NO. 96604-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent/ Cross Petitioner.

STATE OF WASHINGTON'S ANSWER TO AMICUS CURIAE THE INSTITUTE FOR FREE SPEECH

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I. INTRODUCTION

Even though Grocery Manufacturers Association (GMA) has not raised the issues in its petition, the Institute For Free Speech asks this Court to accept review to assess GMA's penalty under two constitutional standards of its own design. This Court should decline.

The Institute first claims that review is warranted because GMA's campaign finance penalties do not serve the State's interests and chill speech. But the State has a significant interest "in promoting [election] integrity and preventing concealment that could harm the public and mislead voters." *State ex rel. Pub. Disclosure Comm'n v. Permanent Offense,* 136 Wn. App. 277, 284, 150 P.3d 568 (2006). GMA deprived Washington voters of the true "sources of election-related spending" and their ability to "make informed choices in the political marketplace." *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 367, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). Penalizing actors like GMA for misconduct does not chill any protected speech; rather it demonstrates that there is a significant cost to concealment and ensures that political contributions remain in the light. *C.f. Buckley v. Valeo*, 424 U.S. 1, 67, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) ("Publicity is justly commended as a remedy for social

and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

The Institute also asks this Court to accept review to analyze GMA's penalty under the Eighth Amendment of the U.S. Constitution and article I, section 14 of the Washington Constitution. Not only has GMA not asserted either claim to this Court, the Institute asks this Court to employ the wrong analysis. A penalty will not violate the constitution unless it is "grossly disproportional" to the gravity of the offense. *State v. WWJ Corp.*, 138 Wn.2d 595, 604, 980 P.2d 1257 (1999) (citing *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct 2028, 141 L. Ed. 2d 314 (1998)). While the Institute suggests this inquiry is inadequate and the Court should conduct an additional "exacting scrutiny" to civil penalties, neither the federal nor the state constitution require such additional analysis.

In sum, the Institute provides no additional basis for this Court to accept review of GMA's petition.

II. ARGUMENT

A. The Court Should Reject the Institute's Attempt to Raise New Constitutional Issues for Review

The Institute asks this Court to accept review to address constitutional issues that were not raised by GMA in its petition for review. It is well settled that this Court generally will not address arguments raised

only by amici, even constitutional ones. *See, e.g.*, *Fields v. Dep't of Early Learning*, No. 95024-5, 2019 WL 759695, *7 n.1 (Wash. Feb. 21, 2019); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). This Court should also not consider arguments raised only by amici when considering whether to accept or reject review under RAP 13.4(b). *Cf. Wood v. Postelthwaite*, 82 Wn.2d 387, 388, 510 P.2d 1109 (1973) (court will not consider issues if not raised in a petition for review). The issues raised by the Institute are not those presented by the parties and, as explained further below, do not present an accurate depiction of the law. There is no basis for this Court to consider the Institute's claims.

B. This Court Should Reject the Institute's Request to Adopt a New Test for Exacting Scrutiny

Exacting scrutiny under the First Amendment requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *John Doe 1 v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (internal quotation marks omitted). As described in the State's Answer to Petition for Review, the Court of Appeals correctly applied this inquiry to find that Washington's compelling interest in informing voters about who is contributing money

to initiative campaigns outweighed any burden claimed by GMA on its First Amendment rights. *See* State's Answer at 7-13. The Institute, however, asks this Court to "announce a test" that would provide for further inquiry into what the Institute deems the "costs of compliance," including the "value of the information gleaned *and* the weight of fines for non-compliance[.]" Institute Br. at 5-6. The Court should reject Institute's request to design a new constitutional test.

Washington's disclosure laws, including the prohibition against concealment, provide voters important information about who is funding efforts to sway their vote. *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). They ensure that the "governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending" is met without imposing a "ceiling on campaign-related activities" or "prevent[ing] anyone from speaking." *See Citizens United*, 558 U.S. at 366-67 (second alteration ours) (quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)). GMA's penalty for intentionally concealing the source of its funds to oppose Initiative 522 reflects its violation of these fundamental tenets.

The Institute nevertheless contends that the State's informational interests are overstated in this case, because GMA did not "ma[k]e up an anodyne name concealing their identities and economic interests" and voters allegedly "knew the constituencies opposing [Initiative 522]." Institute Br. at 7. The Institute's rationale is flawed. "GMA deliberately concealed the actual source of the contributions—certain GMA members." *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 205, 425 P.3d 927 (2018). In doing so, GMA violated "the public's right to know *the identity of those contributing* to campaigns for or against ballot title measures on issues of concern to the public." CP 4069 (FF 108) (emphasis added); *see also Fritz v. Gorton*, 83 Wn.2d 275, 296, 517 P.2d 911 (1974) ("the right to receive information is the fundamental counterpart of the right of free speech"). The Court of Appeals' description of the State's interests in disclosure here was not "overinclusive," as the Institute contends. *See* Institute Br. at 7.

The Institute also faults the Court of Appeals for examining only GMA's claimed burdens, as opposed to what the Institute calls "the actual burdens of disclosure," which purportedly include whether large fines will chill speech. *See* Institute Br. at 7-8. It is hard to understand the Institute's argument here, especially since the Institute says little more than this. Even so, penalizing actors like GMA who deliberately conceal campaign finance

information does not chill speech. Rather, it serves the State's significant interests in punishing particularly egregious conduct and deterring future wrongdoing. *Cf. Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 85-86, 272 P.3d 827 (2012) (affirming a punitive award for egregious conduct and that also served as a deterrent to other actors engaging in similar conduct). Contrary to the Institute's suggestion, there is a substantial relationship between the State's interests in prohibiting concealment and GMA's penalty. No further review by this Court is needed.

C. This Court Should Reject the Institute's Request for Further Review under the Eighth Amendment

The Institute also asks this Court review GMA's penalty under the excessive fines clauses of the Eighth Amendment of the U.S. Constitution and article I, section 4 of the Washington Constitution. GMA does not raise these same concerns, and so there is no basis for this Court to accept review on this issue. But even if that were not so, the Institute asks this Court to employ the wrong test thus providing an additional reason to decline review.

"The touchstone of the constitutional inquiry under the [Eighth Amendment's] Excessive Fines Clause is the principle of proportionality[.]"*Bajakajian*, 524 U.S. at 334. Accordingly, a penalty will not violate the constitution unless it is "grossly disproportional" to the gravity of the offense. *WWJ Corp.*, 138 Wn.2d at 604 (citing *Bajakajian*,

524 U.S. at 334). Courts look to a number of criteria, including the defendant's culpability, to determine whether a penalty in a particular case satisfies this standard. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435-36, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Nevertheless, the Institute contends that this analysis is inadequate and suggests that the Court should conduct an additional "exacting scrutiny" inquiry of GMA's civil penalty. Institute Br. at 8-10.

The Center misstates the Supreme Court when it asserts that the "gross disproportionality standard . . . is 'inherently imprecise.'" Institute Br. at 9 (citing *Cooper Indus., Inc.*, 532 U.S. at 434). The Supreme Court said no such thing. Instead, the Supreme Court recognized that "the relevant *constitutional line* is inherently imprecise" and not "marked by a simple mathematical formula." *Cooper Indus.*, 532 U.S. at 434-35 (emphasis added) (internal quotation marks omitted). In other words, the Court acknowledged that there is no bright line demarking where a penalty will cross into constitutional excessiveness; rather whether a penalty is grossly disproportionate depends on the facts. *Id.* In this case, applying the relevant criteria to the facts prove that GMA's civil penalty is not "grossly

disproportionate" to its multiple, intentional violations of Washington law. *See* State's Pet. at 2-13 (Statement of the Case). No further inquiry is necessary to satisfy the Constitution.

The Institute also contends that GMA's penalty—trebled or not—is out of proportion to the "technical" violations of the State's campaign finance laws. Institute Br. at 9-10. But, in making this claim, the Institute distorts the nature of this case as GMA did not engage in mere technical or minor violation; rather it deliberately concealed information that the public had a right to know. *Fritz*, 83 Wn.2d at 296. There is no constitutional right to conceal the true source of campaign contributions from the public view. In fact, GMA's substantial penalty had nothing to do with its "speech" at all. Nothing in Washington law prohibited GMA from contributing to the No on 522 committee at will. Rather GMA's penalty reflects its intentional concealment of the source of over $14 million in campaign contributions. The Institute's suggestion that this somehow chills "core First Amendment activity," Institute Br. at 10, is simply wrong.

III. CONCLUSION

The Institute asks this Court to accept review of constitutional issues that were not raised by the parties and which do not comport with the law. This Court should not accept these new issues. As set forth in the State's

previous briefs, this Court should however accept the State's Petition for Review and decline GMA's petition.

RESPECTFULLY SUBMITTED this 5th day of March 2019.

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