ELECTRONICALLY FILED JUL 14, 2022 CLERK OF SUPREME COURT

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 BRIEF OF DEFENDANTS-APPELLANTS

---

THE WEINHARDT LAW FIRM

Mark E. Weinhardt
David N. Fautsch
Nathan D.B. Converse
2600 Grand Avenue, Suite 450
Des Moines, IA  50312
Telephone:  (515) 244-3100
Facsimile:  (515) 288-0407
mweinhardt@weinhardtlaw.com
dfautsch@weinhardtlaw.com
nconverse@weinhardtlaw.com

# TABLE OF CONTENTS

TABLE OF AUTHORITIES .......... 4

STATEMENT OF THE ISSUES .......... 11

STATEMENT OF THE CASE .......... 17

STATEMENT OF THE FACTS .......... 20

A. The Text, History, and Tradition of the Consumer Frauds Act. .......... 21

B. The State's Petition. .......... 27

ARGUMENT .......... 30

I. ARTICLE I, § 9 OF THE IOWA CONSTITUTION AFFORDS THE DEFENDANTS THE RIGHT TO A TRIAL BY JURY IN A CIVIL ACTION THAT SEEKS (1) CIVIL PENALTIES, (2) MONEY IN THE AMOUNT OF THE DEFENDANTS' GROSS RECEIPTS, AND (3) JOINT-AND-SEVERAL LIABILITY. .......... 33

A. The Essential Nature of This Case Lies at Law. .......... 36

1. At the common law, actions for consumer fraud were triable to a jury. .......... 36

2. At the common law, civil suits brought by the government to collect statutory penalties were legal actions tried to a jury. .......... 40

3. The statutory history of the CFA shows it was intended to be punitive. .......... 44

B. The Remedies Sought by the State Are Quintessentially Legal. .......... 47

II. THE STATE'S ATTEMPT TO LEVY CIVIL PENALTIES, RECOVER THE DEFENDANTS' GROSS RECEIPTS, AND IMPOSE JOINT-AND-SEVERAL LIABILITY IS

INCONSISTENT WITH THE REQUIREMENT OF "EQUITABLE PROCEDURES" IN THE IOWA CONSUMER FRAUDS ACT. ........ 52

A. The Remedies Available in "Equitable Proceedings" Are Limited to Those Historically Availability in Equity Jurisdiction. ........ 55

B. The CFA Does Not Authorize the State to Pursue, or a District Court to Award, Relief Beyond Those Traditionally Available in "Equitable Proceedings." ........ 57

1. "Equitable proceedings" prohibit financial penalties. ... 58

2. "Equitable proceedings" limit recovery of restitution or disgorgement to net profits. ........ 60

3. "Equitable proceedings" preclude joint-and-several liability. ........ 65

CONCLUSION ........ 67

STATEMENT REGARDING ORAL ARGUMENT ........ 67

CERTIFICATE OF FILING AND SERVICE ........ 68

CERTIFICATE OF COMPLIANCE ........ 69

# TABLE OF AUTHORITIES

## Cases

*AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350 (11th Cir. 2021) ..... 50

*Am. Sec. Benevolent Ass'n, Inc. v. Dist. Ct. of Black Hawk Cnty.*, 147 N.W.2d 55 (1966) ..... 24

*Ambler v. Whipple*, 20 Wall. 546 (1874) ..... 50

*AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021) .... 55

*Atlas Assur. Co. v. Atlas Ins. Co.*, 112 N.W. 232 (Iowa 1907) ..... 38

*Belknap v. Schild*, 161 U.S. 10 (1896) ..... 66

*Binkholder v. Carpenter*, 152 N.W.2d 593 (Iowa 1967) ..... 62

*Blue Grass Sav. Bank v. Cmty. Bank & Tr. Co.*, 941 N.W.2d 20 (Iowa 2020) ..... 55

*Carstens v. Central. Nat'l Bank & Tr. Co. of Des Moines*, 461 N.W.2d 331 (Iowa 1990) ..... 35

*Com. Sav. Bank of Carroll v. Kietges*, 219 N.W. 44 (Iowa 1928) ..... 37

*Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447 (Iowa 1988) ..... 55

*Cox v. State*, 686 N.W.2d 209 (Iowa 2004) ..... 56

*Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012) ..... 62

*Curtis v. Loether*, 415 U.S. 189 (1974) ..... 48

*Dimick v. Schiedt*, 293 U.S. 474 (1935) ..... 35

*Doe v. State*, 943 N.W.2d 608 (Iowa 2020) ..... 56

*Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71 (Iowa 2020) ..... 49

*Faust v. Parker*, 213 N.W. 794 (Iowa 1927) ..... 37

*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) ..... 51, 59

*Folkers v. Southwest Leasing*, 431 N.W.2d 177 (Iowa Ct. App. 1988) ....... 62

*Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199 (Iowa 2014) ..... 64

*Hedlund v. State*, 930 N.W.2d 707 (Iowa 2019) .................................. 35, 57

*Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 664
(Iowa 2020) ........................................................ 33, 34, 35, 39, 47

*Hunt v. Rowland*, 28 Iowa 349 (1869) .................................................. 48, 62

*Huntington v. Attrill*, 146 U.S. 657 (1892) .................................................. 48

*Hyler v. Garner*, 548 N.W.2d 864 (Iowa 1996) .......................................... 63

*In re Davis*, 960 F.3d 346 (6th Cir. 2020) .................................................. 46

*In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995) ....................... 30

*Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724 (Iowa 1981) ............ 35

*Jennings v. Carson*, 4 Cranch 21 (1807) ..................................................... 51

*Jensen v. Sattler*, 696 N.W.2d 582 (Iowa 2005) .......................................... 53

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) ................................. 52

*Kilpatrick v. Smith*, 19 N.W.2d 699 (Iowa 1945) ........................................ 63

*Kokesh*, *v. S.E.C*, 137 S. Ct. 1635 (2017) ............................................. 47, 48

*Lenertz v. Mun. Ct. of City of Davenport*, 219 N.W.2d 513
(Iowa 1974) ........................................................................ *passim*

*Liu v. S.E.C.*, 140 S. Ct. 1936 (2020) ................................................... *passim*

*Livingston v. Woodworth*, 15 How. 546 (1854) .................................... 50, 61

*Marshall v. City of Vicksburg*, 82 U.S. 146 (1872) ..................................... 48

*Marshall v. Vicksburg*, 15 Wall. 146 (1873) ................................................ 59

*McMartin v. Bingham*, 27 Iowa 234 (1869) .................................. 38, 56, 58

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002) ....................................... 53

*Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) .................................... 50, 61

*Miller Oil Co. v. Abramson*, 109 N.W.2d 610 (Iowa 1961)......................... 59

*Miller v. Beck*, 79 N.W. 344 (1899) ........................................................... 51

*Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222 (Iowa 1998)............................................................................................ 46

*Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011) ............................................. 57

*People v. One 1941 Chevrolet Coupe*, 231 P.2d 832 (Cal. 1951)................ 40

*Powers v. Ohio*, 499 U.S. 400 (1990).......................................................... 31

*Providence Rubber Co. v. Goodyear*, 9 Wall. 788 (1870) ........................... 50

*R. E. Morris Invs., Inc. v. Lind*, 304 N.W.2d 189 (Iowa 1981).................... 35

*Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006) ................................ 51, 65

*Rieff v. Evans* 672 N.W.2d 728 (Iowa 2003)................................................ 34

*Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020)..................... 47

*S.E.C v. Life Partners Holdings, Inc.*, 854 F.3d 765 (5th Cir. 2017) ........... 42

*S.E.C. v. Capital Sols. Monthly Income Fund, LP*, 818 F.3d 346 (8th Cir. 2016)......................................................................................... 42

*S.E.C. v. Jensen*, 835 F.3d 1100 (9th Cir. 2016) .......................................... 42

*S.E.C. v. Lipson*, 278 F.3d 656 (7th Cir. 2002) ............................................ 42

*Sarich v. Havercamp*, 203 N.W.2d 260 (Iowa 1972) ............................ 44, 52

*Schloemer v. Uhlenhopp*, 21 N.W.2d 457 (Iowa 1946) ............................... 43

*State ex rel. Bishop v. Travis*, 306 N.W.2d 733 (Iowa 1981)....................... 36

*State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (Iowa 1989)....................................................................... 21, 24, 30

*State ex rel. Miller v. New Womyn*, Inc., 679 N.W.2d 593 (Iowa 2004)...... 30

*State ex rel. Miller v. Pace*, 677 N.W.2d 761 (Iowa 2004) .......................... 63

*State ex rel. Miller v. Rahmani*, 472 N.W.2d 254 (Iowa 1991).................... 48

*State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210 (Iowa 1991) ........................................................................ 26

*State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013).......... 29, 63

*State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971) .......................................................................... 25, 40, 46

*State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330 (Iowa 1976) ................ 25

*State Sur. Co. v. Lensing*, 249 N.W.2d 608 (Iowa 1977) ............................. 30

*State v. Armour Packing Co.*, 100 N.W. 59 (Iowa 1904)............................. 38

*State v. Aschbrenner*, 926 N.W.2d 240 (Iowa 2019).................................... 53

*State v. Brown*, 930 N.W.2d 840 (Iowa 2019) ............................................ 44

*State v. Childs*, 898 N.W.2d 177 (Iowa 2017)............................................. 55

*State v. Cusick*, 84 N.W.2d 554 (Iowa 1957) .............................................. 24

*State v. Hagen*, 840 N.W.2d 140 (Iowa 2013) ............................................ 27

*State v. Hutchinson Ice Cream Co.*, 147 N.W. 195 (Iowa 1914) ........... 23, 38

*State v. Kindy Optical Co.*, 248 N.W. 332 (Iowa 1933)............................... 39

*State v. McCullah*, 787 N.W.2d 90 (Iowa 2010) .......................................... 57

*State v. Miner*, 331 N.W.2d 683 (Iowa 1983) ............................................. 40

*State v. Pickens*, 558 N.W.2d 396 (Iowa 1997)........................................... 53

*State v. Ross*, 941 N.W.2d 341 (Iowa 2020)................................................ 58

*State v. Schlenker*, 84 N.W. 698 (Iowa 1900) ............................................. 38

*State v. Short*, 851 N.W.2d 474 (Iowa 2014) .............................................. 36

*State v. Sorensen*, 436 N.W.2d 358 (Iowa 1989) ......................................... 29

*State v. Thompson*, 836 N.W.2d 470 (Iowa 2013) ....................................... 66

*State v. West*, 320 N.W.2d 570 (Iowa 1982) ................................................ 41

*Thorson v. Board of Sup'rs of Humbolt Cnty.*, 90 N.W.2d 730 (Iowa 1958) ................................................................................ 54

*Tull v. United States*, 481 U.S. 412 (1987) ........................................... *passim*

*United States v. Dish Network, L.L.C.*, 754 F. Supp. 2d 1002 (C.D. Ill. 2010) ............................................................................ 43

*United States v. J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974) ................ 45

*United States v. Ross*, 1843 WL 1192 (Iowa 1843) ...................................... 38

*Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174 (Iowa 2010) ............. 37, 49

*Weltzin v. Nail*, 618 N.W.2d 293 (Iowa 2000) ........................... 35, 36, 45, 52

*Westco Agronomy Co., LLC v. Wollesen*, 909 N.W.2d 212 (Iowa 2017) .... 32

**Statutes**

Territory of Iowa Statute Laws § 1738 ........................................................ 23

Territory of Iowa Statute Laws § 5069 ........................................................ 23

Territory of Iowa Statute Laws at 178, § 94 ................................................ 23

Iowa Code § 713.24(2)(a) ............................................................................ 41

Iowa Code § 714.16(2)(a) ..................................................................21, 41, 48

Iowa Code § 714.16(2)(b) ............................................................................ 47

Iowa Code § 714.17(7) ................................................................................ 55

1913 Iowa Acts ch. 309, § 1 ........................................................................ 23

1965 Iowa Acts ch. 438, § 1 ........................................................................ 24

1987 Iowa Acts ch. 164, § 3 ........................................................................ 26

1991 Iowa Acts ch. 102, § 1 ........................................................................ 27

1992 Iowa Acts ch. 1062, § 3 .......... 27

1994 Iowa Acts ch. 1142, § 5 .......... 27

1998 Iowa Acts ch. 1200, § 4 .......... 28

2009 Iowa Acts ch. 167, § 5 .......... 28

Iowa Code §§ 2748–2751 .......... 23

Iowa Code § 714.16(4) .......... 21

Iowa Code § 714.16(7) .......... *passim*

Article I, § 9 of the Iowa Constitution .......... *passim*

Iowa Code §§ 2747 .......... 23

Iowa Code § 5051-a (Iowa Code Suppl. 1913) .......... 23

Iowa Code § 555A.6 .......... 41

Iowa Code § 611.4 .......... 37, 58, 63

Iowa Code § 668.4 .......... 39, 68

Iowa Code § 713.24 (1946) .......... 24

Iowa Code § 713.24(3) (1966) .......... 25

Iowa Code § 714.16 .......... *passim*

Iowa Code § 714.16A(1) (1993) .......... 27

Iowa Code § 714H.5(1) .......... 62, 67

Iowa Code § 714H.5(1), (2), (4). .......... 28

Iowa Code § 8704 (1919) .......... 23

Iowa Code §§ 714B.6 .......... 41

**Other Authorities**

1 Alexis de Tocqueville, *Democracy in America* 334–37 (Schocken

Books 1961) (1835) .......... 33

1 D. Dobbs, Law of Remedies §§ 4.1(1), 4.3(5) (1993).......... 51

74 Am. Jur. 2d *Torts*, § 66 (2d ed.).......... 67

Akhil Reed Amar, *America's Unwritten Constitution* 435 (2012) .......... 32

H.J. File 561, 61st G.A., .......... 47

Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 (1899).......... 58

*Penalty*, Black's Law Dictoinary (11th ed. 2019) .......... 49

Restatement (Third) of Restitution and Unjust Enrichment (Am. Law. Inst. 2010).......... passim

Restatement (Third) of Torts: Apportionment of Liability § 15 (2000).......... 53

James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655 (1963) .......... 32

Scalia & Garner, *Reading Law* .......... 57, 58, 59, 63

Scalia & Garner, *The Interpretation of Legal Texts* § 40, at 256 (Thomson/West 2012) .......... 49

The Federalist No. 83 (C. Rossiter ed. 1961) (Hamilton) .......... 33

*The Iowa Constitution* 45 (Greenwood Press, 1998).......... 39

Alexandra Lahav, *The Jury and Participatory Democracy*, 55 Wm. & Mary L. Rev. 1029 (2014) .......... 32

William Blackstone, Commentaries on the Laws of England (U. Chi. Press 1979).......... 32, 42

**Rules**

Iowa R. Evid. 5.201(d).......... 29

Iowa R. App. P. 6.907.......... 36, 55

## STATEMENT OF THE ISSUES

I. ARTICLE I, § 9 OF THE IOWA CONSTITUTION AFFORDS THE DEFENDANTS THE RIGHT TO A TRIAL BY JURY IN A CIVIL ACTION THAT SEEKS (1) CIVIL PENALTIES, (2) MONEY IN THE AMOUNT OF THE DEFENDANTS' GROSS RECEIPTS, AND (3) JOINT-AND-SEVERAL LIABILITY.

*AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350 (11th Cir. 2021)

*Am. Sec. Benevolent Ass'n, Inc. v. Dist. Ct. of Black Hawk Cnty.*, 147 N.W.2d 55 (1966)

*Ambler v. Whipple*, 20 Wall. 546 (1874)

*Atlas Assur. Co. v. Atlas Ins. Co.*, 112 N.W. 232 (Iowa 1907)

*Carstens v. Central. Nat'l Bank & Tr. Co. of Des Moines*, 461 N.W.2d 331 (Iowa 1990)

*Com. Sav. Bank of Carroll v. Kietges*, 219 N.W. 44 (Iowa 1928)

*Curtis v. Loether*, 415 U.S. 189 (1974)

*Dimick v. Schiedt*, 293 U.S. 474 (1935)

*Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71 (Iowa 2020)

*Faust v. Parker*, 213 N.W. 794 (Iowa 1927)

*Hedlund v. State*, 930 N.W.2d 707 (Iowa 2019)

*Homeland Energy Sols., LLC v. Retterath*, 938 N.W.2d 66 (Iowa 2020)

*Huntington v. Attrill*, 146 U.S. 657 (1892)

*In re Davis*, 960 F.3d 346 (6th Cir. 2020)

*In re Marriage of Gallagher*, 539 N.W.2d 479 (Iowa 1995)

*Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724 (Iowa 1981)

*Jennings v. Carson*, 4 Cranch 21 (1807)

*Kokesh*, *v. S.E.C*, 137 S. Ct. 1635 (2017)

*Lenertz v. Mun. Ct. of City of Davenport*, 219 N.W.2d 513 (Iowa 1974)

*Liu v. S.E.C.*, 140 S. Ct. 1936 (2020)

*Livingston v. Woodworth*, 15 How. 546 (1854)

*Marshall v. Vicksburg*, 15 Wall. 146 (1873)

*McMartin v. Bingham*, 27 Iowa 234 (1869)

*Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)

*Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222 (Iowa 1998)

*People v. One 1941 Chevrolet Coupe*, 231 P.2d 832 (Cal. 1951)

*Powers v. Ohio*, 499 U.S. 400 (1990)

*Providence Rubber Co. v. Goodyear*, 9 Wall. 788 (1870)

*R. E. Morris Invs., Inc. v. Lind*, 304 N.W.2d 189 (Iowa 1981)

*Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006)

*Rieff v. Evans* 672 N.W.2d 728 (Iowa 2003)

James Fleming, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655 (1963) ........................................ 32

*Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020)

*S.E.C v. Life Partners Holdings, Inc.*, 854 F.3d 765 (5th Cir. 2017)

*S.E.C. v. Capital Sols. Monthly Income Fund, LP*, 818 F.3d 346 (8th Cir. 2016)

*S.E.C. v. Jensen*, 835 F.3d 1100 (9th Cir. 2016)

*S.E.C. v. Lipson*, 278 F.3d 656 (7th Cir. 2002)

*Sarich v. Havercamp*, 203 N.W.2d 260 (Iowa 1972)

*Schloemer v. Uhlenhopp*, 21 N.W.2d 457 (Iowa 1946)

*State ex rel. Bishop v. Travis*, 306 N.W.2d 733 (Iowa 1981)

*State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617 (Iowa 1989)

*State ex rel. Miller v. New Womyn*, Inc., 679 N.W.2d 593 (Iowa 2004)

*State ex rel. Miller v. Rahmani*, 472 N.W.2d 254 (Iowa 1991)

*State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210 (Iowa 1991)

*State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013)

*State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624 (Iowa 1971)

*State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330 (Iowa 1976)

*State Sur. Co. v. Lensing*, 249 N.W.2d 608 (Iowa 1977)

*State v. Armour Packing Co.*, 100 N.W. 59 (Iowa 1904)

*State v. Brown*, 930 N.W.2d 840 (Iowa 2019)

*State v. Cusick*, 84 N.W.2d 554 (Iowa 1957)

*State v. Hagen*, 840 N.W.2d 140 (Iowa 2013)

*State v. Hutchinson Ice Cream Co.*, 147 N.W. 195 (Iowa 1914)

*State v. Kindy Optical Co.*, 248 N.W. 332 (Iowa 1933)

*State v. Miner*, 331 N.W.2d 683 (Iowa 1983)

*State v. Schlenker*, 84 N.W. 698 (Iowa 1900)

*State v. Short*, 851 N.W.2d 474 (Iowa 2014)

*State v. Sorensen*, 436 N.W.2d 358 (Iowa 1989)

*State v. West*, 320 N.W.2d 570 (Iowa 1982)

*Tull v. United States*, 481 U.S. 412 (1987)

*United States v. Dish Network, L.L.C.*, 754 F. Supp. 2d 1002 (C.D. Ill. 2010)

*United States v. J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974)

*United States v. Ross*, 1843 WL 1192 (Iowa 1843)

*Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174 (Iowa 2010)

*Weltzin v. Nail*, 618 N.W.2d 293 (Iowa 2000)

*Westco Agronomy Co., LLC v. Wollesen*, 909 N.W.2d 212 (Iowa 2017)

II. THE STATE'S ATTEMPT TO LEVY CIVIL PENALTIES, RECOVER THE DEFENDANTS' GROSS RECEIPTS, AND IMPOSE JOINT-AND-SEVERAL LIABILITY IS INCONSISTENT WITH THE REQUIREMENT OF "EQUITABLE PROCEDURES" IN THE IOWA CONSUMER FRAUDS ACT.

*AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341 (2021)

*Belknap v. Schild*, 161 U.S. 10 (1896)

*Binkholder v. Carpenter*, 152 N.W.2d 593 (Iowa 1967)

*Blue Grass Sav. Bank v. Cmty. Bank & Tr. Co.*, 941 N.W.2d 20(Iowa 2020)

*Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447 (Iowa 1988)

*Cox v. State*, 686 N.W.2d 209 (Iowa 2004)

*Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817 (Tex. 2012)

*Doe v. State*, 943 N.W.2d 608 (Iowa 2020)

*Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)

*Folkers v. Southwest Leasing*, 431 N.W.2d 177 (Iowa Ct. App. 1988)

*Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199 (Iowa 2014)

*Hedlund v. State*, 930 N.W.2d 707 (Iowa 2019)

*Hunt v. Rowland*, 28 Iowa 349 (1869)

*Hyler v. Garner*, 548 N.W.2d 864 (Iowa 1996)

*Jensen v. Sattler*, 696 N.W.2d 582 (Iowa 2005)

*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)

*Kilpatrick v. Smith*, 19 N.W.2d 699 (Iowa 1945)

*Kokesh*, *v. S.E.C*, 137 S. Ct. 1635 (2017)

*Lenertz v. Mun. Ct. of City of Davenport*, 219 N.W.2d 513 (Iowa 1974)

*Liu v. S.E.C.*, 140 S. Ct. 1936 (2020)

*Livingston v. Woodworth*, 15 How. 546 (1854)

*Marshall v. City of Vicksburg*, 82 U.S. 146 (1872)

*McMartin v. Bingham*, 27 Iowa 234 (1869)

*Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002)

*Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)

*Miller Oil Co. v. Abramson*, 109 N.W.2d 610 (Iowa 1961)

*Miller v. Beck*, 79 N.W. 344 (Iowa 1899)

*Peak v. Adams*, 799 N.W.2d 535 (Iowa 2011)

*Reilly v. Anderson*, 727 N.W.2d 102 (Iowa 2006)

*State ex rel. Miller v. Pace*, 677 N.W.2d 761 (Iowa 2004)

*State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12 (Iowa 2013)

*State v. Aschbrenner*, 926 N.W.2d 240 (Iowa 2019)

*State v. Childs*, 898 N.W.2d 177 (Iowa 2017)

*State v. McCullah*, 787 N.W.2d 90 (Iowa 2010)

*State v. Pickens*, 558 N.W.2d 396 (Iowa 1997)

*State v. Ross*, 941 N.W.2d 341 (Iowa 2020)

*State v. Thompson*, 836 N.W.2d 470 (Iowa 2013)

*Thorson v. Board of Sup'rs of Humbolt Cnty.*, 90 N.W.2d 730 (Iowa 1958)

*Tull v. United States*, 481 U.S. 412 (1987)

*Weltzin v. Nail*, 618 N.W.2d 293 (Iowa 2000)

*Westco Agronomy Co., LLC v. Wollesen*, 909 N.W.2d 212 (Iowa 2017)

## STATEMENT OF THE CASE

This case concerns the sweeping governmental power exercised by the Attorney General in an action brought under the Consumer Frauds Act ("CFA"), Iowa Code § 714.16. Its resolution turns on two discrete yet inextricably intertwined questions: Does a civil action brought by the government to prosecute consumer fraud entitle the defendants to a jury trial under Article I, § 9 of the Iowa Constitution when it seeks to levy financial penalties, recover gross receipts, and impose liability jointly and severally among all defendants? If not, does the government exceed its statutory authority to bring suit through "equitable proceedings" when it seeks such remedies, which were not traditionally available in equity? The answer to one of these questions must be: "yes."

The State of Iowa, through the Attorney General, filed its original Petition against the Defendants on July 16, 2020. App. 6–38. The State accuses the Defendants of engaging in "misleading, deceptive, and unfair acts and practices" that allegedly defrauded Iowa consumers who sought and received stem cell therapy and exosome treatment. App. 82. The Petition seeks relief beyond enjoining proscribed practices and divesting net profits: the State asks the district court to inflict crippling financial penalties; recover

gross receipts; and impose judgment jointly and severally among all Defendants. App. 83–4.

The Defendants denied the allegations and sought to make their case to a jury. App. 105. When the State moved to strike the Defendants' jury demand, it argued that the Defendants had no right to a jury trial because its action under the CFA was brought in equity and "there is no right to a jury trial for cases brought in equity." App. 150.

The Defendants resisted on constitutional and statutory grounds "based on the type of monetary relief . . . sought by the State." App. 155. They argued the State exceeded its statutory authority to enforce the CFA through "equitable proceedings" because civil penalties, gross receipts, and joint-and-several liability were not remedies available in equity. App. 157–60; *see also* Oral Arg. Tr. 20:09–14; 21:1–2, 08–09, 22–24. Demanding that the district court "exercise authority that goes far beyond its equitable powers," the Defendants asserted, "make[s] this case an action at law for which a jury is required under . . . Article I, Section 9 of the Iowa Constitution." App. 156.

The State asserted that the CFA: (1) did not limit recovery to net profits but rather "any moneys or property" derived from the Defendants' business; (2) permitted the imposition of financial penalties to "deter future

violations"; and (3) authorized any order the State deemed "necessary" to aid consumers, including joint-and-several liability. *See* App. 163–67, 170–71, 174–75. None of these remedies, it claimed, entitled the Defendants to a jury trial. *See* Oral Arg. Tr. 18:01–19:23.

The district court granted the State's motion in a perfunctory order striking the Defendants' demand for a jury trial "for the reasons as stated in the [State]'s motion." App. 202.

Defendants Travis Autor, Omaha Stem Cells, LLC, and Regenerative Medicine and Anti-Aging Institutes of Omaha, LLC ("Regenerative Medicine"), timely filed for interlocutory appeal of the district court's order. App. 204–17.[1] The Defendants' application raised two issues: *first*, whether Article I, § 9 of the Iowa Constitution affords the right to jury trial in an enforcement action that seeks civil penalties, gross receipts, and joint-and-several liability; and *second*, whether the State's suit demanding such remedies is consistent with the CFA's requirement of "equitable procedures." App. 205 (*Id.*). This Court stayed proceedings below and granted appellate review.

---

[1] Defendants Emily Autor and Stem Cell Centers, LLC moved to dismiss the charges against them for lack of personal jurisdiction on October 30, 2020. App. 106–14. On March 15, 2021, the district court issued an order granting that motion. App. 177–201. Defendant Michael Pavey is represented by separate counsel and is not a party to this appeal.

## STATEMENT OF THE FACTS

Before it went defunct, the Defendants' business provided stem cell therapy and exosome treatment to treat, cure, and prevent various medical conditions. App. 52–53. The State accuses the Defendants of having misled Iowa consumers on the efficacy of their treatments through "misleading, deceptive, and unfair" means. *See generally* App. 82. All Defendants deny the charge.

In its modern form, the CFA declares it an "unlawful practice" to, among other things, "use or employ . . . an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation . . . in connection with the lease, sale, or advertisement of any merchandise." Iowa Code § 714.16(2)(a). The statute vests the Attorney General with vast powers. He or she is authorized to issue subpoenas and take sworn testimony over a respondent's invocation of their right against self-incrimination. *See generally id.* § 714.16(4). And the Attorney General is empowered to pursue civil enforcement actions on behalf of the State "[if] it appears to the attorney general that a person has engaged in, is engaging in, or is about to engage in a practice declared to be unlawful" by the CFA. *Id.* § 714.16(7). Though it professes to authorize suit pursuant to "equitable proceedings," *id.*, the State maintains that the CFA entitles it to per-violation financial

penalties, restitution or disgorgement in the form of gross receipts, and joint-and-several liability among all charged defendants, *see* App. 163–67, 170–71, 174–75.

But it was not always so. Since the CFA was passed in 1965, the statute has expanded drastically from its origins as a simple law designed to enjoin unfair and deceptive business practices. Long before its enactment, consumer frauds were prosecuted criminally by the State and remedied privately in tort. Over time, however, the State has wielded its increasing authority to seek—and obtain—expansive relief in civil court; those accused of consumer frauds have overwhelmingly yielded to the allegations of the State through consent decrees that are never tested before a jury of their peers.

### A. The Text, History, and Tradition of the Consumer Frauds Act.[2]

In the early days, individual consumers could challenge unsavory business practices and vindicate their rights through the common law tort of fraud. *State ex rel. Miller v. Hydro Mag, Ltd.*, 436 N.W.2d 617, 620 (Iowa 1989). Many unsavory business practices were criminalized by statute. *See,*

[2] Unless specified otherwise, citations to statutory authority is intended to reference the version of the Iowa Code in effect at the time of the events at issue in this appeal.

*e.g.*, Territory of Iowa Statute Laws at 178, § 94 (false pretenses) (1839); Iowa Code § 2747 (false weights and measures), §§ 2748–2751 (fraudulent merchandising) (1851); *id.* § 1738 (false advertising of insurer assets); § 5069 (swindling in the sale of grain) (1897). Indeed, the State prosecuted both businesses and individuals to protect consumers "from fraud and deception" in the sale of goods. *See, e.g.*, *State v. Hutchinson Ice Cream Co.*, 147 N.W. 195, 198–99 (Iowa 1914).

In 1913, "fraudulent advertisements" was made a misdemeanor, 1913 Iowa Acts ch. 309, § 1 (codified at Iowa Code § 5051-a (Iowa Code Suppl. 1913)), and later made punishable by a fine of not more than $100 or thirty days' imprisonment "for each offense," Iowa Code § 8704 (1919) (prohibiting the use of "untrue, deceptive, or misleading" means "to sell, or in any wise [sic] dispose of merchandise" or "with the intent to increase the consumption thereof"). The statutory compilation was recodified in 1924, and again in 1946, where the law was ultimately placed in Chapter 713 alongside criminal statutes designed to thwart the sale of goods to the public by untrue or deceptive means. Iowa Code § 713.24 (1946); *see State v. Cusick*, 84 N.W.2d 554, 556–57 (Iowa 1957) (considering scope of conviction under Iowa Code § 713.24 (1954)).

The Legislature enacted the CFA in 1965. *See* 1965 Iowa Acts ch. 438, § 1. The statute replaced the criminal false advertising law by implementing a regulatory regime in which consumer frauds could also be pursued civilly through an enforcement action brought by the Attorney General:

> Whenever it appears to the attorney general that a person has engaged in, is engaging in or is about to engage in any practice declared to be unlawful by this section he may seek and obtain in an action in a district court an injunction prohibiting such person from continuing such practices or engaging therein or doing any acts in furtherance thereof after appropriate notice to such person. Such notice shall state generally the relief sought and be served in accordance with subsection 5 of this section at least three days prior to the institution of such action. The court may make such orders or judgments as may be necessary to prevent the use or employment by a person of any prohibited practices, or which may be necessary to restore to any person in interest any moneys or property, real or personal which may have been acquired by means of any practice in this section declared to be unlawful including the appointment of a receiver in cases of substantial and willful violation of the provisions of this section.

Iowa Code § 713.24(3) (1966). In 1979, the Code was again recodified and the statute was transferred to Chapter 714, entitled "Theft, Fraud, and Related Offenses," where it resides to this day. *See* Iowa Code § 714.16(7) (1979); *cf.* Iowa Code § 714.8 (defining criminal "fraudulent practices"). Early cases sought to enjoin unlawful practices and place violating

businesses into a receivership. *See Am. Sec. Benevolent Ass'n, Inc. v. Dist. Ct. of Black Hawk Cnty.*, 147 N.W.2d 55, 57 (1966).

The original version of the CFA did not impose financial penalties. But as early as 1976, this Court recognized that the CFA, while operating a civil regulatory regime, "also includes penal sanctions." *State ex rel. Turner v. Limbrecht*, 246 N.W.2d 330, 333 (Iowa 1976), *abrogated by Hydro Mag*, 436 N.W.2d at 617. Had the statute authorized financial penalties, the Court implied, the CFA would be punitive in nature. *See State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 629 (Iowa 1971) (reasoning "a statutory provision for reimbursement or refunding of moneys obtained from others by fraudulent means, *absent any penalty*, or the filing of a petition seeking such redress" did not make the act "penal in nature" (emphasis added)); *cf. Lenertz v. Mun. Ct. of City of Davenport*, 219 N.W.2d 513, 516 (Iowa 1974) (defining "unlawful practices" did not impliedly authorize criminal prosecution).

Throughout the next several decades, however, the CFA underwent numerous amendments that drastically expanded the scope of the statute. In 1987, the Legislature amended the CFA to declare that the Attorney General's civil enforcement actions be conducted "by equitable proceedings." 1987 Iowa Acts ch. 164, § 3. But at the same time, it

provided for the imposition of a "civil penalty not to exceed forty thousand dollars per violation against a person found by the court to have engaged in a method, act, or practice declared unlawful." *Id.* And it permitted a claim for restitution to be proven without individualized proof, "by any competent evidence . . . that would be appropriate in a class action." *Id.* Though the State was already entitled to costs, the 1987 amendment also permitted the Attorney General to recover costs and attorneys' fees "for the use of this state." *Id.* § 5 (codified at Iowa Code § 714.16(11) (1989)).

Prior versions of the CFA did not authorize the Attorney General to seek disgorgement and required that the State only recover monetary judgments for those sums capable of being restored to individual consumers. In *State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, this Court held that the statutory text in effect at the time did not permit the State to deposit unclaimed funds to the State treasury. 475 N.W.2d 210, 219 (Iowa 1991) (ordering "any undistributed portion of the restitution fund be returned to [the defendant]"), *superseded by statute as recognized in State v. Hagen*, 840 N.W.2d 140, 152–53 (Iowa 2013). In response, the Legislature added the following new paragraph to the CFA, providing for the first time the remedy of disgorgement:

> If a person has acquired moneys or property by any means declared to be unlawful by this section and if the cost of

> administering restitution outweighs the benefit to consumers or consumers entitled to the restitution cannot be located through reasonable efforts, the court may order disgorgement of moneys or property acquired by the person by awarding the moneys or property to the state to be used by the attorney general for the administration and implementation of this section.

1992 Iowa Acts ch. 1062, § 3 (codified at Iowa Code § 714.16(7) (1993)). In 1994, the Legislature broadened the statute further by replacing "restitution" with "reimbursement." 1994 Iowa Acts ch. 1142, § 5.

Later amendments sought even harsher penalties. In 1991, the Legislature levied "an additional financial penalty not to exceed five thousand dollars per violation" of the CFA committed against an elderly consumer. 1991 Iowa Acts ch. 102, § 1 (later codified at Iowa Code § 714.16A(1) (1993)). A 1998 amendment further authorized the State to "accept a civil penalty as determined by the attorney general in settlement of an investigation of a violation of" the CFA, "regardless of whether an action has been filed." 1998 Iowa Acts ch. 1200, § 4.

The Legislature eventually provided for a private right of action under the CFA. 2009 Iowa Acts ch. 167, § 5 (codified at Iowa Code § 714H.5 (2011)). Presently, any consumer suffering "ascertainable loss" from an act or practice prohibited by the CFA may sue. Private actions brought by individual consumers are tried at law to a jury and may recover actual

damages, costs and attorney fees, and treble damages, in addition to injunctive relief. Iowa Code § 714H.5(1), (2), (4).

**B. The State's Petition.**

The State filed this action on July 16, 2020. Its Petition seeks monetary remedies that stretch far beyond enjoining allegedly unlawful business practices that, in any event, are no longer in operation. Paragraph C of the State's Prayer for Relief demands "all money acquired by means of acts or practices" that violate the CFA. App. 84. In addition, Paragraph D seeks "complete disgorgement" of "additional funds" that are "traceable to the unlawful practices" it alleges. App. 84 (*Id.*). Paragraph E requests "judgment against each Defendant for up to $40,000.00 for each separate violation" of the CFA, and Paragraph F requests an additional "penalty of up to $5,000.00" on top of "each civil penalty imposed" under the statute. App. 84 (*Id.*). The State demands each monetary award be imposed jointly and severally among every Defendant. App. 84 (*Id.*).

The State routinely files petitions seeking joint-and-several recovery of financial penalties and "all money acquired by means of acts or practices" alleged to be unlawful. *See, e.g.*, App. 494–95 (Petition, *State of Iowa ex rel. Miller v. Vision Improvement Techs., Inc.*, CE51687 (Iowa Dist. Ct. Polk

Cnty. Aug. 10, 2005)).[3] Throughout the slow march of the statute's expansion, the State had sought—and obtained—judgments providing vast forms of relief and enormous monetary sums. *See State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 18, 45 (Iowa 2013) (affirming award of $25,250,736.19 in money damages and increasing financial penalties to $3,000,000).

Throughout the intervening decades, the State has obtained judgments under the CFA that are untethered from business practices' impact on Iowa consumers. The State has obtained judgments worth literally millions of dollars which did not provide for the return of any sums to one single affected Iowa consumer. *See, e.g.*, App. 322–24 (Consent Judgment, *State of Iowa ex rel. Miller v. McGraw-Hill Cos., Inc.* (Feb. 9, 2015)) (apportioning $21,535,714 award to the State of Iowa which "shall be used at the sole and complete discretion of the Attorney General of Iowa"). Likewise, the amount awarded to the State in some cases has had absolutely no relation to affected Iowa consumers. *See, e.g.*, App. 281 (Consent Judgment Entry and Order at 14, *State of Iowa ex rel. Miller v. General*

---

[3] Petitions and consent decrees filed by the Office of the Iowa Attorney General in enforcing the CFA are a matter of public record and therefore subject to judicial notice. *See* Iowa R. Evid. 5.201(d) ("Judicial notice may be taken at any stage of the proceeding."); *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (taking judicial notice on appeal).

*Motors*, EQCE082171 (Iowa Dist. Ct. Polk Cnty. Oct. 26, 2017)) (providing for a total payment of $120,000,000 "to be divided and paid by GM directly to each Signatory Attorney General . . . in the sole discretion of the [Multistate Executive Committee]."). And certain actions have successfully applied the statute extraterritorially to obtain damages on behalf of nonresident consumers. *See State ex rel. Miller v. New Womyn*, Inc., 679 N.W.2d 593, 597 (Iowa 2004). *But see Jahnke v. Deere & Co.*, 912 N.W.2d 136, 141–42 (Iowa 2018) ("It is a well-settled presumption that state statutes lack extraterritorial reach unless the legislature clearly expresses otherwise."); *State Sur. Co. v. Lensing*, 249 N.W.2d 608, 612 (Iowa 1977) (noting the "presumption" that a statute "is intended to have no extraterritorial effect").

Many enforcement actions have also been divorced from equitable remedies. The State has filed petitions in which it does not even seek restitution or disgorgement—two hallmarks of equitable relief. *See, e.g.*, App. 320–21 (Petition, *State of Iowa ex rel. Miller v. General Motors Co.*, EQCE082171 (Oct. 19, 2017)). And it has inflicted financial penalties even after acknowledging the defendant lacks the financial ability to pay the judgment. *See, e.g.*, App. 239–40 (Consent Judgment, *State of Iowa ex rel. Miller v. Auten*, EQCE083092 (Iowa Dist. Ct. Polk Cnty. May 29, 2018)).

The State largely obtains its remedies through consent decrees in which the allegations are never tried before a public factfinder. Many are settled before, or immediately after, the State's filing of the Petition. *See generally, e.g.*, App. 236–67 (Petition, *State of Iowa ex rel. Miller v. Auten*, EQCE083092 (Iowa Dist. Ct. Polk Cnty. May 21, 2018); Consent Decree, *State of Iowa ex rel. Miller v. Auten*, EQCE083092 (Iowa Dist. Ct. Polk Cnty. May 29, 2018)). The overwhelming majority of cases brought under the CFA settle without proving their allegations in court. *Cf. Hydro Mag*, 436 N.W.2d at 620 (observing "[t]here have been relatively few cases [before the Iowa Supreme Court] dealing with the [CFA]").

## **ARGUMENT**

Well before the ratification of the Iowa Constitution, Blackstone warned that "law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator . . . ." *In re Marriage of Gallagher*, 539 N.W.2d 479, 485 (Iowa 1995) (Ternus, J., dissenting) (quoting 1 William Blackstone, Commentaries on the Laws of England 62 (U. Chi. Press 1979)). Because "equity refused to enforce a penalty and the law would not give an injunction," Fleming James, Jr., *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655, 672 (1963), "law issues are for the jury and equity issues

are for the court," *Westco Agronomy Co., LLC v. Wollesen*, 909 N.W.2d 212, 225 (Iowa 2017). The basic teaching is that the power of judicial fiat, though undoubtedly exercised in the interest to do good, so too leads to the very decline in democratic mores that it strives to promote if unchecked by "citizen adjudicators." Alexandra Lahav, *The Jury and Participatory Democracy*, 55 Wm. & Mary L. Rev. 1029, 1030 (2014); *see also* Akhil Reed Amar, *America's Unwritten Constitution* 435 (2012).

It should be no surprise, then, that Blackstone long ago considered the right to trial by jury as "the glory of English law." 3 Blackstone, Commentaries on the Laws of England (1807), p. 379. The right to be judged by one's peers in the eyes of the law was "the most transcendent privilege which any [person] can enjoy." *Id.* Indeed, our Founders almost universally regarded the civil jury trial right as "a valuable safeguard to liberty" and "the very palladium of free government." The Federalist No. 83, at p. 499 (C. Rossiter ed. 1961) (Hamilton). Fundamentally, that is because "[t]he opportunity for ordinary citizens to participate in the administration of justice . . . 'invests the people . . . with the direction of society' . . . [and] ensures continued acceptance of the laws by all of the people." *Powers v. Ohio*, 499 U.S. 400, 406–07 (1990) (quoting 1 Alexis de Tocqueville, *Democracy in America* 334–37 (Schocken 1st ed. 1961).

Blackstone's warning about the need to check the exercise of equity with the strictures of law rings true today. This appeal presents two pressing questions concerning the exercise of government power and the right to defend against it before a jury:

*First*, a civil action brought by the State under the CFA in which the State seeks punitive financial penalties, gross receipts beyond the gains realized by the alleged fraud, and joint-and-several liability without regard to an individual actor's wrongdoing is a suit at law in which the Defendants are entitled to a jury trial under Article I, § 9 of the Iowa Constitution. Notwithstanding that the Legislature has proclaimed such suits shall be pursued by "equitable proceedings," the text, history, and tradition of the CFA reveals that the State's civil actions for modern consumer frauds, once prosecuted criminally, have exceeded the bounds of equitable jurisdiction. The vast and expansive relief sought by the State further confirms that this action is one to be tried at law to a jury, not in equity to the court.

*Second, and alternatively*, the constitutional right to jury trial requires that the CFA be interpreted to confine the State to remedies traditionally and historically recognized in equity. At the common law, financial penalties intended to punish and deter were not available in "equitable proceedings," and courts sitting in equity were limited to ordering restitution or

disgorgement of a wrongdoer's ill-gotten gains. Liability imposed jointly and severally defies fundamental principles of equity and its historical origins, transforming an action for restitution into one for compensatory damages.

The State attempts to have it both ways. Below, it argued both that the text of the CFA deprived the Defendants of their constitutional right to jury trial because such actions must be tried by "equitable proceedings" while entitling the State to remedies not cognizable in equity jurisdiction. In order to recover the remedies the State seeks, however, the State cannot proceed without a jury. Alternatively, in order to try this case without a jury, the State must be restricted to remedies traditionally available in equity.

# I. ARTICLE I, § 9 OF THE IOWA CONSTITUTION AFFORDS THE DEFENDANTS THE RIGHT TO A TRIAL BY JURY IN A CIVIL ACTION THAT SEEKS (1) CIVIL PENALTIES, (2) MONEY IN THE AMOUNT OF THE DEFENDANTS' GROSS RECEIPTS, AND (3) JOINT-AND-SEVERAL LIABILITY.

***Error Preservation.*** Error was preserved through the parties' litigation of the State's motion to strike the Defendants' jury demand. The State moved to strike the Defendants' jury demand on the grounds that its action under the CFA was brought in equity, necessarily relying on the constitutional principle that the right to trial by jury does not extend to cases in equity. App. 150 (citing *Homeland Energy Sols., LLC v. Retterath*,

938 N.W.2d 664, 684 (Iowa 2020)). Accordingly, the Defendants resisted on the ground that Article I, § 9 of the Iowa Constitution demanded they receive a jury trial on all issues extending beyond the court's equitable jurisdiction. App. 155–60; *see Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000) ("Error was preserved by the [party's] timely application for interlocutory appeal on the jury issue.").

***Standard of Review.*** "Whether a party is entitled to a jury trial is a legal question." *Homeland Energy Sols.*, 938 N.W.2d at 683. Thus, the district court's decision striking Defendants' jury demand is reviewed for correction of errors at law. *Id.*; *see* Iowa R. App. P. 6.907. Due to its constitutional dimension, this Court reviews de novo. *See State v. Short*, 851 N.W.2d 474, 478 (Iowa 2014); *Weltzin*, 618 N.W.2d at 296.

***Argument.*** When the government accuses individuals and businesses of "unlawful" practices and sues civilly to inflict financial penalties, seize every penny received, and impose liability among every defendant, Article I, § 9 of the Iowa Constitution demands the government prove its case to a jury. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Rieff v. Evans* 672 N.W.2d 728, 732 (Iowa 2003) (quoting

*Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)). Indeed, the Iowa Constitution's edict—that "[t]he right of trial by jury shall remain inviolate"—is a guarantee beyond the policy prerogatives of the times. *R. E. Morris Invs., Inc. v. Lind*, 304 N.W.2d 189, 192 (Iowa 1981); *Iowa Nat. Mut. Ins. Co. v. Mitchell*, 305 N.W.2d 724, 728 (Iowa 1981).

The primary inquiry is the "essential nature" of the action. *Carstens v. Central. Nat'l Bank & Tr. Co. of Des Moines*, 461 N.W.2d 331, 333 (Iowa 1990). The character of the allegations, and remedies sought, further inform the nature of the action. *Homeland Energy Sols.*, 938 N.W.2d at 685 (holding the "proper remedy" was "the controlling issue" in breach of contract case); *Hedlund v. State*, 930 N.W.2d 707, 718 (Iowa 2019) (holding statutory language providing only "equitable relief" determined jury trial issue). When "both legal relief and equitable relief are demanded, the action is ordinarily classified according to what appears to be its primary purpose or its controlling issue." *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 179 (Iowa 2010) (citation omitted).

As argued below, this case is fundamentally a legal one. Its essential nature is reminiscent of early criminal prohibitions and, as employed by the State, strives for deterrence and punishment. With no revenue to collect or business to be enjoined, the dominant remedies sought by the State in this

action amount to nothing less than punitive sanctions and compensatory damages. Because these purposes are antithetical to proper equitable relief, *Tull v. United States*, 481 U.S. 412, 418–19 (1987), the Defendants are entitled to make their case to a jury.

**A. The Essential Nature of This Case Lies at Law.**

Historically, this Court has held that the Iowa Constitution preserved the right to jury trial on all issues so triable at the common law. *Mitchell*, 305 N.W.2d at 726–28; *see also* Iowa Code § 611.4 ("The plaintiff may prosecute an action by equitable proceedings in all cases where courts of equity, before the adoption of this Code, had jurisdiction . . . ."). Like its historical predecessors and common law antecedents, this case is one which is legal at its heart.

**1. At the common law, actions for consumer fraud were triable to a jury.**

Although the State's statutory action did not exist at the common law, others of like kind did. Suits to abate consumer frauds have never been "entirely statutory," and at one time they were "considered . . . to be criminal in nature." *Cf. State ex rel. Bishop v. Travis*, 306 N.W.2d 733, 734 (Iowa 1981). Both actions were historically tried to a jury.

The State could—and did—pursue unfair business practices inflicted against consumers criminally. *Hutchinson Ice Cream Co.*, 147 N.W. at 199

(noting "[l]aws tending to prevent fraud and to require honest weights and measures in the transaction of business have been frequently sustained in the courts"); *see, e.g.*, *State v. Armour Packing Co.*, 100 N.W. 59, 60–62 (Iowa 1904) (conviction for sale of imitation product); *State v. Schlenker*, 84 N.W. 698, 699 (Iowa 1900) (conviction for selling adulterated product operating as "a fraud upon the purchaser"); *State v. Chingren*, 74 N.W. 946, 947 (Iowa 1898) (conviction for fraudulent exchange of real estate and merchandise); *United States v. Ross*, 1843 WL 1192 (Iowa 1843) (conviction for false pretenses). Because "[t]he right to jury trial is fundamental in criminal cases," Jared Stark, *The Iowa Constitution* 45 (Greenwood Press, 1998), a jury was always afforded in such cases. And although the CFA did not merely codify the common law of fraud, consumers always had the ability to sue individually when harmed by unfair businesses practices now prohibited by statute. *Limbrecht*, 246 N.W.2d at 333 (citing *Com. Sav. Bank of Carroll v. Kietges*, 219 N.W. 44 (1928); *Faust v. Parker*, 213 N.W. 794 (1927)). Damages actions were readily available at law. *See, e.g.*, *Henderson v. Ball*, 186 N.W. 668, 668–69 (1922) (action at law for fraudulent advertisement and sale of cattle).

Historically, when the State did bring civil actions in equity prior to the CFA, it did so to abate illegal trade practices and only sought injunctive

relief. *See, e.g.*, *State v. Kindy Optical Co.*, 248 N.W. 332, 334 (Iowa 1933) (suit in equity to enjoin unlicensed practice of optometry). Private parties, too, brought actions in equity but sought relief solely in the restraint of unfair business practices. *See, e.g.*, *Atlas Assur. Co. v. Atlas Ins. Co.*, 112 N.W. 232, 233 (Iowa 1907).

The CFA's declaration that cases should tried by "equitable proceedings" does not end the inquiry, contrary to the State's assertion. "An act penal in nature is generally one which imposes punishment for an offense committed against the State and is accordingly interpreted strictly." *Koscot Interplanetary*, 191 N.W.2d at 629. Although the Legislature "may be its own lexicographer," *id.*, it may not diminish the constitutional rights of defendants charged under the CFA by legislative fiat, *Lind*, 304 N.W.2d at 192 ("[T]he fundamental right of trial by jury itself, guaranteed by the Iowa Constitution, is perforce beyond the reach of the legislature and the courts."); *McMartin v. Bingham*, 27 Iowa 234, 238–39 (1869) ("But it is better to suffer the inconvenience and delay resulting from a jury trial of such causes than to narrow in the least by judicial construction the invaluable right of trial by jury."). Located in Title XVI (criminal law and procedure), Subtitle 1 (crime control and criminal acts), Chapter 714 (theft,

fraud, and related criminal offenses), the CFA's civil penalty provision must be read in the context of surrounding criminal statutes.

Modern-day actions brought by the Attorney General under the CFA aim to accomplish the same goals as those of its predecessors. Indeed, the State has attempted to use its statutory authority to win cases civilly in which it could not prevail criminally. *See State v. Miner*, 331 N.W.2d 683, 685 (Iowa 1983) (seeking civil injunction after two failed criminal prosecutions). The CFA's facially civil nature has not stopped the State from attempting to continue enforcing consumer frauds by criminal indictment. *Lenertz*, 219 N.W.2d at 514 (sustaining writ of certiorari; no criminal charges could be brought by the State under the original CFA); *see also State v. West*, 320 N.W.2d 570, 572 (Iowa 1982) (reviewing restitution order in criminal prosecution under prior CFA, § 713.24(2)(a)).[4] Notwithstanding the statute's language, the "primary purpose" of the State's action under the "equitable" veneer of the CFA is to punish and deter. *See Homeland Energy*

---

[4] Some consumer protection statutes are, in fact, still prosecuted both criminally and civilly. For instance, a violation of the Door-to-Door Sales Act constitutes a "simple misdemeanor" as well as an "unlawful practice under the CFA. Iowa Code § 555A.6. *See also* Iowa Code § 714B.6 (violation of prize promotions statute an "aggravated misdemeanor"), § 714B.7 (violation of prize promotions statute a violation of § 714.16(2)(a)).

*Sols.*, 938 N.W.2d at 684–85 (concluding legal essential nature of cause of action was outweighed by equitable primary purpose).

### 2. At the common law, civil suits brought by the government to collect statutory penalties were legal actions tried to a jury.

Beyond its historical criminal and civil common law roots, this action—seeking primarily to impose statutory penalties and gross receipts—resembles a common law action in debt. At the early common law, English courts "held that a civil penalty suit was a particular species of an action in debt that was within the jurisdiction of the courts of law." *Tull*, 481 U.S. at 418 (1987) (citing cases). Indeed, "[a]n information on behalf of the crown, filed in the exchequer by the king's attorney general, [was] a method of suit for recovering money or other chattels . . . for any forfeiture due to the crown upon the breach of a penal statute." *People v. One 1941 Chevrolet Coupe*, 231 P.2d 832, 836 (Cal. 1951) (per curiam) (quoting Blackstone, *Commentaries* 261 (12th ed.)). Those actions were tried to a jury.

American courts followed this inherited custom by "treating the civil penalty suit as a particular type of an action in debt, requiring a jury trial." *Tull*, 481 U.S. at 418. Thus, an action seeking to impose a civil financial penalty is, and always has been, one that "could only be enforced in courts

of law." *Id.* at 422. The $45,000 per-violation penalty authorized by the CFA can "hardly can be considered incidental to the modest equitable relief sought in this case." *Id.* at 425. Without the availability of meaningful injunctive relief, this case is, and always has been, about the monetary judgment sought by the State. *See id.* at 424–25 (noting the government "was aware when it filed suit" that its relief would hinge on civil penalties since the defendant's regulatory violation had largely already abated).

The State's insistence on assessing per-violation statutory penalties against a defunct company further negates any notion that the financial penalty is "calculated solely on the basis of equitable determinations, such as the profits gained from violations of the statute." *Id.* at 422. Indeed, the State conceded below that the purpose of the penalties it seeks are deterrence and punishment. App. 171. And its ability to recover costs and attorney fees negates any question of whether the penalties were intended to compensate the State for its enforcement efforts. Like *Tull*, the State's action under the CFA is legal in nature and triable to a jury.

Many federal courts presiding over actions similarly directed at consumer welfare have held that the right to jury trial extends at least as far as the issue of liability. *See United States v. J. B. Williams Co.*, 498 F.2d 414, 422–23 (2d Cir. 1974) ("There can be no doubt that in general 'there is

a right of jury trial when the [government] sues . . . to collect a penalty, even though the statute is silent on the right of a jury trial.'" (citation omitted)); *United States v. Dish Network, L.L.C.*, 754 F. Supp. 2d 1002, 1003 (C.D. Ill. 2010) ("When, as here, a legal claim is joined with an equitable claim, the right to a jury trial on the legal claim, including all issues common to both claims, remains intact." (cleaned up)). The federal courts of appeals are unanimous in preserving a defendant's right to jury trial in enforcement proceedings brought by the SEC as to the issue of liability. *See S.E.C v. Life Partners Holdings, Inc.*, 854 F.3d 765, 781–82 (5th Cir. 2017); *S.E.C. v. Capital Sols. Monthly Income Fund, LP*, 818 F.3d 346, 354–55 (8th Cir. 2016); *S.E.C. v. Jensen*, 835 F.3d 1100, 1106 (9th Cir. 2016); *S.E.C. v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002).

Though *Tull* and other federal authorities were decided under the Seventh Amendment, which has not been incorporated to the States, the State failed to offer a meaningful explanation why these federal authorities are not persuasive. The State's main response below was to claim that *Tull* and other federal authorities applying the Seventh Amendment do not apply. App. 171–73.

To the contrary, "[t]here is . . . evidence in the 1857 debates over the Iowa Constitution that our framers wanted our bill of rights to provide

similar protection to the Federal Bill of Rights when they adopted similar language." *State v. Brown*, 930 N.W.2d 840, 846–47 (Iowa 2019) (observing that when nearly identical language exists, the court generally interprets the "scope and purpose" of a constitutional right "to track with federal interpretations").[5] Indeed, this Court "first examine[s]" federal precedent in evaluating the constitutional right to jury trial under Article I, § 9 of the Iowa Constitution "[b]ecause there is a nexus between interpretations of Iowa's jury provision and the federal provision." *Mitchell*, 305 N.W.2d at 726 (following reasoning of federal precedent concerning the Seventh Amendment to Article I, § 9 in small claims actions). Under both constitutions, there is a strong "preference for jury trials." *Weltzin*, 618 N.W.2d at 298. Far from the irrelevant shade in which the State casts it, "[t]he intention of the two constitutional provisions is obviously the same." *Schloemer v. Uhlenhopp*, 21 N.W.2d 457, 458 (Iowa 1946).[6]

---

[5] Unlike in the criminal search-and-seizure context, there is no applicable federal "backstop" to protect the rights of regulatory defendants in actions brought under the CFA. Only Iowa courts applying the Iowa Constitution can protect Iowa defendants' right to a jury trial in the face of the full weight of Iowa's governmental authority exerted against them.

[6] Contrary the State's assertion, *Tull*'s approach did not "focus on the relief the government sought." *See* App. 172. *Tull*, in fact, applied the same test as does this Court: it "examine[s] both the nature of the action and of the remedy sought." 481 U.S. at 417. By examining "[a]ctions by the government" that enforce policy regulations and are aimed at "recover[ing]

Nowhere in their arguments below has the State endeavored to make out even the most minimal case that Iowa safeguards the right to jury trial any less than in federal court. This Court should follow the reasoning expounded in *Tull* to protect defendants' right to jury trial under Article I, § 9 of the Iowa Constitution. When a sanction is "serious" and "severe enough" to subject the defendant to a fine "to such a degree or in such an amount as to render the offense" more than a mere "petty" one, a jury trial is required. *Sarich v. Havercamp*, 203 N.W.2d 260, 268 (Iowa 1972).

**3. The statutory history of the CFA shows it was intended to be punitive.**

Before the 1987 amendments, this Court previously determined the CFA to *not* be punitive in nature precisely because it did not provide for the imposition of civil penalties. In *Koscot Interplanetary*, the operators of a pyramid scheme argued the CFA was unconstitutionally vague and, being penal in nature, should be strictly construed against the State. *See* 191 N.W.2d at 628–29. Statutes penal in nature, this Court observed, "impose[] punishment for an offense committed against the State." *Id.* at 629. It held the 1971 version of the CFA was not penal: "a statutory provision for reimbursement or refunding of moneys obtained from others

---

civil penalties under statutory provisions," the Court did just that and concluded a jury trial was required. *Id.* at 418–19.

by fraudulent means, *absent any penalty, or the filing of a petition seeking such redress*, [does not] make the act penal in nature." *Id.* (emphasis added).

The modern version of the CFA, however, *does* impose financial penalties. At a baseline, individuals and businesses prosecuted under the CFA civilly face a $40,000 fine per violation. Each penalty is increased by $5,000 for every violation committed against elderly consumers. There can be no question that the State seeks to impose such penalties as "punishment" for the offense. *See id.* Indeed, this Court later held that some of the CFA's provisions, like the one at issue here, "may be interpreted as being both remedial *and penal* in nature." *See Lenertz*, 219 N.W.2d at 516 (emphasis added).

The legislative history of Iowa's consumer frauds statute also supports reading the statute to be punitive in nature. The House originally proposed subjecting any person or business violating now-§ 714.16(2)(b) to a fine of $500 or one year imprisonment, or both. *Lenertz*, 219 N.W.2d at 516; (quoting H.J. File 561, 61st G.A., p. 728). The Senate rejected those penalties, eliminating the clause from the bill. *Id.* ("When the bill went to the Senate, the penalty clause was deleted."). Because the penalty had been considered and deleted from the bill enacting the original CFA, this Court in *Lenertz* concluded the statute could not be plausibly read consistent with

legislative intent to included it. *Id.* ("The striking of a provision is an indication the statute should not, in effect, be construed to include it.").

The Legislature's later choice in 1987 to impose significant financial penalties on individuals and businesses that violate the CFA reflects a shift to punishment and deterrence cognizable at law, not in equity. When adopting a penal sanction it previously rejected, the Legislature changed the nature and purpose of the CFA and altered existing law of this Court interpreting the statute. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 40, at 256 (Thomson/West 2012) (reenactment canon); *see In re Davis*, 960 F.3d 346 (6th Cir. 2020) ("[T]he reenactment canon provides that whenever Congress amends a statutory provision, 'a significant change in language is presumed to entail a change in meaning.'" (citation omitted)).[7] This statutory history—informed by the legislative process—strongly demonstrates the Legislature did *not* acquiesce to this Court's earlier characterization of the statute. *Cf. State ex rel. Miller*

---

[7] In *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222 (Iowa 1998), the Court relied on *Lenertz* to conclude there was no express or implied private right of action under the 1998 version of the CFA. *Id.* at 228. Because there was no expressly authorized private right of action, and there was no evidence the Legislature intended a violation to constitute a crime, it held § 714.16(2)(a) (1994) did not provide a private right of action. *Id.* That opinion did not consider the enactment of a civil penalty in the wake of *Lenertz*. Any statement made in that case that could be construed to assert that the CFA does not contain a feature of punishment is dicta.

*v. Rahmani*, 472 N.W.2d 254, 257 (Iowa 1991) ("When the supreme court has interpreted a statute and thereafter the legislature leaves the statute unchanged, we presume the legislature has acquiesced in that interpretation."). To the contrary, the Legislature's 1987 amendment expressed a clear preference to impose punitive sanctions on violating businesses.

**B. The Remedies Sought by the State Are Quintessentially Legal.**

The character of the remedies sought by the State further inform the nature of the action as one existing at law, not in equity. *See Homeland Energy Sols.*, 938 N.W.2d at 685; *Van Sloun*, 778 N.W.2d at 179. Without meaningful injunctive relief available, the predominant remedies sought by the State in this case show that the primary purpose of its civil action is to punish and deter, not restore and rehabilitate. Indeed, the practices employed by the State "bear[] all the hallmarks of a penalty"—a classic remedy at law. *Kokesh*, *v. S.E.C*, 137 S. Ct. 1635, 1644 (2017). The "transsubstantive guidance on broad and fundamental" matters of traditional equitable principles expounded by courts and treatises alike teach that when the government seeks relief inconsistent with "equitable proceedings," the action becomes one in which a jury trial is required. *See Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1496 (2020).

First, financial penalties like the statutory fines authorized under the CFA are not—and never have been—within the realm of traditional equity jurisdiction. "A 'penalty' is a 'punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws.'" *Kokesh*, 137 S. Ct. at 1642 (quoting *Huntington v. Attrill*, 146 U.S. 657, 667, 13 S. Ct. 224, 227 (1892)); *see also Penalty*, Black's Law Dictoinary (11th ed. 2019) (defining "penalty" as "[p]unishment imposed on a wrongdoer," commonly a "fine"; a "sum of money exacted as punishment for either a wrong to the state or a civil wrong").

It has long been the law that "equity never 'lends its aid to enforce a forfeiture or penalty.'" *Liu v. S.E.C.*, 140 S. Ct. 1936, 1941 (2020) (quoting *Marshall v. City of Vicksburg*, 82 U.S. 146, 149 (1873)). And as a result, suits seeking such relief "historically have been viewed as . . . requiring trial by jury." *Tull*, 481 U.S. at 419; *see also id.* at 422 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). To the extent the Court permits the State to seek such per-violation civil penalties under the CFA, imposing them without a jury violates the Defendant's rights under Article I, § 9 of the Iowa Constitution. *See Curtis v. Loether*, 415 U.S. 189, 196, n.11 (1974).

The State also purports to seek "restitution" and "disgorgement" but does so in name only. As the State argued below, "[a] plain reading of the CFA indicates the State may seek total reimbursement for consumers who were defrauded by persons who engaged in prohibited activities." App. 165. But while they "may have gone by different names," the equitable remedies of restitution and disgorgement were traditionally meant to "deprive[] wrongdoers of their net profits from unlawful activity." *Liu*, 140 S. Ct. at 1942–43 (citing 1 D. Dobbs, Law of Remedies §§ 4.1(1), 4.3(5) (1993); Restatement (Third) of Restitution and Unjust Enrichment § 51, cmt. *a*, (Am. Law. Inst. 2010) ("Restatement (Third)" or "the Third Restatement")). As this Court has recognized, simply labelling a remedy "restitution" does not necessarily mean it exists in equity. *See Endress v. Iowa Dep't of Hum. Servs.*, 944 N.W.2d 71, 80 (Iowa 2020) (plurality op.) (citing Restatement (Third) § 4); *see also id.* at 93 (McDonald, J., concurring in part and dissenting in part) ("The doctrine of unjust enrichment is not an open-ended doctrine that allows a court to . . . dispens[e] justice according to considerations of individual expediency," it "is a term of art." (cleaned up)).

The Third Restatement recounts the "general rule" that defendants are "entitled to a deduction for all marginal costs incurred in producing the revenues" that are subject to orders of restitution or disgorgement; the

"[d]enial of an otherwise appropriate deduction, by making the defendant liable in excess of net gains, results in a punitive sanction" not cognizable in a court of equity. Restatement (Third) § 51, cmt. *h*. Awards were historically limited to net profits from wrongdoing, meaning "the gain made upon any business or investment, when both the receipts and payments are taken into account." *Providence Rubber Co. v. Goodyear*, 9 Wall. 788, 804 (1870); *see also, e.g.*, *Livingston v. Woodworth*, 15 How. 546, 559–560 (1854). And when the State seeks such monetary remedies that go beyond a district court's equitable powers, a jury is required as a matter of law. *Weltzin*, 618 N.W.2d at 300 ("[A]n action seeking recovery of monetary damages will generally give rise to a right to trial by jury." (citation omitted)); *see also Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255 (1993) (per Scalia, J.); *AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350, 1374 n.45 (11th Cir. 2021) (citing Restatement (Third) § 4).

Finally, the State's insistence that it is entitled to recover against all defendants jointly and severally drastically and instantly changes any monetary award for the benefit of consumers from equitable restoration to compensatory damages. At the common law, historical equity jurisdiction was limited to an individual defendant's role in the allegedly wrongful conduct. *Liu*, 140 S. Ct. at 1945 (citing, e.g., *Ambler v. Whipple*, 20 Wall.

546, 559 (1874)). Indeed, equity courts had "no power" to order any form of restitution or disgorgement against defendants for sums "who were not in possession of the thing to be restored." *Jennings v. Carson*, 4 Cranch 2, 21 (1807). To the contrary, joint-and-several liability has long been understood to be the product of tort law, which seeks compensation, not restitution. *See, e.g.*, *Reilly v. Anderson*, 727 N.W.2d 102, 109 (Iowa 2006) (citing Restatement (Third) of Torts: Apportionment of Liability § 15 (2000)); *Miller v. Beck*, 79 N.W. 344, 344–45 (Iowa 899).

Collectively or individually, the remedies sought here are "at odds with the common-law rule requiring individual liability for wrongful profits" and "transform . . . equitable profits-focused remed[ies] into a penalty." *Liu*, 140 S. Ct. at 1949; *cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 354 (1998) (noting remedies extending beyond equitable restitution reflect damages for which "there is overwhelming evidence that the consistent practice at common law was for juries to award"). This Court examines a number of factors in determining when a statute expresses punitive intent:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment-retribution or deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an

> alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned.

*State v. Pickens*, 558 N.W.2d 396 (Iowa 1997) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554 (1963)); *accord State v. Aschbrenner*, 926 N.W.2d 240, 247 (Iowa 2019). Described in detail above, each factor counsels that the remedies truly sought by the State in its civil enforcement action is punitive. When a sanction is "serious" and "severe enough" to subject the defendant to a fine "to such a degree or in such an amount as to render the offense" more than a mere "petty" one, a jury trial is required. *Sarich*, 203 N.W.2d at 268.

## II. THE STATE'S ATTEMPT TO LEVY CIVIL PENALTIES, RECOVER THE DEFENDANTS' GROSS RECEIPTS, AND IMPOSE JOINT-AND-SEVERAL LIABILITY IS INCONSISTENT WITH THE REQUIREMENT OF "EQUITABLE PROCEDURES" IN THE IOWA CONSUMER FRAUDS ACT.

***Error Preservation*.** While the constitutional issue was preserved by virtue of the State's arguments in favor of striking the Defendants' jury demand, the statutory issue was preserved precisely because the State relied so heavily on its authority under the CFA. App. 163–67, 170–71, 174–75; *see also see* App. 158, 160. When legal issues are consensually and necessarily litigated below, this Court may address them on appeal. *See*

*Thorson v. Board of Sup'rs of Humbolt Cnty.*, 90 N.W.2d 730, 736–37 (Iowa 1958).

Moreover, error is only not preserved where the lower court "fails to resolve an issue . . . properly submitted for adjudication." *Jensen v. Sattler*, 696 N.W.2d 582, 586 (Iowa 2005). Because the district court "necessarily rejected" the Defendants' argument that the State's misapplication of its statutory authority was inconsistent with the bounds of equitable proceedings, error was properly preserved on the question. *State v. Childs*, 898 N.W.2d 177, 182 (Iowa 2017) (error preserved when the district court "*necessarily* rejected [appellant's] statutory-interpretation argument" when it ruled against him on the constitutional argument); *see also Meier v. Senecaut*, 641 N.W.2d 532, 539–40 (Iowa 2002) (the Court "assume[s] the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling").

***Standard of Review***. This Court reviews issues requiring statutory interpretation for correction of errors at law. *State v. Warren*, 955 N.W.2d 848, 856 (Iowa 2021); *see* Iowa R. App. P. 6.907.

***Argument***. If Article I, § 9 of the Iowa Constitution does not require that this case be tried to a jury, then the government's attempt to levy civil penalties, recover gross receipts, and impose joint-and-several liability

exceeds its statutory authority under § 714.17(7). The State argued below that the statutory text authorized all three remedies without limitation. But the very first sentence of that same text commands that the State prosecute alleged violations of the CFA "by equitable proceedings." Monetary remedies awarded in "equitable proceedings" must necessarily be limited to those traditionally available in equity. The State's insistence that the Defendants lack the right to a jury trial compels the conclusion that its' recovery, if any, be so limited.

Resolution of the statutory issue on interlocutory review is imperative. The Court cannot adequately resolve the constitutional issue without addressing the statutory one—the legal questions are one in the same. And both issues are of first impression to this Court, in large part because the vast majority of actions under the CFA are settled; the State's improper attempts to gain negotiation leverage is effectively unreviewable from final judgment. An authoritative decision on the fully-developed question of remedies available in "equitable proceedings" not only resolves the constitutional rights of defendants in consumer frauds actions brought by the State, it provides much-needed clarity and guidance to the law.

Here, "the text and structure of the statutory scheme . . . 'in so many words, or by a necessary and inescapable inference, restrict[s] the court's

jurisdiction in equity.'" *AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n*, 141 S. Ct. 1341, 1350 (2021) (citations omitted). Because the CFA commands that regulatory enforcement actions under the CFA are to be tried "by equitable procedures," the State's monetary recovery must be limited to net profits derived from business practices found to be unlawful—the remedies traditionally available in equity.

### A. The Remedies Available in "Equitable Proceedings" Are Limited to Those Historically Availability in Equity Jurisdiction.

If the public enforcement mechanism of the CFA is to be given effect without abrogating the constitutional right to jury trial, the statute must be interpreted to restrict recoverable remedies to those traditionally available in "equitable proceedings." A straightforward and common-sense reading of the statutory text supports so limiting the remedies available to the State.

"In any question of statutory interpretation" the Court begins "with the words of the statute." *Blue Grass Sav. Bank v. Cmty. Bank & Tr. Co.*, 941 N.W.2d 20, 24 (Iowa 2020). But the text of legislative enactments must be interpreted "in conformity with the common law wherever statutory language does not directly negate it." *Cookies Food Prod., Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 452 (Iowa 1988); *see also* Scalia & Garner, *Reading Law* §§ 52–53, at 318–21. The

statute should be assessed "in its entirety, not just isolated words or phrases," and should be interpreted "so that no part of it is rendered redundant or irrelevant." *State v. McCullah*, 787 N.W.2d 90, 94 (Iowa 2010) (citation omitted). Its "subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations" all bear on the question of a statute's meaning. *Cox v. State*, 686 N.W.2d 209, 213 (Iowa 2004). But in the end, what matters is "what the statute means," not "what the legislature meant." *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (quoting Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899)).

Here, the Legislature's pronouncement that regulatory enforcement actions "shall be by equitable proceedings" precludes remedies not traditionally available in equity. A party "may prosecute an action by equitable proceedings" only "where courts of equity . . . had jurisdiction." Iowa Code § 611.4. An Iowa court sitting in equity at the common law was necessarily limited to equitable remedies. *See, e.g.*, *McMartin*, 27 Iowa at 237–39.

Textually, the opening command of the Legislature that the State must enforce the CFA "by equitable proceedings" modifies its later provision of

remedies. Under the canon of construction *noscitur a sociis*, this Court "read[s] words in context rather than in isolation." *State v. Ross*, 941 N.W.2d 341, 348 (Iowa 2020) (citing *Peak v. Adams*, 799 N.W.2d 535, 547 (Iowa 2011)); *see* Scalia & Garner, *Reading Law* § 31, at 195–98.[8]

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." "[S]uch 'statutory reference[s]' to a remedy grounded in equity 'must, absent other indication, be deemed to contain the limitations upon its availability that equity typically imposes.'" *Liu*, 140 S. Ct. at 1947; *see Hedlund*, 930 N.W.2d at 718 (determining that "any other equitable relief" authorized by statute "necessarily implies the 'affirmative relief' authorized is equitable").

### B. The CFA Does Not Authorize the State to Pursue, or a District Court to Award, Relief Beyond Those Traditionally Available in "Equitable Proceedings."

Equity courts commonly "circumscribe[d] the award in multiple ways to avoid transforming it into a penalty outside their equitable powers." *Liu*,

---

[8] Along similar lines, the preamble to § 714.16(7), calling for "equitable proceedings," is also a strong indicator the Legislature intended the civil enforcement of the CFA by the State to truly be tried in equity. Scalia & Garner, *Reading Law* § 34, at 217–20.

140 S. Ct. at 1944. Iowa courts, too, have long required that equitable remedies be constrained by historical equitable principles. *See McMartin*, 27 Iowa at 237–39 (restricting statutory accounting provision to conform to the bounds of equity). The remedies prescribed by the CFA must be circumscribed to true equitable remedies to avoid infringing the Defendants right to jury trial under Article I, § 9 of the Iowa Constitution.

**1. "Equitable proceedings" prohibit financial penalties.**

The jurisdiction of courts sitting in equity do not—and never have—extended to the imposition of penalties. "[W]hile a court in equity may award monetary restitution as an adjunct to injunctive relief, it may not enforce civil penalties." *Tull*, 481 U.S. at 426. The State's main statutory argument—that the words of the CFA authorizes it to levy financial penalties aimed at punishing violators—begs the question. *See* App. 170–71. The State argues that the plain text of the statute authorizes the district court to impose financial penalties. But the plain text also commands actions brought by the State must be conducted "by equitable proceedings." And as voluminous authorities unanimously state, equity does not recognize a penalty. *See, e.g.*, James, 72 Yale L.J. at 672; *cf. Miller Oil Co. v.*

*Abramson*, 109 N.W.2d 610, 1064 (Iowa 1961) (statutory penalty "cannot be remitted even by a court of equity").[9]

Nor does the State's argument that § 714.16(7) authorizes the court, not a jury, to fix civil penalties provide evidence that they may assessed in equitable proceedings. That argument conflates liability and damages. At the common law, juries were required to assess liability on legal issues while Congress could delegate penalties to the court. *See Feltner*, 523 U.S. at 354–55 (citing *Tull*, 481 U.S. at 427–26). No application of the CFA that is faithful to its text supports the State's position that financial "penalties" are properly awarded in "equitable proceedings."

While the State sought to distinguish *Tull*'s significance on jurisdictional grounds, it made no effort to distinguish its exposition of historical common law equity principles. *See* App. 171–74. The tradition that originated in English courts, and followed to early American courts, was that courts sitting in equity had no authority to issue such financial penalties. *Marshall*, 82 U.S. at 149 ("Equity never, under any circumstances, lends its

---

[9] The State's citations to decisions of this Court that "affirmed civil penalty awards" is literally true but also substantively misleading. *See* App. 171. In no case prior to this one has the State's authority to levy civil penalties without a jury been questioned. This Court's precedents reviewing actions brought by the State under the CFA do not stand for the imprimatur of this Court in its authority to do so.

aid to enforce a forfeiture or penalty, or anything in the nature of either.”). Reading the statute as a whole shows that the CFA’s authorization of “civil penalties” is flatly inconsistent with “equitable proceedings” and demands that the State be prohibited from seeking them or the Defendants be granted a jury trial.

### 2. “Equitable proceedings” limit recovery of restitution or disgorgement to net profits.

In enacting the CFA, the Legislature did not intend to authorize the Attorney General to sue for compensatory damages. Instead, it limited monetary awards recoverable by the State to restitution and disgorgement—traditional equitable remedies bound by historical equitable jurisdiction. The Legislature has proven itself capable of permitting suit for “actual damages” when it deems appropriate. *Cf.* Iowa Code § 714H.5(1) (permitting private suit to recover “actual damages” for “an ascertainable loss of money”). It could have done so in proceedings brought by the State but did not.

Nonetheless, compensatory damages are effectively what the State seeks here. The Petition makes clear it seeks “all money” obtained from consumers through the business it alleges to have been wrongful. App. 84. Under the guise of phrases like “total reimbursement” and “total refund,” the State itself insists it is entitled to nothing less than the Defendants’ gross

receipts. *See* App. 165, 167; *see also* App. 167 (complaining true equitable remedy of net-profits based restitution "suggests a partial 'refund' at best, after subtraction of whatever the Defendants claim are their costs").

But permitting such a recovery "converts a court of equity into an instrument for the punishment of simple torts," for which the State can produce no authority. *Livingston*, 15 How. at 559, (1853). Indeed, "monetary relief for all losses . . . sustained" by alleged victims "is nothing other than compensatory *damages*." *Mertens*, 508 U.S. at 255. "Money damages are, of course, the classic form of *legal* relief." *Id.*

The deduction of costs is precisely what confines the monetary relief in equitable proceedings to equitable principles. Restitution and disgorgement fundamentally target "the unjust enrichment of a conscious wrongdoer," which is measured by "the net profit attributable to the underlying wrong." Restatement (Third) § 51(4).[10] Indeed, "[t]he object of restitution in such cases is to eliminate profit from wrongdoing while

---

[10] The Third Restatement is not irrelevant as the State asserts. While the CFA is not a mere codification of common law fraud, *Vertrue*, 834 N.W.2d at 30 (quoting *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 770 (Iowa 2004)), it explicitly incorporated and (thereby codified) common law principles of equity when commanding that the State prosecute alleged violations of the CFA "by equitable proceedings." *See* Scalia & Garner, *Reading Law* §§ 52–53, at 319–21; Iowa Code § 611.4 (authorizing "equitable proceedings" in "all cases where courts of equity . . . had jurisdiction").

avoiding, so far as possible, the imposition of a penalty." *Id.*; *see also* Restatement (Third) § 13(1) (imposing liability for fraud "in restitution as necessary to avoid unjust enrichment"). The return of net profits, after deducting costs, is what enables the prevention of unjust enrichment. Restatement (Third) § 51, cmt. *a* ("[T]he object of restitution is to strip the defendant of a wrongful gain.").

The main problem with the theory of restitution and disgorgement advanced by the State is that their vision of "equitable" relief is not "equitable." Restitution of the sort sought by the State on behalf of consumers here seeks to, in effect, rescind the sale of services provided by the Defendants even if some part of the sale was wholly legitimate.

But rescission "is not a one-way street." *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 825 (Tex. 2012) (citing Restatement (Third) § 37 cmt. *d*) (holding consumer was not entitled to restoration of "all amounts paid" under state unfair business practices act). "Rescission in a court of equity seeks to restore the status quo." *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 183 (Iowa Ct. App. 1988) (citing *Binkholder v. Carpenter*, 152 N.W.2d 593, 596 (Iowa 1967)). "It requires *mutual* restoration and accounting" because it aims to restore the status quo ante by unwinding the transaction. *Cruz*, 364 S.W.3d at 825–26; *see Hunt v. Rowland*, 28 Iowa 349, 351 (1869)

(permitting recovery of taxes and costs expended by party who acquired title by means set aside in equity). And restoring the status quo ante would require the State to prove the exact benefit derived from the Defendants' services as an offset to any return of the consumers' purchase price. *Kilpatrick v. Smith*, 19 N.W.2d 699, 596 (Iowa 1945); *see also Hyler v. Garner*, 548 N.W.2d 864, 874 (Iowa 1996) ("'Parties are returned to the status quo when benefits received under the contract have been returned and liabilities incurred have been removed.' Thus, the plaintiff and defendant must return to the other what each party has received." (citation omitted)). Indeed, "proper restitution . . . should include a deduction." *Hyler*, 548 N.W.2d at 874.

In sum, restitution and disgorgement must be tied to *actual consumers'* losses. The State's interpretation, which seeks gross receipts, offers no such individualized proof. Absent a right to jury trial, the legislative import is clear: By incorporating "longstanding equitable principles" into the CFA, the Legislature effectively "prohibited" the State "from seeking an equitable remedy in excess of a defendant's net profits from wrongdoing." *Liu*, 140 S. Ct. at 1946.

Below, the State justified its broad and sweeping interpretation of its own powers on the statutory language of §714.16(7), arguing that its plain

text permits it to "restore to any person . . . any . . . property . . . acquired by means of a practice declared to be unlawful." *See* App. 171. But the statute is not so unambiguous. While the State urges that the CFA conjures expansive terms such as "reimburse" and "restore," it conveniently ignores any import of the Legislature's opening command on its preferred interpretation. But "[n]o matter the label," equitable remedies were always historically predicated on this "profit-based measure of unjust enrichment." *Liu*, 140 S. Ct. at 1943. These conflicting meanings derived from the plain text hardly divine a plain answer.

Refusing to acknowledge the words "equitable proceedings" limits its authority to equity jurisdiction not only betrays the text of the statute, it creates constitutional problems. Argued above, an interpretation permitting the recovery of such legal remedies unconstitutionally deprives the Defendants of their right to a jury trial. When a statute is ambiguous and "capable of being construed in more than one manner," as it is here, the doctrine of constitutional avoidance counsels that the Court "must adopt" the "one . . . which is constitutional." *State v. Thompson*, 836 N.W.2d 470, 483 (Iowa 2013); *see also Hawkeye Land Co. v. Iowa Utilities Bd.*, 847 N.W.2d 199, 219 (Iowa 2014) (emphasizing the need "to construe statutes in a fashion to avoid a constitutional infirmity where possible." (citation

omitted)). The State's interpretation of the CFA impermissibly results in the unconstitutional denial of a right to jury trial.

At base, only a net-profits monetary award is consistent with "equitable proceedings" authorized by the CFA and informed by historical practice. The Legislature enabled individual consumers, who are not made whole by the State's efforts, to recover actual damages for the remainder. *See* Iowa Code § 714H.5(1). But to the extent the State's demand for monetary award seeking gross-receipts constitutes "restitution" or "disgorgement," it is a legal remedy transforming this case into one for which a jury trial is required.

**3. "Equitable proceedings" preclude joint-and-several liability.**

The State's prayer to impose joint-and-several liability against the Defendants is similarly untenable. There is absolutely no textual basis for such a judgment. The words "joint and several" appear nowhere in the CFA. Indeed, joint-and-several liability is the hallmark of tort law. 74 Am. Jur. 2d *Torts*, § 66 (2d ed.) ("The joint-and several-liability doctrine represents a social policy choice of making a plaintiff whole over any concerns that excessive liability could be imposed on an individual defendant."); *see generally Reilly*, 727 N.W.2d at 108–12. Equity, meanwhile has always been concerned with fairness; remedies "tethered to a wrongdoer's net

unlawful profits, whatever the name, has been a mainstay of equity courts." *Liu*, 140 S. Ct. at 1943. When the Legislature has intended to authorize joint-and-several liability, it has done so expressly. *See* Iowa Code § 668.4.

Lacking a statutory hook, the State turns to interpretation. But it is a strained interpretation at that. Below, the State argued that the CFA empowers it to seek *any* judgment which it deems "necessary" to provide restitution to afflicted consumers, including judgment of joint-and-several liability. *See* App. 174. The plain language of the statute authorizes no such thing. And even if it did, the State's position completely ignores the modifying clause at the outset of § 714.16(7): that any "necessary" order or judgment be constrained to those available in "equitable proceedings."

Even imposed under a proper profits-based award, equity courts awarded monetary remedies "against individuals or partners engaged in concerted wrongdoing, not against multiple wrongdoers under a joint-and-several liability theory." *Liu*, 140 S. Ct. at 1945 (collecting cases). The rule is well-established: defendants are liable in equity "to account for such profits only as have accrued to themselves . . . and not for those which have accrued to another, and in which they have no participation." *Id.* (quoting *Belknap v. Schild*, 161 U.S. 10, 16, 25–26 (1896)). A monetary award imposed jointly and severally would "transform any equitable profits-

focused remedy into a penalty." *Id.* And penalties, discussed above, lie well outside courts' equitable powers.

Because joint-and-several liability is not present in the statutory text and does not exist in equity, it is not authorized by § 714.16(7).

## 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.

## STATEMENT REGARDING ORAL ARGUMENT

This case is appropriate for argument, and the Defendants respectfully request the same.

THE WEINHARDT LAW FIRM

By /s/ David N. Fautsch

Mark E. Weinhardt AT0008280
David N. Fautsch AT0013223
Nathan D.B. Converse AT0013379
2600 Grand Avenue, Suite 450
Des Moines, IA 50312
Telephone: (515) 244-3100
mweinhardt@weinhardtlaw.com
dfautsch@weinhardtlaw.com
nconverse@weinhardtlaw.com

ATTORNEYS FOR DEFENDANTS-
APPELLANTS

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on July 14, 2022, I electronically filed the foregoing Final 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 11,649 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