IN THE IOWA SUPREME COURT

No. 21–0831

STATE OF IOWA ex rel., THOMAS J. MILLER,
ATTORNEY GENERAL OF IOWA,

Plaintiff-Appellee,

v.

TRAVIS AUTOR, EMILY AUTOR, MICHAEL PAVEY, REGENERATIVE MEDICINE AND ANTI-AGING INSTITUTES OF OMAHA, LLC, OMAHA STEM CELLS, LLC, and STEM CELL CENTERS, LLC,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT OF POLK COUNTY
HON. SCOTT D. ROSENBERG

FINAL REPLY BRIEF OF DEFENDANTS-APPELLANTS

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Is the State entitled to pursue a civil action under the Consumer Frauds Act ("CFA") by "equitable proceedings"—denying the defendant a constitutional right to a jury trial—in a suit that seeks to levy punitive financial penalties, collect gross receipts beyond the gains realized by the alleged fraud, and impose joint-and-several liability without regard to an individual actor's wrongdoing? The State and the district court answered in the affirmative. This Court should reverse.

ARGUMENT

I. THE STATE CAN TRY ITS CASE WITHOUT A JURY OR PURSUE LEGAL REMEDIES BUT IT CANNOT DO BOTH.

The CFA mandates that civil enforcement actions brought by the Attorney General on behalf of the State "shall be by equitable proceedings." Iowa Code § 714.16(7). Yet the Iowa Legislature has proclaimed that a party "may prosecute an action by equitable proceedings" only "where courts of equity . . . had jurisdiction." *Id.* § 611.4. By disregarding the historical differences between actions tried at law versus those found in equity, however, the State claims to be entitled to a proceeding completely foreign to either. Based on the nature of the action and the remedies sought, article I, § 9 of the Iowa Constitution demands that one of two things be true: Either the State is limited to those remedies historically available where "courts of equity . . . had jurisdiction," or the State must try its case to a jury.

A. The State Ignores the Fundamental Inconsistency Between Its Preferred Proceedings and Requested Remedies.

Cases heard by common law courts of equity were conducted by "equitable proceedings" and tried to the bench without a jury. *See Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 728 (Iowa 1981) (citing *State ex rel. Kirby v. Henderson*, 145 Iowa 657, 663, 124 N.W. 767, 769 (1910)); *cf. Tull v. United States*, 481 U.S. 412, 417 (1987). But at the common law, courts sitting in equity were also necessarily limited to traditionally equitable remedies. *See Liu v. S.E.C.*, 140 S. Ct. 1936, 1942 (2020) (interpreting statute providing "equitable relief" to "those categories of relief that were *typically* available in equity"); *Hedlund v. State*, 930 N.W.2d 707, 718 (Iowa 2019) (confining "equitable relief" to relief that "is equitable"); *McMartin v. Bingham*, 27 Iowa 234, 238–39 (1869) (same).[1] It follows that to try a case by "equitable proceedings," litigants are restricted to a bench trial in which only traditionally equitable remedies were available.

Yet the State repeatedly relies on the "equitable proceedings" language of the CFA to both deny the Defendants' right to a jury trial *and* justify the sweeping relief sought in the Amended Petition. *Compare* Appellee Br. 28–

[1] *See also Equitable remedy*, Black's Law Dictionary (11th ed. 2019) (defining "equitable remedy" as one that, "[h]istorically, . . . was available only from a court of equity.").

31, 38 *with* 42–56. In fact, the State goes so far as to argue that the CFA empowers it to recover *any* remedy it deems "necessary." *See id.* at 59. "To determine when the constitutional right to a jury applies," however, "the court turns to the common law, not to the statutes of the moment." *Mitchell*, 305 N.W.2d at 728. And while the Legislature can modify the common law, it cannot do so in such a way so as to abrogate its citizens' constitutional rights by statute. *E.g.*, *Godfrey v. State*, 898 N.W.2d 844, 873, 875 (Iowa 2017) ("Statutory rights may be abolished by the legislature, whereas constitutional rights may only be abolished by constitutional amendment," because "[t]he long-settled principle is that a constitution trumps legislative enactments."). The State's argument to the contrary is faithful to the text of the statute only when it suits the State's needs.

By "necessary and inescapable inference," the "text and structure" of Iowa's "statutory scheme" governing the CFA and equity practice "restrict[s] the court's jurisdiction in equity." *See AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1350 (2021) (citations omitted). And while inconvenient to the State's preferred reading of its powers under the CFA, that statutory mandate applies to *both* the Defendants' right to jury trial *and* the remedies available in such a proceeding. The Court should reject the State's inconsistent position to the contrary.

B. Either the Defendants Are Entitled to a Jury Trial or the State Is Restricted in Which Remedies It May Pursue.

The principle that the State may prosecute a civil action under the CFA only where courts of equity had jurisdiction demands one of two conclusions: either the Defendants are entitled to a jury trial in a case like this one where the State seeks legal remedies not traditionally available in equity; or the State is limited to remedies traditionally available in "equitable proceedings." Whichever the case may be, either conclusion requires reversal.

1. The Defendants Are Entitled to a Jury Trial on All Issues So Triable.

First, the text, history, and tradition of the CFA and actions targeting consumer frauds, along with long-established rules of American courts' inherited equity practice, require that the Defendants be entitled to defend against the State's charges to a jury. It is true that despite the Iowa Constitution's broad language, promising that "[t]he right of trial by jury shall remain inviolate," article I, § 9 does not afford the right to jury trial in every instance. "But when there is a right to trial by jury, Iowa's high court strongly protects it." Todd E. Pettys, The Iowa Constitution 88 (Oxford Univ. Press, 2d ed. 2018).

The CFA is not of the same class of special proceedings for which this Court has found no right to a jury trial exists. *Contra* Appellee Br. 25–26.

Challenges to government action regarding the enactment of public policy, *Green v. Smith*, 111 Iowa 183, 82 N.W. 448 (1900); judicial review of administrative actions, *O'Hara v. State*, 642 N.W.2d 303 (Iowa 2002); rehabilitation in lieu of criminal prosecution, *In re Brewer*, 224 Iowa 773, 276 N.W. 766 (1937); *In the Interest of Johnson*, 257 N.W.2d 47 (Iowa 1977); entitlement to social welfare, *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa 245, 154 N.W. 1037 (1915); revocation of professional licensure, *State v. Hanson*, 201 Iowa 579, 207 N.W. 769 (1925); public privileges, *Danner v. Hass*, 134 N.W.2d 534 (Iowa 1965); and establishment of paternity, *State ex rel. Bishop v. Travis*, 306 N.W.2d 733 (Iowa 1980); are not of the same class or origins as actions targeting consumer fraud. Unlike those actions, which were not known to the common law, legal actions taken against consumer frauds have never been "wholly statutory." *Cf. Travis*, 306 N.W.2d at 734. Legal actions taken against consumer frauds were well known to the common law and have a long history of being prosecuted criminally and pursued privately in tort; only actions seeking injunctive relief to abate consumer frauds were recognized in equity. Appellant Br. 22–23, 37–39.

Indeed, Blackstone explained that common-law courts regularly exercised jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought

for a civil remedy; and make the defendant liable in strictness to pay a fine to the king, as well as damages to the injured party." *Jarkesy v. S.E.C.*, 34 F.4th 446, 453–54 (5th Cir. 2022) (quoting 3 William Blackstone, Commentaries on the Laws of England *42). This English common law practice is a "central proposition" to the question of the jury trial right because "the right to a jury trial preserved by the Iowa Constitution, article I, section 9, is the right that existed at common law." *Mitchell*, 305 N.W.2d at 728. At most, the CFA could be said to modify the common law tort of fraud by reducing the requirement of proof on its elements—not creating a wholly new cause of action. *See State ex rel. Miller v. Pace*, 677 N.W.2d 761, 770 (Iowa 2004) (noting CFA "permits relief upon a lesser showing" than an action for "common law fraud"); *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (Iowa 1989) (observing CFA "eliminat[ed] common-law fraud elements of reliance and damages").

The extra-jurisdictional cases cited by the State are inapposite to this Court's analysis in the present case. Those cases turned on that state's precedent for evaluating the right to jury trial under that state's constitution in the context of the history and tradition of the specific state law at issue. This Court considers only Iowa law and "first examine[s] interpretations of the seventh amendment, even though its provisions have no application to state

court proceedings," because "there is a nexus between interpretations of Iowa's jury provision and the federal provision." *Mitchell*, 305 N.W.2d at 726. And as discussed in the Defendants' opening brief, the Seventh Amendment requires a right to jury trial in cases like the one brought by the State under the CFA. Appellant Br. 41–44, 48–53.[2]

If any doubt remains, this Court should hold that article I, § 9 of the Iowa Constitution demands bifurcation of trial on the issues of liability and damages in actions brought like this one by the Attorney General under the CFA. *See Tull*, 481 U.S. at 426–27 (holding that while jury trial was required for issue of liability, the Seventh Amendment did not require the same for "the determination of the amount of civil penalties"); *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 354–55 (1998) (observing "the awarding of civil penalties to the Government could be viewed as analogous to sentencing in a criminal proceeding" in which a jury is not required to determine the amount). Indeed, "[t]he 'right to trial by jury is to be preserved and should not be impaired except for compelling reasons.'" *See Westco*

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[2] Nonetheless, other jurisdictions employing similar tests as Iowa support the right to jury trial in suits brought by the government such as this one. *See State v. Credit Bureau of Laredo, Inc.*, 530 S.W.2d 288 (Tex. 1975); *State v. Walgreen Co.*, 250 So. 3d 465 (Miss. 2018); *Am. Appliance, Inc. v. State ex rel. Brady*, 712 A.2d 1001 (Del. 1998); *see also Bendick v. Cambio*, 558 A.2d 941 (R.I. 1989).

Agronomy Co., LLC v. Wollesen, 909 N.W.2d 212, 226–27 (Iowa 2017) (citation omitted) (district court did not abuse discretion in bifurcating legal issues to be tried to jury first before equitable issues were tried to the court); *cf. Weltzin v. Nail*, 618 N.W.2d 293, 298 (Iowa 2000) (recognizing "not all equity cases can proceed without a jury on every issue"). The State conceded below that the issues of liability and remedies could be bifurcated to preserve the Defendants constitutional right to a jury trial. App. 175.

Bifrucation is often ordered in complex disputes raising legal and equitable issues. *E.g.*, *Morningstar v. Myers*, 255 N.W.2d 159, 161 (Iowa 1977) (ordering that severed legal claims be tried before equitable claims to avoid depriving the plaintiffs to their jury trial right). Where the issue of liability may "dispose of the whole case," obviating the need for a remedies phase, bifurcation promotes procedural efficiency and fairness without impairing the Defendants' constitutional right to jury trial. *See Westco Agronomy*, 909 N.W.2d at 227. Bifurcation is particularly appropriate in civil enforcement actions brought by the Attorney General under the CFA. *See State ex rel. Miller v. Vertrue*, 834 N.W.2d 12, 19 (Iowa 2013) (observing "[t]he district court bifurcated trial" with "[t]he first phase address[ing] the issue of liability"). At a minimum, bifurcation is "necessary to preserve the

substance of the common-law right of trial by jury." *Tull*, 481 U.S. at 426 (cleaned up).

2. Alternatively, the State Is Precluded from Obtaining a Civil Penalty, Gross Receipts, and Joint and Several Liability.

Second, and alternatively, the importance of the jury trial right protected by article I, § 9 requires that the State be restricted to remedies actually available in "equitable proceedings"—i.e., those remedies traditionally available "where courts of equity . . . had jurisdiction." Iowa Code § 611.4. The only reading of § 714.16(7) that gives effect and meaning to the entire statute is one that limits every enumerated remedy in the CFA to those historically and traditionally available in "equitable proceedings."

Contrary to the State's argument, *see* Appellee Br. 53–57, courts sitting in equity had no authority to issue financial penalties at the common law. *Liu*, 140 S. Ct. at 1941; *see Kokesh v. S.E.C.*, 137 S. Ct. 1635, 1644 (2017). Only where the penalty was "incidental to or intertwined with injunctive relief"—such as contempt for violating a court order or injunction—could an equity court do so. *Tull*, 481 U.S. at 424; *see Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 571 (1990) (holding "monetary award" not "incidental to or intertwined with injunctive relief" to be considered equitable (citation omitted)). The punitive financial penalty sought by the State is a

standalone punishment that lies well outside of courts' historical equitable powers. Appellant Br. 48–49, 59–60.; *see* Iowa Code §§ 714.16(7) (purporting to authorize civil penalty "*in addition* to the remedies otherwise provided" under the CFA (emphasis added)), 714.16A (purporting to authorize "*an additional* civil penalty" beyond others (emphasis added)).

Nor did common law courts have the ability to impose the type of joint-and-several liability proposed by the State. Appellant Br. 51–52, 66–67 (citing, e.g., *Liu*, 140 S. Ct. at 1943), 1945). Any tacit endorsement of that principle by this Court was not directly in issue and should be limited to their facts or abrogated as inconsistent with longstanding historical evidence of equity practice. *Contra State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 219–20 (Iowa 1991) (rejecting "piercing the corporate veil" doctrine where owner's liability arose in part from "his own personal acts in perpetrating consumer fraud").

Finally, the State's interpretation of "restor[ation]" and "reimbursement" fails to conform to the common law understanding of "equitable procedures." *See Cookies Food Prod., Inc., ex rel. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452 (Iowa 1988). Without requiring the State to offset costs and other expenses involved in setting aside a transaction as to any individual allegedly affected consumer, the State seeks

nothing more than compensatory damages properly cognizable in tort, not equity. Appellant Br. 63–65 (citing, e.g., *Hyler v. Garner*, 548 N.W.2d 864, 874 (Iowa 1996)).

II. THE DEFENDANTS PRESERVED ERROR.

This is a straightforward case of preserved error. The State moved to strike the Defendants' jury demand, the Defendants resisted, the district court struck the jury demand, and this appeal followed. The State's argument against error preservation is that the Defendants did not seek to obtain "a ruling from the District Court limiting the available remedies," so this Court should not address the issue. Appellee's Br. 62. The State cites the cases from this Court that stand for the proposition that an issue must be decided in the district court before this Court will entertain it. The problem with the State's argument is that the district court necessarily addressed the issue of whether the remedies sought by the State under the CFA are legal or equitable. That, of course, is the crux of the order below and this appeal.

The record must reveal that the district court was aware of the issue and the issue was resolved by the order. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002). The question of whether the remedies sought by the State are (a) within the bounds of equity or (b) remedies for which a right to a jury exists were briefed by both parties. App. 146–176. The judge sided with the

State on all issues by striking the jury demand. That is, the district court decided that either the State was seeking remedies that are essentially equitable or for which no jury right exists. This is straightforward error preservation: the appellant resisted a motion, lost, and is appealing the order.

The State is trying to avoid review on the merits by claiming that a different procedural vehicle, like a motion to strike the offending remedies or summary judgment, should have been used. The procedural vehicle, however, makes no difference. The rule is that an *issue* must be presented and decided. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). For this reason, it also makes no difference that the district court's opinion did not explain whether the remedies sought by the State are legal or equitable, or otherwise delineate the scope of the jury trial right. *Id.* (explaining that error preservation is "not concerned with the substance, logic, or detail in the district court's decision. If the court's ruling indicates that the court considered the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved.").

CONCLUSION

The Defendants respectfully request that the Court reverse the district court's order striking the Defendants' jury demand or, in the alternative, issue a ruling that limits the remedies available to the State in prosecuting civil

violations of the Consumer Frauds Act to those traditionally available in equity.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 14, 2022, I electronically filed the foregoing Final Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

By /s/ David Fautsch

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,855 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft 365 Word in Times New Roman 14 pt.

Dated: July 14, 2022

By /s/ David Fautsch