SC221530

IN THE SUPREME COURT OF CALIFORNIA

DEBORAH SHAW,

Plaintiff and Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

Respondent;

THC—ORANGE COUNTY, INC., KINDRED HEALTHCARE OPERATING, INC., KINDRED HOSPITALS WEST, LLC, KINDRED HEALTHCARE, INC., and JEFFREY SOPKO,

Real Parties in Interest.

COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 3
CASE NO. B254958

ANSWER BRIEF ON THE MERITS

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ANSWER BRIEF ON THE MERITS

INTRODUCTION AND SUMMARY OF ARGUMENT

This is an action for compensatory damages by an employee whose employment was wrongfully terminated and who suffered retaliation pursuant to Health and Safety Code section 1278.5 and for damages for wrongful employment termination in violation of public policy. Shaw does not seek reinstatement.

The Court of Appeal properly granted extraordinary relief because the Superior Court denied Deborah Shaw a jury trial on her damages arising under section 1278.5, creating a high probability that judicial resources would be wasted by a second trial.

Although a jury trial had been demanded, respondent, Superior Court, concluded that a cause of action under section 1278.5 is equitable, denied a jury trial for that cause of action, and stayed trial to allow the filing of the petition on the certified issue, which it believes "is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation."

The Court of Appeal, Second Appellate District, Division Three, granted a writ of mandate on the bases of (1) *Byram v. Superior Court* (1977) 74 Cal.App.3d 648 (writ appropriate to correct inadvertent failure to post jury fees) and (2) the fact that, because plaintiff does not seek equitable relief, section 1278.5(g) allows common-law legal remedies, which are to be decided by a jury.

This Court granted a Petition for Review and requested briefing on the propriety of review by extraordinary writ and the right to jury trial under Health and Safety Code section 1278.5.

This Answer Brief on the Merits explains that (1) the extraordinary relief is proper because the rule in *Nessbit v. Superior Court* (1931) 214 Cal. 1, is no longer good law and has long been implicitly overruled, and (2) plaintiff is entitled to a jury trial on the issue of

common-law compensatory damages under section 1278.5.

I. The Issues

This case presents the following issues:

(1) Did the Court of Appeal err by reviewing plaintiff's right to a jury by writ of mandate, rather than appeal? *See Nessbit,* 214 Cal. 1.

(2) Is there a right to jury trial on a retaliation cause of action under Health and Safety Code section 1278.5?

II. Answers to the Issues

A. The Court of Appeal Did Not Err by Reviewing Plaintiff's Right to a Jury by Extraordinary Writ, Rather than Appeal.

The clear modern view is that refusal to allow a jury trial in a proper proceeding is an act in excess of jurisdiction and extraordinary relief will lie to prevent a trial by the court. The 1931 holding in *Nessbit,* 214 Cal. 1, and the 1892 holding in *Donohue v. Superior Court* (1892) 93 Cal. 252, refusing to allow mandamus to compel a jury trial, while never expressly overruled, have long been inconsistent with the Supreme Court's views on the meaning and scope of the doctrine of acts in excess of jurisdiction. The holding in *Nessbit* generally has been ignored by numerous Courts of Appeal, in particular in *Knight v. Superior Court* (1950) 95 Cal.App.2d 838, 839-840; *Turlock Golf etc. Club v. Superior Court* (1966) 240 Cal.App.2d

693, 699; *Byram, supra,* 74 Cal.App.3d at 654; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 522-523; and *Winston v. Superior Court* (1987) 196 Cal.App.4th 600, 603. It has also been questioned as of doubtful validity by the Montana Supreme Court in *In re Banschbach* (1958) 133 Mont. 312. *Nessbit* was implicitly overruled by the California Supreme Court decisions in *Crouchman v. Superior Court* (1988) 45 Cal.3d 1167 (considering merits of writ petition concerning right to jury trial from small claims appeal), and *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944 (reviewing merits of writ of prohibition concerning jury waivers).

Nessbit has not been good authority for decades.

Accordingly, this Court should expressly overrule *Nessbit.*

B. There Is a Right to Jury Trial on a Retaliation Cause of Action Under Health and Safety Code § 1278.5.

Relief was properly granted because section 1278.5 was amended in 2007 to enlarge the available remedies by *adding* ***"any remedy*** deemed warranted by the court pursuant to this chapter ***or any other applicable provision of statutory or common law."*** The plain language of the amendment adds common-law damages to the remedies. Shaw does not seek any equitable relief. The "gist" of plaintiff's action is purely legal, not equitable. The Court of Appeal properly granted extraordinary relief. Entitlement to a jury trial for legal damages under section 1278.5 fulfills the legislative purposes behind the

whistle-blower enactment and provides substantive meaning to this Court's decision in *Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, which real parties in interest ignore. A jury trial is available because, "If the action is *not* one in equity, it follows, of course, that it is an action at law." *Philpott v. Superior Court* (1934) 1 Cal.2d 512, 517. Shaw has a right to a jury trial.

STATEMENT OF THE CASE

I. Shaw Was Employed by Real Parties in Interest.

Shaw was employed by real parties in interest's health care facility. Plaintiff complained to defendants about conditions that affected the quality of care and services at defendants' health care facility. In particular, plaintiff complained that defendants were employing as health care professionals individuals who were not licensed or certified. Plaintiff also complained to defendants that they employed health care professionals who had not properly completed their competencies. (Opn., pp. 2-3.)

II. Shaw Was Fired in Retaliation.

In retaliation for her complaints, defendants discriminated against plaintiff by issuing her a warning, taking adverse employment actions against her, and then terminating her employment. (Opn., p. 3.)

Shaw alleges that, as a result of defendants' conduct, she has suf-

fered and continues to suffer past and future monetary losses, losses of benefits, ***emotional damages, and physical injury.*** (Opn., p. 3.)

III. Shaw Does Not Seek Equitable Relief.

On October 17, 2012, plaintiff filed her Amended Complaint against real parties, alleging two causes of action: damages pursuant to Health and Safety Code section 1278.5 and damages for wrongful employment termination in violation of public policy. (FAC, pp. 1-6.)

Shaw did not seek reinstatement.

Instead, the prayer for the section 1278.5 cause of action demanded, *inter alia,* "compensatory and emotional distress damages according to proof." ***The prayer does not request any equitable relief.***

IV. Shaw Demands Jury Trial.

Plaintiff demanded a jury trial.

V. The Trial Court Denied a Jury Trial.

On March 6, 2014, petitioner and real parties in interest simultaneously filed briefs on the availability of a jury trial under section 1278.5. On March 10, 2014, the issue of a jury trial was argued. Respondent Court then concluded that a cause of action under section 1278.5 is equitable, denied a jury trial for that cause of action, and stayed trial until April 1, 2014, to allow the writ petition. (Opn., pp. 3-5.)

VI. The Second District Properly Considered the Petition.

The clear modern view is that refusal to allow a jury trial in a proper proceeding is an act in excess of jurisdiction and that extraordinary relief will lie to prevent a trial by the court. The 1931 holding in *Nessbit,* 214 Cal. 1, refusing to allow mandamus to compel a jury trial, while never expressly overruled, has long been inconsistent with the Supreme Court's views on the meaning and scope of the doctrine of acts in excess of jurisdiction.

Specifically, *Nessbit* has not been good authority for decades.

This Court should expressly overrule *Nessbit.*

VII. There Is a Right to Jury Trial Under § 1278.5.

Plaintiff's Complaint seeks compensatory damages, including damages for emotional distress and physical injuries. Such damages are traditionally recoverable in employment actions. These damages were tried to a jury at common law.

The Second District properly granted relief because section 1278.5 was amended in 2007 to enlarge the available remedies by adding ***"any remedy*** deemed warranted by the court pursuant to this chapter ***or any other applicable provision of statutory or common law."*** The "gist" of plaintiff's action is purely legal, not equitable. She does not seek reinstatement. The amendment clearly adds common-law damages to the available remedies. "If the action is *not* one

in equity, it follows, of course, that it is an action at law." *Philpott,* 1 Cal.2d at 517. It therefore follows that a jury trial is available under subdivision (g).

Entitlement to a jury trial for legal damages under section 1278.5 fulfills the legislative purposes behind the whistle-blower enactment and provides substantive meaning to this Court's decision in *Fahlen,* 58 Cal.4th 655.

As is explained below, the district court was correct.

ARGUMENT

I. THE COURT OF APPEAL DID NOT ERR BY REVIEWING PLAINTIFF'S RIGHT TO A JURY BY EXTRAORDINARY WRIT, RATHER THAN APPEAL.

The clear modern view of all courts is that refusal to allow a jury trial in a proper proceeding is an act in excess of jurisdiction and that extraordinary relief [1] will lie to prevent a trial by the court. Contrary to real parties in interest's Opening Brief, the reasoning of *Byram,* 74

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[1] This Court has long recognized that "If the facts justify such [extraordinary] relief it is immaterial that defendant has prayed for the wrong remedy . . ." *Owens v. Superior Court* (1959) 52 Cal.2d 822, 827. Although the petition was framed in terms of mandate, extraordinary relief was warranted, whether as a denominated mandate or as prohibition. *Honore v. Superior Court* (1969) 70 Cal.2d 162, 164; *Anderson v. Superior Court* (1989) 213 Cal.App.3d 1321, 1328; *Silva v. Superior Court* (1993) 14 Cal.App.4th 562, 573.

Cal.App.3d 648, is not "cursory and flawed." (OB, p. 4.) Moreover, this Court itself has implicitly overruled *Nessbit.*[2] This is an opportunity to do so expressly, applying consistent precedent that has existed over the past several decades.

A. The Modern View of Express Jurisdiction

The holdings in *Nessbit* and *Donohue,* 93 Cal. 252, refusing to allow mandamus to compel a jury trial, while never expressly overruled, have long been wholly inconsistent with the Supreme Court's views on the meaning and scope of the doctrine of acts in excess of jurisdiction.

In *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, this Court explained:

> [I]n its ordinary usage the phrase "lack of jurisdiction" is not limited to these fundamental situations. For the purpose of determining the right to review by certiorari, restraint by prohibition, or

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[2] Additionally, *Nessbit* and the facts present are inapposite. *Nessbit* held that a writ of mandate should not be granted *under the facts of the case. Nessbit* was a shareholders' lawsuit. There was a dispute as to whether the underlying facts of the case permitted resolution of the claim individually, which would give a jury trial, or whether the action had to be brought as a representative suit, which would give a bench trial. *Nessbit,* 214 Cal. 1. The case here has no disputed facts. Instead, the only dispute is a question of law resting solely on whether remedies under section 1278.5 are legal or equitable.

> dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no "jurisdiction" (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.

Id. at 288.

Denial of the right to a jury trial was an act in excess of the trial Court's jurisdiction because:

> Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari.

Id. at 291.

By 1941, any underpinning of *Nessbit* had been removed.

This is simply a case in which "Some earlier decisions containing expressions inconsistent with this analysis can no longer be relied upon." 2 Witkin, *California Procedure* (3rd ed.), Jurisdiction, § 220, p. 608.

Nessbit has not been good law since at least 1941.

B. The *Nessbit* Holding Has Been Properly and Consistently Ignored.

The holding in *Nessbit* generally has been ignored by numerous Courts of Appeal. Several of the cases are gathered by the Fifth District in *Turlock, supra,* 240 Cal.App.2d at 699 ("Prohibition is a proper remedy, in circumstances such as these, to test a litigant's right to a jury trial"); *see also Mallarino v. Superior Court* (1953) 115 Cal.App.2d 781; *Budde v. Superior Court* (1950) 97 Cal.App.2d 615; *Knight, supra,* 95 Cal.App.2d 838. While the illegal denial of a jury would constitute cause to reverse any judgment against petitioner (*Cowlin v. Pringle* (1941) 46 Cal.App.2d 472; *Union Oil Co. of California v. Hane* (1938) 27 Cal.App.2d 106, 110; *City of Redondo Beach v. Kumnick* (1963) 216 Cal.App.2d 830, 839), it would be inefficient and, indeed, unconscionable to refuse to ascertain petitioner's right to a jury trial at this stage of the case.

Knight, 95 Cal.App.2d at 839-840, illustrates how the courts of appeal have analyzed the issue. In *Knight,* a petition to compel a jury trial was opposed on jurisdictional grounds. The Second District Court of Appeals found no such obstacle:

> We are impressed, however, that later cases have relaxed this rigorous rule as well as definition of jurisdiction, and have committed the question of issuance of the writ here sought to the sound discretion of the court to which application therefore is made, in the light of whether by reason of the nature of the proceeding and the facts

> and circumstances shown, an appeal would be a speedy and adequate remedy.

Specifically concerning the right to a jury trial, the *Knight* court stated: "It is our view that any court which denies the right of trial by jury in a case where any party has the constitutional right to it *exceeds its jurisdiction.*"

In 1977, the Second District flatly stated:

> A writ of mandate is a proper remedy to secure the right to a jury trial. After a trial to the court it may be difficult for the petitioner to establish that he was prejudiced by the denial of a jury trial. In addition, even if he could establish such prejudice as to warrant reversal of the judgment, such a procedure would be inefficient and time consuming.

Byram, supra, 74 Cal.App.3d at 654 (citation omitted).

The view that extraordinary relief is available to challenge the denial of a jury trial was so well established by 1979 that the Third District observed, "Such a review would normally appear to be the better practice in the interest of saving the time needlessly expended in a court trial if an erroneous jury trial denial has occurred." *Selby Constructors, supra,* 91 Cal.App.3d at 522-523.

The First District was equally blunt: "When a trial court has abused its discretion in denying relief from a waiver of jury trial, a writ of mandate prior to trial is the proper remedy." *Winston, supra,* 196 Cal.App.4th at 603.

The Court of Appeal has been equally clear that appealing the denial of a jury trial *after* trial is not the ideal practice. *Villano v. Waterman Convalescent Hosp., Inc.* (2010) 181 Cal.App.4th 1189, 1205 (although denial of right to jury trial is reviewable on appeal, "it is the better practice to seek review of such a ruling by writ, saving the time and expense of a court trial if a jury trial is improperly denied"); *see also Van de Kamp v. Bank of America* (1988) 2014 Cal.App.3d 819, 862 ("While the better practice is to seek review of such a ruling by writ, saving the time and expense of a court trial if a jury trial improperly was denied, the ruling may be reviewed on appeal from the judgment"). Society has a manifest interest in avoiding needless retrials: they cause hardship to the litigants, delay the administration of justice, and result in social and economic waste. *Hasson v. Ford Motor Company* (1982) 32 Cal.3d 388, 418.

While age alone does not vitiate valid precedent, *Nessbit* and *Donohue* have been properly ignored because, "In assessing the precedents, [courts] . . . are not rigidly bound by the exacting rules that happen to be found on 'the legal scrap heap of [history].'" *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 829.

The views in *Abelleira, Nessbit,* and *Donohue* have been properly ignored by the Courts of Appeal. Requiring the former to control is contrary to judicial economy and would violate the public policy that retrials are to be avoided whenever possible.

C. The Reasoning in *Nessbit* Has Been Questioned by Other Supreme Courts.

What sparse note has been made of *Nessbit* has not been favorable. In 1958, the Montana Supreme Court did discuss *Nessbit,* questioning the jurisdictional rule. In *In re Banschbach, supra,* 133 Mont. 312, the initial issue was whether the denial of a jury trial were within the trial court's jurisdiction, precluding review by extraordinary writ. The Montana Supreme Court noted that *Nessbit* did support that view, "but even in California there are cases to the contrary." *Mallarino v. Superior Court,* 115 Cal.App.2d 781, 252 P.2d 993; *Knight v. Superior Court,* 95 Cal.App.2d 838, 214 P.2d 21, and see *Ex parte Becknell,* 119 Cal. 496, 51 P. 692." *Id.* at 314.

The Montana Supreme Court then noted numerous cases from other jurisdictions that hold that, where a party is entitled to a jury trial as a matter of right and it is being withheld from him, extraordinary relief is allowed, concluding:

> The better-reasoned cases take the view that where either the Constitution or statute gives the right to a trial by jury and the jury is demanded and not waived, the jury constitutes an essential part of the tribunal authorized to determine the facts, and that *the court in attempting to determine the facts without a jury exceeds its jurisdiction.*

Id. at 314-315.

The outdated rule in *Nessbit* should not be revived.

D. *Nessbit* Was Implicitly Overruled by This Court.

Real parties in interest's Opening Brief asserts that "this Court has not overruled" *Nessbit.* (OB, p. 13.)

This is not the case.

Nessbit was implicitly overruled by this Court with the decisions in *Crouchman, supra,* 45 Cal.3d 1167 (considering merits of a petition for writ of mandamus concerning right to jury trial from small claims appeal), and *Grafton, supra,* 36 Cal.4th 944 (reviewing merits of writ of prohibition concerning jury waivers).

In *Crouchman,* this Court considered the merits of a writ of mandamus petition concerning the right to a jury trial from a small claims appeal. Although the Court determined that there was no right to a jury trial under the circumstances, ***the California Supreme Court did not dismiss the petition on jurisdictional grounds, as* Nessbit *compels.*** Deciding the issue on the merits implicitly overruled *Nessbit.*

Likewise, in *Grafton,* this Court reviewed the merits of a writ of prohibition concerning jury waivers. The First District had previously stated in the decertified opinion:

> A ruling denying a party's claim to trial by jury is reviewable by writ or on appeal from the judgment.[3] As the improper denial of the right to

[3] Of course, prohibition has been consistently held to be appropriate for review of an improper denial or granting of a jury trial. *Turlock, supra,* 240 Cal.App.2d at 695 (prohibition proper to test

> jury trial is reversible error per se writ review is appropriate to save the time and resources that otherwise would be expended in a needless and unwarranted court trial.

Id. (citations omitted). Again, the court did not dismiss the petition on jurisdictional grounds, as *Nessbit* compels. Deciding the issue on the merits implicitly overruled *Nessbit.*

E. *Nessbit* Should Be Expressly Overruled.

Nessbit has long been properly ignored. It is not good law.

The Court of Appeal, mindful of precedent, sidestepped the issue by concluding that "the opinions can be harmonized." *Nessbit* acknowledged that a mandate is appropriate when there is no plain, speedy, or adequate remedy in the ordinary course of law. *Nessbit, supra,* 214 Cal. at 9. The Supreme Court further noted that it had:

> [F]requently exercised this power in cases in which matters of great public interest are involved and in cases in which great and irreparable injury would result if the case was relegated to the ordinary course provided by law. It concluded, however, that the case before it was not such a case. It did not conclude that no case in which a jury trial was denied would ever be appropriate for writ review.

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litigant's right to a jury trial); *Pacific Tel. & Tel. Co. v. Superior Court* (1968) 265 Cal.App.2d 370, 375; *Gann v. Williams Bros. Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704.

(Opn., pp. 6-7 (citation omitted).)

> We conclude that the instant case is appropriate for writ review. We are concerned not with a routine application of established law to the facts of a particular case, but with a novel question of statutory interpretation, which is a matter of interest to all plaintiffs who may bring suit under Health and Safety Code section 1278.5. Moreover, the trial court certified that immediate resolution of the question "may materially advance the conclusion of the litigation." We therefore overrule Kindred's demurrer to the writ petition, and proceed to resolve the petition on its merits.

(Opn., pp. 6-7.)

There is no reason to require "harmonization" with *Nessbit,* nor is there any concern with violating the doctrine of *stare decisis.* As is recognized by this Court's opinions in *Crouchman,* 45 Cal.3d 1167, and *Grafton,* 36 Cal.4th 944, and authority outlined by the numerous Courts of Appeal, *Nessbit* has not been good authority for years and is no longer followed.

Nessbit should now be expressly overruled.

F. There Is a Right to Jury Trial on a Retaliation Cause of Action Under Health and Safety Code § 1278.5.

Generally speaking, in an employment case, "[T]he jury is entrusted with vast discretion in determining the amount of damages." *Hope v. California Youth Authority* (2005) 134 Cal.App.4th 577, 595

(citation omitted).

Section 1278.5 provides for civil actions to redress injured whistle-blowers. *Fahlen, supra,* 58 Cal.4th at 676.[4] The amended version of section 1278.5(g) broadly adds ***"any remedy*** deemed warranted by the court pursuant to this chapter ***or any other applicable provision of statutory or common law."*** Such common-law damages are triable before a jury.

G. § 1278.5's Pre-Amendment Equitable Remedies

Section 1278.5(a) declares that it is "the public policy of the State of California to encourage patients, nurses, members of the medical staff, and other health care workers to notify government entities of suspected unsafe patient care and conditions."

Prior to its amendment in 2007, section 1278.5 provided employees with limited equitable remedies:

> (g) An employee who has been discriminated against in employment pursuant to this section shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.

No one disputes that the remedies under the initial version of section 1278.5 provided equitable relief.

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[4] This Court did not consider subdivision (g) and jury trials.

H. § 1278.5 Was Amended to Include Common-Law Damages, as is Evident from a Clear, Plain Reading of the Statute.

In 2007, section 1278.5 was amended to add additional common-law remedies to subsection (g):

> ***[O]r to any remedy*** deemed warranted by the court pursuant to this chapter ***or any other applicable provision of statutory or common law.***

Although decided on the narrow ground of exhaustion, *Fahlen,* 58 Cal.4th 655, recognized that whistle-blowers face formidable personal and financial burdens, for which peer review alone would be an inadequate remedy.

Reinstatement is, in most cases, wholly unrealistic, as would be equitable relief in general. A health care professional once subject to retaliation is not likely to be gracefully accepted back into the facility. The whistle-blower would suffer damages—emotional trauma and losses—beyond equitable relief. Only through pursuit of common-law damages can whistle-blowers be given the incentive to fulfill the legislative purpose of protecting patients from unsafe conditions.

A plain reading of the amendment is that common-law damages are available. Contrary to real parties in interest's assertions, no one contends that "the court" can impose "any remed[y] whatsoever," such as meal period premium pay or "waiting time" penalties. (OB, pp. 22-23.) However, the Legislature did not engage in an idle act. The amendment should be fairly read to mean that the common-law

remedies for damages typically available in employees' actions are available under subdivision (g).

The amendment must be read with the assumption that the Legislature was aware of the "common law"—existing judicial decisions concerning employees' labor actions. *Bishop v. San Jose* (1969) 1 Cal.3d 56; *Enyeart v. Board of Supervisors* (1967) 66 Cal.2d 728. The developed body of labor law generally allows common-law damages in employees' actions. *See, e.g., Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 21 (under FEHA, claimants are entitled to all damages generally available to civil litigants, namely, economic and non-economic damages and punitive damages); *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 425 (future lost wages and damages "caused by his 'feeling of betrayal' by his employer, stress and his emotional reaction to ACSC's actions" allowed); *Hope, supra,* 134 Cal.App.4th at 595 (in an employment case, "[T]he jury is entrusted with vast discretion in determining the amount of damages" (citation omitted)).

This was the "common law" to which the amendment referred, implicating new legal remedies.

Had the Legislature intended to add only vague equitable remedies while precluding legal remedies, it would have stated so unequivocally. Adding ***"or any other applicable provision of statutory or common law"*** would be "absurd" if the phrase is not given its plain and expansive meaning of including damages.

I. Broad Remedies Are Supported by the Legislative History.

Although the plain text of subdivision (g) should suffice, the Court of Appeal analyzed the legislative history supporting its conclusion that broad new remedies were added:

> It is apparent, from this legislative history, that the language at issue was added to Health and Safety Code section 1278.5 to greatly broaden the scope of the remedies available to wronged employees, health care workers, and medical staff members. It can be inferred that the legislature intended to give courts the discretion to fashion remedies for all of the methods of retaliation raised by the California Medical Association and discussed in the Senate Judiciary Committee's bill analysis. While some of the methods of retaliation might be resolved with equitable remedies (e.g., if the health facility buys the medical building with the physician's office and refuses to renew the physician's lease, an order directing the health facility to renew the lease may be an appropriate remedy), other methods of retaliation involve undermining the physician's practice by underwriting competitors, and can only be remedied by an award of monetary damages. Indeed, it is impossible to look at the wide range of methods of retaliation discussed in the Senate Judiciary Committee's bill analysis and conclude that the legislature *did not* intend to grant courts the discretion to award remedies at law.

(Opn., pp. 13-14.)

In short, the statutory language and its legislative history greatly

expanded the remedies available under Health and Safety Code section 1278.5(g), from equitable remedies to remedies available in law and equity. As such, the statute provides for a jury trial on legal issues. (Opn., p. 14.)

This Court's discussion of the legislative history in *Fahlen, supra,* 58 Cal.4th at 679-682, is equally apt. A proper remedy—civil damages—is necessary to fulfill the purposes of the whistle-blower statute.

Extending the holding in *Fahlen* to include the right to a jury trial is consistent with the rule that a statute will be construed with a view to promoting, rather than defeating, its general purpose and the policy behind it. *Department of Motor Vehicles v. Industrial Acc. Com.* (1939) 14 Cal.2d 189, 195. The objects sought to be achieved and the evils sought to be prevented are of prime consideration in its interpretation. *Freedland v. Greco* (1955) 45 Cal.2d 462, 467-468. Removing the hurdle of exhausting an administrative remedy would be meaningless by itself. The right to a jury trial gives meaning to the purpose and meaning of subdivision (g).

The Court of Appeal properly granted extraordinary relief. Entitlement to a jury trial for legal damages under section 1278.5 fulfills the legislative purposes behind the whistle-blower enactment and provides substantive meaning to this Court's decision in *Fahlen,* 58 Cal.4th 655.

J. New Remedies Are Not Restricted to Equity.

Real parties in interest's assertion that the additional remedies are limited by the canons of *ejudem generis, expressio unius est exclusio alterius,* and *noscitur a sociis* (OB, p. 20) is mistaken. No limitation or negative inference arises where an amendment adds *new* remedies to a statute. Absent textual guidance to the contrary, expressly adding new remedies is the antithesis of these canons.

They are exactly what they are: *new* remedies.

Unlike *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1390-1391 (OB, pp. 20-22), section 1278.5 does not use the language "including but not limited to" in adding remedies. There is no textual basis on which to conclude that the new remedies are restricted to the original equitable remedies.

K. There Is a Constitutional Right to a Jury Trial.

No one disagrees that the right to a jury trial is a basic and fundamental part of our system of jurisprudence. It should be zealously guarded by the courts. California Constitution, Article I, § 16; *Van de Kamp, supra,* 204 Cal.App.3d at 862; *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1122; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647-648; *Lofty v. Southern Pacific Co.* (1954) 129 Cal.App.2d 459, 462.

"In case of doubt therefore, the issue should be resolved in favor

of preserving a litigant's right to trial by jury." *DiPirro v. Bondo Corp.* (2007) 153 Cal.App.4th 150, 176 (citations omitted); *Byram, supra,* 74 Cal.App.3d at 654. As the U.S. Supreme Court has noted, "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry* (1990) 494 U.S. 558, 564-565.

Likewise, no one disagrees that the right to a jury trial in California generally is a matter of right in a civil action at law.

> [T]he right as it existed at common law in 1850, when the Constitution was first adopted, "and what that right is, is a purely historical question, a fact which is to be ascertained like any other social, political or legal fact." As a general proposition, "[T]he jury trial is a matter of right in a civil action at law, but not in equity."

Martin v. County of Los Angeles (1996) 51 Cal.App.4th 688, 694 (citations omitted).

A denial of the right to trial by jury is an act in excess of the court's jurisdiction and is reversible error *per se. Heim v. Houston* (1976) 60 Cal.App.3d 770, 774.

L. Statutory Causes of Action May Be Tried Before a Jury.

In the federal context:

> The right to a jury trial includes more than the common-law forms of actions recognized in 1791; the phrase "Suits at common law" refers to "suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered."

Chauffeurs, Teamsters and Helpers, 494 U.S. at 564.

In California, it is said:

> The right to trial by jury is not inapplicable to causes of action based on statutes, but applies to actions enforcing statutory rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." Where, as here, we are deciding if a jury trial is required and have been presented with a statutory scheme that was not known at common law in 1850, as with any other action we look to the essence of the rights conferred and the relief sought—"'the "gist of the action." *If the "gist" is legal, as opposed to equitable, we have recognized a right to jury trial.'"*

We thus first "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and then "examine the remedy sought and determine whether it is legal or equitable in nature." *DiPirro,* 153 Cal.App.4th at 180 (citations omitted).

Generally, "characterization of the relief sought is '[m]ore important' than finding a precisely analogous common-law cause of ac-

tion in determining whether the Seventh Amendment guarantees a jury trial." *Tull v. United States* (1987) 481 U.S. 412, 417.

New torts that did not exist as such in 1850, *i.e.,* negligent infliction of emotional distress, have been judicially created in the modern era. Such torts, arising as they do from the common-law "action on the case," are tried to a jury because the "gist" of the action is legal, not equitable. Because jury trials are favored, the guiding principle is that, "If the action is *not* one in equity, it follows, of course, that it is an action at law." *Philpott, supra,* 1 Cal.2d at 517.

In this case, Shaw is not seeking equitable relief. As the Court of Appeal explained, "The gist of Shaw's action is the statutory violation; although it could also be viewed as an action for breach of a term implied (by statute) into her employment contract, or an action for damages for personal injury." At common law, each of these classes of actions was triable by jury. Wegner, *et al., Cal. Practice Guide: Civil Trials and Evidence* (The Rutter Group, 2013), § 2:89, p. 2-18 (damages for violation of a statute); *id.* at § 2:84, p. 2-17 (damages for breach of contract); 7 Witkin, *California Procedure* (5th ed. 2008), Trial, § 84, p. 111 (damages for personal injuries). Thus, the historical analysis, including consideration of the remedy sought, confirms that Shaw's Health and Safety Code section 1278.5 cause of action is an action at law, rather than equity, for which she is entitled to a jury trial." (Opn., pp. 16-17.)

Here, the "gist" of a section 1278.5 action is damages.

By statute, the right to a trial by jury exists in actions "for money claimed as due upon contract, or as damages for breach of contract, or for injuries." Code of Civil Procedure § 592. "Generally speaking, this means that legal as distinguished from equitable actions are triable by jury." 7 Witkin, *California Procedure* (4th ed. 1997), Trial, § 94, p. 113.

M. Employees Had Action at Law in 1850.

Examining the historic roots of an action for damages—even an employee's action for damages—supports a right to a jury trial.

The English common law recognized no separate legal action in tort. Instead, the British legal system afforded litigants two central avenues of redress: trespass for direct injuries and actions "on the case" for indirect injuries. These were legal remedies.

An action for damages is traditionally a legal action. *See* James, Fleming, Jr., "Right to a Jury Trial in Civil Actions," 72 Yale L.J. (1962-1963) 655, 668-669 ("Many suits today are, from summons to judgment, no more than the counterpart of a former action at law. The typical personal injury suit furnishes a ready example").

Shaw seeks traditional tort damages, not equitable relief. Under the English system as described by Sir John Salmond, a tort is a civil wrong for which the remedy is a common-law action for unliquidated damages *and that is* ***not*** *exclusively the breach of a contract or the breach of a trust or other merely equitable obligation.* Salmond, J.

W., and Heuston, R.S.V., *The Law of Torts* (1957).

While "the employment claim for retaliation" appears to have been unknown to the common law in 1850 (OB, p. 16), real parties in interest's claim that there was "no common law 'whistle-blower' claim in 1850" (OB, p. 17) overstates the point and is misleading.

The facts here are wholly different from those in *Interactive Multimedia Artists v. Superior Court* (1998) 62 Cal.App.4th 1546, 1550 (OB, p. 25), because the "breach of a fiduciary duty is an equitable action under both Delaware law and California law and hence . . . IMA is not entitled to a jury trial."

Shaw's action simply is *not* equitable.

Even in 1850, an employee injured by a wrongful breach of an express or implied employment contract had an action for damages.

> Wrongful discharge and, to a more limited extent, employment discrimination were actionable at common law. Wrongful discharge of an employee would support a recovery of "lost wages" in an action tried to a jury at common law, even when no assumpsit or quantum meruit would lie because no work was done subsequent to final payment and discharge.

Minton, Michael B., *Right to Jury Trial Under the Age Discrimination Employment Act* (1978) 43 Missouri Law Review 250, 256.

A jury trial is required on the basis of historical analysis.

N. Jury Trial Is Required Because Shaw Waived Her Equitable Claims.

Real parties in interest's claim that "Shaw's statutory action is a claim for restitution, a claim in equity" (OB, p. 18), is simply wrong on several levels.

First, Shaw does not seek reinstatement or any equitable remedy. She seeks money damages. Shaw eschewed any equitable relief, clearly limiting her claims to legal damages. *Cf. Raedeke v. Gibraltar Sav. & Loan Ass'n* (1974) 10 Cal.3d 665, 671 (recognizing plaintiff's right to waive equitable claims and proceed on legal damages tried to a jury).

Second, Shaw's claim is for damages, not restitution.

Plaintiff's Complaint seeks compensatory damages, including damages for emotional distress and physical injuries. Damages for emotional distress and physical injuries were tried before a jury at common law. Damages for emotional distress and physical injuries are traditionally recoverable in employment actions for retaliation.

Shaw's claim sounds in tort, a traditional legal claim. Her claims are not analogous to any case that was traditionally heard in a court of equity. *See Dalis v. Buyer Advertising, Inc.* (1994) 418 Mass. 220, 223 (in wrongful employment termination action, "The plaintiff does not seek primarily equitable relief. Nor is the nature of her claim analogous to any case which was traditionally heard in a court of equity. Thus, the plaintiff has a right to a jury trial").

Third, even though there may be some connection between equitable remedies and damages, the "gist" of this action is legal and requires a jury trial. *Cf. Chauffeurs, Teamsters and Helpers, supra,* 494 U.S. at 573 ("[T]he connection between backpay under Title VII and damages under the unfair labor practice provision of the NLRA does not require us to find a parallel connection between Title VII backpay and money damages for breach of the duty of fair representation").

> The fact that trial by jury is jealously preserved as a matter of right dictates that the mere existence of a remedy in equity cannot operate to defeat a right to proceed at law. It is only where the issues to be tried are exclusively equitable in nature that a suitor is deprived of a right to a jury trial.

Ripling v. Superior Court (1952) 112 Cal.App.2d 399, 408 (incompetent's guardian sued alleged trustee/fiduciary for money had and received and prayed for accounting, declaration of constructive trust, and money judgment; defendant was entitled to jury trial because plaintiff essentially elected to sue on contract-based debt).

Neither *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 172, nor *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 328 (OB, pp. 16-17), explores the historic basis for an employee's action at common law. Neither of them is authority for "a proposition not therein considered." *Ginns v. Savage* (1964) 61 Cal.2d 520, 524.

While the original version of section 1278.5 was limited to equi-

table claims, the amended version adds new remedies.

Shaw is pursuing a claim for damages that would have been cognizable at law before 1850 and seeks relief that could have been obtained at law before 1850. Shaw has a right to a jury trial.

O. The Court Is Not Acting as a Chancellor.

Real parties in interest's assertion that subdivision (g) allows the court to act as a chancellor in equity is a forced construction that should be avoided under the rules generally favoring jury trials.

"[T]he boundaries of equity jurisdiction 'ought not to be widened by judicial decision . . . [because] the constitutional right of trial by jury would thereby become correspondingly narrowed.'" *Parkway, Inc. v. United States Fire Ins. Co.* (1943) 314 Mass. 647, 651.

At best, subdivision (g) is unclear: Is *"any other applicable provision of statutory or common law"* only one deemed warranted by the court or one that simply exist in statutes and in common law? A comma after "chapter" would have clarified this. However, the lack of a comma is not unusual and can hardly be determinative where constitutional rights are at issue. *People v. Leiva* (2013) 56 Cal.4th 498, 506-507 ("'. . . when faced with an ambiguous statute that raises serious constitutional questions, [we] should endeavor to construe the statute in a manner which avoids any doubt concerning its validity'"), *quoting Young v. Haines* (1986) 41 Cal.3d 883, 898.

The amendment to section 1278.5 is not like a Government Code

section 946.6 proceeding, such as was considered in *County of Sacramento v. Superior Court* (1974) 42 Cal.App.3d 135, 140 (OB, p. 23), in which the court noted that "Government Code section 946.6 obviously had no counterpart in 1850. Moreover, section 946.6 provides for a 'special proceeding,' rather than a common law action."

"Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context." *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052. An employee in a discrimination lawsuit is entitled to a jury determination. *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, 869 (trial court erred in granting defendant's motion to strike employee's jury demand in a discrimination lawsuit). These are not claims tried to a chancellor.

Jury trials are traditionally allowed in damages[5] cases because the jury, as the trier of fact, is in the best position to assess compensatory damages. *See, e.g., Agarwal v. Johnson* (1979) 25 Cal.3d 932, 953 ("And it is the members of the jury who, when properly

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[5] Even under ERISA, legal claims for relief may invoke the right to a jury trial. *See, e.g.,* discussion in *Sullivan v. LTV Aerospace & Defense Co.* (W.D. N.Y. 1994) 850 F.Supp. 202 (jury trial allowed in ERISA case because "[T]his Court finds that plaintiffs are asserting legal claims for relief, the resolution of which will depend upon a factfinder's determination of disputed factual questions. Therefore, under the Seventh Amendment, plaintiffs are entitled to a jury trial to resolve those questions").

instructed, are in the best position to assess the degree of the harm suffered and to fix a monetary amount as just compensation therefor"); *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 814 ("The jury's verdict on the retaliation charge is supported by substantial evidence").

The constitutionally favored reading of the amendment is that an employee may pursue statutory and common-law remedies in addition to the equitable relief previously available. The additional common-law remedies include causes of action tried to a jury.

P. § 1278.5 Is Not Restricted to Administrative Relief.

Section 1278.5 does not "mirror other California statutes providing administrative relief without a jury." (OB, p. 30.)

Petitioner's claims for compensatory damages are not pre-empted by Labor Code section 132a. *Cf. Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 347 ("Labor Code section 132a is not applicable here. Accardi does not claim her employer retaliated against her because she filed a workers' compensation claim. She claims she is the victim of sexual harassment").

The remedial scheme under section 1278.5 is distinguishable from Labor Code section 132a, which prohibits discrimination against an employee for filing or making known his intention to file an application for benefits with the Workers' Compensation Appeals Board. That section *expressly states* that there is no right to a jury

trial. Specifically, the appeals board is expressly "vested with full power, authority, and jurisdiction to try and determine finally all the matters specified in this section subject only to judicial review." Emphasizing that language and the general principle of exclusivity under the Workers' Compensation Act, the court in *Portillo v. G.T. Price Products, Inc.* (1982) 131 Cal.App.3d 285, held that the statutory scheme of remedies was exclusive. Section 1278.5 contains no comparable language and does not provide a self-contained administrative remedy.

Likewise, California Labor Code section 98.7 says that "the Labor Commissioner . . . [shall] take any action deemed necessary [to enforce] this section."

Section 1278.5 contains no such language. Rather, it mirrors statutes that allow for legal remedies. The Fair Employment and Housing Act's ("FEHA") anti-retaliation clause states:

> It is an unlawful employment practice . . . For any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part.

Government Code § 12940(h).

Additionally, the anti-retaliation provision of the Labor Code with regard to reports of illegal activity reads:

> (b) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for disclosing information, or because the employer believes that the employee disclosed or may disclose information, to a government or law enforcement agency, to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance, or for providing information to, or testifying before, any public body conducting an investigation, hearing, or inquiry, if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation, regardless of whether disclosing the information is part of the employee's job duties.
>
> (c) An employer, or any person acting on behalf of the employer, shall not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or regulation.

Labor Code § 1102.5(b)-(c).

The texts of FEHA, Labor Code section 1102.5, and Health and Safety Code section 1278.5 are functionally identical. Consequently, as is illustrated, it is well established that FEHA and Labor Code section 1102.5 are legal. *Commodore, supra,* 32 Cal.3d 21 (legal damages available in FEHA actions); *Campbell, supra,* 35 Cal.4th 311 (same for § 1102.5). There is no reason to read the statutes, including

Health and Safety Code section 1278.5, differently.

The Legislature undoubtedly would have included the language it included in Labor Code section 132(a) or Labor Code section 98.7 had it wanted the courts to find that the claims sounded in equity.

Of course, this Court noted in *Fahlen, supra,* 58 Cal.4th at 676:

> [I]n contrast with [other statutory schemes], section 1278.5 neither provides, nor acknowledges the existence of, a parallel administrative proceeding in which the complainant's claim of retaliation, as such, might be addressed and resolved. Section 1278.5's failure to mention resort to such an administrative forum as a condition to suit, where the Legislature has included such a requirement in similar statutes, is a significant indicator that the Legislature did not contemplate such a precondition in this instance.

Plaintiff is entitled to a trial by jury on her damages claims.

Q. Ambiguities Are to Be Resolved in Favor of Jury Trial.

The right to a jury trial is zealously guarded by the courts. *Jacoby v. New York* (1942) 315 U.S. 752, 753. Consequently, a trial court has the duty to resolve all doubts in favor of granting relief to allow a jury trial. *Bishop v. Anderson* (1980) 101 Cal.App.3d 821.

It is clear that the 2007 amendment aimed to conform to the court's express preference for allowing jury trials. It is also clear that the California Supreme Court has already addressed the issue of

whether Health and Safety Code section 1278.5 provides for legal remedies, confirming that it does. Specifically, the California Supreme Court held this year that "nothing we see in . . . Health and Safety Code section 1278.5 itself, expressly or implicitly impedes a legal claim." *Fahlen, supra,* 58 Cal.4th 655. Yet despite this, even assuming that real parties in interest's contentions related to the statute are true, at best, the statute is ambiguous. Under such circumstances, this Court must resolve the dispute in favor of a jury trial.

CONCLUSION

The Court of Appeal properly granted extraordinary relief. Entitlement to a jury trial for legal damages under section 1278.5 fulfills the legislative purposes behind the whistle-blower enactment and provides substantive meaning to this Court's decision in *Fahlen,* 58 Cal.4th 655.

Dated: February 10, 2015 Respectfully submitted,

SHEGERIAN & ASSOCIATES, INC.

By: 
Carney R. Shegerian

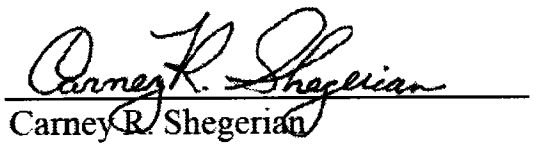
Attorneys for Plaintiff/Petitioner,
DEBORAH SHAW

BRIEF FORMAT CERTIFICATE (C.R.C. 8.204(c)(1))

Pursuant to California Rules of Court, Rule 8.204(c)(1), the undersigned certifies that, according to the computer program on which it was prepared, the word count of this Answer Brief on the Merits is 7,958, excluding tables, covers, and this certificate.

Dated: February 10, 2015 Respectfully submitted,

SHEGERIAN & ASSOCIATES, INC.

By: 
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SHAW v THC ORANGE COUNTY, INC. **CASE NO.: BC 493928/ B254958**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 225Santa Monica Boulevard, Suite 700, Santa Monica, California 90401.

On February 10, 2015, I served the foregoing document, described as **"ANSWER BRIEF ON THE MERITS"** on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
CENTRAL DISTRICT
111 North Hill Street
Los Angeles, California 90012
(One Copy)

CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT,
DIVISION TWO
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300 S. Spring Street, 2nd Floor
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☒ I placed such envelope, with postage thereon prepaid, in the United States mail at Santa Monica, California.

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☒ **(STATE)** I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

Executed on February 10, 2015, at Santa Monica, California.

Edgar Claros