Nos. 497689 and 501881

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Respondent*,

v.

GROCERY MANUFACTURERS ASSOCIATION, *Appellant*.

GROCERY MANUFACTURERS ASSOCIATION, *Appellant*,

v.

ROBERT W. FERGUSON, Attorney General of the State of Washington, in his official capacity, *Respondent*.

BRIEF OF *AMICUS CURIAE* CENTER FOR COMPETITIVE POLITICS

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INTEREST OF AMICUS CURIAE

Founded in 2005, the Center for Competitive Politics ("CCP") is a nonpartisan, nonprofit organization that works to defend the First Amendment rights of speech, assembly, and petition through litigation, research, and education. CCP has an interest in this case because it involves severe governmental sanctions likely to chill the exercise of fundamental First Amendment rights.

INTRODUCTION

The Eighth Amendment identifies, and seeks to prevent, the universal temptation toward heaping increasingly severe penalties upon unlawful conduct in the hopeless pursuit of universal compliance and complete deterrence. That tendency is not limited to obviously corrupt conduct: here, GMA simply failed to meet reporting obligations while engaging in constitutionally protected activity. Nevertheless, in what the Attorney General has called a "historic decision," the Superior Court assessed an unprecedented fine[1] that will chill lawful and constitutionally-protected activity: "speech about public issues and the qualifications of candidates for elected office," a category that "commands the highest level

[1] Washington State Attorney General, *Grocery Manufacturers Assoc. To Pay $18M, Largest Campaign Finance Penalty In US History* (Nov. 2, 2016), http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us.

of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

The fine imposed by the Superior Court is constitutionally excessive because, in failing to take First Amendment considerations into account, it "is grossly disproportional to the gravity of" GMA's offense. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). In particular, the Superior Court's standards for activity triggering trebled fines cannot meet the scrutiny necessary to justify such punitive penalties, especially given the vast range of activity for which the state demands disclosure. Based on these flawed standards, the Superior Court has imposed a massive fine—a death sentence for most groups—with tremendous potential to chill specially protected speech. That decision was in error and should be reversed.

STATEMENT OF THE CASE

On March 9, 2016, the Superior Court held that GMA failed to meet its deadline to register as a political committee. Letter Opinion at 5, *State of Wash. v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Mar. 9, 2016). It further held that GMA, although its initial contribution had been reported by its recipient, violated state law by failing to disclose individual contributors and by failing to submit reports required of properly registered political committees. *Id*.

On July 15, 2016, the Superior Court held that treble damages under RCW 42.17A.765 do not require "subjective intent to violate the law," and that violators need merely "act[] with the purpose of accomplishing an" act that is illegal. Order Confirming the Meaning of an Intentional Violation ("Intent Order") at 2, *State of Wash. v. Grocery Mfrs. Ass's*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. July 15, 2016).

On November 2, 2016, the Superior Court held that GMA intentionally violated state law and ordered a civil penalty of $6,000,000 and treble punitive damages. Findings of Fact, Conclusions of Law and Order on Trial at 23-24, *State of Wash. v. Grocery Mfrs. Ass's*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).

ISSUES ADDRESSED

Appellant has raised both First and Eighth Amendment objections to the fine imposed by the Superior Court below. App. Opp. Br. at 1-3. This brief addresses those claims, with an emphasis on the Superior Court's failure, in the context of activity at the core of the First Amendment's protection, to properly apply exacting scrutiny before imposing a $6,000,000 fine and punitive, trebled damages.

ARGUMENT

The massive, trebled fine imposed on GMA cannot survive constitutional scrutiny.[2] In particular, because of the fine's potential to chill specially protected political speech, this Court's Eighth Amendment excessive-fines analysis should incorporate the exacting scrutiny standard applicable in cases regulating political association and expression.

The gross disproportionality standard for reviewing excessive fines is "inherently imprecise." *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001). Accordingly, courts broadly examine the strength of the relationship between a fine and a defendant's actions. While the Supreme Court has generally examined certain criteria in all its cases, including "the degree of the defendant's reprehensibility or culpability, the relationship between the penalty and the harm to the victim . . . , and the sanctions imposed in other cases for comparable misconduct," *id.*, those factors are not exclusive. Courts have also looked at "legislative intent," *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014), "the defendant's ability to pay," *id*., whether a defendant is in the class of persons for whom the statute was designed, *United States v.*

[2] There does not appear to be a reasoned basis for imposing the underlying $6,000,000 fine in this case, especially as the Superior Court's constitutional analysis is lacking. *See infra* at 9. Nevertheless, this brief focuses on that court's decision to impose punitive damages.

Collado, 348 F.3d 323, 328 (2d Cir. 2003), and the maximum fine and penalty allowed by statute, *id*. *See also United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005).

The fine at issue here, because it targets constitutionally protected speech and not presumptively reprehensible activity, also requires the examination of another criterion. In the First Amendment context, burdens on protected speech must meet at least exacting scrutiny, which "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Doe v. Reed*, 561 U.S. 186, 196 (2010). And, "[t]o withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights.'" *Id*. (emphasis added). Those burdens include fines for non-compliance, especially where they are as devastating as the penalty imposed here. *Cf., Sampson v. Buescher*, 625 F.3d 1247, 1259-62 (balancing interest against all the burdens created by law).

Here, the Superior Court imposed an $18,000,000 fine, even though the violation involved a reporting offense for which "[t]he harm that [GMA] caused was also minimal," *Bajakajian*, 524 U.S. at 339. GMA was fined despite having never hidden or understated its contributions to the anti-initiative committee, and despite the fact that GMA's name is fully descriptive of its economic interest in that campaign. Exacting

scrutiny applies, therefore, because the fear of such an exorbitant fine—especially when it may be triggered by nothing more than errors made in the context of a complex and counterintuitive disclosure regime—is sure to chill protected activity.[3] *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (noting that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day").[4]

As noted above, exacting scrutiny requires that the state show a "substantial relation between the government['s] interest[s] and the" burdens the government imposes. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (per curium). The fine imposed by the Superior Court cannot meet exacting scrutiny in at least two ways. First, the trebled fine is not substantially related to the state's interest in condemning and punishing

[3] Furthermore, the exacting scrutiny criteria will benefit the Eighth Amendment excessive fines analysis. As noted, the analysis of gross disproportionality is "inherently imprecise." *Cooper Indus.*, 532 U.S. at 434. The exacting scrutiny criteria are better developed, and can add precision to the inherently *ad hoc* gross disproportionality analysis.

[4] This fear is particularly acute where, as here, the initiation of enforcement is not left to government regulators with a duty to fairly, impartially, and evenly enforce the law, but rather to political or ideological opponents with an incentive to advance marginal or hyper-technical claims. *See* RCW 42.17A.765(4) (granting private right to bring action in the name of the state).

reprehensible conduct. Second, the disclosure demanded by the state is not substantially related to its informational interest.

A. The Superior Court's standard for intent fails to require that punitive damages be substantially related to the purpose of condemning and punishing reprehensible conduct.[5]

The standard for treble damages used by the Superior Court fails exacting scrutiny's requirement that fines be tailored to the government's purpose for imposing punitive damages. A court may only impose punitive damages—such as the treble damages here—to express "moral condemnation" and "'to punish reprehensible conduct.'" *Cooper Indus.*, 532 U.S. at 432 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Exacting scrutiny requires "a 'substantial relation' between [the law at issue] and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64, 66). Washington's law recognizes that the treble damages provision is a form of punitive damages, and it requires a mental state sufficient to justify such punitive damages: "If the violation is found to have been *intentional*, the amount of the judgment . . . may be trebled as *punitive damages*."

[5] The standard of review for whether a fine is constitutionally permissible when it intrudes upon First Amendment activity appears to be a matter of first impression. But, in line with other disclosure requirements, the standard would be at the very least exacting scrutiny. *See, e.g.*, *Citizens United*, 558 U.S. at 366.

RCW 42.17A.765 (emphasis added). The Superior Court, however, held that the mental state required by "RCW 42.17A.765 is not limited to instances where the person acted with subjective intent to violate the law. In other words, it is not limited to only those instances where the person subjectively knew their actions were illegal and acted anyway." Intent Order at 2.

Because the Superior Court did not require a subjective intent to violate the law, or some other "misconduct [that] was especially reprehensible,"[6] its interpretation of the trebling provision is not restricted "to punish[ing] reprehensible conduct." *Cooper Indus.*, 532 U.S. at 432. Rather, it diminishes any true "expression of . . . moral condemnation" for such misconduct, *id.*, by punishing any violation where a defendant merely intended to take a prohibited action. Thus, assuming that expressing moral condemnation and punishing egregious behavior is "a 'sufficiently important' governmental interest" in the First Amendment context, there is no "'substantial relation' between [the law at issue] and"

[6] *See, e.g.*, *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2097 (2016) (noting right to seek treble damages for harm to business or property for RICO violations); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928 (2016) (Roberts, C.J.) (permitting treble damages for patent infringement for those whose conduct is comparable to that of a "wanton and malicious pirate," "not to be meted out in a typical infringement case," but only for conduct that is "willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, [and] flagrant").

that interest under the definition of intent the Superior Court used here. *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64, 66). Consequently, the trebling provision for a reporting violation, as interpreted by the Superior Court, has no place in the context of core First Amendment activity, where "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361.

B. The disclosure demanded by the state is not substantially related to the informational interest.

Furthermore, the state overstated its interest in disclosure in the first place, exacerbating any issues with the excessive, trebled fine granted here. Apart from the lack of any substantial relationship between the trebled fine and any interest in punishing reprehensible behavior, there is no "'substantial relation' between the disclosure requirement and" the informational interest that justifies the additional reporting demanded of GMA. *Citizens United*, 558 U.S. at 366. *Buckley* and its requirement that disclosure laws meet exacting scrutiny apply in the ballot measure context as much as they do in the candidate context. *See Sampson*, 625 F.3d at 1254-55 (discussing *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 296 (1981)). Thus, applying *Buckley*'s requirement that disclosure justified under the informational interest "increase[] the fund of information concerning those who support" a

candidate and thus "define more of the candidates' constituencies," *Buckley*, 424 U.S. at 81, a court reviewing a law in the ballot context "must therefore analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue," *Sampson*, 625 F.3d at 1256.[7]

This is not a case where a measure's opponents made up an anodyne name concealing their identities and economic interests. Rather, the information that was disclosed to the public fulfilled the purposes of the informational interest: the voters knew the constituencies opposing the measure. But the state demanded more, and the scope of the disclosure demanded fails exacting scrutiny. And, if the state's demands of GMA were unconstitutional, then any trebled fine based on GMA's failure to meet those demands was unconstitutional as well.

[7] Moreover, shortened references to *Buckley* in *Citizen United*, such as the statement that the informational interest is one "in 'provid[ing] the electorate with information' about the sources of election-related spending," 558 U.S. at 367, did not expand *Buckley*, either explicitly or implicitly. The *Citizens United* Court dealt with a law whose application was explicitly limited to the disclosure of donations that were earmarked for a communication, and thus were explicitly intended to support or oppose a candidate. *See Citizens United v. FEC*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008), *affirmed in part by* 558 U.S. 310 (2010) (noting requirement that a contribution be "for the purpose of furthering" the communication at issue).

As the Federal Election Commission and the D.C. Circuit have explained, an earmarking requirement is needed for disclosure to educate voters about the financial constituencies of candidates and ballot measures. That is, when a law compels disclosure of donors who have not given specifically to fund a communication, that law "mislead[s] voters as to who really supports the communications." *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 497 (D.C. Cir. 2016). This is because the general treasury funds of corporations and unions are comprised of "donations from persons who support the [organization's] mission," but who "do not necessarily support" individual communications. *Id*. (noting that it is "hard to escape the intuitive logic behind this rationale," and that it was "based firmly in common sense and economic reality").

Furthermore, both the FEC and the D.C. Circuit have explained that earmarking maintains a constitutional balance between disclosure and the right to anonymity, limiting "requirements [that] have their real bite [by] flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence." *Id*. at 501.

Thus, in analyzing whether a Colorado disclosure law met exacting scrutiny, the Tenth Circuit held that it was "important" that the law required "only disclos[ure of] those donors who have specifically earmarked their contributions for electioneering purposes." *Indep. Inst. v.*

Williams, 812 F.3d 787, 797 (10th Cir. 2016). Similarly, a specially convened three-judge district court in *Independence Institute v. Federal Election Commission*, held that the Bipartisan Campaign Reform Act was sufficiently tailored to withstand constitutional scrutiny because "disclosure is limited to only those substantial donors who contribute . . . for the specific purpose of supporting the advertisement." 216 F. Supp. 3d 176, 2016 U.S. Dist. LEXIS 152623 at *34 (D.D.C. 2016), *summarily affirmed, Indep. Inst. v. Fed. Election Comm'n*, 137 S. Ct. 1204 (2017).

Moreover, the three-judge court in *Independence Institute v. Federal Election Commission* emphasized that the law was tailored to the informational interest through "disclosure . . . limited to . . . substantial donors." *Id*. Such tailoring protects voters from becoming the victims of a deluge of information which, as Justice Thurgood Marshall warned in the context of corporate disclosure, "simply [] bur[ies] the [recipient] in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking." *See TSC Indus. v. Northway*, 426 U.S. 438, 448-49 (1976).

The state, however, rejects the requirement that the disclosure demanded educate voters about those in fact supporting or opposing a ballot measure. For example, the state failed to acknowledge that it had "no governmental interest in GMA's other financial transactions unrelated

to the Washington ballot measure," arguing that "[t]he point of disclosure is to provide the public information about money coming into a political committee and money available to that political committee at any point during a campaign." *See* State Motion for Summary Judgment at 16, *State of Washington v. Grocery Manufacturers Association*, No. 13-2-02156-8 (Thurston Cty. Superior Ct. Jan. 22, 2016).

And the Superior Court altogether failed to analyze the fit between the disclosure demanded here and the informational interest, much less require that the disclosure meet exacting scrutiny as applied to GMA. That is, while the Superior Court acknowledged that exacting scrutiny applied, Letter Opinion at 6, and that any interest in the ballot measure context is related to citizens "knowing who is lobbying for their vote," Letter Opinion at 5 (quoting *Human Life of Wash. v. Brumsickle*, 624 F.3d 990, 1006 (9th Cir. 2010)), the court showed no interest in conducting any part of an exacting scrutiny analysis. Rather, it simply declared that "Washington disclosure laws have been found to pass this test." Letter Opinion at 6 (citing *Human Life of Wash.*, 624 F.3d 990; *Utter ex rel. State v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398 (2015)).

But that is not how courts address as-applied challenges. *See* GMA SJ Reply at 2-3 (noting as-applied challenge). As-applied rulings only bind materially similar cases. *See United States v. Nat'l Treasury Emps.*

Union, 513 U.S. 454, 478 (1995) (noting as-applied relief is a "narrower remedy" than a facial ruling and the outcome may change based on differing circumstances); *cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (even under the doctrine of claim preclusion, "development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim"). Accordingly, the Superior Court cannot simply state that two other facial decisions decide the issue here.[8]

Instead of taking this conclusory approach, the Superior Court should have analyzed whether the additional disclosure demanded in this case educates voters about "who is spending and receiving money to support or oppose a ballot issue." *Sampson*, 625 F.3d at 1256; *see Buckley*, 424 U.S. at 67. And, had it done so, it would have recognized that the voters were already informed about those who had paid for the communication and thus who was opposing the measure. The court would have recognized that the state sought additional information not justified by the informational interest, and thus that the disclosure demands were unconstitutional. The court would have also recognized that the State

[8] The Superior Court cites a Ninth Circuit decision and a Washington Supreme Court decision. Letter Opinion at 6. In both, however, the courts declined to address the parties' as-applied challenges. *See Human Life*, 624 F.3d at 1021-22; *Utter*, 182 Wn. 2d at 430.

seeks to create a new interest in knowing all donors, including those not supporting or opposing candidates or measures, and that in doing so it has asserted a new governmental interest not recognized by the Supreme Court as sufficiently important to infringe on protected First Amendment rights. *Cf. Sampson*, 625 F.3d at 1256 (noting that "who is spending and receiving money to support or oppose a ballot issue" is the only interest recognized by the Supreme Court that applies in the ballot issue context). Finally, from all this, the court would have concluded that Washington's law does not meet exacting scrutiny, as applied to GMA.

There is no "'substantial relation' between [Washington's additional] disclosure" demands and the interest in knowing who was spending money to oppose the measure. *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64, 66). Lacking any interest in the additional information demanded, the state also lacks a sufficient interest to justify a crippling penalty, much less a trebled one, for failing to provide that information.

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CONCLUSION

For the reasons above, this Court should hold that the fine imposed violates GMA's Eighth Amendment right against excessive fines.

RESPECTFULLY SUBMITTED this 20th day of July, 2017.

/s/ *Ryan P. McBride*
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I, Ryan McBride, hereby certify under penalty of perjury of the laws of the State of Washington that on July 20, 2017, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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