THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2018 – 0035

CURTIS S. RIDLON

v.

NEW HAMPSHIRE BUREAU OF SECURITIES REGULATION

APPEAL FROM A FINAL JUDGMENT OF
THE MERRIMACK COUNTY SUPERIOR COURT

BRIEF OF THE APPELLEE CURTIS S. RIDLON

Submitted by:

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If oral argument is scheduled, Brian M. Quirk will appear on behalf of the Appellee.

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QUESTION PRESENTED

The Bureau of Securities Regulation (the "State") filed an action against Curtis S. Ridlon seeking to recover millions of dollars in penalties for alleged fraud. Did the trial court act within its discretion in enjoining the State from pursuing its administrative enforcement action against Ridlon because he has a constitutional right to a jury trial of the State's claims against him under Part I, Article 20 of the New Hampshire Constitution?

STATEMENT OF THE CASE

The State filed an administrative enforcement action against Ridlon alleging that he had engaged in "a scheme to defraud" his clients of millions of dollars in violation of RSA 421-B:5-502(a). After a hearing officer who works for the Bureau of Securities Regulation denied Ridlon's motion to dismiss, Ridlon filed this action in superior court to enjoin the administrative proceeding on the ground that it deprived him of his constitutional right to a jury trial. The trial court granted the injunction Ridlon requested. The State appealed.

STATEMENT OF THE FACTS

In April 2017, the State brought a Staff Petition against Ridlon. The Petition alleged that Ridlon, then an investment advisor, "engaged in a scheme to defraud up to [208] clients of millions of dollars over a period of at least eight (8) years by deceiving those clients into believing that they were required to pay an annual fee for management of their accounts when in reality Ridlon was having them sign up for unnecessary optional financial planning." (Appendix ("App.") 112.) According to the State, in so doing Ridlon violated RSA 421-B:5-502(a) of the Securities Act, which makes it unlawful "for any person that advises others for compensation . . . as to the value of securities or the advisability of investing in, purchasing, or selling securities . . . (1) to employ a device, scheme, or artifice to defraud another person; or (2) to

engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."

The Staff Petition seeks the following remedies:

- an administrative fine in the amount of up to $3,235,000.
- restitution in the amount of up to $1,343,427.20
- disgorgement in the amount of up to $1,513,711.09.

(App. 118.) The Securities Act defines these remedies as "penalties." *See* RSA 421-B:6-601(b) ("[T]he secretary of state shall have exclusive authority and jurisdiction: . . . (5) To investigate and impose penalties for violations of the securities laws, including: . . . (B) Fines. (C) Rescission, restitution, or disgorgement."). The remedies add up to over $6 million that the State seeks from Ridlon, a resident of the State of New Hampshire.

The Bureau of Securities Regulation is a small office—its website lists just 12 employees, fewer than half of whom are attorneys. *See* http://sos.nh.gov/Bureau.aspx. The Bureau appointed one of the Bureau's attorneys, Kevin Moquin, as the hearing officer charged with adjudicating the Bureau's claims against Ridlon. As an employee of the Bureau, Moquin ultimately reports to the Secretary of State, who is identified as the petitioner in the administrative proceeding. Moquin's salary is determined and his job performance is evaluated by the Secretary or by personnel who report to the Secretary. During his time as an employee of the Bureau, Moquin was specifically involved in the enactment of the statutory scheme Ridlon argues is unconstitutional. (App. 70.)

Until 2009, the Securities Act provided for *de novo* appeal of administrative decisions to the superior court, where a jury trial would have been available. *See* RSA 421-B:26, VII (2008). During the time that the statute provided for a *de novo* appeal to the superior court, there was no

constitutional problem with administrative proceedings before a State-employed hearing officer—at least with respect to the constitutional right to a jury trial. That provision, however, was repealed in 2009. *See* N.H. Session Laws Ch. 128:3 (2009) (repealing RSA 421-B:26, VII). The statute now limits a respondent to an appeal to this Court, where a jury trial is not available. *See* RSA 421-B:6-609 ("Final orders issued by the secretary of state under this chapter are subject to judicial review in accordance with RSA 541."); RSA 541:6 (providing for appeal to the Supreme Court); RSA 541:13 ("[T]he burden of proof shall be upon the party seeking to set aside any order or decision . . . to show that the same is clearly unreasonable or unlawful . . . ."). Despite the fact that the statute gives the State the option of proceeding against Ridlon in the superior court, where his right to a jury trial would have been preserved, the State instead elected to go after Ridlon in its own administrative forum.

Ridlon moved for Hearing Officer Moquin to dismiss the State's action against him because the method of adjudication deprived him of his right to a jury trial under the New Hampshire Constitution and was inconsistent with his constitutional right to an impartial adjudicator. Ridlon also moved to stay the State's administrative proceeding pending the outcome of this litigation. Hearing Officer Moquin denied both motions.

Ridlon then filed this action in superior court seeking to block the State from pursuing its claims against him in a forum where he would be denied his constitutional right to a jury trial.[1] Citing this Court's declaration that "the decisions of this State indicate a strong tendency to uphold the right of trial by jury whenever possible," *McElroy v. Gaffney*, 129 N.H. 382, 386

[1] Ridlon also argued that the Bureau's selection of one of its own employees as a hearing officer —an employee who was specifically involved in the enactment of the statutory scheme that Ridlon argues is unconstitutional—was inconsistent with Ridlon's right "to be tried by judges as impartial as the lot of humanity will admit." N.H. Const. pt. 1, art. 35. Because it found a violation of Ridlon's constitutional right to a jury trial, the trial court did not reach Ridlon's second constitutional argument. *See* Bureau Br. at 62.

(1987), the trial court granted Ridlon's motion for a preliminary injunction. The court reasoned that "[w]hile the remedy the BSR requests is cast in equitable terms, restitution and disgorgement of lost profits, its claim is in fact one of fraud." (Bureau Br. 54.) "And of course, the BSR seeks penalties in the amount of $2,500 per violation, an amount over the constitutional limit of $1,500." *Id.* The trial court observed that this Court "has not wavered from the principle that a penalty greater than $1,500 may not be imposed other than after jury trial." *Id.* at 55. The trial court concluded: "If RSA 421-B was interpreted to allow fines of $2,500 to be imposed without a jury finding, it would be inconsistent with the Court's decisions in *State v. Morrill* and *Town of Henniker v Homo*." *Id.* at 56.

In response to the State's argument that "even if Ridlon is entitled to a jury trial on the penalty portion of its claim, no right of jury trial exists to the extent the BSR seeks disgorgement or restitution, as they are equitable remedies" (Bureau Br. 58), the trial court pointed out that "RSA 421-B:6-601 makes clear that these remedies are, in fact, penalties." *Id.* The trial court also noted that the Staff Petition "specifically alleges that Ridlon committed fraud," and concluded that "[i]f the action by the BSR is considered a fraud action, a separate right to trial by jury exists." *Id.* at 59. The trial court therefore entered a preliminary injunction ordering that "[w]hether Ridlon is liable for penalties as a result of violating RSA 421-B must be determined by a jury if Ridlon requests one." *Id.* at 62.

On appeal the State argues only that Ridlon does not have constitutional right to a jury trial; it does not dispute that the other requirements for a preliminary injunction were met.

SUMMARY OF ARGUMENT

Ridlon has a constitutional right to a jury trial because the State seeks to recover over $6 million in penalties against him. Under the New Hampshire Constitution, "in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 . . . the parties have a right to a trial by jury." N.H. Const. pt. 1, art. 20. There was a right to a jury trial in New Hampshire in actions by the government to recover penalties when the constitution was adopted in 1784, and that right is therefore protected under the New Hampshire Constitution today. Contrary to what the State suggests, while the legislature may create new rights and condition their exercise by a plaintiff on a waiver of the constitutional right to a jury trial, the legislature does not have the power to deprive a defendant of his constitutional right to a jury trial by establishing a new statutory mechanism for imposing penalties. If the legislature could do that, it could eliminate the constitutional right at will. That is a power the legislature does not possess.

In the alternative, Ridlon has a constitutional right to a jury trial because the State's action is in essence one for common law fraud, an action at law for which a right to a jury trial existed in 1784. Because the State's claim is one for fraud, and it seeks to recover in excess of $1,500 in penalties, Ridlon is entitled to a jury trial. The legislature cannot take away that right simply by enacting a statute that permits the State to punish a particular type of fraud in a special jury-free proceeding.

The State sued Ridlon on behalf of his alleged victims, stepping into their shoes to assert a claim under the Securities Act that mirrors the common law cause of action his alleged victims could have filed against Ridlon. Because Ridlon would have had a right to a jury trial in an action for fraud by his alleged victims, he has the same right in the State's action on their behalf.

The Court should reject the State's argument that the remedies it seeks against Ridlon are "equitable" remedies. The State itself designates over $3 million of the relief it seeks as "fines," which are obviously a form of punishment, and the Securities Act expressly defines the other remedies the State seeks as penalties. This is not "equitable" relief in any meaningful sense of the word. The cases the State cites from other jurisdictions are neither persuasive nor on point. Because the amount the State seeks to recover exceeds $1,500, Ridlon is entitled to a jury trial.

STANDARD OF REVIEW

"[T]he granting of an injunction is a matter within the sound discretion of the Court exercised upon a consideration of all the circumstances of each case and controlled by established principles of equity." *DuPont v. Nashua Police Dep't*, 167 N.H. 429, 434 (2015) (quotation marks omitted). "We will uphold the decision of the trial court with regard to the issuance of an injunction absent an error of law, [unsustainable exercise] of discretion, or clearly erroneous findings of fact." *Id.* (quotation marks omitted) (alteration in original).

ARGUMENT

I. Ridlon Has a Constitutional Right to a Jury Trial.

a. The constitutional right.

The New Hampshire Constitution provides that "in all suits between 2 or more persons except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury." N.H. Const. pt. 1, art. 20. "To resolve whether a party has a right to trial by jury in a particular action, we generally look to both the nature of the case and the relief sought, and ascertain whether the customary practice included a trial by jury before 1784." *Gilman v. Lake Sunapee Properties, LLC*, 159 N.H. 26, 30-31 (2009). Simply put, the right to a

jury trial extends to "cases for which the jury trial right existed when the constitution was adopted in 1784." *State v. Morrill*, 123 N.H. 707, 712 (1983).

The right Ridlon asserts goes back to colonial times, when "New Hampshire was full of the English passion for trial by jury, intensified, if possible, by . . . experience in this country." *Gilman*, 159 N.H. at 31 (quotation marks omitted). The constitutional right to a jury trial is "not to be restricted to a narrow meaning and operation by any literal or illiberal interpretation." *Copp v. Henniker*, 55 N.H. 179, 187 (1875). "[T]he essential and distinguishing features of the trial by jury, as known at the common law, and generally if not universally adopted in this country, were intended to be preserved"—and "it is beyond the power of the legislature to impair the right or materially change its character." *Id.* at 193 (quotation marks omitted); *see also Gilman*, 159 N.H. at 31 ("Part I, Article 20 was a recognition of an existing right, guaranteeing it as it then stood and was practiced, guarding it against repeal, infringement, or undue trammel by legislative action . . . .").

"[T]he right to a jury trial is a fundamental one under our State Constitution in both the civil and the criminal contexts." *Morrill*, 123 N.H. at 711. This Court has made clear that, "[i]n those civil cases in which trial by jury is a constitutional right, that right is as sacred as it is in criminal cases." *Copp*, 55 N.H. at 195. Indeed, "[i]ts sacredness is not a matter of degree: it is absolute." *Id.*

Ridlon is entitled to a jury trial of the State's claims against him for two reasons. First, the State seeks to impose millions of dollars in penalties against him. Second, the State's action amounts to an action for common law fraud.

b. Ridlon has a right to a jury trial because the State seeks to recover millions of dollars in penalties.

Ridlon has a constitutional right to a jury trial because the State seeks to recover over $6 million in penalties against him—including over $3 million in fines—plus additional amounts framed as restitution, rescission, and disgorgement, remedies the Securities Act expressly defines as penalties. The trial court correctly observed that this Court "has not wavered from the principle that a penalty greater than $1,500 may not be imposed other than after jury trial[,]" and that "[i]f RSA 421-B was interpreted to allow fines of $2,500 to be imposed without a jury finding, it would be inconsistent with the Court's decisions in *State v. Morrill* and *Town of Henniker v Homo*." (Bureau Br. at 55-56.)

"Actions by the Government to recover civil penalties under statutory provisions . . . historically have been viewed as one type of action in debt requiring trial by jury." *Tull v. United States*, 481 U.S. 412, 418-19 (1987). English common law had "treat[ed] the civil penalty suit as a particular type of an action in debt, requiring a jury trial," and "[a]fter the adoption of the Seventh Amendment, federal courts followed this English common law . . . ." *Id.* at 418. There was likewise a right to a jury trial in New Hampshire in actions to recover penalties when the constitution was adopted in 1784. As this Court observed in *State v. Jackson*, "Justices of the peace"—a class of adjudicators that did *not* conduct jury trials—"did not have authority in 1784 to fine offenders to the extent of twenty dollars." 69 N.H. 511, 520 (1899). The Bureau of Securities Regulation did not exist in 1784, but if it had existed, it would not have had the authority to do what justices of the peace did not have the authority to do.

In colonial times, "it was enacted that every justice of the peace in the respective Town where he dwells, shall have power . . . to hear and determine any Civil action where the debt or damages *exceed not forty shillings* . . . .'" *Id.* at 515 (emphasis added) (quotation marks

omitted). "This jurisdiction in civil cases . . . was continued down to the time of the adoption of the constitution and for some time afterwards . . . ." *Id.*; *see also id.* at 519 ("By the act of February 16, 1791, justices of the peace were given jurisdiction of the offenses of stealing goods and receiving stolen goods, the value of which did not exceed 40 shillings . . . ."). "According to the rule of the constitution, 40 shillings equaled 6 ounces of silver,--a quantity sufficient to make seven and three fourths United States silver dollars." *Id.*

The constitutional right to a jury trial extends to both criminal and civil actions. This Court has made clear that the New Hampshire Constitution "certainly deemed it as necessary to secure a person from being deprived of his property without the judgment of his peers in a criminal action *as it was in a civil action*." *Id.* at 522 (emphasis added); *see also Morrill*, 123 N.H. at 713 (same). In *Morrill*, the Court held that while persons charged with a first offense of driving while intoxicated were not entitled to a jury trial, "any fine imposed upon them cannot exceed the sum of $500" (then the constitutional threshold). 123 N.H. at 709. This principle was applied in a civil action in *Town of Henniker v. Homo*, 136 N.H. 88 (1992), where the Court reaffirmed the rule that the imposition of what the Court described as "civil fines" in excess of the constitutional threshold (today $1,500) triggers the right to a jury trial. *See id.* at 89.

This Court has concluded, based on its "review of the landmark cases outlining the right to a jury trial in this State," that "the framers of our constitution did not intend that individual criminal defendants be denied a jury trial in cases where fines may be levied which are greater than the amount constitutionally entitling civil litigants to a jury determination[.]" *State v. Morrill*, 123 N.H. at 712. It is hard to see why the Court would have looked in *Morrill* to the constitutional threshold entitling civil litigants to a jury trial if the rule it was announcing for criminal cases did not also apply on the civil side. Just as it is unconstitutional to impose a civil

fine in excess of $1,500 against a defendant in a civil action for violating a local ordinance without providing the opportunity for a jury trial, it is unconstitutional to impose penalties exceeding $1,500 in a civil action for violating the Securities Act without providing the opportunity for a jury trial.

The right to a jury trial is "not a protection of the government, but a protection of the subject against the government . . . ." *Wooster v. Plymouth*, 62 N.H. 193, 201 (1882). In other words, the right to a jury trial is "a security, not for the sovereignty, the independence, or the public property of the state, but for private life, private liberty, and private property against all power, public and private." *Id.* It is inconceivable that the framers of the New Hampshire Constitution would have understood the State's action to recover in excess of $6 million from a resident of New Hampshire as anything other than an exercise of sovereign power that entitles the defendant to a jury trial. Nor is there any reason to think that the framers believed they were reserving to the legislature the power to erase the jury trial right they had created simply by enacting an alternative mechanism for the State to impose penalties in a non-judicial setting. *See Gilman* 159 N.H. at 31 (2009) ("Part I, Article 20 was a recognition of an existing right, guaranteeing it as it then stood and was practiced, *guarding it against repeal, infringement, or undue trammel by legislative action* . . . .") (quotation marks omitted). That may be what the State wishes to do at this juncture, but it was not "the customary practice" in 1784. *Id.* If the State wishes to recover penalties in excess of $1,500 against Ridlon, it must do so in a forum that preserves his constitutional rights.

The State devotes much of its brief to the argument that the constitutional right to a jury trial "has no application in special, statutory, or summary proceedings unknown to the common law" (Bureau Br. at 5). According to the State, "when the Legislature creates statutory rights

that did not exist at common law," as it did with the Securities Act, "no right to a jury trial attaches to that proceeding." (Bureau Br. at 5-6.) But the cases the State cites do not support its position. As the trial court pointed out, while this Court has found in certain circumstances that "there is no right to jury trial in cases in which a plaintiff's cause of action did not exist at common law," the Court "has taken a different approach where the State seeks to obtain a penalty" against the party asserting the jury trial right. (Bureau Br. at 52.)

The State describes *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363 (2009), as having held that no right to a jury trial existed for claims made under the Consumer Protection Act, because the Consumer Protection Act "'creates new statutory rights which did not exist in New Hampshire common law.'" (Bureau Br. at 6 (quoting *Hair Excitement*, 158 N.H. at 368).) But there is a fundamental difference between this case and *Hair Excitement*. The plaintiff in *Hair Excitement* was seeking to recover from another private party under a statute that created new statutory rights; the Court held that the plaintiff (which was not the State of New Hampshire[2]) was not entitled to a jury trial, because it was asserting "new statutory rights which did not exist in New Hampshire common law in 1784 when this state adopted its constitution." *Id.* at 368. It makes good sense that a *plaintiff* who sues to enforce new statutory rights the legislature has created may be limited to the mechanisms the statute provides for asserting those new rights. *See Hair Excitement*, 158 N.H. at 368 ("[O]ur constitution does not confer the right to a jury trial *for a claim under* RSA chapter 358-A.") (emphasis added). There was of course no right to a jury trial of claims asserting rights under the Consumer Protection Act when the Constitution was adopted in 1784, because the Consumer Protection Act did not exist in 1784.

[2] Counsel have not been able to locate a decision of this Court that addresses whether a defendant has the right to a jury trial when the State of New Hampshire is the plaintiff in a Consumer Protection Act case and seeks penalties greater than the constitutional threshold.

Ridlon's situation is different. He is not asserting rights under a statute, but defending himself against millions of dollars in penalties the State seeks to extract (based on a purported violation of a statute). The State (and its subdivisions) has always had the power to impose penalties against individuals for violating the law, and when the penalties have exceeded the constitutional threshold, actions to recover them have always triggered the right to a jury trial. *See Henniker*, 136 N.H. at 89; *Morrill*, 123 N.H. at 709; *Jackson*, 69 N.H. at 522; *East Kingston v. Towle*, 48 N.H. 57, 64-65 (1868). If the legislature could take away the constitutional right to a jury trial simply by setting up a "special statutory proceeding" for imposing penalties without one, it could eliminate the constitutional right at will. That is not how constitutional rights work.

The same goes for *Hallahan v. Riley*, 94 N.H. 338, 340 (1947)), which the State describes as having held that "a party had no right to a jury trial in an unemployment-compensation dispute," because an unemployment-compensation dispute, like a Consumer Protection Act claim, is a "special statutory proceeding." (Bureau Br. at 8.) But the actual holding of *Hallahan* was that plaintiffs seeking statutory unemployment compensation benefits—a new right created by the legislature that did not exist under the common law—were not entitled to a jury trial *when they asserted that new statutory right*. 94 N.H. at 340. Again, that makes sense: the legislature can create new rights—such as the right to unemployment compensation benefits—and condition their exercise by a plaintiff on a waiver of their constitutional right to a jury trial. What does not make sense is to read *Hallahan* (as the State does) to eliminate the right to a jury trial where a citizen seeks to defend himself against an effort by the state to impose a penalty that would deprive him of millions of dollars. To read *Hallahan* as eliminating the right to a jury trial wherever the legislature creates a new type of proceeding that does not allow for juries would give the legislature a license to do away with the constitutional right to a jury trial simply by

enacting "comprehensive statutes" (Bureau Br. at 6) that encompass claims that would have given a citizen the right to a jury trial at common law, but providing in the statute a jury-free proceeding.

The correct reading of *Hair Excitement* and *Hallahan* is that when the legislature creates a new statutory right, a plaintiff who asserts that new statutory right is not entitled to a jury trial if the legislature creates a special type of proceeding for asserting it. But a defendant in an action by the State to impose penalties under the statute retains their constitutional jury-trial right (provided the monetary threshold under Part I, Article 20 has been met). Unless the right created by Part I, Article 20 is to be subordinated to the preferences of the legislature, *Hair Excitement* and *Hallahan* must be read to permit the legislature to legislate away the right to a jury trial only when it creates, and a plaintiff asserts, new statutory rights that did not previously exist. If the State were correct that the legislature had the power to create new procedures for asserting existing rights—such as the right to defend oneself against the government when it seeks to impose monetary penalties that exceed the constitutional threshold—and in so doing eliminate an established right to a jury trial, the *Hair Excitement/Hallahan* exception would swallow the Part I, Article 20 rule.

The State resists this conclusion by characterizing the trial court's decision as having held that "the State must be treated differently when it seeks penalties." (Bureau Br. at 8.) That simply reflects the fact that the State is no ordinary civil litigant, but a sovereign authority, backed by essentially unlimited resources, with the power to impose crushing punitive sanctions on citizens that fall into its disfavor. As explained above (and further below), when the State seeks to exercise that power in a civil action, it triggers the defendant's jury trial right. *See*

Henniker, 136 N.H. at 89; *Morrill*, 123 N.H. at 709; *Jackson*, 69 N.H. at 522; *Towle*, 48 N.H. at 64-65.

It is important in this context to underscore just how far the procedure the State has offered Ridlon diverges from a hearing before a jury of his peers. The Bureau of Securities Regulation has about a dozen employees, fewer than half of whom are attorneys, and it appointed one of its attorneys, Kevin Moquin, to decide its claims against Ridlon. As a Bureau employee, Moquin ultimately reports to the Secretary of State (the petitioner in this case), and his salary is set and his performance evaluated by the Secretary or personnel who report to the Secretary. Moreover, Moquin was personally involved in the enactment of the statutory scheme that Ridlon contends is unconstitutional. A hearing officer who works for the Bureau of Securities Regulation has an obvious conflict of interest in hearing a case being prosecuted by the Bureau, because by siding with the Bureau he would be doing what any reasonable person would assume their employer wanted them to do. To say this is not to question anyone's integrity, but to acknowledge the inescapable conflict of interest and fundamental unfairness the State's preferred method of adjudication presents.

If the Securities Act provided for a *de novo* appeal of Hearing Officer Moquin's decision to the superior court, where a jury trial would be available, there would be no constitutional problem (at least with respect to the right to a jury trial.) *See Opinion of the Justices*, 113 N.H. 205, 214 (1973) ("The jury trial need not be had in the first instance if a reasonably unfettered right of appeal is allowed to a court where the constitutional right of trial by jury can be enjoyed."). Until 2009, the Securities Act preserved a citizen's constitutional right to a jury trial by providing for a *de novo* appeal to the superior court—but then the right of appeal to the superior court was repealed. *See* N.H. Session Laws Ch. 128:3 (2009) (repealing RSA 421-B:26,

VII). It was the 2009 repeal of the right to appeal to the superior court that created the constitutional problem Ridlon now confronts.[3]

The State complains that the trial court failed to consider other trial court decisions in a series of environmental cases, that (in the State's telling) "used the analysis set forth in cases like *Hair Excitement* to deny requests for a jury trial in civil statutory-enforcement actions . . . ." (Bureau Br. at 9.) But the environmental statutes at issue in these cases are not comparable to the Securities Act. And even if they were, their rationale is not persuasive, particularly given the nature of relief the State seeks here. One of the decisions the State cites contains no analysis beyond a reference to the "reasons stated on the record." *See* App. at 175. The other three found no jury trial right because the claims were equitable in nature (seeking injunctive relief to protect wetlands) and any monetary relief sought was ancillary to the equitable relief. *See id.* at 185 ("[R]emedies for violations of . . . environmental laws are essentially equitable, with accompanying civil penalties playing a supporting role in prohibiting the objectionable practice."). In contrast, fines and penalties are the crux of the relief the State seeks against Ridlon. S*ee id.* at 117-18. The Bureau of Securities Regulation is of course free to take actions like issuing and revoking licenses without a jury, but imposing millions of dollars in penalties without making a jury trial available is something it cannot constitutionally do.

c. Ridlon has a right to a jury trial because the State's action is for fraud.

In the alternative, Ridlon has a constitutional right to a jury trial because the State's action against him amounts to an action for common law fraud. The right to a jury trial extends to "cases for which the jury trial right existed when the constitution was adopted in 1784,"

[3] The State could have avoided this issue by proceeding against Ridlon in superior court (as the statute permits) rather than in an administrative proceeding before its own hearing office. *See* RSA 421-B:6-603. If the State had elected to proceed in superior court, as the legislature presumably envisioned it would in cases where the defendant has the right to a jury trial, there would be no constitutional problem.

Morrill, 123 N.H. at 712, and fraud is an action at law for which a right to a jury trial existed in 1784. *See Dion v. Cheshire Mills*, 92 N.H. 414, 415-16 (1943) ("If a plaintiff has been deprived of money or chattels by a contract fraudulently procured, he may rescind the contract and recover *in an action at law* his money or his chattels; or he may bring an action of deceit at common law and recover money damages.") (emphasis added); *HSBC Bank USA, Nat. Ass'n, Inc. v. MacMillan*, 160 N.H. 375, 377 (2010) ("In 1784, equity matters, *as contrasted with actions at law*, were tried to the bench, not to a jury.) (emphasis added). The trial court found that "[w]hile the remedy the BSR requests is cast in equitable terms, . . . its claim is in fact one of fraud." (Bureau Br. 54.) The State does not dispute that a jury trial right exists in actions for common law fraud.

The State alleges that Ridlon "employed a scheme to defraud many of his clients by misleading them into purchasing optional and unnecessary financial planning services by misrepresenting that the fees charged were required and by failing to disclose the true nature of those fees." (App. 116.) That is a description of common law fraud. Because the State's claim is one for fraud, and because it seeks to recover in excess of $1,500 in penalties, the trial court correctly ruled that Ridlon is entitled to a jury trial. *See Morrill*, 123 N.H. at 712 (right to a jury trial extends to "cases for which the jury trial right existed when the constitution was adopted in 1784."). It is true that the legislature has enacted a statute—the Securities Act—that codifies common law fraud in the securities context. But the legislature does not have the power to deprive Ridlon of his constitutional right to a jury trial simply by enacting a fraud statute that permits the State to punish a specific category of fraud in a jury-free proceeding. If it did, constitutional rights would be subordinated to the whim of the legislature.

The State objects to the trial court's determination that its claim against Ridlon is in essence one for common law fraud that triggers his right to a jury trial right on the ground that the requirements for proving common law fraud are not identical to the requirements for proving a violation of RSA 421-B. Instead, the State points out, a violation of RSA 421-B is easier to prove, because "[u]nlike common-law fraud or deceit, a person can violate the [Securities Act] without a purposeful mental state" (Bureau Br. at 30), and proving a violation of the Securities Act does not require evidence of actual reliance on the alleged misrepresentation. *Id.* at 31. The State is therefore correct that the Securities Act "encompasses a broader scope of conduct than common-law fraud." *Id.* But if the legislature could eliminate the right to a jury trial for fraud actions simply by creating a statutory claim that overlaps with the common law fraud claim, but is *easier* to prove, it could pass a law providing that henceforth an action for fraud does not require proof of scienter, or proof by clear and convincing evidence, and the common law right to a jury trial in defending against fraud claims would be gone, as there would be no right to a jury trial on this new and more powerful statutory claim. The legislature cannot eliminate the right to a jury trial for defendants accused of fraud simply by making fraud easier to prove. Yet that is the logical conclusion of the State's reasoning.

The State's reliance on *Hair Excitement* is once again misplaced. *See* Bureau Br. at 30. It is one thing to say (as the Court did in *Hair Excitement*) that a plaintiff is not entitled to a jury trial when asserting "new statutory rights which did not exist in New Hampshire common law in 1784 . . . ." 158 N.H. at 368. It is something altogether different to claim, as the State does here, that the State may eliminate the right of a defendant accused of fraud to a jury trial simply by creating a statutory form of fraud that is easier to prove. *Hair Excitement* is not, then, a case

where the Court "rejected substantially the same argument" as Ridlon advances here. (Bureau Br. at 30.)

Nor does the State get anywhere with the argument that the Securities Act "contains numerous violations with unique elements that in no way resemble common-law fraud . . . ." (Bureau Br. at 31.) It is true that one *could* violate the Securities Act by engaging in conduct that does not amount to common law fraud, but that is not this case. Not all enforcement actions under the Securities Act will trigger a defendant's right to a jury trial—but this one does.

The State suggests that even if its petition against Ridlon "touches upon fraud," it cannot be tried to a jury because "[c]omplex accounting cases" should be "considered equitable and not tried to a jury." (Bureau Br. at 33.) By this logic, of course, *any* "complex" case could be deemed equitable, and thus not eligible for a jury trial. That is not how litigation works; instead, parties hire expert witnesses if they deem it necessary to help explain complex cases to juries. The State's suggestion that juries should simply be eliminated in "complex" cases is not a serious argument.

The State cites *Davis v. Dyer*, 62 N.H. 231 (1882) in support of its claim that this matter is too complex for a jury, but *Davis* was an action "upon an account, . . . the items of which are so numerous and complicated that the case cannot be intelligently understood by a jury . . . ." (*id.* at 231). The same cannot be said of the State's petition against Ridlon, which alleges simply that he charged fees that he should not have charged. The State fails to explain what it is about this case that makes it so hard to understand, beyond a conclusory reference to "the complexity of these financial matters" that is supported only by the fact that the attachment to the Petition "contains over fifty pages of accounting spreadsheets." (Bureau Br. at 33.) But these allegedly confusing "accounting spreadsheets" simply display "the financial planning fees paid by . . .

Ridlon's clients from 2007 to 2016." (App. at 113.) Ridlon is confident that jurors of average intelligence can understand them (with expert assistance as needed). In any event, even if it would be more efficient to try the case to an employee who works for the State rather than to a jury, "[a] constitutional right, inconvenient in the highest degree, is as sacred as the most convenient one." *Copp*, 55 N.H. at 206.

Because Ridlon would have had a right to a jury trial on fraud claims against him in 1784, he has a right to a jury trial on fraud claims against him today. If the State wishes to proceed against Ridlon on allegations of fraud for more than $1,500, it must afford him the opportunity to make his case to a jury trial by filing its action in superior court.

Ridlon's position is further supported by *East Kingston v. Towle*, 48 N.H. 57 (1868). Here as in *Towle*, the government sued a defendant on behalf of third parties, stepping into their shoes to assert a cause of action that mirrors a common law cause of action that the alleged victims of the defendant's conduct could have filed. Here as in *Towle*, the defendant in that common law action would have had the right to a jury trial. The Court found a jury trial right in *Towle* for that reason, and it should do so here too.

The statute in *Towle* provided that a person who sustained "damage by reason of the maiming, worrying, or killing of his sheep, lambs, or other domestic animals" by a dog could "present to the selectmen of the town . . . proof of the nature and extent" of the loss. The town would then issue an order requiring that the owner of the injured domestic animals be compensated for their loss. *Id.* at 58. At that point the town could recover the amount it had paid to the owner of the injured animals in an "action of assumpsit" against the owner of the dog. *Id.* The Court held that the constitutional right to a jury trial applied to the town's action to recover against the dog owner, because "[t]he owner of the animals is the real party injured" (*id.*

at 63), and "[t]he result, so far as the owner of the dog is concerned, is the same as if the suit were brought directly by the owner of the animals to recover damages for the injury he has sustained." *Id.* at 64. Because the dog owner would have had a right to a jury trial if the owner of the injured animals had sued him directly, he had the same right in defending against the action the town filed on their behalf. *Id.* at 63-64.

The logic of *Towle* applies here. The State has accused Ridlon of defrauding his clients. *See* App. 116 (alleging that Ridlon "employed a scheme to defraud many of his clients by misleading them into purchasing optional and unnecessary financial planning services by misrepresenting that the fees charged were required and by failing to disclose the true nature of those fees."). Under the State's theory of the case, Ridlon's alleged victims would have had common law fraud claims against him, and as just explained, he would have had a constitutional right to a jury trial. Because those common law fraud claims have been codified in the Securities Act, the State sued Ridlon under the Act. For the same reason that the Court found a right to a jury trial in *Towle* on codified common law claims when the government stepped into the shoes of the victims of the defendant dog-owner, it should find a jury trial right where the State has stepped into the shoes of the alleged victims of the defendant securities-broker.

It made no difference in *Towle* that the amount the dog owner was required to pay could also have been characterized as a penalty:

> There are cases where a penal action may be maintained to recover the amount, or double the amount, which an individual has suffered by a violation of his private rights; but in such cases the party subject to the penalty is as much interested in the assessment of the damages, and has the same right to a hearing on the question of damages, and to the same mode of trial, as where he is sued in a civil action sounding in damages; and the amount of the damages is determined by the jury who try the general question of the defendant's liability for the penalty. It would not relieve the act from constitutional objection if the suit by the town were held to be in the nature of a penal action.

Id. at 64-65 (citations omitted). In other words, *Towle* found a constitutional right to a jury trial regardless of whether the action was viewed as one seeking damages on behalf of an individual, or as one to impose penalties.

The State tries to distinguish *Towle* on the ground that in *Towle* "[t]he statute, not the common law, created the type of action." (Bureau Br. at 29.) But *Towle* found a constitutional right to a jury trial, not a statutory right. *See* 48 N.H. at 65 (finding a "violation of the provision in the bill of rights, which secures the right of trial by jury" . . . .) As for the State's suggestion that *Towle* is inapposite "because it involved 'property'" (Bureau Br. at 29), this case too involves property (money), and in any event, the principle undergirding *Towle* is not limited to cases that involve property. In sum, the trial court was right to say of *Towle* that "[t]he analogy to the instant case . . . is apparent." (Bureau Br. at 53-54.) Because the State's action against Ridlon is an action for fraud, Ridlon is entitled to a jury trial.

II. The State Fails to Distinguish *Town of Henniker v. Homo.*

Because *Town of Henniker v. Homo* supports Ridlon's argument and the trial court's decision, the State strives mightily to distinguish or dismiss it, as well as *State v. Morrill*, a precedent on which *Henniker* relies. The trial court's decision emerges from this section of the State's brief unscathed.

In *Morrill*, the Court held that while persons charged with a first offense of driving while intoxicated were not entitled to a jury trial, "any fine imposed upon them cannot exceed the sum of $500" (then the constitutional threshold). 123 N.H. at 709. The Court explained: "Our review of the landmark cases outlining the right to a jury trial in this State convinces us that the framers of our constitution did not intend that individual criminal defendants be denied a jury trial in cases where fines may be levied which are greater than the amount constitutionally entitling civil litigants to a jury determination . . . ." *Id.* at 712.

The State devotes two pages of its brief to pointing out that *Morrill* was a criminal case, not a civil case. *See* Bureau Br. at 11-13. It struggles, however, to deal with the fact that the general principle established in *Morrill* applies with equal logical force in the civil context, and in fact was applied to a civil fine in *Town of Henniker v. Homo*, 136 N.H. 88 (1992). The defendants in *Henniker* had been fined $6,060 by the superior court for maintaining an unlicensed junkyard in violation of state and local law. They appealed on the ground that they had been "unfairly deprived of their right to a jury trial because the amount of the fine exceeded $500." *Id.* at 88.

The *Henniker* court started with the holding in *Morrill* that "'a fine exceeding [$500] can [not] be levied against individuals charged with offenses under our penal code, without granting them a jury trial on appeal.'" 136 N.H. at 89 (quoting *Morrill*, 123 N.H. at 713) (alterations in original). It then applied that rule to civil penalties for maintaining an unlicensed junkyard, holding that "the same principle" it had announced in *Morrill* "applies to violations of local ordinances." *Id.* In other words, if a person is to be fined more than $1,500 for violating a local ordinance, they are entitled to a jury trial—even if the offense is civil, not criminal.

The State takes the position that *Henniker* is somehow irrelevant here because (it claims) the defendants were not civil litigants engaged in civil litigation, but instead were "'criminal defendants' charged with 'offenses under our penal code.'" (Bureau Br. at 16 (quotation marks omitted).) That is simply wrong. *Henniker* twice refers to the penalties that were imposed on the defendants as "civil fines." *See* 136 N.H. at 89 ("[T]he plaintiff, Town of Henniker, filed a petition for an injunction and the imposition of civil fines against the defendants."); *id.* ("[W]e will assume that the defendants would have been entitled to a jury trial had the civil fines arisen

from the *same* violation.") (italics in original). The Court also refers to the case as a "civil action...." *Id.* at 90.

Steadfastly ignoring the fact that while *Morrill* was a criminal case, *Henniker* was not, the State writes:

> the trial court . . . acted as if both *Henniker* and *Morrill* had found that any civil penalty over the constitutional limit in Part I, Article 20, in any type of case—civil, administrative, or otherwise—triggered the right to a jury trial. . . . [N]one of the defendants in the cases cited qualified as "civil litigants" and none were embroiled in "civil litigation." The opinions limited their own rulings to instances involving "criminal defendants" charged with "offenses under our penal code." *Morrill*, 123 N.H. at 713; *Henniker*, 136 N.H. at 89.

(Bureau Br. at 16.) As just explained, this Court correctly described the litigation in *Henniker* as "a civil action" in which the plaintiff had "filed a petition for an injunction and the imposition of civil fines against the defendants." 136 N.H. at 89-90. Indeed, one of the trial court decisions the State cites refers to *Henniker* as a case where the "town brings a *civil action* for fines. . . ." (App. at 180 (emphasis added).)

The State nevertheless declares that "[t]he opinions limited their own rulings to instances involving 'criminal defendants' charged with 'offenses under our penal code.' *Morrill*, 123 N.H. at 713; *Henniker*, 136 N.H. at 89." The problem with this reference to "the opinions" is that both of the quotes come from *Morrill*, which no one disputes is a criminal case. The "offenses under our penal code" language also turns up in *Henniker* (136 N.H. at 89)—but prefaced by the words, "In *Morrill*, we held...." *Morrill* may have limited its ruling to criminal defendants charged with offenses under our penal code, but *Henniker* did not.

The State's contention that "the constitutional right to a jury trial enforced in [*Henniker*] resides in Part I, Article 15," not in Part I, Article 20 (Bureau Br. at 17) is hard to square with the fact that the *Henniker* opinion makes no reference to Article 15, but does cite Article 20.

Henniker, 136 N.H. at 89. The State may be right that Article 20 was applied by "analogy" in *Morrill* (Bureau Br. at 17), but it was applied directly in *Henniker*, which was a civil action. The State claims that because *Morrill* "interpret[s] Part I, Article 15," *Henniker* must do so too "by extension" (Bureau Br. at 18)—but the more straightforward and correct reading is that *Henniker* interprets and applies Article 20.

That said, even if *Henniker* had not been a civil action, Ridlon would still be entitled to a jury trial, because "[i]t is beyond dispute that the right to a jury trial is a fundamental one under our State Constitution *in both the civil and the criminal contexts*." *Morrill*, 123 N.H. at 711 (emphasis added); *see also Copp*, 55 N.H. at 195 ("In those civil cases in which trial by jury is a constitutional right, that right is as sacred as it is in criminal cases."). Where the State acts to deprive one of its citizens of millions of dollars, the constitutional right to a jury trial applies; the formal characterization of the tool it selects to accomplish the deprivation as a "civil" or a "criminal" action does not change the underlying constitutional principle.

The State declares that it "found no cases" to "support the proposition that its drafters created Part I, Article 20 with the intent that it apply differently to the State...." (Bureau Br. at 19.) The State appears to have missed *Wooster v. Plymouth*, 62 N.H. 193 (1882), where the Court made clear that the right to a jury trial is "not a protection of the government, but a protection of the subject against the government . . . ." *Id.* at 201. Indeed,

> jury trial is no more a constitutional right granted to the state than is the right of religious belief and worship, *habeas corpus*, freedom of the press, or immunity from general warrants, compulsory self-crimination, trial after acquittal, retrospective legislation, unauthorized taxation, and excessive bail. It is a security, not for the sovereignty, the independence, or the public property of the state, but for private life, private liberty, and private property against all power, public and private.

Id. at 201. In other words, Part I, Article 20 *does* "apply differently to the State"—*Wooster* makes clear that it is precisely to guard against abuses of power by the State against its citizens that the right to a jury trial exists. *Whelton v. State*, cited by the State for the proposition that "where the right of trial by jury does exist the right is bilateral," is not to the contrary, and is irrelevant to the issue in this appeal. 106 N.H. 362, 363 (1965).

The State suggests that Ridlon is not entitled to the protection against abuses of State power that the jury trial right affords because its enforcement actions "work to the benefit of specific citizens rather than the bulwarking of government authority . . . ." (Bureau Br. at 20). But it is often the case that the government acts on behalf of specific citizens; that does not change the fact that in doing so it is exercising its sovereign power.

The State objects to being "hamstrung" in its work by Ridlon's assertion of his constitutional right to a jury trial. *Id.* at 20. It would of course be easier for the State to adjudicate its claims and to impose penalties of $6 million against Ridlon in an administrative hearing conducted by one of its own employees. That, however, is a weak argument for depriving Ridlon of a constitutional right. One could just as well say that prosecutors should not be "hamstrung" in their efforts to keep criminals off the streets—but that is not an argument for depriving suspects or defendants of their constitutional rights. The Court should reject the State's invitation to elevate perceived bureaucratic efficiency over constitutional rights. "If trial by jury be regarded as in many cases expensive, inconvenient, and behind the intelligence of the age, that may show that the constitution requires amendment, but it cannot be amended by an act of the legislature or a decision of the court." *Copp*, 55 N.H. at 209.

The State then complains that the trial court is somehow "[i]mporting the criminal guarantee" of a jury trial into civil litigation. (Bureau Br. at 22.) But the trial court did no such

thing; it applied the right to a jury trial found in Part 1, Article 20 ("[I]n all *suits between two or more persons* except those in which another practice is and has been customary and except those in which the value in controversy does not exceed $1,500 and no title to real estate is involved, the parties have a right to a trial by jury.") (emphasis added); *see also Morrill*, 123 N.H. at 711 ("[T]he right to a jury trial is a fundamental one under our State Constitution in both the civil and the criminal contexts."). No "importing of the criminal guarantee" is required to achieve this result.

Nor does *Perkins v. Scott* advance the State's cause, as the very passage the State quotes demonstrates that the holding in *Perkins* was simply that the jury trial right does not apply to actions in equity. *See* Bureau Br. at 21; 57 N.H. 55, 81 (1876) ("[T]he investigation and adjustment of accounts had come to be [a] matter of well understood and admitted equity jurisdiction; and...until...1838, it had not been intimated in this state, or anywhere else, that there was a right of trial by jury in equity proceedings."). This proceeding, as explained in the next section, is not an equity proceeding, and *Perkins* therefore does not control.

Contrary to the impression the State tries to create, the trial court's ruling does not require the "universal application" of the jury trial right in all civil actions. (Bureau Br. at 22.) It does, however, require that a jury trial be offered where the State seeks to impose millions of dollars in penalties against an individual. *See Henniker*, 136 N.H. at 89; *Morrill*, 123 N.H. at 709; *Jackson*, 69 N.H. at 522; *Towle*, 48 N.H. at 64-65. That is a rule this Court should embrace.

III. The Relief the State Seeks against Ridlon Under the Securities Act is Not Equitable Relief.

The State's next argument is that Ridlon is not entitled to a jury trial because of "the equitable nature of the USA overall and the specific relief sought . . . ." (Bureau Br. at 23.) First of all, the State seeks to impose over $3 million in *fines* against Ridlon. Fines are obviously a

form of penalty or punishment; they cannot plausibly be described as equitable relief. This is the primary relief the State seeks.

Nor are the other remedies the State demands equitable remedies. While the State describes the remedies available to it under the Act as "equitable remedies" (*id.*), the Act makes clear in two places that the remedies of restitution, rescission, and disgorgement the State seeks are penalties in the context of the Act. First, the statute expressly grants the secretary of state the power to impose "penalties," including "[r]escission, restitution, or disgorgement":

> Notwithstanding any other provision of law, the secretary of state shall have exclusive authority and jurisdiction: . . .
>
> (5) To investigate and impose *penalties* for violations of the securities laws, including:
>
> (A) Revoking, suspending, or denying licenses and registrations.
>
> (B) Fines.
>
> (C) Rescission, restitution, or disgorgement.

RSA 421-B:6-601(b) (emphasis added). The statute thus unmistakably defines the remedies in question as penalties.

Lest there be any doubt, the statute then refers to rescission, restitution, and disgorgement as penalties a second time:

> After notice and hearing, the secretary of state may enter an order of rescission, restitution, or disgorgement directed to a person who has violated this chapter, or a rule or order under this chapter. Rescission, restitution, or disgorgement shall be in addition to any *other penalty* provided for under this chapter.

RSA 421-B:6-604(e) (emphasis added). The phrase "other penalty" demonstrates the legislature's understanding that restitution, rescission, and disgorgement under the Securities Act are penalties; if they were not, the statute would simply say "[r]escission, restitution, or disgorgement shall be in addition to *any penalty* provided for under this chapter," not "any *other*

penalty . . . ." To conclude that rescission, restitution, and disgorgement are not penalties would require a court to read the word "other" out of the statute, something this Court has repeatedly instructed courts not to do. *See Appeal of Derry Educ. Ass'n, NEA-New Hampshire*, 138 N.H. 69, 71 (1993) ("Basic statutory construction rules require that all of the words of a statute must be given effect and that the legislature is presumed not to have used superfluous or redundant words.") (quotation marks omitted); *see also Chase Home for Children v. New Hampshire Div. for Children, Youth & Families*, 162 N.H. 720, 733 (2011) ("We interpret statutes to give meaning to every word and phrase."). Because the legislature unmistakably identified the remedies of restitution, rescission, and disgorgement as penalties, once expressly and then again by implication, their threatened imposition triggers Ridlon's right to a jury trial.

Further support for the characterization of rescission, restitution, and disgorgement as penalties is found in the United States Supreme Court's decision in *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017). *Kokesh* addressed a statute of limitations question not at issue here, but in the course of its analysis the Court held that "SEC disgorgement constitutes a penalty." *Id.* at 1642. The Court explained that "[w]hen the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties." *Id.* at 1643 (quotation marks omitted) (alteration in original). The Supreme Court observed that "SEC disgorgement is imposed for punitive purposes," in that it is intended "to deprive the defendants of their profits in order to . . . protect the investing public by providing an effective deterrent to future violations." *Id.* (quotation marks omitted) (omission in original). Indeed, "courts have consistently held that [t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains." *Id.* (quotation marks omitted). That is certainly

true of the disgorgement remedy the State seeks against Ridlon: it is not designed to compensate alleged victims of his conduct for their losses, but is expressly intended to protect the public interest and deprive Ridlon of his "ill-gotten gains." *See* App. 118 (Petition ¶ II(6)) ("Ridlon should be ordered to . . . disgorge up to $1,513,711.09 in ill-gotten gains."). Like the disgorgement order in *Kokesh*, the order the State seeks against Ridlon would be punitive in nature.

Trying to push back against the inconvenient (for the State) fact that the statute describes the remedies of rescission, restitution, and disgorgement as penalties, the State clouds the situation by suggesting that the trial court held that the word "penalties" in RSA 421-B:6-601(b) somehow—mysteriously, the State implies—"transforms everything near it . . . into nothing more than legal remedies." (Bureau Br. at 3-4.) In fact, as explained above, the statute squarely and expressly defines rescission, restitution, and disgorgement as "penalties."

The State cites *Patch v. Arsenault*, 139 N.H. 313 (1995) for the proposition that "[r]escission and restitution is an equitable remedy" (Bureau Br. at 24), but the statute at issue in *Patch* did not define rescission and restitution as "penalties," as the Securities Act does.[4] Nor was there a statute defining restitution as a penalty in *In re Haller*, 150 N.H. 427 (2003) (cited by the State). The State claims that it is simply seeking "traditionally equitable remedies" (Bureau Br. at 24), but in fact it is seeking particular statutory remedies that the legislature has designated as "penalties."

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[4] The plaintiffs in *Patch* "sought rescission and restitution . . . under the civil remedy provision of the Condominium Act, RSA 356–B:65 . . . ." 139 N.H. at 315. There is a general reference in subsection IX of the Condominium Act to "any other penalty imposed by this chapter," but the Condominium Act does not *define* rescission and restitution as penalties, as the Securities Act expressly does. *See* RSA 421-B:6-601(b) ("Notwithstanding any other provision of law, the secretary of state shall have exclusive authority and jurisdiction: . . .(5) To investigate and impose *penalties* for violations of the securities laws, *including*: . . . (C) *Rescission, restitution, or disgorgement*.") (emphasis added).

The State also argues that even if the remedies are penalties, "the word 'penalty' has no fundamental aversion to equity." (Bureau Br. at 26.) By this the State appears to mean that something may be a "penalty," but still constitute equitable relief. That is indeed a theoretical possibility, but the remedies the State seeks in this case—in particular, its request for "an administrative fine in the amount of up to $3,235,000" under RSA 421-B:6-604(d), which expressly provides for a "civil penalty"—do not implicate any grey area that may exist.

The State cites *In re Guardianship of Dorson*, 156 N.H. 382 (2007) in support of its contention that "some remedies may qualify as penalties although distinctly equitable in nature." (Bureau Br. at 27.) *Dorson* at one point refers to a surcharge a court had imposed on a trustee for misappropriating funds held by an estate as an "equitable penalty." 156 N.H. at 386. But that surcharge was not a "penalty" as the word is ordinarily used; rather, it was "designed to put the estate in the same position it would have been [in] had [the trustee] not misappropriated the funds." *Id.* at 387. Here, the State does not seek a $3.2 million fine to put Ridlon's alleged victims in the same position they would have been in if not for his alleged improper actions, but instead to punish him. Because it was not designed to restore anyone to their prior position, the $3.2 million fine is not an "equitable penalty" within the meaning of *Dorson*.

IV. The Cases the State Cites from Other Jurisdictions Do Not Change the Law of New Hampshire or Support the State's Position on the Facts of this Case.

Given the lack of support in New Hampshire law for its position, it is understandable that the State spends a great deal of time in its brief talking about decisions from other states that it believes somehow support its position that Ridlon does not have the right to a jury trial under the New Hampshire Constitution. These cases are neither on point nor persuasive.

The State describes *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888 (Minn. Ct. App. 1992) as having "denied a defendant the right to a jury trial in the consumer-

protection context where the trial court 'imposed civil penalties of $70,000.'" (Bureau Br. at 25.) But the "penalties" in *Alpine Air* were separate from the restitution claim on which the Court found no jury trial right. *See id.* at 891 ("The court ordered certain injunctive relief including full restitution to consumers, imposed civil penalties of $70,000 and awarded the state $104,165.20 in attorney fees and costs."). And in the section of the opinion on the right to a jury, the court ignored the $70,000 penalty, but talked about just two forms of relief: "injunctive relief" and "restitution." *Id.* at 895. So *Alpine Air* stands for the proposition that restitution may be a form of equitable relief in some circumstances, but there is no indication that the argument Ridlon advances here—that a statutory restitution claim that is expressly defined as a penalty is a legal claim that carries a jury trial right—was made in *Alpine Air.*

Even less helpful to the State is *State v. Mandatory Poster Agency, Inc.*, 199 Wash. App. 506 (2017). Of this case the State writes: "Despite a request for civil penalties, the court ruled that a consumer case brought by the State is an equitable action, and there is no jury trial." (Bureau Br. at 25 (quotation marks omitted).) But there no indication in *Mandatory Poster Agency* that the issue of a right to a jury trial had even been raised; the sole reference to the issue is the court's statement, at the end of a description of the state's consumer protection act, that "[a] CPA case brought by the State is an equitable action, and there is no jury trial." 199 Wash. App. at 518. In support of this proposition the court cited *State ex rel. Dept. of Ecology v. Anderson*, 94 Wash.2d 727 (1980)—but the issue in that case was whether there was a *statutory* right to a jury trial. *Id.* at 730 ("The respondent concedes that he has no constitutional right to a trial by jury . . . .").

The Colorado case the State cites is inapplicable on its face, because—as the court declared at the beginning of its discussion of the jury trial issue—"In Colorado, the right to a

civil jury trial is not constitutional. It exists by virtue of statutes and court rules." *People v. Shifrin*, 342 P.3d 506, 512 (Colo. App. 2014). Also failing to advance the State's cause is *State ex rel. Douglas v. Schroeder*, 222 Neb. 473 (1986), as the court there found that the civil penalties imposed under the Nebraska Consumer Protection Act were "ancillary to the act's principal equitable thrust" (*id.* at 477)—whereas here, as explained above, the Securities Act expressly defines each of the remedies the State seeks against Ridlon as "penalties."

Nor is *State v. Irving Oil Corp.*, 183 Vt. 386 (2008), instructive here, as that case turned on Vermont's "own state-law approach to civil penalties," which diverges from the U.S. Supreme Court's approach in *Tull v. United States*, 481 U.S. 412 (1987). *See* 183 Vt. at 398-99 (trial court "relied principally on *Tull*," rather than adhering to Vermont's "own state-law approach to civil penalties . . . ."). The Supreme Court observed in *Tull* that "[a]ctions by the Government to recover civil penalties under statutory provisions . . . historically have been viewed as one type of action in debt requiring trial by jury." 481 U.S. at 418-19. The Court found a jury trial right where the government sought penalties under the Clean Water Act, because "[t]his action is clearly analogous to the 18th-century action in debt," where a jury trial right existed in the English courts. *Id.* at 420. With all due respect to the Vermont court's opinion that "we do not find *Tull* persuasive," 183 Vt. at 399, *Tull* is the more persuasive authority on the jury trial right.

CONCLUSION

The constitutional right to a jury trial is not one the State is permitted to disregard simply because it would be more convenient for the Bureau of Securities Regulation to adjudicate a case—here, a claim by the State for over $6 million against a New Hampshire resident—before its own employee in an administrative forum. "Constitutional construction . . . is not to be dealt with like unimportant forms of procedure . . . . On questions concerning the foundations of society, where a system of government has lasted more than a century, the ancient landmarks cannot be removed by judicial decisions." *Daley v. Kennett*, 75 N.H. 536, 540 (1910) (quotation marks omitted). That being so, "[t]he relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived." *Id.* (quotation marks omitted). Ridlon has not waived his right to a jury, and he is therefore entitled to one in this case. The trial court acted within its discretion in determining that Ridlon was likely to succeed on the merits of his claim that he has a constitutional right to a jury trial, and its order granting Ridlon's motion should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 3rd day of July 2018, I mailed two copies of this Brief, via first class mail, postage prepaid, to all counsel of record.

Brian M. Quirk