No. 99407-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, *Respondent*,

v.

GROCERY MANUFACTURERS ASSOCIATION, *Petitioner*.

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GROCERY MANUFACTURERS ASSOCIATION, *Petitioner*,

v.

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

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# *AMICUS CURIAE* MEMORANDUM OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF REVIEW

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## INTEREST OF AMICUS CURIAE

The Institute for Free Speech is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, *pro bono,* in cases raising First Amendment objections to the regulation of political activity. First as the Center for Competitive Politics and later as the Institute for Free Speech, the Institute has served as *amicus curiae* to this Court and the Court of Appeals in this litigation.

## INTRODUCTION

Washington authorities imposed an unprecedented $18 million fine on the Grocery Manufacturers Association ("GMA") for technical filing violations of the state's campaign finance laws. A fine of this magnitude on political speech chills discourse on "public issues and the qualifications of candidates for elected office." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 443 (2015). Even so, the Court of Appeals refused to apply the First Amendment's exacting scrutiny analysis and affirmed the fine under the Eighth Amendment. *State v. Grocery Mfrs. Ass'n* (*GMA III*), 15 Wash. App. 2d 290, 306 (2020).

Because GMA's political speech "commands the highest level of First Amendment protection," *Williams-Yulee*, 575 U.S. at 443, this Court

should review the decision below and hold that Washington's campaign finance penalties must face First Amendment exacting scrutiny regardless of whether they are valid under another legal doctrine. And as applied in this case, an $18 million fine for technical reporting violations fails First Amendment scrutiny.

## STATEMENT OF THE CASE

The Superior Court held that GMA failed to meet its deadline to register as a political committee under Washington's Fair Campaign Practices Act (FCPA). Letter Opinion at 5, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Mar. 9, 2016); *see also* FCPA (Wash. Rev. Code § 42.17A *et seq*.). The trial court also held that GMA violated the FCPA by failing to disclose the identities of individual contributors or submit reports required of political committees, even though GMA's initial contribution had been reported by its recipient. *Id*. Nevertheless, the trial court ruled that GMA intentionally violated state law, and ordered a base $6 million civil penalty, trebled to $18 million. Findings of Fact, Conclusions of Law and Order on Trial at 23-24, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).

Subsequently, the Court of Appeals reversed the trial court's treble damages award on statutory grounds. *State v. Grocery Mfrs. Ass'n* (*GMA I*), 5 Wash. App. 2d 169, 207-09 (2018).

This Court disagreed with the Court of Appeals' statutory interpretation, and held that the superior court had applied the correct standard to determine intent. *State v. Grocery Mfrs. Ass'n* (*GMA II*), 195 Wash. 2d 442, 475 (2020). But the Court remanded the matter to the Court of Appeals to determine whether the treble damages penalty was unconstitutionally excessive. *Id*. at 475-76.

On remand, the Court of Appeals ruled that the treble damages award was constitutional under the Eighth Amendment. But it refused to apply the First Amendment's exacting scrutiny analysis because it believed that GMA's speech was not at issue. *GMA III*, 15 Wash. App. 2d at 306.

## ISSUES ADDRESSED

The petition for review asks the Court to resolve questions regarding the proper Eighth Amendment analysis for excessive fines, the state's anti-GMA animus, and the chilling effect excessive fines have on free speech.

This brief requests that the Court grant review of this matter so that it can rule that First Amendment analysis is required for campaign finance laws regardless of whether they are lawful under another legal doctrine.

## ARGUMENT

### I. The Court should apply First Amendment exacting scrutiny to speech-chilling fines.

Campaign finance disclosure laws are subject to First Amendment exacting scrutiny. *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (*per curiam*).

GMA received its excessive fine for a reporting offense that caused minimal harm. *Cf. United States v. Bajakajian*, 524 U.S. 321, 339 (1998). First Amendment exacting scrutiny applies because fear of an exorbitant fine—especially fines triggered by small errors made in a complex and counterintuitive campaign finance disclosure regime—will chill protected speech. *See Citizens United*, 558 U.S. 310, 324 (2010) ("The 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."). This chilling effect is especially well-founded here, because the FCPA allows private enforcement actions, Wash. Rev. Code § 42.17A.775(1), thereby encouraging political opponents to pursue marginal and hyper-technical claims to silence their opposition.

Whether a campaign finance regulation appears in the Federal Election Campaign Act, *Buckley*, 424 U.S. at 64, the Bipartisan Campaign Reform Act, *Citizens United*, 558 U.S. at 366-67, or the FCPA, First Amendment exacting scrutiny applies. And that this case involves a fine rather than a direct prohibition on speech does not reduce that protection. *Cf. First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 n.23 (1978) (noting that dependence of speech on money does not "reduce the exacting scrutiny required by the First Amendment" (quoting *Buckley*, 424 U.S. at 16)). A treble damages award for a campaign finance disclosure law violation may

be constitutional under the Eighth Amendment. *See GMA II*, 195 Wash. 2d at 476 (excessive fines standard). But whether an $18 million fine for GMA's violations is constitutional under the First Amendment is a separate question that this Court should resolve—and resolve in the negative.

Exacting scrutiny requires the government to demonstrate not only that its campaign finance law serves an important interest, but that the law is properly tailored to serve that interest while respecting First Amendment rights. *Doe v. Reed*, 561 U.S. 186, 196 (2010); *Wash. Post v. McManus*, 944 F.3d 506, 521 (4th Cir. 2019). Thus, the government must show "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Doe*, 561 U.S. at 196 (quoting *Citizens United*, 558 U.S. at 366-67); *Buckley*, 424 U.S. at 64-66. Exacting scrutiny also "requires governments to 'employ[] not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" *Wash. Post*, 944 F.3d at 521 (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014)).

"To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (internal quotation marks omitted). That burden includes 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 (10th Cir. 2010) (balancing interest against all the burdens created by Colorado's ballot issue disclosure law). The Court must weigh the state's interest in compliance against the burdens of fines for misinterpreting the FCPA. The government must demonstrate not only the important interest that promoting compliance with the disclosure regulations serves—including the value of the disclosed information—but also that an $18 million fine on these facts is narrowly tailored to serve that interest—while accounting for the costs of compliance, the chilling effect treble damages have on political speech, and the other burdens such a fine imposes.

Accordingly, for GMA's trebled penalty to survive exacting scrutiny, "the strength of the governmental interest [in the disclosure law] must reflect the seriousness of the actual burden [the fine imposed] on First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008). The Court must weigh the state's interest in compelling disclosure against the actual burdens of compliance—which includes both the value of the information gleaned *and* the weight of fines for non-compliance. *See*, *e.g.*, *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (balancing Montana's zero-dollar disclosure threshold with compliance burdens); *Sampson*, 625 F.3d at 1259-62 (balancing interest against all the burdens created by law).

Fundamentally, this Court should analyze whether the actual burdens of disclosure, including how treble damages fines chill speech, are outweighed by the state's interest.

Disclosure laws justified under the government's informational interest must "increase[] the fund of information concerning those who support" a candidate, *Buckley*, 424 U.S. at 81, and courts "must . . . 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.

Here, disclosure of GMA's expenditures in connection to a ballot measure suffices to inform the electorate. GMA did not make up an anodyne name to conceal its identity and economic interests. Rather, the information that was disclosed to the public fulfilled the purposes of the informational interest—the voters knew who opposed the ballot measure.

Campaign finance systems are, by nature, very complex. *Citizens United*, 558 U.S. at 324 (noting campaign finance law is "[p]rolix."). Allowing multimillion dollar fines for violations of technical rules chills speech. Political activists will hesitate to speak lest they be put out of business for misinterpreting complex disclosure regulations. This Court should employ exacting scrutiny to weigh such large fines against the chill of core First Amendment political activity.

## CONCLUSION

This case presents substantial questions of constitutional law. This Court should grant review.

RESPECTFULLY SUBMITTED this 11th day of March, 2021

*/s/ Ryan P. McBride*

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## CERTIFICATE OF SERVICE

I, Ryan McBride, hereby declare under penalty of perjury under the laws of the State of Washington that on March 11, 2021, I electronically filed the foregoing document via the Washington State Supreme Court secure portal which will send e-mail notifications of such filing to all parties of record. Signed in Bellevue, Washington the 11th day of March, 2021.

*/s/ Ryan P. McBride*
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## LANE POWELL PC

## March 11, 2021 - 11:59 AM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 99407-2 |
| **Appellate Court Case Title:** | State of Washington v. Grocery Manufacturers Association |
| **Superior Court Case Number:** | 13-2-02156-8 |

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