866 (Ariz. Ct. App. 1991) (citing a federal case to accredit the court’s holding that § 44-1991(2) (now § 44-1991(A)) does not require scienter); *State ex rel. Corbin v. Goodrich*, 726 P.2d 215, 223-24 (Ariz. Ct. App. 1986) (citing a Ninth Circuit case to accredit a finding supported by Arizona case law on the materiality of certain facts).

<sup>69</sup> See *Sell*, 295 P.3d at 425-27 ¶¶ 16-29.

<sup>70</sup> See, e.g., *Hirsch v. Ariz. Corp. Comm’n*, 352 P.3d 925, 931-32 ¶ 22 (Ariz. Ct. App. 2015) (citing decisions by the federal Courts of Appeals and a district court in holding that loss causation does not apply in enforcement actions by the Corporation Commission); *Shorey v. Ariz. Corp. Comm’n*, 359 P.3d 997, 1003 ¶ 21 (Ariz. Ct. App. 2015) (citing a district-court decision on the materiality of an undisclosed 72.5% commission); *Caruthers*, 326 P.3d at 276 ¶ 34 n.5 (citing federal Courts of Appeals decisions to support the court’s holding that plaintiffs were not entitled to a jury trial on their rescission claim for statutory securities fraud); *Grand v. Nacchio*, 147 P.3d 763, 774 ¶ 35 (Ariz. Ct. App. 2006) (citing lower federal-court decisions to explain loss causation under A.R.S. § 44-1991(A)); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm’n*, 977 P.2d 826, 830-31 ¶¶ 19-20, 832-33 ¶¶ 26-27 (Ariz. Ct. App. 1998) (relying upon Fifth Circuit decisions to explain when LLC interests are investment contracts and therefore securities).

ing the scope of § 10(b) and Rule 10b-5 liability.<sup>71</sup> Other opinions have been issued under a variety of other federal securities statutes. These include decisions that address civil liability under federal securities statutes besides § 10(b),<sup>72</sup> as well as such issues as what is a security and the requirements for a federal-registration exemption.<sup>73</sup> On top of these Supreme Court decisions are thousands of district-court and circuit-court decisions issued by federal judges.<sup>74</sup> The sheer volume of federal precedent creates opportunities for practitioners and Arizona courts

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<sup>71</sup> See Joseph A. Grundfest, *Damages and Reliance Under Section 10(b) of the Exchange Act*, 69 BUS. LAW. 307, 324-25 & n.85 (2014) (collecting the 28 cases decided before 2014). In 2014, two additional cases were decided. See *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1063 (2014); *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). Two more were decided in 2016. See *Salman v. United States*, 137 S. Ct. 420 (2016); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562 (2016).

<sup>72</sup> See, e.g., *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327-32 (2015) (explaining when statements of opinion qualify as false or misleading (by omission) statements under § 11(a) of the 1933 Act); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 568-78 (1995) (interpreting the meaning of prospectus under § 12(a)(2) of the 1933 Act); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1090-96 (1991) (discussing when statements of reason, opinion, or belief in proxy statements are actionable as material misrepresentations under § 14(a) of the 1934 Act); *Randall v. Loftsgaarden*, 478 U.S. 647, 655-60 (1986) (interpreting rescission and rescissionary damages under § 12(2) (now § 12(a)(2)) of the 1933 Act); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 445-50 (1976) (defining materiality for purposes of implied liability under § 14(a) of the 1934 Act).

<sup>73</sup> See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56, 60-70 (1990) (formulating a test for determining when a note is a security under the 1934 Act); *Int'l Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 570 (1979) (holding that the 1933 and 1934 Acts do not apply to noncontributory, compulsory pension plans); *SEC v. Ralston Purina Co.*, 346 U.S. 119, 122-27 (1953) (interpreting the 1933 Act's registration exemption for private offerings); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-301 (1946) (defining investment contracts under the 1933 Act).

<sup>74</sup> For example, a Westlaw search of all federal-circuit court and all federal-district court cases citing Rule 10b-5 since January 1, 1990 produced over 10,000 decisions.

to selectively mine federal cases for decisions that support their position. Arguably, *Sell* limits what can be cited by approving only citations to “settled federal securities cases.”<sup>75</sup> Historically, however, the Arizona Court of Appeals has cited federal decisions where the circuits are divided<sup>76</sup> and where the law is not well developed.<sup>77</sup>

Fourth, until 2006, Arizona cases overlooked the relevance of § 12(a)(2) of the 1933 Act. A 2006 Court of Appeals decision involving issues regarding loss causation and statutory rescission correctly recognized that § 12(a)(2) is the federal counterpart of § 44-1991(A)(2).<sup>78</sup> Earlier decisions interpreting reliance and scienter under § 44-1991(A)(2) failed to identify § 12(a)(2) as a relevant federal statute.<sup>79</sup> Instead, the cases drew on precedent under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act.<sup>80</sup> Although the cases reached the correct result—neither scienter nor reliance is required under § 44-

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<sup>75</sup> See *Sell v. Gama*, 295 P.3d 421, 425 ¶ 18 (Ariz. 2013).

<sup>76</sup> See, e.g., *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 79 P.3d 86, 98-99 ¶¶ 40-41 (Ariz. Ct. App. 2003) (citing Eighth and Fifth Circuit authority to define control while refusing to follow certain Ninth Circuit decisions); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm’n*, 977 P.2d 826, 832-33 ¶¶ 26-28 (Ariz. Ct. App. 1998) (relying on a Fifth Circuit decision interpreting *Howey* and rejecting a contrary Ninth Circuit decision).

<sup>77</sup> See, e.g., *Caruthers v. Underhill*, 326 P.3d 268, 276 ¶ 34 n.5 (Ariz. Ct. App. 2014) (citing two decisions from the Second and Sixth Circuits to hold that a claim for rescission under A.R.S. § 44-2002(A) is an equitable claim on which the plaintiff is not entitled to a jury trial).

<sup>78</sup> See *Grand v. Nacchio*, 47 P.3d 763, 780 ¶ 58 (Ariz. Ct. App. 2006).

<sup>79</sup> See, e.g., *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) (relying upon Supreme Court precedent under § 17(a) to interpret state-of-mind requirements under § 44-1991(2) (now § 44-1991(A)(2)); *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131, 1135-36 (Ariz. Ct. App. 1986) (citing implied-liability cases under §§ 10(b) and 14(a) of the 1934 Act in which exceptions to a reliance requirement were recognized); *Rose v. Dobras*, 624 P.2d 887, 892 (Ariz. Ct. App. 1981) (relying upon precedent under § 17(a) and § 10(b)).

<sup>80</sup> See, e.g., cases cited *supra* note 79.

1991(A)(2)—they would have been better reasoned if they had relied on § 12(a)(2) precedent.<sup>81</sup>

Finally, the nine Arizona decisions that rejected federal securities law did so for multiple reasons. One reason is because of differences in statutory language.<sup>82</sup> Another is because of differences in policy.<sup>83</sup> In other cases, the appellate court rejected one line of federal case law in favor of another line.<sup>84</sup> And in two cases, the courts departed from U.S. Su-

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<sup>81</sup> See *Kronenberg v. Katz*, 872 A.2d 568, 598-99 (Del. Ch. 2004) (similar as to reliance and scienter under Pennsylvania's counterpart of § 44-1992(A)); *Marram v. Kobrnick Offshore Fund, Ltd.*, 809 N.E.2d 1017, 1026-27 (Mass. 2004) (citing authority under § 12(a)(2) and holding that under the Massachusetts Securities Act the plaintiff does not need to prove either scienter or reliance); see also 9 LOSS ET AL., *supra* note 42, at 168-69 nn.21, 23 (explaining that § 410(a)(2) of the 1956 Uniform Securities Act was modeled on § 12(2) (now § 12(a)(2)) and was intended to create liability for materially misleading statements without proof of reliance).

<sup>82</sup> See *Hirsch v. Ariz. Corp. Comm'n*, 352 P.3d 925, 935-36 ¶ 41 (Ariz. Ct. App. 2015) (refusing because of differences in statutory language to follow federal law on disgorgement to interpret restitution in enforcement actions by the Corporation Commission); *Grand*, 47 P.3d at 778-79 ¶ 51 (declining to follow federal case law in scheme-liability cases because "the federal statutes contain no explicit rescission remedy" like that in § 44-2001(A)); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317 (Ariz. Ct. App. 1996) (declining to consider federal case law because § 44-2003 (now § 44-2003(A)) has no federal counterpart).

<sup>83</sup> See, e.g., *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); *Siporin v. Carrington*, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

<sup>84</sup> See *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 977 P.2d 826, 832-33 ¶¶ 26-28 (Ariz. Ct. App. 1998) (interpreting *Howey* and rejecting the Ninth Circuit's knowledge test in favor of the Fifth Circuit's test); *Daggett v. Jackie Fine Arts, Inc.*, 733 P.2d 1142, 1148-49 (Ariz. Ct. App. 1986) (noting that the lower-federal courts are divided on whether both horizontal and vertical commonality are required for a common enterprise and adopting the

preme Court precedent without fully acknowledging that they were doing so. In the first case, the Arizona Supreme Court fashioned a novel definition of when promissory notes are securities.<sup>85</sup> In the second case, *Shorey*, the Arizona Court of Appeals applied Arizona's securities-registration and antifraud statutes to an Arizona-based issuer's sales to foreign investors.<sup>86</sup>

*Shorey* cited Arizona's interest in protecting its business reputation and rejected arguments that extraterritorial application was federally preempted and violated the federal Commerce Clause.<sup>87</sup> *Shorey* failed to discuss the U.S. Supreme Court's *Morrison* decision, which held that federal securities laws should not be given extraterritorial application.<sup>88</sup> The same decision found unpersuasive the argument accepted by *Shorey* that without extraterritorial application, the U.S. was at risk of becoming a base of operations for fraudulent securi-

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Ninth Circuit's approach allowing use of either horizontal or vertical commonality).

<sup>85</sup> *Compare* State v. Tober, 841 P.2d 206, 208-09 (Ariz. 1992) (declining to follow *Reves v. Ernst & Young*, 494 U.S. 56 (1990) and holding that a note is not a security under Arizona's registration statutes if it is exempt from registration), with *SEC v. Wallenbrock*, 313 F.3d 532, 536-40 (9th Cir. 2002) (applying *Reves* to both registration and antifraud violations).

<sup>86</sup> *Shorey v. Ariz. Corp. Comm'n*, 359 P.3d 997, 1004-08 ¶¶ 25-44 (Ariz. Ct. App. 2015).

<sup>87</sup> *Id.* at 263 ¶ 40, 359 P.3d at 1007 ¶ 40 ("A state has an interest in seeing that its territory is not used as a base of operations to conduct illegal sales in other states. Thus, the host state has an interest in protecting its reputation as not being a center for illegal or questionable securities activity." (quoting *Ariz. Corp. Comm'n v. Media Products, Inc.*, 763 P.2d 527, 533 (Ariz. Ct. App. 1988)).

<sup>88</sup> *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010) (holding that § 10(b) of the 1934 Act applies only to transactions in securities listed on domestic exchanges and to domestic transactions in other securities).

ties sales.<sup>89</sup>

#### IV. IDENTIFYING RELEVANT FEDERAL LAW: A SUGGESTED APPROACH

No case has attempted to comprehensively list the principles of statutory interpretation that should be followed to decide whether to cite federal securities law. But when carefully analyzed, the cases and intent provisions in Arizona's securities statutes articulate a core of interpretative principles. The cases state, for example, that relying on federal cases may not be appropriate because of differences in statutory language or policy.<sup>90</sup> The Arizona Supreme Court has also suggested that it will only follow settled federal law.<sup>91</sup> Other cases show that judge-made rules under implied-liability provisions like Rule 10b-5 may not be appropriate under the express-liability provisions of Arizona's securities statutes.<sup>92</sup> The cases also show it

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<sup>89</sup> See *id.* at 270 (rejecting argument that extraterritorial jurisdiction was proper to prevent "the United States from becoming a 'Barbary Coast' for malefactors perpetrating frauds in foreign markets").

<sup>90</sup> See *Sell v. Gama*, 295 P.3d 421, 424-25 ¶¶ 12, 18 (Ariz. 2013) (noting that the court will give less weight to and not necessarily defer to federal securities law when the federal statutes or their policies are materially different); *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) ("Because, however, there is no counterpart in those [federal] statutes to the participation-or-inducement standard of our state statute, the federal statutes do not guide us here."); see also *In re Allstate Life Ins. Co. Litig.*, 971 F. Supp. 2d 930, 944 (D. Ariz. 2013) (holding that unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) is not limited to misleading statements made in a prospectus used in an initial public offering).

<sup>91</sup> See *Sell*, 295 P.3d at 424-25 ¶¶ 12, 18 (stating that the court will follow "settled federal securities law" unless there is a good reason not to); see also *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) ("Unless there is a good reason for deviating from the United States Supreme Court's interpretation, we will follow the reasoning of that court in interpreting sections of our statutes which are identical or similar to federal securities statutes.").

<sup>92</sup> See *Grand v. Nacchio*, 147 P.3d 763, 778-79 ¶ 51 (Ariz. Ct. App. 2006) (refusing to apply Rule 10b-5 loss-causation requirements to rescission

may be necessary to consider more than one federal statute to decide whether federal law is relevant.<sup>93</sup>

Other cases reveal the importance of the intent statutes.<sup>94</sup> The intent statutes explain that the purpose of Arizona's securities laws is public protection;<sup>95</sup> that narrow interpreta-

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claims based on § 44-1991(A)(1) or (3) and noting that unlike the Arizona statutes, the federal statutes do not contain an express-rescission remedy for violations of scheme provisions like those in § 44-1991(A)(1) or (3)); *see also* Strategic Diversity, Inc. v. Alchemix Corp., 666 F.3d 1197, 1209 (9th Cir. 2012) (holding that unlike federal law under Rule 10b-5, "rescission under Arizona securities law does not require the existence of damages").

<sup>93</sup> *See Grand*, 147 P.3d at 778-79 ¶ 51 (declining to follow either Rule 10b-5 of the 1934 Act or § 12(a)(2) of the 1933 Act regarding loss causation requirements for claims seeking *rescission* for violations of § 44-1991(A)(1) and (3)); *see also id.* at 26 ¶¶ 58-59, 147 P.3d at 780 ¶¶ 58-59 (using loss-causation requirements under Rule 10b-5 and § 12(a)(2) to explain the loss-causation rules that govern *damages* under § 44-1991(A)'s three subsections).

<sup>94</sup> On the importance of statutes describing the legislature's purpose, *see Grand Canyon Trust v. Ariz. Corp. Comm'n*, 107 P.3d 356, 366 ¶ 30 n.13 (Ariz. Ct. App. 2005) (a session law's "statement of legislative purpose is itself enacted and is thus subject to the entire review process by which a bill becomes law. The statement is thus free from some of the vagaries that can otherwise accompany a judicial search for legislative intent."); *accord Flood Control Dist. of Maricopa Cnty. v. Paloma Inv. Ltd. P'ship*, 350 P.3d 826, 831 ¶ 20 (Ariz. Ct. App. 2015) ("When the legislature specifies the statute's applicability or purpose in the session law that contains the statute, it is appropriate to interpret the statutory provisions in light of that enacted purpose.").

<sup>95</sup> *See Securities Act of Arizona*, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75:

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 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 con-

tions are to be avoided;<sup>96</sup> that the statutes should be liberally construed;<sup>97</sup> that federal cases should be cited only when the Arizona and federal statutes are substantially similar;<sup>98</sup> and that interpretations by the SEC of substantially similar federal statutes may be considered.<sup>99</sup> The courts use these statutory expressions of legislative intent to evaluate and sometimes reject federal case law.<sup>100</sup>

When synthesized, the intent statutes and case law identify the body of interpretative principles that should be followed in deciding whether federal securities law provides relevant guidance on Arizona securities law. These principles are summarized below in ten questions and explanatory comments.

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struction, but shall be liberally construed as a remedial measure in order not to defeat the purpose thereof.

*See also* cases cited *supra* note 56 (regarding the ASA's public-protection goals).

<sup>96</sup> Securities Act of Arizona, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75 (providing that the "Act shall not be given a narrow or restricted interpretation"); *see also* *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (citing § 20 of the 1951 Act and declining to follow Ninth Circuit cases that the court characterized as too restrictive to adequately guard the public).

<sup>97</sup> Securities Act of Arizona, ch. 18, § 20, 1951 Ariz. Sess. Laws 46, 75 (providing that the Act "shall be liberally construed as a remedial measure"); *see also Grand*, 147 P.3d at 776-77 ¶¶ 42, 45 (noting the Arizona legislature's intent that the securities laws be liberally construed and refusing to follow federal case law that would have narrowed the plaintiff's choice of remedies under § 44-2001(A)).

<sup>98</sup> *See Private Securities Litigation Act*, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023 (providing that the courts may use as a guide interpretations of "substantially similar provisions in the federal securities laws of the United States") (quoted in full *supra* note 4).

<sup>99</sup> *See id.* (providing that interpretations by the SEC may be used as a guide).

<sup>100</sup> *See, e.g.,* cases cited *supra* notes 96-97.

**Questions**

Is the text of the Arizona statute the same as the federal statute?

**Comments**

Some provisions in the Arizona Securities Act have no federal counterpart.<sup>101</sup> In cases involving these unique Arizona statutes, the courts have declined to consider federal case law.<sup>102</sup> In other instances, the Arizona and federal statutes are similar but have textual differences that require different interpretations.<sup>103</sup>

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<sup>101</sup> See, e.g., *Grand*, 147 P.3d at 779 ¶ 51 (explaining that “the federal statutes contain no explicit rescission remedy” for scheme violations like those prohibited by § 44-1991(A)(1) and (3)); *Standard Chartered, PLC v. Price Waterhouse*, 945 P.2d 317, 329 (Ariz. Ct. App. 1996) (refusing to consider federal case law because there is no federal counterpart to § 44-2003 (now § 44-2003(A))).

<sup>102</sup> See cases cited *supra* notes 96-97.

<sup>103</sup> See, e.g., *In re Allstate Life Ins. Co. Litig.*, 971 F. Supp. 2d 930, 944 (D. Ariz. 2013) (holding that unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) does not require a plaintiff to prove it purchased securities as part of an initial public offering); *In re Allstate Life Ins. Co. Litig.*, No. CV-09-8162-PCT-GMS, 2012 WL 1900560, at \*5 n.3 (D. Ariz. May 24, 2012) (stating that unlike the U.S. Supreme Court’s interpretation of Rule 10b-5, the Arizona Securities Act “appears to create liability for one’s participation in creating a misleading statement even where one is not the ‘maker’ of the statement.” (citing A.R.S. § 44-2003(A) (2013))); *Hirsch v. Ariz. Corp. Comm’n*, 352 P.3d 925, 935 ¶ 41 (Ariz. Ct. App. 2015) (noting differences in statutory text and refusing to follow precedent under the federal-disgorgement statute to interpret restitution in securities-enforcement actions by the Corporation Commission).

Is the federal court's interpretation one that reduces public protection?

Some federal decisions adopt interpretations that conflict with the 1951 Act's intent to foster public protection.<sup>104</sup>

Does the federal case adopt a narrower interpretation than what is required by the statute's language?

Some federal decisions adopt narrower interpretations than a fair reading of the statute requires.<sup>105</sup> These cases are inconsistent with the Arizona legislature's intent to have Arizona's securities laws liberally construed without narrow or restricted interpretations.<sup>106</sup>

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<sup>104</sup> See *Grand*, 147 P.3d at 776-77 ¶¶ 42, 45 (noting the Arizona legislature's intent that the securities laws be liberally construed and refusing to follow federal case law that would have narrowed the plaintiff's choice of remedies under § 44-2001(A)); *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 97 ¶ 36 (Ariz. Ct. App. 2003) (declining to follow certain cases in the Ninth Circuit that the court characterized as too restrictive to adequately guard the public); *Siporin v. Carrington*, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

<sup>105</sup> See cases cited *supra* notes 44-52 and accompanying text (discussing the U.S. Supreme Court's practice of interpreting Rule 10b-5 and § 10(b) of the 1934 Act more narrowly than their words require).

<sup>106</sup> Compare, e.g., *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 165, 167 (2008) (expressing concern about avoiding expansion of Rule 10b-5 and stating that the Rule's implied cause of action should be given "narrow dimensions"), with *Eastern Vanguard*, 79 P.3d at 101 ¶ 50 (declining to follow U.S. Supreme Court precedent that would read a state-of-mind requirement into Arizona's control-liability statute because of the "legislative directive that Arizona's securities laws be interpreted liberally to protect the public"), and *Siporin*, 23 P.3d at 99 ¶ 35 (refusing to follow federal decision because its "rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act").

Does the federal court's method of statutory interpretation conflict with established methods of Arizona interpretation? U.S. Supreme Court decisions, particularly those involving civil liability under Rule 10b-5, sometimes adopt narrower interpretations that contradict normal statutory interpretation in Arizona.<sup>107</sup>

Is federal case law settled? If the U.S. Supreme Court has not addressed the issue, the lower-federal courts may not have developed a settled position.<sup>108</sup> The Arizona Supreme Court has only approved citing settled-federal securities law.<sup>109</sup>

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<sup>107</sup> Compare, e.g., *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 151 (2011) (criticizing the majority for interpreting the word "make" in Rule 10b-5 to contradict ordinary English (Breyer, J., dissenting)), with *Red River Res., Inc. v. Mariner Sys., Inc.*, No. CV 11-02589-PHX-FJM, 2012 WL 2507517, at \*10 (D. Ariz. June 29, 2012) ("While *Janus* limited liability under Rule 10b-5 to those with ultimate authority over a statement, Arizona has not defined 'make' in § 44-1991(A)(2) in the same way.").

<sup>108</sup> See cases cited *supra* notes 8-9 and accompanying text (discussing the small number of securities-law decisions issued by the U.S. Supreme Court) and *supra* notes 22-28 and accompanying text (discussing the frequently unsettled nature of federal securities law).

<sup>109</sup> See *Sell v. Gama*, 295 P.3d 421, 424-25 ¶¶ 12, 18 (Ariz. 2013) (stating that the court will follow "settled federal securities law" unless there is a good reason not to).

- If unsettled federal case law is cited, what justifies its use? If federal case law is cited on an issue where federal law is unsettled or conflicting, that fact should be mentioned. A reasoned explanation should then be provided as to why the selected case law provides an appropriate interpretation of the Arizona statute.<sup>110</sup>
- Does more than one federal statute with similar language exist? The federal securities laws include nine acts.<sup>111</sup> As a result, multiple federal statutes may be similar to the language of an Arizona statute.<sup>112</sup> If federal precedent is cited, all potentially relevant statutes and the differences in their elements and remedies should be considered.<sup>113</sup>

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<sup>110</sup> See, e.g., *Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 39-41 ((a) noting conflicting positions by the federal courts on whether actual participation in a securities violation is required for control liability and (b) concluding that participation should not be required because the plain language of Arizona's control-liability statute (§ 44-1999(B)) does not support a participation requirement); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 77 P.2d 826, 832-33 ¶¶ 27-28 (Ariz. Ct. App. 1998) (adopting the Fifth Circuit rather than the Ninth Circuit's interpretation of the efforts-of-others element of investment contracts and explaining that the Fifth Circuit's approach advances the Arizona legislature's intent to protect investors and more accurately takes account of the economic realities of the transaction).

<sup>111</sup> See *supra* note 29 and accompanying text (listing the federal acts).

If more than one federal statute applies, do the statutes have different elements of proof?

Federal securities statutes sometimes provide cumulative remedies.<sup>114</sup> Sometimes this statutory overlap exists even when the federal statutes “involve distinct causes of action and were intended to address different types of wrongdoing.”<sup>115</sup> Care must therefore be taken to identify the federal statute that most closely parallels the Arizona statute.<sup>116</sup>

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<sup>112</sup> See Pritchard, *supra* note 46, at 234-37 (discussing the different approaches to reliance under the 1933 and 1934 Acts’ antifraud statutes).

<sup>113</sup> See, e.g., *State v. Gunnison*, 618 P.2d 604, 606-07 (Ariz. 1980) (implicitly noting differences in state-of-mind requirements under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act and interpreting § 44-1991 (now § 44-1991(A)) on the basis of the U.S. Supreme Court’s interpretation of § 17(a)); *Grand v. Nacchio*, 147 P.3d 763, 778-79 ¶ 51, 780 ¶¶ 58-59 (Ariz. Ct. App. 2006) (analyzing case law regarding loss causation under both § 12(a)(2) of the 1933 Act and Rule 10b-5 of the 1934 Act).

<sup>114</sup> See cases cited *supra* notes 37-40 and accompanying text.

<sup>115</sup> See cases cited *supra* notes 39-40 and accompanying text (regarding the different reliance and scienter requirements under the federal antifraud statutes); *Grundfest*, *supra* note 71, at 330-43 (discussing the elements of proof under the seven express-liability statutes that existed when the 1933 and 1934 Acts were initially enacted); Pritchard, *supra* note 46, at 234-37 (discussing the different approaches to reliance under the 1933 and 1934 Acts’ antifraud statutes).

<sup>116</sup> See, e.g., *Gunnison*, 618 P.2d at 606-07 (implicitly noting differences in state-of-mind requirements under § 17(a) of the 1933 Act and § 10(b) of the 1934 Act and interpreting § 44-1991 (now § 44-1991(A)) on the basis of the U.S. Supreme Court’s interpretation of § 17(a)); *Grand*, 147 P.3d at 778-79 ¶ 51, 780 ¶¶ 58-59 (analyzing case law regarding loss causation under both § 12(a)(2) of the 1933 Act and Rule 10b-5 of the 1934 Act).

Is the federal statute an express-liability statute or an implied-liability statute?

Arizona's securities statutes provide for express-liability and articulate the available remedies and elements of proof within the statutes' text.<sup>117</sup> By contrast, with implied remedies like those under Rule 10b-5, the elements of proof and permissible remedies were judicially created and often cannot be explained by the statute's text.<sup>118</sup> This judge-made law may be inconsistent with Arizona's statutes.<sup>119</sup>

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<sup>117</sup> See *Sell v. Gama*, 295 P.3d 421, 427 ¶ 28 (Ariz. 2013) (“[T]he ASA prescribes the available remedies and categories of potential defendants, and articulates the ‘elements of securities fraud.’” (quoting in part *Aaron v. Fromkin*, 994 P.2d 1039, 1042 ¶ 13 (Ariz. Ct. App. 2000) (“The elements of securities fraud are articulated within the statute itself.”))).

<sup>118</sup> See *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 84 (2006) (acknowledging that the court had relied “chiefly, and candidly, on ‘policy considerations’” to interpret Rule 10b-5’s “‘in connection with’” language as a limitation that restricts Rule 10b-5 claims to persons who actually purchase or sell a security (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737, 749 (1975))); see also *supra* note 46 and accompanying text (explaining that reliance is a required element under Rule 10b-5 even though nothing in the text of the Rule or § 10(b) of the 1934 Act requires reliance).

<sup>119</sup> See, e.g., *Gunnison*, 618 P.2d at 606-07 (overruling prior case law and refusing to follow U.S. Supreme Court precedent on Rule 10b-5 scienter regarding § 44-1991(2) (now § 44-1991(A)(2))). Compare also *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 151 (2011) (criticizing the majority for interpreting the word “make” in Rule 10b-5 in a manner that contradicts ordinary English (Breyer, J., dissenting)), with *Red River Res., Inc. v. Mariner Sys., Inc.*, No. CV 11-02589-PHX-FJM, 2012 WL 2507517, at \*10 (D. Ariz. June 29, 2012) (“While *Janus* limited liability

Does relevant precedent by the SEC or a state court exist? Sometimes the SEC's rules or administrative decisions may provide relevant guidance.<sup>120</sup> Securities law in other states may also be relevant.<sup>121</sup>

From this ten-part list, the core principles that should govern citations to federal precedent can be stated even more succinctly. First, as an overarching principle, the text of Arizona's statutes should be given their fair meaning.<sup>122</sup> Second,

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under Rule 10b-5 to those with ultimate authority over a statement, Arizona has not defined 'make' in § 44-1991(A)(2) in the same way.”).

<sup>120</sup> See *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm'n*, 79 P.3d 86, 99 ¶ 41 (Ariz. Ct. App. 2003) (relying upon an SEC rule defining control to interpret control-liability under § 44-1999(B)); see also *Allstate Life Ins. Co. v. Robert W. Baird & Co.*, 756 F. Supp. 2d 1113, 1161 (D. Ariz. 2010) (refusing to apply SEC Rule 131 to interpret § 44-1998 because of uncertainty about the Rule's relevance); John P. Flannery and James D. Hopkins, Exchange Act Release No. 3981, 2014 WL 7145625, at \*14 & n.69 (Dec. 15, 2014) (disagreeing with decisions from the Second, Eighth, and Ninth Circuits on the scope of liability under Rule 10b-5(a) and (c)), *vacated on other grounds sub nom.* Flannery v. SEC, 810 F. 3d 1 (1st Cir. 2015).

<sup>121</sup> See Private Securities Litigation Act, ch. 197, § 11(C), 1996 Ariz. Sess. Laws 1003, 1023 (providing that decisions of “the federal *or other courts*” may be used as a guide in construing substantially similar provisions in Arizona's securities laws (emphasis added)); *State v. Baumann*, 610 P.2d 38, 46 (Ariz. 1980) (relying upon a federal court's interpretation of Ohio securities law to explain that a defendant who claims the benefit of a registration exemption has the burden of proof (citing *United States ex rel. Shott v. Tehan*, 365 F.2d 191 (6th Cir. 1966))); *Grand v. Nacchio*, 147 P.3d 763, 775-76 ¶¶ 39-40 (Ariz. Ct. App. 2006) (relying in part on common-law cases from other states as authority for interpreting § 44-2001(A)'s tender requirement).

<sup>122</sup> *Grand*, 147 P.3d at 778-79 ¶¶ 50-51 (finding no support in the text for a loss-causation requirement when the plaintiff seeks rescission under § 44-1991(A)(1) or (3)); *Eastern Vanguard*, 79 P.3d at 99 ¶ 41 (“The plain lan-

federal cases should not be used to support narrow interpretations not required by an Arizona statute's words.<sup>123</sup> Third, requirements from federal case law should not be added to a statute when the requirements are not supported by its text.<sup>124</sup> And fourth, if an interpretation that furthers public protection is supported by the statute's text, that interpretation is the preferred one even if federal cases reach a different interpretation.<sup>125</sup> These four principles—giving the words their fair meaning; avoiding narrow interpretations; avoiding nontextual requirements; and adopting textually permitted interpretations that advance public protection—describe the predominate approach followed in Arizona securities cases. If fairly applied,

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guage of the statute [A.R.S. § 44-1999(B)] does not support a requirement that a 'controlling person' must have actually participated in the specific action upon which the securities violation is based.”).

<sup>123</sup> See *Eastern Vanguard*, 79 P.3d at 98-99 ¶¶ 40-41 (concluding that the plain language of Arizona's control statute does not support the participation requirement added by some federal courts); *Siporin v. Carrington*, 23 P.3d 92, 99 ¶ 35 (Ariz. Ct. App. 2001) (refusing to follow federal decision because its “rationale does not serve the prophylactic and remedial purposes of the Arizona Securities Act”).

<sup>124</sup> See *Grand*, 147 P.3d at 778-79 ¶¶ 50-51 (finding no support in the text for a loss-causation requirement when the plaintiff seeks rescission under § 44-1991(A)(1) or (3)); *Eastern Vanguard*, 79 P.3d at 99 ¶ 41 (declining to follow contrary federal law and holding that a participation requirement for control liability is not supported by the text of Arizona's statute).

<sup>125</sup> See, e.g., *Grand*, 147 P.3d at 777-78 ¶¶ 45-48 (declining to follow contrary federal precedent and interpreting tender under § 44-2001(A) to permit substitute tender because that approach better protected the public); *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 77 P.2d 826, 832-33 ¶¶ 26-27 (Ariz. Ct. App. 1998) (adopting the federal interpretation of investment contracts that best protected investors); cf. *DMK Biodiesel, LLC v. McCoy*, 859 N.W.2d 867, 871-76 (Neb. 2015) (stating that Nebraska's securities act should be construed to afford the greatest possible public protection and refusing to follow Rule 10b-5 cases on reliance, constructive knowledge, an investor's duty to investigate, and the right to rely on oral representations that contradict written disclosures).

these principles will distinguish relevant federal case law from cases that are only superficially relevant.

Interpretive principles may of course sometimes point in different directions.<sup>126</sup> And the courts are not always consistent.<sup>127</sup> Interpretative canons are sometimes marshaled or distinguished in the manner that best suits the outcome the court prefers.<sup>128</sup> Federal cases can be selectively cited the same way.<sup>129</sup> But if fairly applied, the four suggested princi-

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<sup>126</sup> See, e.g., *Sell v. Gama*, 295 P.3d 421, 426 ¶ 23 (Ariz. 2013) (acknowledging that the securities laws are to be liberally construed but placing greater weight on the absence of textual support for a separate or implied claim for aiding-and-abetting liability).

<sup>127</sup> Compare *id.* at 427 ¶ 10 (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]”), with *Caruthers v. Underhill*, 326 P.3d 268, 276 ¶ 33, 277 ¶ 37 (Ariz. Ct. App. 2014) (holding that a securities seller’s right to statutory rescission is subject to nonstatutory, equitable defenses and citing the canon that courts will usually presume that the legislature did not intend to change the common law).

<sup>128</sup> See *True v. Stewart*, 18 P.3d 707, 712 ¶ 24 (Ariz. 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)). Compare *Caruthers*, 326 P.3d at 277-78 ¶ 40 (rejecting the argument that the legislature’s decision to enact express, statutory defenses to securities violations implied the legislature’s intent to exclude nonstatutory defenses), with *Legacy Res., Inc. v. Liberty Pioneer Energy Source, Inc.*, 322 P.3d 683, 692-93 ¶ 41 (Utah 2013) (concluding that recognizing equitable defenses was inconsistent with the Utah legislature’s listing of specific statutory defenses).

<sup>129</sup> Compare *In re Allstate Life Ins. Co. Litig.*, Nos. CV-09-01862-PCT-GMS, CV-09-8174-PCT-GMS, 2013 WL 5161688, at \*13-15 (D. Ariz. Sept. 13, 2013) (relying upon federal cases to hold that scheme or course-of-conduct liability under § 44-1991(A)(1) or (3) requires conduct beyond misrepresentations or omissions), with *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 922 (D. Ariz. 2011) (refusing to rely on federal cases cited by defendants and holding that § 44-1991(A)(1) and (3) do impose liability for misleading disclosures or omissions).

ples provide a reasoned and predictable approach to the use of federal securities law.

## V. CONCLUSION

Both the Arizona Supreme Court and the Arizona legislature have approved using federal securities cases as interpretive guides. Under the case law, it is proper to look to federal securities law when federal law is settled and the Arizona and federal statutes are similar. In practice, however, federal law has limited utility. Many examples exist of Arizona securities decisions that do not cite federal decisions. In other decisions, the courts have expressly declined to follow federal case law.

Several reasons for the limited utility of federal law exist. One is the small volume of securities-law precedent generated by the U.S. Supreme Court, which averages only 1.3 securities cases per term. A second is that many of the Supreme Court's decisions turn on uniquely federal issues of little or no relevance to state securities law. A third is that the Supreme Court's small output results in open issues on which the lower-federal courts often disagree.

A fourth is the breadth and overlap of the nine federal securities acts that have been enacted since 1933. These laws provide cumulative remedies even when the elements of proof are different. As a result, identifying the most relevant federal counterpart can be challenging. This is illustrated by the tendency in Arizona decisions to focus on decisions under Rule 10b-5 without considering other analogous federal statutes such as §§ 11(a) and 12(a)(2) of the 1933 Act.<sup>130</sup>

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<sup>130</sup> See cases cited *supra* notes 41-43 and accompanying text.

Finally, differences in approach by Arizona's appellate courts and the U.S. Supreme Court on statutory interpretation and securities-law policy may also curb the relevance of federal precedent.<sup>131</sup>

Yet despite the limitations and difficulties in applying federal law, it is possible to cite federal cases in a principled way. Part IV provides an approach to identifying relevant law that can be reduced to four core principles of interpretation. Those principles, if fairly applied, will distinguish relevant federal precedent from precedent that is only superficially relevant.

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<sup>131</sup> See cases cited *supra* notes 44-56 and accompanying text.

## **Appendix A**

**Reported Arizona Securities-Law Decisions: 1980-2017**

### Arizona Supreme Court Decisions

1. Grand v. Nacchio, 176 ¶ 24, 236 P.3d 398, 401-02 ¶ 18, 403 ¶ 24 (Ariz. 2010) (interpreting § 44-2003(A) and holding that (a) a complaint need not separately parse whether a defendant made, participated in, or induced an unlawful sale, (b) plaintiff's allegations did not describe statutory participation, and (c) allegations that defendants' acts and omissions encouraged plaintiff to buy stock described "classic inducement").
2. Sell v. Gama, 295 P.3d 421, 425-27 & n.6 ¶¶ 19-24 (Ariz. 2013) (holding that "a separate claim for aiding and abetting does not exist under the ASA" and leaving open whether participant liability under § 44-2003(A) is broad enough to cover aiding and abetting).
3. State ex rel. Corbin v. Pickrell, 667 P.2d 1304, 1307 (Ariz. 1983) (holding that the "legislature intended the consumer fraud act to provide an additional avenue of relief to those aggrieved by securities act violations").
4. State v. Baumann, 610 P.2d 38, 46 (Ariz. 1980) (holding in a criminal case that (a) the defendant has the burden of proving a registration exemption and (b) to prove a registration exemption the defendant "must hold a good-faith belief that the security to be exempted was in fact a bona fide security").
5. State v. Gunnison, 618 P.2d 604, 606-07 (Ariz. 1980) (overruling prior case law that held that § 44-1991(2) (now § 44-1991(A)(2)) requires scienter and holding, on the basis of the U.S. Supreme Court's interpretation of § 17(a) of the 1933 Securities Act, that scienter is not required for a § 44-1991(2) violation).

6. *State v. Tober*, 841 P.2d 206, 207-09 (Ariz. 1992) (distinguishing registration and antifraud violations in deciding when notes are securities; rejecting the federal, *Reves* [494 U.S. 56 (1990)] test when a registration violation is alleged; and holding that a promissory note is a security under the registration statutes unless the note falls within a registration exemption).

### Arizona Court of Appeals Decisions

1. *Aaron v. Fromkin*, 994 P.2d 1039, 1042-44 ¶¶ 13-24 (Ariz. Ct. App. 2000) (discussing the elements of securities fraud under § 44-1991(A); concluding that damage is not a required element; and holding that the statute of limitations had run).

2. *Albers v. Edelson Tech. Partners L.P.*, 31 P.3d 821, 825-26 ¶¶ 13-16 (Ariz. Ct. App. 2001) (holding that plaintiff's allegations that defendants promised funding and assistance that they never intended to provide stated a claim under §44-1991(A)).

3. *Ariz. Corp. Comm'n v. Media Prods., Inc.*, 763 P.2d 527, 529-34 (Ariz. Ct. App. 1988) (interpreting the meaning of offer or sell "*from this state*" in § 44-1841 (the registration statute) and concluding that (a) the offer and sale were from Arizona and (b) application of the statute to a Delaware issuer was, under the facts, a violation of the federal Commerce Clause).

4. *Carrington v. Ariz. Corp. Comm'n*, 18 P.3d 97, 99 ¶ 10 (Ariz. Ct. App. 2000) (holding in an action to enforce the Securities Division's subpoenas that (a) "when interpreting Arizona law, Arizona courts are not bound even by the United States Supreme Court's interpretation of federal securities

laws” and (b) a federal case holding that viatical settlements are not securities was not binding Arizona law).

5. *Caruthers v. Underhill*, 287 P.3d 807, 818 ¶ 43 (Ariz. Ct. App. 2012) (discussing the materiality of appraisals and estimates of value and holding that materiality in securities cases contemplates a showing that an omitted fact *would have* been significant to a reasonable shareholder or *would have* significantly altered the total mix of information).

6. *Caruthers v. Underhill*, 326 P.3d 268, 274-78 ¶¶ 24-40 (Ariz. Ct. App. 2014) (holding that (a) rescission under § 44-2002(A) is an equitable remedy subject to equitable defenses, but (b) if rescission proves unavailable because of a successful defense, a plaintiff may seek damages).

7. *Daggett v. Jackie Fine Arts, Inc.*, 733 P.2d 1142, 1148-49 (Ariz. Ct. App. 1986) (applying the *Howey* investment-contract test and holding that *Howey*’s common-enterprise element may be established by either horizontal or vertical commonality).

8. *DeJonghe v. E.F. Hutton & Co.*, 830 P.2d 862, 866 (Ariz. Ct. App. 1991) (holding that scienter is not required under § 44-1991(2) (now § 44-1991(A)(2))).

9. *Eastern Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 79 P.3d 86, 98-99 ¶¶ 39-42, 100 ¶ 46, 101 ¶ 50 (Ariz. Ct. App. 2003) (interpreting the ASA’s control-liability statute and holding that: (a) actual participation in the securities violation is not required for control liability, (b) § 44-1999(B) imposes presumptive control liability on those persons who have the *power* to control the activities of a securities violator, (c) the controlling person has the burden of proof on §

44-1999(B)'s good-faith-and-noninducement defense, (d) evidence of lack of scienter is not enough to prove good faith, and (e) in nonfeasance cases, good faith requires control persons to show that they exercised due care to prevent securities violations).

10. *Foy v. Thorp*, 920 P.2d 31, 38 (Ariz. Ct. App. 1996) (holding that a real-estate transaction involving the purchase of real estate with a property-management agreement was not an investment contract because neither the common-enterprise nor efforts-of-others element existed).

11. *Grand v. Nacchio*, 147 P.3d 763, 775-79 ¶¶ 37-51 (Ariz. Ct. App. 2006) (interpreting the ASA's loss-causation and remedies statutes and holding that (a) loss causation is not required for statutory rescission on claims based on violations of § 44-1991(A)(1) and (A)(3) and (b) plaintiffs who sell publicly traded stock before suing may make a substitute tender by purchasing and tendering replacement shares).

12. *Hernandez v. Superior Court*, 880 P.2d 735, 741 (Ariz. Ct. App. 1994) (holding in a criminal case interpreting § 44-1991 (now § 44-1991(A)) that securities fraud may be proved in "any one" of the three ways described in subsections (1), (2), and (3)).

13. *Hirsch v. Ariz. Corp. Comm'n*, 352 P.3d 925, 931-32 ¶¶ 19-24, 933-34 ¶ 27, 935 ¶ 41 (Ariz. Ct. App. 2015) (holding as follows: (a) the ASA's loss causation statutes do not apply to enforcement actions by the Corporation Commission, (b) materiality is based upon an objective standard that eliminates the need to investigate whether a misstatement or omission was material to a particular investor, and (c) the Corporation Commission's authority to order restitution under §

44-2032(1) creates a broader remedy than the SEC's statutory authority to order disgorgement).

14. *London v. Green Acres Trust*, 765 P.2d 538, 545-46 (Ariz. Ct. App. 1988) (affirming judgment for plaintiffs in a class action under multiple laws including the securities-registration statute and consumer-fraud statute and rejecting defenses that the class plaintiffs' class action was barred by the statute of limitations, election of remedies, or because it duplicated an Attorney General's action).

15. *MacCollum v. Perkinson*, 913 P.2d 1097, 1103-06 (Ariz. Ct. App. 1996) (applying Arizona's *Tober* test to find that promissory notes were securities under the registration statutes and applying the federal, *Reves* test to find that the notes were also securities under § 44-1991(A)).

16. *Nutek Info. Sys., Inc. v. Ariz. Corp. Comm'n*, 977 P.2d 826, 830-35 ¶¶ 16-36 (Ariz. Ct. App. 1998) ((a) holding that LLC membership interests were securities under the *Howey* test and (b) following Fifth Circuit law, and rejecting Ninth Circuit law, in holding that under *Howey's* efforts-of-other element, proving knowledge requires evidence that the investor had meaningful knowledge of the specific business in which the investor invested).

17. *Rose v. Dobras*, 624 P.2d 887, 889-92 (Ariz. Ct. App. 1981) ((a) adopting *Howey's* test for investment contracts; (b) holding that scienter is not required for a violation of § 44-1991(2) (now § 44-1991(A)(2)); (c) adopting *TSC Industries'* [426 U.S. 438 (1976)] would-have standard for materiality; (d) holding that reliance is not required under § 44-1991 (now § 44-1991(A)); and (e) concluding that a tender at the start of trial was sufficient for statutory rescission).

18. *Rosier v. First Fin. Capital Corp.*, 889 P.2d 11, 15 (Ariz. Ct. App. 1994) (concluding that under § 44-1991 (now § 44-1991(A)) “even an innocent [misrepresentation], can be a violation of the securities statute”).

19. *Shorey v. Ariz. Corp. Comm’n*, 359 P.3d 997, 1001-08 ¶¶ 12-14 (Ariz. Ct. App. 2015) (holding as follows: (a) because Arizona-based issuer’s sales to foreign investors were “overwhelmingly connected to Arizona,” they were sold “within or from” Arizona; (b) failure to disclose that 72.5% offering proceeds were spent on commissions and finders’ fees was materially misleading; (c) federal law did not preempt Arizona’s registration or antifraud statutes; and (d) Arizona’s interest in protecting its business reputation by applying its securities laws to sales to foreign investors outweighed any incidental burden on interstate or foreign commerce).

20. *Siporin v. Carrington*, 23 P.3d 92, 96-99 ¶¶ 21-35 (Ariz. Ct. App. 2001) (holding that investments in viatical settlements were securities under *Howey*’s investment-contract test and rejecting a contrary decision by the D.C. Circuit as one that would undermine public protection).

21. *Standard Chartered, PLC v. Price Waterhouse*, 945 P.2d 317, 329, 332-33 (Ariz. Ct. App. 1996) (defining participation and inducement under § 44-2003) (now § 44-2003(A)) and refusing to consider federal securities cases because § 44-2003 has no federal counterpart).

22. *State ex rel. Corbin v. Goodrich*, 726 P.2d 215, 219-20, 223-24 (Ariz. Ct. App. 1986) (affirming preliminary injunction in Attorney General’s action under the securities-fraud and consumer-fraud statutes and holding that (a) applying the ASA to out-of-state sellers did not violate the commerce clause, (b) gold-and-silver contracts were securities, (c)

omitted facts were material facts that “would have been facts important to an investor’s decision”).

23. *State v. Agnew*, 647 P.2d 1165, 1177 (Ariz. Ct. App. 1982) (holding in a criminal case that (a) the only act necessary for a defendant to violate § 44-1991 (now § 44-1991(A)) is the making of an untrue statement and (b) that there must be an offer or sale in connection with the untrue statement; but (c) the defendant need not make the offer or sale).

24. *State v. Barber*, 133 Ariz. 572, 575-76, 578, 653 P.2d 29, 32-33, 35 (Ct. App. 1982) (holding that (a) under the criminal statute of limitations, fictitious dividend payments that were made after stock was sold were part of a fraudulent-securities scheme and (b) a defendant who claims a registration exemption has the burden of proof).

25. *Sullivan v. Metro Prods. Inc.*, 724 P.2d 1242, 1245-46 (Ariz. Ct. App. 1986) (applying *Howey*’s investment-contract test and holding that (a) investments in master videotapes were securities and (b) the word “solely” in *Howey* is not to be read literally).

26. *Trimble v. Am. Sav. Life Ins. Co.*, 733 P.2d 1131, 1135-37 (Ariz. Ct. App. 1986) (refusing in an action by state securities and insurance regulators to follow a federal case that held that § 44-1991 (now § 44-1991(A)) requires reliance and holding that (a) under § 44-1991 plaintiffs are not required to prove due diligence, (b) defendants have an affirmative duty not to mislead, (c) materiality exists if omitted facts would be material to a reasonable investor, and (d) neither waiver nor election of remedies prevented investors from rescinding).

27. *Vairo v. Clayden*, 734 P.2d 110, 114-15 (Ariz. Ct. App. 1987) (applying *Howey*’s investment-contract analy-

sis to an investment in master videotapes and finding disputed facts regarding *Howey*'s common-enterprise and efforts-of-others elements).

## **Appendix B**

### **Reported Federal Decisions Interpreting Arizona Securities Law: 1980-2017**

### Ninth Circuit Decisions

1. *Davis v. Metro Prods., Inc.*, 885 F.2d 515, 522, 523 & n.10, 524-25 (9th Cir. 1989) (holding that (a) for purposes of personal jurisdiction, corporate officers who participated in a scheme to solicit Arizona investors had fair warning that they could be liable for securities violations under § 44-2003 (now § 44-2003(A)) and (b) investments in master videotapes were investment contracts and hence securities under Arizona law).

2. *Garvin v. Greenback*, 856 F.2d 1392, 1398 (9th Cir. 1988) (holding that under § 44-1991(2) (now § 44-1991(A)(2)) “[a] seller of securities is strictly liable for the misrepresentations or omissions he makes”).

3. *Little v. Valley Nat. Bank of Ariz.*, 650 F.2d 218, 220, 223 (9th Cir. 1981) (affirming trial court’s ruling that “the proof required to show violations of Rule 10b-5, section 17 of the Securities Act of 1933, and the Arizona blue sky laws . . . was identical as a matter of law”).

4. *Shivers v. Amerco*, 670 F.2d 826, 831 (9th Cir. 1982) (affirming dismissal of plaintiffs’ Rule 10b-5 Arizona securities-law claims and reasoning that Arizona “intended [its securities] statutes to be interpreted consistently with the federal rule”).

5. *Strategic Diversity, Inc. v. Alchemix Corp.*, 666 F.3d 1197, 1209 & n.2 (9th Cir. 2012) (reversing district court’s dismissal of plaintiff’s Arizona securities-fraud claim and holding that (a) “[u]nlike federal law, rescission under Arizona securities law does not require the existence of damages” and (b) “[w]ith respect to loss causation in a suit for rescissionary damages, Arizona law directs the court to consider ‘equitable considerations’ to determine whether loss causation is required”).

6. *Warfield v. Alaniz*, 569 F.3d 1015, 1019 n.5 (9th Cir. 2009) (holding that charitable-gift annuities were investment contracts under the federal securities laws and concluding without separate analysis that they were also investment contracts under Arizona securities law because (a) the Arizona statute defining securities mirrors the federal definition and (b) Arizona courts look to federal courts for guidance in interpreting the state statute).

### District Court Decisions

1. *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1157-61 (D. Ariz. 2010) (holding as follows: (a) law firms that were retained for “*the sole purpose of preparing, drafting, and reviewing documents that were primarily designed to solicit*” investors were statutory participants under § 44-2003(A); (b) scienter is required under § 44-1991(A)(1) but not under § 44-1991(A)(2) and (3)); (c) the *bespeaks-caution* doctrine was not a defense under § 44-1991(A) because there was evidence that defendants knew they were making false statements; (d) § 44-1998 did not apply to plaintiff’s claim because the securities fell within an exemption to liability under § 44-1998; and (e) plaintiff’s complaint adequately pleaded a claim for control liability under § 44-1999(B)).

2. *In re Allstate Life Ins. Co. Litig.*, 971 F. Supp. 2d 930, 938-44 (D. Ariz. 2013) (holding as follows: (a) transaction causation is an element of a claim under § 44-1991(A); (b) transaction causation under § 44-1991(A) can be inferred from materiality; (c) transaction causation does not require reliance; (d) underwriters who sold bonds to fifteen plaintiffs in aftermarket purchases could be liable under § 44-2003(A) as persons who “made” the sales; (e) facts were not sufficient to

show that underwriters were statutory inducers or participants as to another seventeen aftermarket purchasers who did not purchase their bonds from the underwriters; and (f) unlike § 12(a)(2) of the 1933 Act, § 44-1991(A) does not require a plaintiff to prove that it purchased securities as part of an initial public offering).

3. *Armbruster v. Wameworks, Inc.*, 953 F. Supp. 2d 1072, 1077 (D. Ariz. 2013) (holding that complaint did not satisfy § 44-1991(A)'s in-connection-with requirement where it failed to allege that the plaintiff and defendants were involved in a transaction to buy or sell securities).

4. *Chrysler Capital Corp. v. Century Power Corp.*, 800 F. Supp. 1189, 1191-95 (S.D.N.Y. 1992) (holding as follows: (a) plaintiffs' complaint adequately alleged that defendants' securities were issued "from" Arizona within the meaning of § 44-1991 (now § 44-1991(A)) and (b) applying § 44-1991 to Arizona-based issuer who sold securities outside of Arizona did not violate federal Commerce Clause).

5. *Facciola v. Greenberg Traurig, LLP*, 781 F. Supp. 2d 913, 920-23 (D. Ariz. 2011) (holding as follows: (a) direct contact with a defendant is not needed to state a claim for fraud under § 44-1991(A); (b) conduct of corporate officers and LLC managers in preparing misleading offering documents stated a claim for participating or inducing under § 44-2003(A); (c) a defendant may be liable for misleading disclosures or material omissions under § 44-1991(A)(1) or (3); and (d) a defendant's status as a sole shareholder or as an officer or director may create the power to control needed for controlling-person liability under § 44-1999(B)).

6. *Facciola v. Greenberg Traurig, LLP*, 281 F.R.D. 363, 371-72 (D. Ariz. 2012) (holding as follows: (a) reliance is not an element of a claim under § 44-1991(A)(1) or (3); (b) the ASA does not require investors to show that they acted with

due diligence; and (c) § 44-1991(A) imposes an affirmative duty not to mislead).

7. *McDaniel v. Compania Minera Mar de Cortes, Sociedad Anonimo, Inc.*, 528 F. Supp. 152, 166-67 (D. Ariz. 1981) (citing Rule 10b-5 precedent on reliance and interpreting § 44-1991 (now § 44-1991(A)) to require reasonable reliance (by implication)).

8. *In re Nat'l Century Fin. Enters., Inc.*, 846 F. Supp. 2d 828, 888-90 (S.D. Ohio 2012) (holding that § 44-1991(A), which applies to sales “within or from” Arizona, applied to sales to Arizona entities that were made by a New York seller and noting that defendant had conceded that § 44-1991 does not require reliance).

9. *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 541 F. Supp. 2d 986, 1011 (S.D. Ohio 2007) (holding as follows: (a) § 44-1998 is restricted to untrue statements by means of a prospectus and does not apply to private placements; but (b) unlike § 44-1998, § 44-1991(A) applies to any untrue statement and applies to private placements).

10. *R & L Ltd. Invs., Inc. v. Cabot Inv. Props., LLC*, 729 F. Supp. 2d 1110, 1113-14, 1116-17 (D. Ariz. 2010) (invalidating a choice-of-law provision that would have precluded application of the ASA and holding that an arbitration provision that would have altered the one-way-right to attorney's fees under § 44-2001(A) violated the anti-waiver provisions of § 44-2000).

11. *Wojtunik v. Kealy*, 394 F. Supp. 2d 1149, 1157 n.4, 1170 (D. Ariz. 2005) ((a) holding that “a § 44-1991 claim is subject to the same strict-pleading requirements as a § 10(b) claim” and (b) upholding a claim for aiding and abetting § 44-1991 violations on the basis of Arizona authority later overruled in *Sell v. Gama*, 231 Ariz. 323, 295 P.3d 421 (2013)).