SUPREME COURT
FILED

MAR 18 2019

Jorge Navarrete Clerk

Deputy

Case No. S250047

IN THE SUPREME COURT OF CALIFORNIA

NATIONWIDE BIWEEKLY ADMINISTRATION, INC.; LOAN PAYMENT ADMINISTRATION, LLC; DANIEL LIPSKY,

Petitioners,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF ALAMEDA,

Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA

Real Party in Interest.

First Appellate District, Division 1, Case No. A150264
Superior Court, County of Alameda, Civil Case No. RG15770490

ANSWER BRIEF ON THE MERITS

Nathaniel Garrett (SBN 248211)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Tel: (415) 626-3939
Fax: (415) 875-5700

Alan S. Yockelson (SBN 130380)
Law Office of Alan S. Yockelson
501 W. Broadway, #A-385
San Diego, California 92101
Tel: (949) 290-6515

*James R. Saywell
(admitted *pro hac vice*)
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44144
Tel: (216) 586-3939
Fax: (216) 579-0212
jsaywell@jonesday.com

Counsel for Nationwide Biweekly, et al.

TABLE OF CONTENTS

Page

QUESTION PRESENTED 13

INTRODUCTION 13

STATEMENT OF THE CASE 15

A. Nationwide conducted business in California to help consumers reduce their debt 15

B. The government alleges wrongdoing and seeks billions of dollars in penalties 16

C. The Court of Appeal protects Nationwide's right to a jury 18

SUMMARY OF ARGUMENT 19

ARGUMENT 21

I. THE CONSTITUTION GUARANTEES THE RIGHT TO TRIAL BY JURY IN GOVERNMENT ACTIONS FOR STATUTORY CIVIL PENALTIES 22

A. The California Constitution protects the jury right for modern actions of the same class as legal actions tried by a jury in 1850 23

B. At common law in 1850, civil actions by the government for statutory penalties were legal actions triable by a jury 25

1. English authorities 26

2. American authorities 28

3. California authorities 30

C. The nature of the relief sought further supports Nationwide's right to a jury trial 33

1. Civil penalties could be nothing but legal relief in 1850 33

2. Civil penalties remain legal relief today 34

3. The addition of equitable relief does not change the gist of the action 37

TABLE OF CONTENTS

Page

D. Modern courts, performing this same historical analysis under the same test, have reached the same conclusion 39

1. Federal courts and state courts with the same tests and histories protect the right to a jury in comparable actions 40

2. The government fails to understand the importance of these cases 42

II. THE GOVERNMENT'S COUNTERARGUMENTS DO NOT CHANGE THIS CONCLUSION 46

A. The gist of the actions, not of the statutes, determines the constitutional right to a jury trial 47

B. The relevant actions here are UCL and FAL governmental actions for civil penalties, not UCL or FAL actions in general 50

C. These actions are "legal" no matter what particular form they would have taken in 1850 53

D. Previous Court of Appeal opinions are not persuasive 57

E. There are no "severability" or "equity-first" problems because all of the government's claims are legal 60

F. The government overstates the practical consequences, which are in any event irrelevant to the question presented 62

III. IN THE ALTERNATIVE, THE U.S. CONSTITUTION GUARANTEES NATIONWIDE A JURY TRIAL 64

A. The Seventh Amendment should be incorporated 64

B. The Sixth Amendment and due process mandate a jury trial 66

CONCLUSION 68

CERTIFICATE OF COMPLIANCE 69

PROOF OF SERVICE 70

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Superior Court
(2018) 24 Cal.App.5th 1 18

Adams v. Seaman
(1890) 82 Cal. 636 32

Adams v. Woods
(1805) 6 U.S. 336 29

Alden v. Maine
(1999) 527 U.S. 706 27

Am. Appliance, Inc. v. State
(Del. 1998) 712 A.2d 1001 42

Atcheson v. Everitt
(K.B. 1776) 98 Eng.Rep. 1142 28

Atty. Gen. v. Brewster
(1795) 145 Eng.Rep. 966 28

Atty. Gen. v. Horton
(1817) 146 Eng.Rep. 451 27

Baker v. Nelson
(1972) 409 U.S. 810 66

Bendick v. Cambio
(R.I. 1989) 558 A.2d 941 .... 41, 55

C & K Engineering Contractors v. Amber Steel Co.
(1978) 23 Cal.3d 1 .... 24, 38, 44, 61

Cahoon v. Levy
(1855) 5 Cal. 294 24

Calcraft v. Gibbs
(K.B. 1792) 101 Eng.Rep. 11 .... 28, 53

Chaffee & Co. v. United States
(1873) 85 U.S. 516 .... 29, 54

City & County of S.F. v. Sainez
(2000) 77 Cal.App.4th 1302 67

City of Biddeford v. Holland
(Me. 2005) 886 A.2d 1281 42

Clark v. Superior Court
(2010) 50 Cal.4th 605 34

Comr. of Envt. Protection v. Conn. Bldg. Wrecking Co.
(Conn. 1993) 629 A.2d 1116 46

Connell v. Bowes
(1942) 19 Cal.2d 870 60

Connolly v. United States
(9th Cir. 1945) 149 F.2d 666 37

Cortez v. Purolator Air Filtration Products Co.
(2000) 23 Cal.4th 163 34

Crouchman v. Superior Court
(1988) 45 Cal.3d 1167 .... 24, 57

Curtis v. Loether
(1974) 415 U.S. 189 55

Dairy Queen, Inc. v. Wood
(1962) 369 U.S. 469 44

Dept. of Revenue v. Printing House
(Fla. 1994) 644 So.2d 498 42

DiPirro v. Bondo Corp.
(2007) 153 Cal.App.4th 150 59

Donahue v. Meister
(1891) 88 Cal. 121 .... 49, 52

Ex parte Marquand
(C.C.D. Mass. 1815) 16 F.Cas. 776 29

Farrell v. City of Ontario
(1919) 39 Cal.App. 351 62

Feltner v. Columbia Pictures Television, Inc.
(1998) 523 U.S. 340 34

Franchise Tax Bd. v. Superior Court
(2011) 51 Cal.4th 1006 .... passim

Granger v. Sherriff
(1901) 133 Cal. 416 32

Greenberg v. Western Turf Assn.
(1905) 148 Cal. 126 30

Grim v. Norris
(1861) 19 Cal. 140 .... passim

Grossblatt v. Wright
(1951) 108 Cal.App.2d 475 .... 25, 27, 56

Hodge v. Superior Court
(2006) 145 Cal.App.4th 278 59

Hudson v. United States
(1997) 522 U.S. 93 .... 66, 67

Hughes v. Dunlap
(1891) 91 Cal. 385 .... 37, 61, 62

Iskanian v. CLS Transportation L.A., LLC
(2014) 59 Cal.4th 348 36

Jacob v. United States
(C.C.E.D. Va. 1821) 13 F.Cas. 267 29

Jehl v. Southern Pacific Co.
(1967) 66 Cal.2d 821 .... 43, 44, 62, 63

Jones v. Steamship Cortes
(1861) 17 Cal. 487 57

Kennedy v. Mendoza-Martinez
(1963) 372 U.S. 144 67

Kizer v. County of San Mateo
(1991) 53 Cal.3d 139 36

Koppikus v. State Capitol Comrs.
(1860) 16 Cal. 248 .... 22, 63

Korea Supply Co. v. Lockheed Martin Corp.
(2003) 29 Cal.4th 1134 52

Latta v. Otter
(9th Cir. 2014) 771 F.3d 456 66

Lees v. United States
(1893) 150 U.S. 476 29

Livingston v. Woodworth
(1853) 56 U.S. 546 33

Lockyer v. City & County of S.F.
(2004) 33 Cal.4th 1055 65

Matthews v. Offley
(C.C.D. Mass. 1837) 16 F.Cas. 1128 29

McDonald v. City of Chicago
(2010) 561 U.S. 742 .... 64, 65

Minneapolis & St. Louis Ry. Co. v. Bombolis
(1916) 241 U.S. 211 .... 65, 66

O'Callaghan v. Booth
(1856) 6 Cal. 63 .... 30, 57

Orcutt v. Pacific Coast Ry. Co.
(1890) 85 Cal. 291 30

Pacific Western Oil Co. v. Bern Oil Co.
(1939) 13 Cal.2d 60 .... 37, 62

People ex rel. v. Superior Court
(2015) 234 Cal.App.4th 1360 58

People ex rel. Younger v. Superior Court
(1976) 16 Cal.3d 30 35

People v. Bhakta
(2008) 162 Cal.App.4th 973 59

People v. Craycroft
(1852) 2 Cal. 243 55

People v. One 1941 Chevrolet Coupe
(1951) 37 Cal.2d 283 .... passim

People v. Powell
(1891) 87 Cal. 348 .... 24, 27

People v. Superior Court
(1974) 12 Cal.3d 421 36

People v. Witzerman
(1972) 29 Cal.App.3d 169 58

Perez v. City of San Bruno
(1980) 27 Cal.3d 875 67

Philpott v. Superior Court
(1934) 1 Cal.2d 512 33

Raedeke v. Gibraltar Savings & Loan Assn.
(1974) 10 Cal.3d 665 .... 33, 37, 60, 61

Rex v. Malland
(K.B. 1728) 93 Eng.Rep. 877 28

Sakhrani v. City of San Gabriel
(C.D. Cal., Feb. 6, 2017) No. 2:16-cv-01756, 2017 WL 507209 45

Shaw v. Superior Court
(2017) 2 Cal.5th 983, 995 .... passim

Smith v. Polack
(1852) 2 Cal. 92 .... 22, 54

State v. Abbott Laboratories
(Wis. 2012) 816 N.W.2d 145 .... 45, 50

State v. Altus Finance
(2005) 36 Cal.4th 1284 36

State v. Credit Bureau of Laredo, Inc.
(Tex. 1975) 530 S.W.2d 288 41

State v. Poulterer
(1860) 16 Cal. 514 .... passim

State v. Schweda
(Wis. 2007) 736 N.W.2d 49 45

State v. Walgreen Co.
(Miss. 2018) 250 So.3d 465 42

Stevens v. Gladding
(1854) 58 U.S. 447 .... 33, 34

Stockwell v. United States
(1871) 80 U.S. 531 .... 29, 31, 53, 54

Thomson v. Thomson
(1936) 7 Cal.2d 671 61

Timbs v. Indiana
(2019) 139 S.Ct. 682 .... 26, 65

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

United States v. J.B. Williams Co.
(2d Cir. 1974) 498 F.2d 414 .... 29, 49, 54

United States v. Lyman
(C.C.D. Mass. 1818) 26 F.Cas. 1024 29

United States v. M.C.C. of Fla., Inc.
(11th Cir. 1985) 772 F.2d 1501 50

United States v. Mann
(C.C.D.N.H. 1812) 26 F.Cas. 1153 28

United States v. Mundell
(C.C.D. Va. 1795) 27 F.Cas. 23 30

United States v. Regan
(1914) 232 U.S. 37 29

United States v. Ward
(1980) 448 U.S. 242 66

Weinberger v. Romero-Barcelo
(1982) 456 U.S. 305 50

Wisden v. Superior Court
(2004) 124 Cal.App.4th 750 43

Zorba Contractors, Inc. v. Housing Auth., City of Newark
(N.J. Super. Ct. App. Div. 2003) 827 A.2d 313 45

CONSTITUTIONAL PROVISIONS

Cal. Const., art. I, § 16 .... 22, 43, 58

R.I. Const., art. I, § 15 41

U.S. Const., 6th Amend. 21, 58, 66

U.S. Const., 7th Amend. .... passim

U.S. Const., 8th Amend. 65, 67

U.S. Const., 14th Amend. 64, 65

STATUTES

Act of Aug. 18, 1856, ch. 169, 34th Cong., 1st Sess., 11 Stat.
138 57

Bus. & Prof. Code, § 17206 .... 17, 18

Bus. & Prof. Code, § 17536 .... 17, 18

Civ. Code, § 3345 36

Health & Safety Code, § 1278.5 51

OTHER AUTHORITIES

1 Chitty Pleadings (3d ed. 1819) 28

Blackstone, Commentaries on the Laws of England (1807) .... passim

47 Am. Jur. 2d Jury 34, 63

50A C.J.S. Juries § 8 45

Espinasse, Treatise on the Law of Actions on Penal Statutes (1822) 28

Gilbert, A Treatise on the Court of the Exchequer (1758) 28

Hale's Pleas of the Crown 28

Henderson, *The Background of the Seventh Amendment* (1966) 80 Harv. L. Rev. 289 .... 21, 43

James, *Right to A Jury Trial in Civil Actions* (1963) 72 Yale L.J. 655, 672 .... 34, 45

Nelson, *The Constitutionality of Civil Forfeiture* (2016) 125 Yale L.J. 2446 .... 28, 31

Report on Household Debt and Credit (Feb. 2019) 15

Jeffrey S. Sutton, 51 Imperfect Solutions (2018) 42, 43

QUESTION PRESENTED

Whether defendants have a constitutional right to a jury trial in civil actions brought by the government seeking statutory penalties under the Unfair Competition Law (UCL) and False Advertising Law (FAL).

INTRODUCTION

There are few exercises of governmental power more daunting than what the government seeks to do to the defendants here: impose on them over $19.25 *billion* in civil penalties. Since Magna Carta, at the American Founding, and well through the ratification of California's Constitution, defendants faced with this kind of action could at least be secure knowing that they could test its validity through a jury trial. After all, the jury trial has long been one of the most essential checks on the awesome power of government. To deny that time-honored right today would astound the People who ratified this State's Constitution—and who in the process forever safeguarded the civil-jury right as "inviolate."

Fortunately, this Court's longstanding precedent confirms that the jury right remains inviolate in this case. The Constitution protects this right as it existed at common law in 1850, and by 1850, the jury right in civil actions by the government seeking statutory penalties had been well-established for hundreds of years. It follows that California's Constitution protects defendants' jury-trial rights in this action.

The government does not dispute that the Constitution protects the common-law right or that this right applied to actions for civil penalties. Rather, to justify conducting this multi-billion-dollar case without the constitutional check of a jury, the government mints a new theory: California's jury right does not apply, it contends, because the UCL and FAL are "equitable statutes." (Government Br. at pp. 14, 34.)

But from common law until today, the nature of the *statutes* at issue has never determined whether a party has the *constitutional* right to a jury. And for good reason: "The right to a trial by jury cannot be avoided by merely calling" a statute "equitable"; "[i]f that could be done, the Legislature, by providing new remedies and new judgments and decrees in form equitable, could in all cases dispense with jury trials, and thus entirely defeat the provision of the Constitution." (*People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 295 (*1941 Chevrolet*).)

It is instead the nature of the *action* that matters. And from a historical and precedential perspective, there can be no doubt that "[a]ctions by the Government to recover civil penalties under statutory provisions . . . requir[e] trial by jury." (*Tull v. United States* (1987) 481 U.S. 412, 418–419; see *1941 Chevrolet, supra*, 37 Cal.2d at p. 295 [same].) This action, to recover civil penalties under the UCL and FAL, thus requires trial by jury all the same.

STATEMENT OF THE CASE

The government brought this legal action seeking billions of dollars in civil penalties from Nationwide Biweekly Administration, its subsidiary, and its owner (collectively, Nationwide) for alleged statutory violations that cost California consumers, by the government's estimate, $10 million. (See Vol. II, Ex. R. at p. 420, ¶ 4.[1]) Nationwide requested a jury trial to defend against this civil-penalty lawsuit, but the government resisted, and continues to resist, that constitutional check.

A. Nationwide conducted business in California to help consumers reduce their debt.

Long before the government sued, Nationwide identified a problem—and a way to help. American consumers carry sizable debt, $13.54 trillion to be exact.[2] As any homeowner (or former student) knows, paying off that debt can be difficult, especially because of the interest. One way to help is to make voluntary extra payments each year directly toward principal, rather than the minimum twelve required monthly payments.

Nationwide's business model is premised on this savings method. In California and elsewhere, the company offered consumers a biweekly-interest-savings program, called the Interest Minimizer program. Under the

---

[1] References to the record take the same form as in the government's brief and are to the "Exhibits in Support of Petition for Writ of Mandate," filed by Nationwide below.

[2] Federal Reserve Bank of New York, Quarterly Report on Household Debt and Credit (Feb. 2019) at p. 2.

program, Nationwide would work with customers to pair a withdrawal of half the loan's monthly payment from their bank account each payday, which usually happens every other week (hence the name "biweekly"). These automated biweekly payments would occur 26 times a year, resulting in the equivalent of 13 monthly payments. Nationwide would then, as designated by the customer, automatically transmit the extra month's payment to the lender for accelerated paydown of the loan's principal. Through this scheduling and automation, Nationwide would help borrowers pay off their loans faster, stick to their goals, and save money on interest. Indeed, customers in the program for more than 10 years have saved, on average, $34,500. (See Vol. I, Ex. D. at p. 63, ¶¶ 2–3.)

To get the word out, Nationwide would show borrowers (say, on a direct-mail marketing letter) how many years and how much interest they could save by using Nationwide's services. Before 2013, the company would provide borrowers their specific loan amount with their actual lender, all found using publicly available information. To avoid any confusion, and just to be sure, Nationwide's offers included statements such as "[we are] not affiliated with the lender." (Vol. I, Ex. B at p. 16, ¶ 57.)

B. The government alleges wrongdoing and seeks billions of dollars in penalties.

Even though Nationwide told consumers that it is "not affiliated with the lender," the government accuses it of deceiving consumers about just

that. The California Department of Business Oversight and prosecutors in three counties asserted that Nationwide engaged in unfair competition and false advertising in connection with its use of the lender's name and consumer's information in its communications.

The government's four remaining causes of action allege overlapping violations of the UCL and FAL: (1) using the lender's name to "confuse" the consumer; (2) using consumers' loan information "without the[ir] consent"; (3) "misleading" the "public" in advertising; and (4) unfair competition generally, "as more specifically alleged" elsewhere. (Vol. II, Ex. R at pp. 440–443, ¶¶ 122, 126, 130, 134, 136.)

All four causes of action seek colossal civil penalties. (Vol. II, Ex. R at pp. 440, 441, 443, 445, ¶¶ 123, 127, 131, 151.) In governmental actions (and governmental actions only), the UCL and FAL impose "liab[ility] for a civil penalty not to exceed two thousand five hundred dollars ($2,500) for each violation." (Bus. & Prof. Code, §§ 17206, subd. (a), 17536, subd. (a).) But "each violation" is not all that limited; it can mean, for example, each person who received an allegedly deceptive direct-mail marketing letter. So civil penalties in a case like this, where the government alleges that Californians were "blanket[ed]" with 7.7 million deceptive advertisements, can reach well into the billions. (Government Br. at p. 17; see Vol. II, Ex. M at p. 274 & 280, ¶ 18 [7.7 million advertisements at $2,500 per alleged violation equals $19.25 billion in civil penalties].)

Money collected by the government as civil penalties is "paid to the treasurer of the county in which the judgment [is] entered." (Bus. & Prof. Code, §§ 17206, subd. (c), 17536, subd. (c).) And these penalties are distinct from the "injunctive relief," "restitution," and "reimbursement of investigative costs" the government can also collect (and seeks here). (Vol. II, Ex. R at p. 423, ¶ 16.) This combination "incentivize[s] public prosecutors, acting in their respective county's financial self-interest," to race "to the courthouse" to seek civil penalties. (*Abbott Laboratories v. Superior Court* (2018) 24 Cal.App.5th 1, 31.) Some counties even include the anticipated inflows from these penalties as part of their operating budgets.

Nationwide objects to civil penalties in this case, but it also denies all of the government's allegations. It intends to show at trial that it did not deceive, and in fact helped, California consumers. In the meantime, however, a preliminary question has arisen: At trial, who will be the trier of fact on Nationwide's liability—a judge or a jury?

C. The Court of Appeal protects Nationwide's right to a jury.

From the get-go, Nationwide requested a jury trial, but the government wanted a judge. (See Vol. I, Ex. A, pp. 4–5; Ex. B, p. 9; Ex. C, pp. 52–54; Ex. D, p. 83.) After briefing and argument, the trial court held that a judge may decide the case. (Vol. II, Ex. Q, at p. 414.)

Nationwide filed a petition for writ of mandate in the Court of Appeal, but that court summarily denied the writ. Nationwide then asked this Court for review.

This Court granted the petition, vacated the Court of Appeal's decision, and transferred the case back to the lower court. (Order of March 22, 2017 in Case No. S239979.) It ordered the Court of Appeal to "show cause why [Nationwide] does not have a right to a jury trial where the government seeks to enforce the civil penalties authorized under [the UCL and FAL]." (*Ibid.*)

In a thorough opinion, the Court of Appeal agreed that Nationwide has a right to a jury trial. It held that, because "statutory penalties were recoverable in an action for debt at common law," and because "as a matter of historical fact a civil penalty was a type of remedy at common law that could only be enforced in courts of law," the "'gist' of the statutory causes of action asserted against [Nationwide] are legal, thereby giving rise to a right to jury trial." (*Nationwide Biweekly Admin., Inc. v. Superior Court* (2018) 24 Cal.App.5th 438, 442, 453–454, internal quotation marks and citations omitted.)

SUMMARY OF ARGUMENT

The Court of Appeal correctly held that defendants have a jury-trial right when the government seeks civil penalties under the UCL and FAL.

I. It is a matter of historical fact that civil-penalty actions were the type of action at common law that could only be enforced in courts of law, thereby giving rise to a jury right today.

When the Legislature creates a modern action, this Court extends the jury right to statutory claims in the same class as "legal" actions tried by a jury in 1850. In amending the UCL and FAL to allow public agencies to seek civil penalties, the Legislature created actions in the same class as common-law "legal" actions tried by a jury in 1850. Everyone from Blackstone to Chief Justice Marshall to the Justices of this Court have described statutory actions for civil penalties as exclusively legal in nature. And the nature of civil penalties—the predominant form of relief requested here—confirms that these are legal actions.

Other courts performing this same historical inquiry have reached this same conclusion. That includes the Supreme Court of the United States, which has held that the nature of a statutory action by the government for both equitable relief and civil penalties is legal, and that those actions are constitutionally required to be tried by a jury.

II. The government's counterarguments do not persuade.

Throughout its brief, the government focuses on the gist of the *statutes*, arguing that the UCL and FAL are equitable in nature. But that is not the relevant *constitutional* question. The relevant question, instead, is whether *actions* for civil penalties under the UCL and FAL are legal in

nature, which they plainly are. And this type of action—as opposed to some generic private-party action for equitable relief—remains legal regardless of what particular form it would have taken at common law, or what a lower court or two has said about it.

Because all four causes of action are legal, this is not a "mixed" case; liability on all four claims must be tried to a jury. Finally, no practical consequences can change this *constitutional* conclusion, especially when no such consequences will arise.

III. In the alternative, this Court should hold that the federal Constitution protects Nationwide. The Seventh Amendment should be incorporated against the States, and the Sixth Amendment and due process should apply to the gigantic—and punitive—penalties sought by the government.

ARGUMENT

The right to trial by jury is one of the most fundamental of all rights. Blackstone predicted that it would be "looked upon as the glory of English law," and indeed it has been. (3 Blackstone, Commentaries on the Laws of England (1807), p. *379 ("Blackstone").) Our country's founders cited it in declaring independence and in ratifying the Constitution. (The Declaration of Independence (1776) ¶ 20; Henderson, *The Background of the Seventh Amendment* (1966) 80 Harv. L.Rev. 289, 295.) As Alexander Hamilton summarized, Americans saw this right as at least "a valuable safeguard to

liberty," and potentially "the very palladium of free government." (The Federalist No. 83, at p. 499 (C. Rossiter ed. 1961).)

This passion to protect the civil-jury-trial right had not waned by the time California achieved statehood. "The people [of California] who, by their votes, adopted the Constitution" likewise saw it as "sacred" and "inviolate." (*Grim v. Norris* (1861) 19 Cal. 140, 142; *Koppikus v. State Capitol Comrs.* (1860) 16 Cal. 248, 254). Accordingly, from the very beginning, this Court has carefully protected this right, recognizing that it is "not to be narrowly construed" (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300), and that "the benefit of the trial by jury" applies whenever it would have existed at common law (*Smith v. Polack* (1852) 2 Cal. 92, 94; see *Shaw v. Superior Court* (2017) 2 Cal.5th 983, 995).

I. THE CONSTITUTION GUARANTEES THE RIGHT TO TRIAL BY JURY IN GOVERNMENT ACTIONS FOR STATUTORY CIVIL PENALTIES

The UCL and FAL are silent on the right to a jury trial, but the Constitution is not. "Trial by jury," it declares, "is an inviolate right" that is "secured to all." (Cal. Const., art. I, § 16.) This provision preserves the right to a jury trial as it existed in 1850—including for governmental civil actions for statutory penalties.

A. The California Constitution protects the jury right for modern actions of the same class as legal actions tried by a jury in 1850.

"It is settled that the state constitutional right to a jury trial is the right as it existed at common law in 1850, when the Constitution was first adopted." (*Franchise Tax Bd. v. Superior Court* (2011) 51 Cal.4th 1006, 1010, quotation marks and citations omitted.) So too is it settled that "what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." (*Ibid.*, quotation marks and citations omitted.)

To ascertain that historical fact where, as here, the precise statutory action did not exist in 1850, this Court must determine the "nature" or "gist of the action" at issue. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 299.) The right to a jury trial, after all, "is not limited strictly to those cases in which it existed before the adoption of the Constitution." (*Id.* at p. 300.) It extends to "claim[s] arising under [] modern statute[s]" that are "'of like nature' or 'of the same class' as a common law right of action." (*Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1012 (quoting *1941 Chevrolet*, at p. 300).) So when the Legislature creates a new cause of action under a modern statute, this Court "look[s] to" whether the modern "statutory cause of action" is similar "in nature" to an "old private right of action." (*Id.* at pp. 1012, 1017–1018; *1941 Chevrolet*, at p. 299.)

The question then becomes whether the comparable old action was legal or equitable in nature. If "the Legislature authorized the type of action which was cognizable in a common-law court at the time of the adoption of the Constitution"—if, that is, the old analogue action was tried by a jury in 1850—then the modern action must be tried by a jury as well. (*Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1018, quoting *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300, alterations omitted.) If, on the other hand, the Legislature created a type of action that was historically "available only in equity," or was otherwise not tried by a jury in 1850, then the modern action may be tried by the court. (E.g., *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 7, 9; *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1175–1177.)

This Court has resolved every civil-jury-right case, old and new, under this rubric. It has always looked to how similar actions would have been treated in 1850 and "preserved" the "common-law right of trial by jury" for comparable modern actions. (E.g., *People v. Powell* (1891) 87 Cal. 348, 354–355.) For all actions that would have been tried before a jury in 1850, the jury right remains "inviolate" today. (E.g., *Cahoon v. Levy* (1855) 5 Cal. 294, 294.)

B. At common law in 1850, civil actions by the government for statutory penalties were legal actions triable by a jury.

The same class of actions at issue here—civil actions by the government for statutory penalties—existed in 1850, and these actions were "cognizable in a common-law court[] and triable by a jury" at that time. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300.) They are, therefore, triable by a jury today.

Although these precise consumer-protection actions did not exist when California achieved statehood, the same "type of action" certainly did. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300.) "Statutory penalties existed at common law" in civil cases, "and debt was the appropriate action for the recovery thereof." (*Grossblatt v. Wright* (1951) 108 Cal.App.2d 475, 484–485 & fn. 19, collecting cases.) All four modern causes of action in this case thus have direct common-law analogues: governmental actions for civil penalties under a wide variety of statutes aimed at protecting the public.

Governmental actions for statutory civil penalties were classically legal in nature in 1850. Indeed, they were tried *exclusively* in a court of law; equity courts lacked jurisdiction to award a civil penalty. Countless common-law cases, treatises, and other legal documents, discussed below, confirm that "[c]ases involving penalties to the Crown" authorized by statute were "tried by a jury in the Court of Exchequer"—"a common-law

court." (*1941 Chevrolet*, *supra*, 37 Cal.2d at pp. 288–289, 295 & fn. 15, collecting authorities.)

1. English authorities.

For hundreds of years, English authorities have recognized that these actions are triable by a jury. Magna Carta itself provided that civil penalties (then called "amercements") were to be assessed only by "honest and lawful men of the vicinage [*i.e.*, neighborhood]"—what we might today call "a jury of one's peers." (9 Hen. III, ch. 14 (1225) in 1 Eng. Stat. at Large 5; cf. *Timbs v. Indiana* (2019) 139 S.Ct. 682, 687–688 & fn. 2 [discussing Magna Carta's protections against "amercements"].)

By the time Blackstone summarized the English common law 500 years later, the right to a jury in this type of action was firmly entrenched. Trial by jury attached to an action "on behalf of the crown" to "recover[] money" that is "due to the crown upon the breach of a penal statute," *i.e.*, upon any "act[] of parliament whereby a forfeiture" or "amercement" is "inflicted for transgressing the provisions therein enacted." (3 Blackstone pp. *160, *261.) If found liable at common law, the statutes here would "order [Nationwide] to pay" civil penalties, which would "become[] instantly a debt" and give the government the ability to "file[] in the exchequer" an action of "debt" to "recover such damages, or sum of money, as are assessed by the jury." (*Id.* at pp. *159–160, *261.)

It is of course "noteworthy that Blackstone's Commentaries, more read in America before the Revolution than any other law book," describes this action as legal and triable to a jury. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 290.) What "Mr. Blackstone" says about the "common-law right of trial by jury," after all, "clearly and definitely state[s]" the scope of the right under the California Constitution. (E.g., *Powell*, *supra*, 87 Cal. at p. 354; see *Alden v. Maine* (1999) 527 U.S. 706, 715.)

But it is not just Blackstone. (See, e.g., *Grossblatt*, *supra*, 108 Cal.App.2d at pp. 484–485, fn. 18–19, collecting authorities.) This Court has already collected 28 English cases in which a variety of statutes—prohibiting everything from absence from church (in 1611) to manufacturing alcohol without a license (in 1846)—imposed civil penalties payable to the government. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 295, fn. 15.) These cases—which span the nearly 250 years leading up to 1850—have one thing in common: all 28 were legal actions tried by a jury. (E.g., *Atty. Gen. v. Horton* (1817) 146 Eng.Rep. 451, 451–452 [civil actions for statutory penalties to the Crown present "question[s] to be left to the jury"].)

This Court's collection of cases could have been far more voluminous. Probably hundreds or even thousands more "la[y] down as law" that "where a pecuniary penalty is annexed to a[] [statutory] offence," a civil "information of debt in the exchequer" was the proper form of action,

(e.g., *United States v. Mann* (C.C.D.N.H. 1812) 26 F.Cas. 1153, 1154 [Story, J.], citing *Rex v. Malland* (K.B. 1728) 93 Eng.Rep. 877)—and the case should be "properly left to the jury" (e.g., *Calcraft v. Gibbs* (K.B. 1792) 101 Eng.Rep. 11, 12). (See also, e.g., *Atcheson v. Everitt* (K.B. 1776) 98 Eng.Rep. 1142 [Lord Mansfield]; *Atty. Gen. v. Brewster* (1795) 145 Eng.Rep. 966, 966–967.)

Treatises on English common law are of a piece. They explain that, at common law, the government could "only" bring "an action of debt" in "the court of exchequer" to recover "a penalty against the party who has broken [a] statute" (Espinasse, Treatise on the Law of Actions on Penal Statutes (1822) pp. 2, 8), and the arbiter "was not [the] Judge" but instead were the "Jurors" (Gilbert, A Treatise on the Court of the Exchequer (1758) pp. 61–64). (See, e.g., Hale's Pleas of the Crown, vol. I, pp. 493, 530, cited in *1941 Chevrolet*, at p. 295, fn. 15; 1 Chitty Pleadings (3d ed. 1819) p. 263; accord Nelson, *The Constitutionality of Civil Forfeiture* (2016) 125 Yale L.J. 2446, 2497.)

2. American authorities.

This deeply rooted English common-law rule crossed the Atlantic well before the founding—and continued well through 1850. So much so, in fact, that the U.S. Supreme Court could confidently pronounce in 1871 that "it has frequently been ruled that debt will lie, at the [civil] suit of the United States, to recover the penalties and forfeitures imposed by statutes."

(*Stockwell v. United States* (1871) 80 U.S. 531, 543, collecting cases.) And again, in 1893: "From the earliest history of the government, the jurisdiction over actions to recover penalties and forfeitures has been placed in the district court," where "a penalty may be recovered . . . by a civil action in the form of an action of debt." (*Lees v. United States* (1893) 150 U.S. 476, 478–479.) And again, in 1914: The "defendant [is] entitled to have the issues tried before a jury" in governmental actions "to recover [money] as a penalty for an alleged violation by the defendant of [the statute]." (*United States v. Regan* (1914) 232 U.S. 37, 40, 47.)

The greatest American jurists of the eighteenth, nineteenth, and twentieth centuries agreed with the Supreme Court. From Story to Marshall to California's own Field, all understood "that where a penalty is given by a statute," an "action or information of debt lies," and a jury must hear the case. (*Chaffee & Co. v. United States* (1873) 85 U.S. 516, 534, 546 [Field, J.] [actions for civil penalties, as "action[s] being *debt upon a penal statute*," trigger the "constitutional right of trial by jury"]; *Jacob v. United States* (C.C.E.D. Va. 1821) 13 F.Cas. 267, 268 [Marshall, C.J.]; *Ex parte Marquand* (C.C.D. Mass. 1815) 16 F.Cas. 776, 777 [Story, J.].)[3]

---

[3] See also, e.g., *Adams v. Woods* (1805) 6 U.S. 336, 341 [Marshall, C.J.] ["fine or forfeiture under a penal statute[] may be recovered by an action of debt"]; *United States v. J.B. Williams Co.* (2d Cir. 1974) 498 F.2d 414, 422–423 [Friendly, J.], collecting cases; *Matthews v. Offley* (C.C.D. Mass. 1837) 16 F.Cas. 1128, 1130 [Story, J.]; *United States v. Lyman* (C.C.D. Mass. 1818) 26 F.Cas. 1024, 1030–1032 [Story, J.] [this rule has

3. California authorities.

This dyed-in-the-wool common-law rule did not somehow escape California. This State's early courts had jury trials for civil actions "[w]here an offense is created by statute, and a penalty inflicted." (E.g., *O'Callaghan v. Booth* (1856) 6 Cal. 63, 65–66.) And from early on this Court explained that actions to recover statutory penalties are "properly submitted . . . for determination [by] the jury." (*Greenberg v. Western Turf Assn.* (1905) 148 Cal. 126, 127; see also, *e.g.*, *Orcutt v. Pacific Coast Ry. Co.* (1890) 85 Cal. 291, 296–297 [under a statute allowing a "district attorney" to sue for "a penalty" for "every [statutory violation]," it is "for the jury alone to determine the question"].)

Like the English common-law rule, California's rule included "civil action[s] for the recovery of money due the State," brought "on behalf of the State, to enforce the payment" of duties or penalties created by statute. (*State v. Poulterer* (1860) 16 Cal. 514, 521, 532.) When "[t]he law has created a direct liability" by statute, "debt would undoubtedly lie." (*Id.* at p. 527.) So when the government sought penalties against violators of a statute, it was through "an action of debt," and that action—as it always had been—was tried by a jury. (See *id.* at pp. 525, 527–528.)

---

been "repeatedly settled, both here and in England"]; *United States v. Mundell* (C.C.D. Va. 1795) 27 F.Cas. 23, 26–28, 31 [Iredell, J.] ["scarcely necessary to stop here to observe" that this is an action of debt].

Consonant with this uniform history, this Court held in *1941 Chevrolet* that defendants in California have "a constitutional right to a trial by jury of the issues of fact" in governmental actions to "recover[] money or other chattels" allegedly owed to the government under a statute. (37 Cal.2d at pp. 289, 300.) That was the rule at common law and in California in 1850, this Court concluded. (*Id.* at pp. 286–300, collecting authorities.) These actions were a species of suits tried "in the Court of Exchequer," a common-law court that heard "all suits for penalties." (*Id.* at pp. 288–289.)

That case controls this one—both in reasoning and in result. In reasoning, the Court explained that "[c]ases involving penalties to the Crown" were "tried by a jury" in 1850. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 295.) In result, the Court held that modern governmental statutory actions for civil penalties must be tried by a jury. The same is true here.

True, the specific *type* of "penalt[y] to the Crown" in *1941 Chevrolet* was a Chevy Coupe, rather than billions of dollars in fines. But as recognized by this Court, the U.S. Supreme Court, Blackstone, and many others, *all* types of civil penalties—whether "a statutory duty, or [monetary] penalty, or forfeiture" (*Poulterer*, *supra*, 16 Cal. at p. 529)—were treated the same at common law. (3 Blackstone pp. *160, *261 ["forfeitures" and "amercements" treated the same]; *Stockwell*, *supra*, 80 U.S. at p. 543 [same rule for both "penalties and forfeitures imposed by statutes"]; accord Nelson, *supra*, 125 Yale L.J. at p. 2498.) No matter if the "suit [was] for

recovering money" (as here) or "other chattels" (as in *1941 Chevrolet*), all governmental actions for civil penalties were "filed in the exchequer" and "tried by a jury." (*1941 Chevrolet*, *supra*, 37 Cal.2d at pp. 289, 291.)

For this reason, the government's main objection to *1941 Chevrolet*—that it is "dicta"—is simply not true. (Government's Br. at pp. 43–45.) We rely on its *holding*: that the gist of actions "to recover *money or property* for the Crown" is legal. (*1941 Chevrolet*, *supra*, 37 Cal.2d at pp. 288–289, 295, 299–300, emphasis added.) But even if the entire case were somehow "dicta," this Court "quite elaborately considered" these points—and supported them with a bevy of treatises, Supreme Court cases, and 28 common-law cases—so "what was said [there] is entitled to great weight, [even] if it be not taken as authority in the strict sense." (*Adams v. Seaman* (1890) 82 Cal. 636, 639; see, e.g., *Granger v. Sherriff* (1901) 133 Cal. 416, 417–418.)

The government's secondary objections to *1941 Chevrolet* are more picayune. It boasts that "[n]one of the[] [28] historic cases" cited in *1941 Chevrolet* "involved the 'gist of the action' test," and that "[n]one were consumer protection actions" involving the UCL or FAL. (Government Br. at p. 44). Of course not. They were English common-law cases dating back to 1611, involving a wide variety of statutes and showing that the common-law-analogue actions to modern statutory actions for civil penalties were triable to a jury. They thus represent the paradigm

application of the "gist of the action" test—an application that means Nationwide is entitled to a jury trial here.

C. The nature of the relief sought further supports Nationwide's right to a jury trial.

Were there any doubt about the "nature of [the] cause[s] of action" here, the "mode of relief to be afforded" puts it to rest. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 672.) Because the difference between an equitable and legal action "lies largely in the mode of relief granted" (*Philpott v. Superior Court* (1934) 1 Cal.2d 512, 516), the gist of the action "ordinarily is determined" by the nature of the relief requested (*Raedeke*, at p. 672). The overwhelmingly predominant mode of relief sought here—billions of dollars in monetary penalties—cannot be classified as anything *but* legal.

1. Civil penalties could be nothing but legal relief in 1850.

Monetary civil penalties are classically legal in nature. Indeed, "civil penalt[ies] w[ere] a type of remedy at common law that could *only* be enforced in courts of law." (*Tull*, *supra*, 481 U.S. at p. 422, emphasis added.) Equity courts in 1850 did not possess jurisdiction to impose monetary penalties—meaning actions like this one, for "penalties imposed" by statute, were *necessarily* tried before a court of law with a jury. (E.g., *Stevens v. Gladding* (1854) 58 U.S. 447, 453–455; see also, e.g., *Livingston v. Woodworth* (1853) 56 U.S. 546, 559–560.) If a "prayer" for relief

included civil penalties in a court of equity, it was "rejected" (*Stevens*, at p. 455), because "equity refused to enforce [the] penalty" (James, *Right to A Jury Trial in Civil Actions* (1963) 72 Yale L.J. 655, 672).

To argue, then, as the government does here, that civil penalties are "equitable in nature" (Government Br. at p. 60; see *id.* at pp. 57–60), is to ignore this history—and that despite this Court's test being "purely historical." (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 287.) If the government found itself before a court of equity in 1850, and requested civil penalties, it would have been thrown out of court—and thrown into a court of law with a jury.

2. Civil penalties remain legal relief today.

The "general rule" today remains that all monetary relief is legal in nature. (*Feltner v. Columbia Pictures Television, Inc.* (1998) 523 U.S. 340, 352.) The only exception is for the kind of monetary relief, like restitution and disgorgement, that simply restores the "status quo ante." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 177; see 47 Am. Jur. 2d Jury § 43.)

An award of statutory civil penalties does far more than restore the status quo ante; it also serves "purposes traditionally associated with legal relief, such as compensation[,] punishment," and deterrence. (*Feltner*, *supra*, 523 U.S. at p. 352; see *Clark v. Superior Court* (2010) 50 Cal.4th 605, 609 ["restitution under the unfair competition law is not [like] a

penalty"].) As this Court recognized as early as 1860, a monetary "penalty" authorized by statute "is added as a punishment." (*Poulterer*, *supra*, 16 Cal. at p. 532.) So too, "civil penalties . . . fulfill legitimate compensatory functions." (*People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 39.) And penalties "provide[] an effective deterrent" (*id.* at p. 44)—as the government all but concedes here. (See Government Br. at pp. 59, 65 [penalties "ensur[e] obedience to the law" and "deter[] unfair business practices"].)

All of these legal purposes apply to civil penalties under the UCL and FAL—as the Attorney General himself recently argued. "[A]ction[s] under the UCL" brought by "district attorney[s]" for "civil penalties," he wrote, "serve the People's interest in deterring and punishing acts of unfair competition," and, "like [actions for] punitive damages, are intended to punish the wrongdoer and to deter future misconduct." (Brief of Cal. Atty. Gen. in *Gamestop v. Superior Court* (4th Dist.), No. E068701, at pp. 13, 17, quotation marks and citations omitted.)

The Legislature agrees. It amended the UCL and FAL to authorize civil penalties because equitable relief alone "did not adequately deter violations" of the statutes, and because it wanted to "supplement" the punishment of "criminal enforcement, especially [for] corporate defendants." (Brief of Cal. Atty. Gen., *supra*, at pp. 12, 17–18, citing, *inter*

alia, legislative history; cf., e.g., Civ. Code, § 3345 ["authoriz[ing]" a "civil penalty" by "statute" to "punish [and] deter"].)

This Court, too, has recognized that civil penalties under the UCL and FAL are "designed to penalize a defendant for past illegal conduct," "constitute a severe punitive exaction by the state," and are "unquestionably intended [to serve] as a deterrent." (*State v. Altus Finance* (2005) 36 Cal.4th 1284, 1308; *People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431; see *id.* at p. 433 ["categoriz[ing] the civil penalties [here] sought as being in the nature of exemplary damages"]; accord, e.g., *Iskanian v. CLS Transportation L.A., LLC* (2014) 59 Cal.4th 348, 383–384.) Even the cases invoked by the government say the same thing: "civil penalties may have a punitive or deterrent aspect." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 146–148.[4])

The facts of this case prove the legal nature of civil penalties. The government alleges approximately $10 million in monetary harm to California consumers. (See Vol. II, Ex. R. at p. 420, ¶ 4.) If all the government wanted to do was restore the status quo ante, it would be

---

[4] The government's reliance on dicta from *Kizer* is puzzling. The Court there interpreted a statute, not the Constitution, and the case had nothing to do with jury trials. The Court held that the statute, which barred punitive-damage awards from public entities, applied only to tort actions, not to statutory ones. In the process, the Court explained that civil penalties could serve "punitive or deterrent" purposes, just like classic legal relief subject to a jury trial. (53 Cal.3d at 146–148.) If the case has any bearing on this case, it cuts against the government.

seeking only an injunction, restitution, and disgorgement—and thus be seeking little more than $10 million. Yet it requests *1,925 times* that amount in civil penalties. Of course that massive monetary request serves legal, not equitable, ends. It penalizes (hence the name, civil *penalties*); it deters; and it compensates. Because this relief is legal, this Court has all the more reason to hold that Nationwide is entitled to a jury trial. (See *Raedeke*, *supra*, 10 Cal.3d at p. 672.)

3. The addition of equitable relief does not change the gist of the action.

The gist of a statutory action for civil penalties remains legal even when the government also requests equitable relief. At common law, "while a court in equity [could] award monetary restitution as an adjunct to injunctive relief, it [could] n[ever] enforce civil penalties." (*Tull*, *supra*, 481 U.S. at p. 424.) Thus, when the government at common law sought equitable relief in conjunction with civil penalties, it needed to bring the action in a court of law. (See, e.g., *id.* at pp. 424–425; *Connolly v. United States* (9th Cir. 1945) 149 F.2d 666, 669.) That same rule applied "under the English common law as it stood in 1850" when, in a single legal action, a plaintiff sought equitable remedies along with other forms of legal relief. (*Pacific Western Oil Co. v. Bern Oil Co.* (1939) 13 Cal.2d 60, 67–69; see *Hughes v. Dunlap* (1891) 91 Cal. 385, 389.) It follows, therefore, that the

government must bring an action seeking civil penalties and equitable relief under the UCL and FAL before a court with a jury.

This conclusion is all the stronger when, as here, the equitable relief sought pales in comparison to the legal relief. The government seeks monetary legal relief that is 1,925 times greater than the monetary equitable relief. And there is no longer any real need for an injunction: By November 2015, Nationwide had stopped doing any business in California, and as of May 2016, it is no longer licensed to do business here. (See Vol. II, Ex. M at pp. 279–280.) It is thus an understatement to say that the relief here comes "primarily [in] civil penalties," meaning "the enforcement action [seeks] relief that [is] primarily legal in nature." (See Government Br. at p. 61; accord *Tull*, *supra*, 481 U.S. at pp. 424–425 ["A potential penalty of $22 million hardly can be considered incidental to the modest equitable relief sought in this case."])

This conclusion aligns well with this Court's "gist" test. Just as "the addition . . . of a prayer for damages does not convert what is essentially an equitable action into a legal one," the addition of a prayer for restitution and an injunction does not convert what is essentially a legal action into an equitable one. (*C & K Engineering*, *supra*, 23 Cal.3d at p. 11.) For this reason, *C & K Engineering* helps Nationwide, not the government. (See Government Br. at pp. 37–41, 44, 54–55.) In that case, the action (promissory estoppel) "would not lie" in courts of law in 1850; it was

equitable only. The nature of the relief requested there (damages) did not change that conclusion. In *this* case, conversely, the action (a civil suit for statutory penalties) would not lie in courts of *equity* in 1850; it was legal only. The addition of a tiny sliver of equitable relief to the massive legal relief—and to the underlying legal action—cannot convert that legal action into an equitable one.

The Court of Appeal understood all this. It recognized that "the prayer for relief in a particular case is not conclusive." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 445.) But it also understood that in 1850, civil actions by the government for statutory penalties were tried *exclusively* by a jury in a court of law, and that, separately, the relief here is the kind that "could only be enforced in courts of law." (*Tull*, *supra*, 481 U.S. at p. 422.) It understood, in other words, that the government's "prayer for relief" here is not "convert[ing]" an action "sound[ing] in equity" into a legal action (Government Br. at p. 38); rather, the *whole* of the government's action, along with the predominant relief it requests, has always been considered *legal*. The Court of Appeal thus correctly held that everything about the "gist" of this action is legal, and that Nationwide has a right to a jury trial.

D. Modern courts, performing this same historical analysis under the same test, have reached the same conclusion.

Authority from other jurisdictions strongly supports Nationwide's constitutional right. It is not just Blackstone, Marshall, and the other greats

of old who understood that defendants have the right to a jury trial in statutory actions by the government for civil penalties. Modern High Courts from around the country, interpreting their sovereign charters using this Court's same historical test, have reached the same conclusion.

1. Federal courts and state courts with the same tests and histories protect the right to a jury in comparable actions.

Start with the most prominent High Court, the Supreme Court of the United States. In a case on all fours—a modern statutory action by the government for both equitable relief and civil penalties—the Supreme Court held that these actions "historically . . . requir[ed] trial by jury" and thus are constitutionally required to be tried by jury today. (*Tull*, *supra*, 481 U.S. at pp. 418–419, 425.) If this very case were in federal court, all agree that *Tull* would guarantee Nationwide's right to a jury trial.

This case is in state court, true enough, but not much else is different. Just like this Court, the U.S. Supreme Court applies a historical nature- or gist-of-the-action test, "examin[ing] both the nature of the action" and "the remedy sought" to "determine whether a statutory action is more similar to cases that were tried in courts of law than to suits tried in courts of equity." (*Tull*, *supra*, 481 U.S. p. 417; accord, e.g., *Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1012, quotation marks and citation omitted ["We look to whether a claim arising under a modern statute is of like nature or of the same class as a common law right of action."].) Under this test, the

Supreme Court unanimously extended Seventh Amendment protection to those in Nationwide's position.

State High Courts, too, have answered the question presented the same way as *Tull*. Take Rhode Island, which maintains the jury right as "inviolate" as of 1842. (R.I. Const., art. I, § 15.) Its High Court asks how "courts in 1842" would treat actions in the same class as a modern action. (*Bendick v. Cambio* (R.I. 1989) 558 A.2d 941, 944.) When confronted with the question of what to do with a governmental statutory action for injunctive relief and civil penalties "of up to $5,000 for each day of violation," that Court held "that these civil penalties would have been enforceable at common law by an action for debt and would thus have been triable to a jury." (*Id.* at p. 945.)

Or take Texas, which resolved this question the same way in the statutory consumer-protection context. "At common law," its High Court held, "suits for civil penalties were tried as actions for debt, and actions for debt were triable before a jury." (*State v. Credit Bureau of Laredo, Inc.* (Tex. 1975) 530 S.W.2d 288, 292.) As a result, the "nature of th[e] suit" was legal, and Texas's Constitution—which provides that "the right of trial by jury shall remain inviolate" as of 1845—"preserved the right to a trial by jury in a suit for the collection of civil penalties" from defendants who allegedly sent deceptive mailings to debtors. (*Id.* at pp. 290–291.)

There are more examples—both in the consumer-protection context (see, e.g., *State v. Walgreen Co.* (Miss. 2018) 250 So.3d 465; *Am. Appliance, Inc. v. State* (Del. 1998) 712 A.2d 1001, 1003 & fn. 10), and outside it (see, e.g., *City of Biddeford v. Holland* (Me. 2005) 886 A.2d 1281, 1285–1286; *Dept. of Revenue v. Printing House* (Fla. 1994) 644 So.2d 498). But by now it should be abundantly clear: "Cases involving penalties to the [government]" were "tried by a jury" in 1850, and that right remains "inviolate" today. (*1941 Chevrolet*, *supra*, 37 Cal.2d at pp. 286, 295.)

2. The government fails to understand the importance of these federal and state cases.

The government never comes to grips with why these cases matter. They matter not because the U.S. Supreme Court's interpretation of the Seventh Amendment, or the Texas Supreme Court's interpretation of its Constitution, somehow binds this Court in interpreting California's Constitution. (See Government's Br. at pp. 51–53.) Of course this Court remains free to give its charter a different meaning. (See Jeffrey S. Sutton, 51 Imperfect Solutions (2018) pp. 8–21.)

These cases persuade, instead, because this Court has defined the scope of California's civil-jury-trial right using "a purely historical" test. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 287.) And other courts—including the U.S. Supreme Court—have performed exactly this historical analysis, and have concluded that these actions were historically triable to a jury. If

all this Court is doing is finding a historical fact, like any other fact (*ibid.*), the U.S. Supreme Court's conclusion on that fact is "highly pertinent." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 453; see also *Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 759.)

Nor are these cases "distinguishable." (Government Br. at p. 53.) The government first offers what it calls a "significant[]" difference "in language" between the U.S. and California Constitutions. (*Id.* at p. 52.) But that is wishful thinking. If anything, the constitutional language at issue here is actually *broader* than the federal Constitution. (See *Shaw*, *supra*, 2 Cal.5th at p. 994 [noting "the breadth of [California's] declaration"].) The only meaningful linguistic difference is that the Seventh Amendment, unlike Article I, § 16, contains a reexamination clause. (See *Jehl v. Southern Pacific Co.* (1967) 66 Cal.2d 821, 827, 835 & fn. 17.) But that clause is not at issue in this case, and the clause that is protects the jury right as it existed at common law. (See U.S. Const., 7th Amend.; Cal. Const., art. I, § 16.) The language in both Constitutions derives from the same place and accomplishes the same thing. (See Sutton, *supra*, at p. 8; Henderson, *supra*, 80 Harv. L.Rev. at p. 298.)

The government next claims that the federal test "differs meaningfully" from California's test, largely because the federal test regards the relief requested as "more important" than "whether [a] cause of action" is "similar to an 18th century claim at common-law." (Government

common-law action. (*1941 Chevrolet*, *supra*, 37 Cal.2d at pp. 287, 300; see, e.g., *id.* at pp. 289–290 [following the "conclusions of our Supreme Court"]; *Shaw*, *supra*, 2 Cal.5th at pp. 997–998, fn. 15.) Jury-right scholars and federal courts also agree that California's Constitution has "been given an essentially uniform" interpretation as the Seventh Amendment, and that the "Seventh Amendment analysis applies equally to the question of whether defendants are entitled to a jury trial pursuant to the California Constitution." (James, *supra*, 72 Yale L.J. at p. 655 & fns. 2, 4; *Sakhrani v. City of San Gabriel* (C.D. Cal., Feb. 6, 2017) No. 2:16-cv-01756, 2017 WL 507209, at *3, fn. 2; see also, e.g., 50A C.J.S. Juries § 8, fn. 3.)

Other than challenging the relevance of *Tull*, the government collects a few state cases of its own. In doing so, however, the government exaggerates the number of States that go the other way, and it ignores the differences in the cases. (See Government Br. at pp. 16, 53, 62–64.) Some States the government cites would actually recognize a right to a jury trial on these very facts. (See, e.g., *State v. Abbott Laboratories* (Wis. 2012) 816 N.W.2d 145, 156, 159; *Zorba Contractors, Inc. v. Housing Auth., City of Newark* (N.J. Super. Ct. App. Div. 2003) 827 A.2d 313, 317). Other States employ a "different" "approach" than the California and federal approach. (E.g., *State v. Schweda* (Wis. 2007) 736 N.W.2d 49, 59 & fn. 9.) And still other States decline to follow *Tull* because of the State's unique "history concerning an action in debt" and because the government sought

"extensive injunctions" but a much more "modest" penalty. (See *Comr. of Envt. Protection v. Conn. Bldg. Wrecking Co.* (Conn. 1993) 629 A.2d 1116, 1122–1123.) California, on the other hand, has the same test and history as the United States, and a $19.25-billion penalty is anything but "modest."

In the end, an examination of all the government's cases "shows that in none of them was the problem adequately discussed in terms of the common law practice in England and the United States before 1850." (*1941 Chevrolet*, *supra*, 37 Cal.2d at 301.) Courts that faithfully follow the "nature" or "gist" of the action historical test hold that modern civil actions for statutory penalties are "clearly analogous to the 18th-century action in debt," and that "civil penalt[ies] [were] a type of remedy at common law that could only be enforced in courts of law." (*Tull*, *supra*, 481 U.S. at pp. 420, 422.) This Court should hold the same.

II. THE GOVERNMENT'S COUNTERARGUMENTS DO NOT CHANGE THIS CONCLUSION

In the face of this mountain of historical evidence, the government tries to shift focus. It does not dispute that civil actions for statutory penalties were triable by a jury at common law in 1850. Nor does it argue that any historical exception applies. (See *Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1011–1012.) Instead, it urges this Court to adopt a different test: one that looks not at the gist of the *action*, but rather at the gist of the

statutes. That, however, has never been the test, and it should not be the test today either.

The government does no better when it engages with the Court's actual test. And the government's additional arguments—about "actions of debt," contrary Court of Appeal precedent, "severability" concerns, and practical consequences—do not change the fundamental and constitutional nature of a jury trial in this case.

A. The gist of the actions, not of the statutes, determines the constitutional right to a jury trial.

The crux of the government's argument is that "there is no right to a jury trial in actions brought under the UCL or FAL" because "neither the UCL nor the FAL is of the 'same class' or a 'like nature' as claims triable at common law." (Government Br. at pp. 25, 29; see *id.* at pp. 25–34.) Neither "*statute[]*," the government contends, has a "common law analogue," because both are "modern, equitable *statutes*" and "are quintessential examples of *statutes* sounding in equity." (*Id.* at pp. 15, 34, emphasis added; see also *id.* at pp. 28–34, 37, 65–66.)

The government's focus on the gist of the *statutes*, however, does not matter one whit in determining whether the *Constitution* provides a right to a jury trial. The Constitution is not concerned with whether the Legislature enacted a "modern" or "contemporary" or "equitable statute[]." (*Id.* at pp. 15, 34.) It cares only about the "type of *action*" the Legislature

created under the statute. (*1941 Chevrolet*, *supra*, at 37 Cal.2d at p. 300, emphasis added.) And the actions the UCL and FAL authorize here—government actions for civil penalties—are very much "legal" in nature, regardless of how one characterizes the statutes.

In focusing on the statutes rather than on the actions, the government rehashes arguments this Court rejected as early as 1861. That year, in *Grim*, this Court held that even though a "statute afforded the requisite authority" for trying a case without a jury, "[t]he *action* [wa]s an ordinary suit at law for the recovery of a debt," and thus the "parties [were] entitled to a trial by jury." (19 Cal. at p. 142, emphasis added.) "The framers of the Constitution regarded the right of the citizen in this respect as too sacred and valuable to be intrusted to the guardianship of the Legislature." (*Ibid.*)

Again, nearly one hundred years later in *1941 Chevrolet*, the government argued that forfeiture proceedings under the "equitable" Health and Safety Code should be tried by the court, even though the common law would have had jury trials for those proceedings. (See 37 Cal.2d at p. 299.) That statute, the government surely pointed out, provided "new remedies and new judgments and decrees in form equitable," so proceedings under it must have been "equitable in nature." (See *ibid.*)

This Court disagreed. It did not, as the government does here, look to whether the "history and purpose" of the statute made it a "statute[] sounding in equity." (Government Br. at p. 15.) Instead, the Court homed

in on "the type of action" the Act created, reasoning that "[t]he Legislature cannot [by statute] convert a legal right into an equitable one so as to infringe upon the right of trial by jury." (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 299; see also *Donahue v. Meister* (1891) 88 Cal. 121, 126–128 ["[I]t is clear that the right to a jury trial cannot be avoided by merely calling an action equitable."].)

Analyzing the action rather than the statute follows history as well. At common law, it never mattered what kind of statute gave rise to the "[a]ction[] by the Government to recover civil penalties under statutory provisions." (*Tull*, *supra*, 481 U.S. at pp. 418–419.) The statutes could be "very miscellaneous" indeed. (4 Blackstone pp. *161–162; see, e.g., *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 295, fn. 15 [collecting 28 English cases under statutes prohibiting everything from missing church to selling alcohol]; *J.B. Williams*, *supra*, 498 F.2d at 422–423 [collecting "cases[] arising under a broad range of [statutory] civil penalty and forfeiture provisions"].) No common-law cases or treatises discussed whether the statute was somehow "equitable." All instead discussed whether the *actions* were, and all concluded that "actions by the Government to recover" civil penalties under any kind of statute "requir[ed] trial by jury." (*Tull*, at pp. 418–419.)

In any event, the government's statute-based test would not work in practice. Most if not all statutes are "equitable" in the sense the

government uses that term. "They reflect a contemporary approach" to modern problems, and they "afford an 'expeditious,'" "streamlined," and "flexible" way to quash perceived problems "in whatever form they occur." (Government Br. at pp. 15, 31, 65.) That certainly describes the federal Clean Water Act, for example, and many courts had accordingly held that the Act was "equitable in nature." (E.g., *United States v. M.C.C. of Fla., Inc.* (11th Cir. 1985) 772 F.2d 1501, 1507.) Even the Supreme Court said, just as the government does here, that the Act allows "the exercise of a court's equitable discretion . . . to order relief that will achieve compliance with the Act." (*Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 318, emphasis omitted.) And yet, despite *the statute's* equitable nature, the Supreme Court in *Tull* concluded that a type of *action* brought under it—by the government for civil penalties—was legal. The same is true here.[5]

B. The relevant actions here are UCL and FAL governmental actions for civil penalties, not UCL or FAL actions in general.

Retreating, the government next argues that, if it really is the "action" that matters, all UCL and FAL actions are "equitable." It even suggests that this Court has already held as much. (Government Br. at pp. 31–34.)

---

[5] One irony for the government is that it would lose on its own statute-based test. If this Court looks for a common-law analogue of a statute aimed at "combatting deceptive commercial conduct," the analogue is the tort of "common law cheating," which comes with the right to a jury trial. (*Abbott Laboratories*, *supra*, 816 N.W.2d at pp. 156, 159.)

But the government's argument on this score suffers from a level-of-generality defect. It defines the "action" at a dizzyingly high level of generality, as if the UCL and FAL authorize only one type of action. (See *id.* at pp. 25–36.) This Court, however, does not define the gist of an action in the abstract; it defines it by looking to "the nature of the rights involved and the facts *of the particular case*." (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 299, emphasis added.)

At issue in this particular case, as the Court has already said, is the "right to a jury trial *where the government seeks to enforce the civil penalties* authorized under [the UCL and FAL]." (Order of March 22, 2017 in Case No. S239979, emphasis added). The relevant "action" has to be defined at the proper level of generality, and here it is governmental statutory actions for civil penalties under the UCL and FAL. (*Ibid.*)

This Court's recent decision in *Shaw* proves the point. It reserved for a future case a "gist of the action" question under the Health and Safety Code, and it did so specifically for "the gist of a section 1278.5(g) action *in which damages are sought*." (*Shaw*, *supra*, 2 Cal.5th at p. 1003, emphasis added.) The Court did not assume that all actions brought under the Health and Safety Code were "legal" simply because one "type of action," the one in *1941 Chevrolet*, was "legal." And it did not ask whether section 1278.5(g) in general, or even a section 1278.5(g) *action* in general, is legal

or equitable. It asked the equivalent of whether UCL and FAL actions *in which civil penalties are sought* are legal or equitable.

This Court's commentary from other UCL and FAL cases—where private parties brought actions for purely equitable relief (see Government Br. at pp. 31–34)—is thus irrelevant. (See *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 303; *Donahue*, *supra*, 88 Cal. at pp. 126–127.) For example, the government relies heavily on *Korea Supply*, which it quotes as having held "[a] UCL action is equitable in nature." (Government Br. at pp. 31–32; see also *id.* at pp. 34, 58, 59, 70, citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) That was true in that context, *i.e.*, "for an individual private plaintiff under the UCL" seeking solely equitable relief. (*Korea Supply*, at p. 1144.) But as the Court made clear in *Korea Supply* itself, its discussion (which did not involve the jury right) was "limited to individual private actions brought under the UCL," because "[i]n public actions, civil penalties may be collected from a defendant." (*Id.* at p. 1148, fn. 6.) In public actions where civil penalties may be collected, that is, the nature of the action changes.

This Court's holding in this case can thus be quite narrow. A statutory action, even one under the same statute, can take many forms. It can be brought by a private party or by the government. It can seek purely legal relief or purely equitable relief. It can even be civil and other times criminal. Not all actions are equal. That is why this case would be

different if a private party had brought an action for purely equitable relief. (Accord Reply Brief in *Tull v. United States* (No. 85-1259), 1987 WL 880534, at p. *3.) But those are not "the facts of th[is] particular case." (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 299, emphasis added.) In this "particular case," as opposed to some generic private-party UCL or FAL case, the "nature of the rights involved" demand a jury trial. (*Ibid.*) That is all this Court must decide.

C. These actions are "legal" no matter what particular form they would have taken in 1850.

Out of affirmative arguments that these actions are really "equitable," the government makes a negative argument—that these actions would not have been a particular *kind* of legal action, "actions of debt," at common law. (See Government Br. at pp. 34–36, 55–57.) The government does not say what it thinks the proper historical analogue for these actions would be—a notable omission considering this Court's "purely historical" test. (*1941 Chevrolet*, *supra*, 37 Cal.2d at p. 287.) It says only what it thinks they would *not* be.

But the government is wrong: These actions would in fact have been actions of debt, as the overwhelming evidence discussed above shows. (Sections I.B–I.C, *supra*; see, e.g., 3 Blackstone pp. *159–160, *261; *Stockwell*, *supra*, 80 U.S. at pp. 542–543; *Poulterer*, *supra*, 16 Cal. at pp. 527–528; *Calcraft*, *supra*, 101 Eng.Rep. at p. 11.)

Nor, contrary to the government's argument, does the action become equitable merely because "civil penalties under the UCL or FAL are not 'sums certain' or 'readily reducible.'" (Government Br. at pp. 35–36.) As an initial matter, the "sum demanded" in this case, as in many actions of debt, is "certain" in the relevant sense: The government demands exactly $2,500 per violation. (*Chaffee*, *supra*, 85 U.S. at p. 538; see Vol. II, Ex. R. p. 445, prayer ¶¶ 3–4.)

But more importantly, at common law and beyond, "actions for statutory penalties" entail a jury right "both where the amount of the penalty was fixed and where it was subject to the discretion of the court." (*J. B. Williams*, *supra*, 498 F.2d at p. 423, collecting cases; see, e.g., *Stockwell*, *supra*, 80 U.S. at p. 543; 3 Blackstone pp. *162, *167–169.) In this Court, for example, actions for non-fixed amounts were called "ordinary suit[s] at law for the recovery of a debt" and were constitutionally required to be tried by a jury. (See, e.g., *Grim*, *supra*, 19 Cal. at p. 142 [plaintiff seeking $3,850 but receiving $2,335]; *Smith*, *supra*, 2 Cal. at pp. 92, 94 [statute providing for an amount "not exceeding $500"].) That is why modern courts have "not" found "this distinction to be significant," and why they have extended jury protection for "statutory penalt[ies] [that are] not fixed or readily calculable from a fixed formula"—indeed penalties

that use the same factors as the UCL and FAL.[6] (*Tull*, *supra*, 481 U.S. at pp. 422–424 & fns. 7–8; see also, e.g., *Bendick*, *supra*, 558 A.2d at p. 945 ["up to $5,000 for each day of violation"].)

This conclusion aligns with how this Court treats other types of monetary relief, which need not be fixed to be legal. Punitive damages, for example, remain a "legal remed[y] as to which a right to jury trial would apply" despite being indeterminate. (*Shaw*, *supra*, 2 Cal.5th at p. 1005, fn. 19; see *Curtis v. Loether* (1974) 415 U.S. 189, 190 [jury trial required in an action under a statute providing that "the court may grant as relief . . . not more than $1,000 punitive damages"].)

The government's contrary evidence comes in the form of two cases, both of which it misreads. (Government Br. at pp. 35, 55–56.) In *People v. Craycroft* (1852), there was only one type of action authorized, and it was *criminal*. (2 Cal. 243, 244.) Because there was no "provision in the statute authorizing a civil action," a civil action could not be maintained. (*Ibid.*) The Court's conclusion on that score had nothing to do with the penalty not being "certain" in the sense of not being fixed (Government Br. at p. 56); it

[6] In the Clean Water Act claim at issue in *Tull*, for example, the factors courts use in calculating the amount of the penalty mirror the factors under the UCL and FAL. (Compare *Tull*, *supra*, 481 U.S. at p. 422–423 & fn. 8 ["the seriousness of the violations, the number of prior violations, [] the lack of good-faith efforts to comply," the "economic benefits accrued," and the "economic impact"], with Government Br. at p. 60 ["seriousness of the misconduct; the number of violations; the persistence of the misconduct; the length of time over which it occurred; willfulness; and the defendant's assets, liabilities, and net worth"].)

had everything to do with "the law [having] made no provision for the mode of prosecuting" *any* kind of civil action, whether for a fixed penalty or not. (*Craycroft*, at p. 244.)

The government's citation of *Poulterer* is weaker still. In that case, the Court held that "civil action[s] for the recovery of money due the State," brought "on behalf of the State[] to enforce the payment" of statutory duties and penalties, are properly brought as "action[s] of debt." (16 Cal. at pp. 521, 527–528, 532.) If that case looks like it helps Nationwide, it is because it does. True, the suit there *happened* to be for a "determinate" amount, but nothing turned on that fact. (*Id.* at p. 527; see *id.* at p. 521; see also *Grossblatt*, *supra*, 108 Cal.App.2d at pp. 484–485 & fn. 19.) Indeed, the Court a year later held that jury trials were required in actions of debt for *indeterminate* amounts, too. (See *Grim*, *supra*, 19 Cal. at p. 142.) *Poulterer* thus proves only that many common-law statutes fixed duties and penalties (just as many common-law statutes fixed criminal punishments). It does not prove that a "sum certain" or "readily reducible" amount was *necessary* for an action of debt. It plainly was not. (See 3 Blackstone pp. *161–162, *167–169.)

But even if the government were right that this action is not "'of like nature' or 'of the same class' as" an action of debt, that does not mean the action is *equitable*. (*Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1012, quoting *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300.) The government puts

forth no *affirmative* evidence that this class of actions was tried in courts of equity in 1850. Indeed, it does not even say what "class" of actions it thinks this action falls into. So regardless of the precise common-law form of action, whether debt or something else, the government is stuck with the reality that "[c]ases involving penalties to the Crown" were "tried by a jury" in 1850—and stuck with the conclusion that today's case must be tried by a jury all the same. (*1941 Chevrolet*, at pp. 291, 295; cf. *O'Callaghan*, *supra*, 6 Cal. at p. 66 [jury trial required in a statutory action not for a "given sum," "without regard to [the] form" the action took].)[7]

D. Previous Court of Appeal opinions are not persuasive.

The government spends much of the rest of its brief arguing that there is a split among California lower courts on the question presented. (See Government Br. at pp. 45–47, 49–51.) That is true, and a good argument in a petition for review. But now that this Court has granted review, it must answer the question presented de novo. And it of course is not bound by Court of Appeal precedent in doing so. (See, e.g., *Crouchman*, *supra*, 45 Cal.3d at p. 1179; *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 303.)

---

[7] If this action were not "debt," it would likely be an "action on the case," another legal action triable by a jury "for damages equivalent to [the plaintiff's] loss." (3 Blackstone pp. *160–161; see *Jones v. Steamship Cortes* (1861) 17 Cal. 487, 487, 497–498.) Statutes around 1850 allowed an "action on the case" for indeterminate amounts (e.g., a "sum not less than one hundred dollars"), and were tried by a jury. (See, e.g., Act of Aug. 18, 1856, ch. 169, 34th Cong., 1st Sess., 11 Stat. 138, 139.)

Nor is this lower-court precedent persuasive. The government's cases are either "not on point or did not fully analyze the jury trial issue," as the First District explained at length below. (*Nationwide*, *supra*, 24 Cal.App.5th at pp. 457–463.) To say that this case represents a "seismic break with precedent" is thus pure hyperbole. (Government Br. at p. 45.)

To start, all cases involving "actions between private litigants" seeking equitable relief are not affected by this case. (Government Br. at p. 45.)

In "virtually all" of the remaining cases, *i.e.*, those involving civil penalties, the courts did not "address[]" the question presented here—"whether there [is] a right to jury trial under . . . article I, section 16 of the California Constitution." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 459.) They instead "considered only the Sixth Amendment right to jury trial in criminal cases," a different question (involving a different Constitution). (*Ibid.*)

The cases that actually mention the California Constitution are not persuasive either. In two of them, the Courts of Appeal resolved the issue in a paragraph or less and failed to engage with the common-law history or "discuss *Tull* or any other case addressing the right to jury trial in statutory penalty cases." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 457, citing *People ex rel. v. Superior Court (Cahuenga's The Spot)* (2015) 234 Cal.App.4th 1360, 1384; *People v. Witzerman* (1972) 29 Cal.App.3d 169, 176–177.)

"In only one case that the People cite, [*Bhakta*], did the appellate court apply the gist-of-the-action analysis" to the UCL in a serious way. (*Nationwide*, *supra*, 24 Cal.App.5th at p. 459, citing *People v. Bhakta* (2008) 162 Cal.App.4th 973, 978–979.) *Bhakta* held that the action was equitable because the UCL "provides for only equitable remedies." (162 Cal.App.4th at p. 979.) "Respectfully," however, "this is not an accurate description of the remedies under the UCL" when civil penalties are in play: Historically, equity courts lacked jurisdiction to award civil penalties, and today civil penalties serve legal, not equitable, ends. (*Nationwide*, at p. 460; see Section I.C, *supra*.) That explains why *Bhakta*'s only support for its holding was two cases involving private parties and purely equitable relief. (162 Cal.App.4th at p. 979, citing, *inter alia*, *Hodge v. Superior Court* (2006) 145 Cal.App.4th 278, 281, 284.)

That leaves only *DiPirro*, a private-party, non-UCL/FAL First District case that the First District itself said was both "[not] determinative of the right to jury trial under the UCL and the FAL" and almost certainly wrongly decided. (*Nationwide*, *supra*, 24 Cal.App.5th at pp. 462–463, citing *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 163.) *DiPirro* "made no mention at all of *1941 Chevrolet*," miscited *Tull*, and misunderstood the nature of civil penalties. (*Ibid.*) Like the other Court of Appeal cases the government cites, it is therefore neither controlling nor convincing.

E. There are no "severability" or "equity-first" problems because all of the government's claims are legal.

The government next accuses the Court of Appeal of "severing" a single action into pieces, and trying the legal parts first. (See Government Br. at pp. 41–43.) But the court did no such thing. Like the government, it recognized that "we are not dealing with separate *claims* in the sense that one claim for statutory penalties is legal and the other is equitable." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 456.) The Court of Appeal instead agreed with the government that this "is not a 'mixed case'" because it does not "combin[e]" "equitable and legal [claims]"; and it thus agreed "[o]nly one decision can be made" on Nationwide's liability for all four claims. (Government Br. at pp. 42, 48.) The only disputed question is who the single trier of fact will be for that one decision. And for reasons explained, the Court of Appeal correctly held that it must be a jury. (See also *Raedeke*, *supra*, 10 Cal.3d at pp. 671–675 [the party is "entitled to a jury determination of the issues raised in [all] their . . . causes of action"].)

The court's conclusion does not conflict with—indeed does not even implicate—the so-called "equity-first" policy. That policy arises when there are multiple *claims* in a single case, some legal and others equitable—for example when a plaintiff files a purely equitable action, and the defendant cross-claims with purely legal claims. (E.g., *Connell v. Bowes* (1942) 19 Cal.2d 870, 872.) In that context, "the defendant is entitled to

have the legal issues submitted to a jury," "the plaintiff is entitled to have the equitable issues tried by the court," and the court may "first pass[] upon the equitable issues presented by plaintiff's complaint." (*Thomson v. Thomson* (1936) 7 Cal.2d 671, 681–683.)

A very different rule applies when, as here, the plaintiff seeks legal and equitable *relief* through a single claim. Then, a jury decides liability if the gist of the claim is legal, and a judge decides liability if it is equitable. (See, e.g., *Raedeke*, *supra*, 10 Cal.3d at pp. 671–675.) *C & K Engineering* holds exactly this—that a court cannot "sever[]" the "remedies" requested in a single action, even when some are legal and others are equitable. (23 Cal.3d at p. 11; see Government Br. at p. 42 [agreeing].) As applied here, then, "while there are an array of *remedies* under these two statutes, they all flow from what are historically legal *claims* by the government," as to which "there is a right to jury trial." (*Nationwide*, *supra*, 24 Cal.App.5th at p. 456.) A jury must therefore decide liability on all four claims.

Even if a court *could* sever the remedies in a single action, moreover, the legal would trump the equitable. When a defendant is "entitled to a jury" if the gist of the action is legal, "the fact that [the plaintiff] also prayed for an injunction [does not] take away from [the defendant] the right to have the *real issues* of fact tried by a jury." (*Hughes*, *supra*, 91 Cal. at p. 389.) Only *after* the jury decides liability on the legal claims may the judge then "frame and deliver a decree according to the doctrines and

methods of equity." (*Id.* at p. 390.) That is precisely what would happen here.

Having a jury decide liability in a legal action that includes a request for equitable relief also comports with "the English common law as it stood in 1850." (*Pacific Western Oil*, *supra*, 13 Cal.2d at p. 68.) At that time, when "a plaintiff applie[d] for an injunction to restrain the violation of a common-law right," and liability was "disputed," the plaintiff had to "establish that right at law; or, in other words by a jury." (*Ibid.*, adopting *Farrell v. City of Ontario* (1919) 39 Cal.App. 351, 354–355.) In legal "actions wherein both legal and equitable remedies are the subject," therefore, it is "error [to] deny[] the demand . . . for a jury." (*Id.* at p. 69.) It would thus be error here, too.

F. The government overstates the practical consequences, which are in any event irrelevant to the question presented.

The government ends its brief with eight pages on the "practical" effects of recognizing Nationwide's constitutional right in this case. (See Government Br. at pp. 64–71.) The short answer to this is found in the government's most cited case on the point: "[S]uch practical considerations [are] immaterial if [allowing the court to resolve the case] impaired the right to a jury trial." (*Jehl*, *supra*, 66 Cal.2d at p. 829.) It would impair the right here, and so the government's proffered practical

effects are at bottom "immaterial." (*Ibid.*; see also *Grim*, *supra*, 19 Cal. at p. 142.)

The longer answer is not only that, but also that the government overstates the implications of upholding the jury right here. One way to know for sure is to see what has happened—or rather, what has *not* happened—in the federal system in the 32 years since *Tull*. That system has the same rule that Nationwide asks for, and it applies to 330 million people. And yet the government fails to point to a single *real-world* negative effect in those courts—no "confusion" about what juries are deciding, no problems with the "compet[ence]" of jurors, and no flurry of questions for appellate courts to decide. (Government Br. at pp. 66–70.) The government's fears are thus unfounded.

Its fears are also hostile toward juries. Good thing, the Constitution enshrines the opposite attitude. The Constitution understands that judges will always decide *legal* questions—the kinds of questions the government worries about (see Government Br. at pp. 66–70). (See *Koppikus*, *supra*, 16 Cal. 248 at p. 254.) And it understands that, as to any factual questions remaining, "the complexity of a case may not serve as a ground for the denial of a jury trial." 47 Am. Jur. 2d Jury § 17. Plus, the issues of fact in these actions—say, whether a particular direct-mail marketing letter deceives a consumer—are issues that juries have decided since the advent

of juries. Juries will be capable of deciding these factual questions under the UCL and FAL too, despite the government's fears.

* * *

Blackstone, Marshall, Story, Friendly, and this Court were all right: At common law in 1850, civil actions by the government for statutory penalties were legal in nature, and were triable by a jury. Because the four causes of action here, though "arising under [] modern statute[s]," are "'of like nature' or 'of the same class' as a common law right of action," it follows that Nationwide's right to a jury trial is guaranteed by the California Constitution. (*Franchise Tax Bd.*, *supra*, 51 Cal.4th at p. 1012, quoting *1941 Chevrolet*, *supra*, 37 Cal.2d at p. 300.) This Court should thus affirm.

III. IN THE ALTERNATIVE, THE U.S. CONSTITUTION GUARANTEES NATIONWIDE A JURY TRIAL

A. The Seventh Amendment should be incorporated.

If this Court concludes that the California Constitution does not protect Nationwide, it should hold that the Seventh Amendment to the U.S. Constitution, through the Fourteenth Amendment, *does* protect it.

The Fourteenth Amendment prohibits States from denying a person a right that is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition." (*McDonald v. City of Chicago*, (2010) 561 U.S. 742, 767, alterations omitted.) The civil-jury

right easily fits that description. Like many rights in the Bill of Rights, the right to a civil jury "traces its venerable lineage back to" Magna Carta; it came "[a]cross the Atlantic" "first in the Virginia Declaration of Rights, then in the [Bill of Rights]"; it "resonated as well with similar colonial-era" and Fourteenth-Amendment-era state constitutions; and it "remains widespread" and "fundamental" today. (*Timbs*, *supra*, 139 S.Ct. at pp. 687–689.) For the same reasons the Supreme Court recently incorporated the Excessive Fines Clause, this Court should incorporate the Seventh Amendment. (*Ibid.*; see Tr. of Oral Argument in *Timbs* (Nov. 28, 2018), No. 17-1091, at p. 33:6–8 [Justice Kavanaugh: "Isn't it just too late in the day to argue that any of the Bill of Rights is not incorporated"?].)[8]

It is true that, "[t]o date, the United States Supreme Court has not" yet applied the Seventh Amendment in "civil actions in state court" (*Shaw*, *supra*, 2 Cal.5th at p. 993, fn. 8), and that it in fact has held otherwise (*Minneapolis & St. Louis Ry. Co. v. Bombolis* (1916) 241 U.S. 211, 215). But "doctrinal developments" in the 103 years since *Bombolis* "are necessarily incompatible with that decision," freeing this Court to hold that the Seventh Amendment applies to the States. (*Lockyer v. City & County of S.F.* (2004) 33 Cal.4th 1055, 1127 [Kennard, J., concurring in part], quoting *Hicks v. Miranda* (1975) 422 U.S. 332, 344.) *Bombolis* long

[8] Indeed, the Supreme Court is poised to fully incorporate the Sixth Amendment's guarantee of a unanimous verdict next Term. (See *Ramos v. Louisiana*, No. 18-5924, cert. granted Mar. 18, 2019.)

predates the era of incorporation (*McDonald, supra*, 561 U.S. at p. 765, fn. 13), and its reasoning—that the Bill of Rights "are not concerned with state action" (*Bombolis*, at p. 217)—has long been rejected and abandoned.

As a result, "subsequent decisions of the Supreme Court not only suggest but make clear" that *Bombolis* is no longer good law. (*Latta v. Otter* (9th Cir. 2014) 771 F.3d 456, 466, alterations omitted [same holding for *Baker v. Nelson* (1972) 409 U.S. 810, in the same-sex-marriage context].) Because of that, and because Nationwide has preserved this argument at every stage of this case, this Court should hold that the Seventh Amendment protects Nationwide in state court.

B. The Sixth Amendment and due process mandate a jury trial.

In the alternative, the penalties the government seeks here are so extreme that they should be treated as criminal, and Nationwide should receive the Sixth Amendment and due-process right to a jury.

It is the rare case where a statutory penalty labeled "civil" is so "excessive" as to count as criminal. (*Hudson v. United States* (1997) 522 U.S. 93, 100.) But this is that rare case. The penalties requested here—over $19.25 billion for approximately $10 million in harm—are "so punitive . . . in purpose [and] effect as to negate" the Legislature's "civil" label and to count as criminal punishment. (*United States v. Ward* (1980) 448 U.S. 242, 248–49.)

In making this determination, courts consider the seven *Hudson* factors, 522 U.S. at pp. 99–100, all of which cut in favor of Nationwide. (1) Although civil penalties do not equate to imprisonment, they come awfully close here: a multi-billion-dollar penalty is crippling, if not ruinous. (2) Penalties this large have "historically" been considered punitive. (3) These penalties increase when the violation is willful, and (4) they clearly serve purposes of "retribution and deterrence." (*Ibid.*) (5) A "parallel . . . statute [had] established criminal penalties" for the same conduct. (Brief of Cal. Atty. Gen., *supra*, at pp. 11–12.) (6) In light of the other available remedies and the giant nature of the penalties, no "alternative purpose" can fairly be "assigned." (*Hudson*, *supra*, 522 U.S. at pp. 99–100.) And (7) these penalties are undeniably "excessive" (*ibid.*): The government seeks not 2x, not 100x, not 1,000x, but almost *2,000x* the amount of harm alleged.

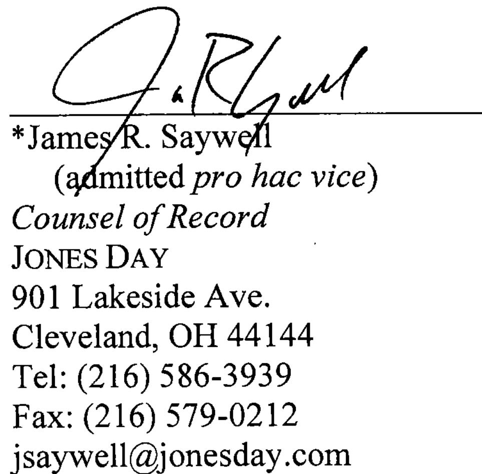
This case is thus like *Kennedy v. Mendoza-Martinez* (1963), where the Supreme Court held that where the function of a civil penalty is to serve as "an additional punishment," the penalty requires the "safeguards [that] attend a criminal prosecution"—including a jury trial. (372 U.S. 144, 169–170, 183–186.) These penalties would no doubt be "oppressive" (see *Perez v. City of San Bruno* (1980) 27 Cal.3d 875, 893), and they would likely violate the Eighth Amendment (*City & County of S.F. v. Sainez* (2000) 77 Cal.App.4th 1302, 1321.) Before any are imposed, a jury, not a judge, must determine Nationwide's liability.

CONCLUSION

For these reasons, the Court should affirm the Court of Appeal.

March 18, 2019

Respectfully submitted,



*James R. Saywell
(admitted *pro hac vice*)
Counsel of Record
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44144
Tel: (216) 586-3939
Fax: (216) 579-0212
jsaywell@jonesday.com

Nathaniel Garrett (SBN 248211)
JONES DAY
555 California Street – 26th Floor
San Francisco, CA 94104
Tel: (415) 626-3939
Fax: (415) 875-5700

Alan S. Yockelson (SBN 130380)
Law Office of Alan S. Yockelson
501 W. Broadway, #A-385
San Diego, California 92101
Tel: (949) 290-6515

Counsel for Nationwide Biweekly, et al.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rules 8.204(b) and 8.520(b)(1) because it has been prepared using proportionately spaced, 13-point Times New Roman typeface. This brief complies with the volume limitation of Rule 8.520(c) because it contains fewer than 14,000 words, as counted using the word-count function on Microsoft Word 2007 software.

I declare under penalty of perjury that this Certificate of Compliance is true and correct.

March 18, 2019 James R. Saywell

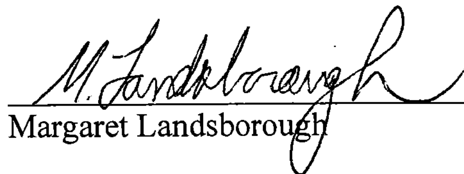
PROOF OF SERVICE

I am more than eighteen years old and not a party to this action. My business address is Jones Day, 555 California Street, 26th Floor, San Francisco, CA 94104. On March 18, 2019, I served true copies of the **ANSWER BRIEF ON THE MERITS** on the interested parties of this action by placing a true copy thereof in sealed envelopes, addressed as follows:

SEE ATTACHED SERVICE LIST

I am employed in an office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on March 18, 2019, at San Francisco, California.



Margaret Landsborough

SERVICE LIST

Superior Court of Alameda County 1225 Fallon Street, Dept. 17 Oakland, CA 94612	Petitioner
Sean Michael Rooney Department of Business Oversight 1350 Front Street, #2024 San Diego, CA 92101 Email: sean.rooney@dbo.ca.gov	Counsel for The People, Real Party in Interest
John Fulton Hubanks Monterey County District Attorney 1200 Aguajito Road, Room 301 Monterey, CA 93940 Email: hubanks@co.monterey.ca.us	Counsel for The People, Real Party in Interest
Andres Humberto Perez District Attorney of Marin County 3501 Civic Center Drive, #130 San Rafael, CA 94903 Email: aperez@marincounty.org	Counsel for The People, Real Party in Interest
Matthew Beltramo Office of the District Attorney County of Alameda 7677 Oakport Street, Suite 650 Oakland, CA 94621 Email: matthew.beltramo@acgov.org	Counsel for The People, Real Party in Interest
John Thomas Mitchell Kern County District Attorney's Office White Collar Crime Division 1215 Truxtun Avenue Bakersfield, CA 93301-4619 Email: da@kernda.org	Counsel for The People, Real Party in Interest

Sean Eric Ponist Attorney at Law 100 Pine Street, Suite 1250 San Francisco, CA 94111 Email: sponist@ponistlaw.com	Co-Counsel for Nationwide Biweekly Administration, Inc., et al., Respondents
Alan Steven Yockelson Attorney at Law 501 West Broadway, Apt. 385 San Diego, CA 92128 Email: yockelson@appellatelaw.net	Co-Counsel for Nationwide Biweekly Administration, Inc., et al., Respondents
Clerk of the Court First District Court of Appeal 350 McAllister Street San Francisco, CA 94102	Office of the Attorney General Consumer Law Section 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102 https://oag.ca.gov/services-info/172909/brief/add