No. 96604-4

99407-2

[Court of Appeals No. 49768-9-II]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner,

v.

ROBERT W. FERGUSON, Attorney General of the State of Washington, in his Official Capacity,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Grocery Manufacturers Association ("GMA"), now known as Consumer Brands Association, asks this Court to accept review of the decision designated in Part II.

II. COURT OF APPEALS DECISION

On November 10, 2020, the court of appeals rejected GMA's Eighth Amendment challenge to the trial court's record-breaking judgment. *State v. Grocery Mfrs. Ass'n*, __ Wn. App. __, 475 P.3d 1062 (2020) ("*GMA III*"). *See* Appendix A. On November 30, GMA moved for reconsideration, *see* Appendix B, which was denied on December 9, 2020. *See* Appendix C.

III. ISSUE PRESENTED FOR REVIEW

"Punitive fines should not be sought or imposed 'to retaliate against or chill the speech of political enemies' or as 'a source of revenue.'" *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 476, 461 P.3d 334 (2020) ("*GMA II*") (quoting *Timbs v. Indiana*, 586 U.S. __, 139 S. Ct. 682, 689, 203 L. Ed. 2d 11 (2019)). Yet the court of appeals flatly rejected the argument that free speech is relevant in judging the excessiveness of a penalty, and it refused to consider evidence that the State improperly singled out GMA for a huge fine. After a perfunctory review that misapplied each Eighth Amendment factor considered, the court held that the $18 million penalty imposed in this case—nearly ***six times*** all the other penalties imposed since 2005 in AGO

enforcement actions under the Fair Campaign Practices Act ("FCPA")—was not grossly disproportional to GMA's conduct in shielding members that contributed funds GMA spent on lawful political expression. Should this Court review and correct the court of appeals' constitutional errors?[1]

IV. STATEMENT OF THE CASE

GMA represents American food, beverage, and consumer-product makers. *See* CP 4052; RP 641–42. Before Congress adopted federal legislation in 2016, debate raged over whether food manufacturers should be required to disclose on their labels the presence of ingredients derived from genetically modified organisms ("GMOs"). Ex. 2, 139. GMA opposed piecemeal state-level efforts and supported a uniform nationwide standard.

GMA fought a GMO-labeling initiative that appeared on the 2012 California ballot. *See* Ex. 139; CP 4053; RP 442. When GMA and its members contributed funds to oppose this initiative, they confronted death threats and boycotts. CP 4053. In August 2012, GMA staff began discussing creation of a "Defense of Brands Strategic Account" (the "Account"). Ex. 131; *see also* CP 4053–54. The goal of the Account was to enable GMA to speak for its members on the controversial issue of GMO labeling through political activity and consumer outreach. Ex. 21, 139; RP 441–43.

[1] This petition for review does not address GMA's liability because all liability issues were resolved in *GMA II*. Although this petition treats liability issues as settled, GMA reserves the right to raise them in connection with a future petition for a writ of certiorari.

After GMA established the Account, Washington Initiative 522 qualified for the ballot in 2013 and became a focus of GMA's advocacy efforts. RP 436, CP 605, 4054. That May, GMA began contributing to the No on 522 Committee ("No on I-522"). *See* Ex. 76. GMA's contributions were all disclosed as coming from "Grocery Manufacturers." Ex. 76, 104, 119, 120. In October 2013 the State sued GMA, alleging that GMA had failed to properly register and report as a political committee and had thereby concealed the sources of funds that GMA contributed to No on I-522. CP 18–24. Three weeks before Election Day, GMA registered a political committee and disclosed its members who had funded the Account. CP 1690–92, 3858–60.

After a penalty-phase trial, the trial court entered judgment against GMA for $19,026,090: a $6 million base fine, trebled to $18 million based on the finding that GMA's violations had been intentional, plus legal fees. SCP 4354–57. The Attorney General called this "the highest penalty ever awarded for [a] campaign finance lawsuit anywhere in the country[,] ever."[2]

Division Two affirmed as to liability but held that the trial court had improperly interpreted RCW 42.17A.765(5) when it trebled its $6 million

[2] *A Conversation with Attorney General Bob Ferguson*, SEATTLE PUB. LIBRARY PODCAST (July 11, 2017), https://www.spl.org/Audio/17_07_11_AGBobFerguson.mp3 (transcript: https://www.spl.org/Seattle-Public-Library/documents/transcriptions/2017/17-07-11_Bob-Ferguson.pdf) ("LIBRARY PODCAST").

base fine. *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 208–09, 425 P.3d 927 (2018) ("*GMA I*"). This Court reversed that decision and remanded for consideration of GMA's Eighth Amendment arguments, stating:

> [T]he state requested an apparently unprecedented base penalty of $14,622,820, trebled to $43,868,460. CP at 3996. Nearly all of the requested base penalty ($14 million) was attributed to "the amount of funds that went unreported." *Id.* at 4002. This is a permitted statutory basis for determining a penalty. Former RCW 42.17A.750(1)(f) (2013). However, it will not always be constitutional as applied. *See Bajakajian*, 524 U.S. at 338–39, 118 S. Ct. 2028. The trial court ultimately imposed a smaller, but still apparently unprecedented, base penalty of $6 million, trebled to $18 million. On remand, this penalty must be scrutinized carefully to ensure that it is based on constitutionally permissible considerations and is not grossly disproportional to GMA's violations of the FCPA's registration and disclosure requirements for political committees.

GMA II, 195 Wn.2d at 476–77.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The court of appeals failed to "scrutinize[ ] carefully" the penalty against GMA "to ensure that it is based on constitutionally permissible considerations and is not grossly disproportional to GMA's violations of the FCPA's registration and disclosure requirements." *See id.* The court of appeals' failure to follow this Court's directions, to apply U.S. Supreme Court authority, and to limit the State's fine as required under the Constitution warrants review under RAP 13.4(b)(1), (3), and (4).

A. The Court of Appeals Misapplied *Bajakajian*.

"A fine is excessive 'if it is grossly disproportional to the gravity of a defendant's offense.'" *GMA II*, 195 Wn.2d at 476 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)). To determine whether a fine is grossly disproportional, courts consider "(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *GMA II*, 195 Wn.2d at 476 (quoting *United States v. 100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)).

Rather than examine these factors as instructed and as *Bajakajian* requires, the court of appeals determined, in essence, that an $18 million fine is constitutional because GMA did something for which the FCPA authorizes a large fine and because the fine promotes the underlying policy judgment that more disclosure is better than less. This reasoning, if not corrected, would render the Excessive Fines Clause a nullity. Properly applied, the *Bajakajian* factors establish that both the base penalty and the trebling are grossly disproportional and, therefore, unconstitutional.

1. The "crime" here was a garden-variety FCPA violation.

GMA failed to register a political committee and to disclose which of its members provided funds to the Account. This is a fairly common

offense—indeed, it happened multiple times in the I-522 campaign. *See, e.g.*, *State ex rel. Wash. Pub. Disclosure Comm'n v. Food Democracy Action!*, 5 Wn. App. 2d 542, 544–48, 427 P.3d 699 (2018) ("*FDA*"). It has happened before and since the 2013 election as well. For example, Voters Education Committee in 2010 failed to report and concealed a $1.5 million contribution, a crime for which it was required to pay $160,000. CP 3636.

The court of appeals pointed out that GMA had been found to have acted intentionally and that it "infringed on the FCPA's first stated policy" favoring full disclosure. *GMA III*, 475 P.3d at 1069. But acting intentionally cannot be enough to warrant a massive fine. Intent is a prerequisite for ***any*** punitive-damage award under the FCPA. *See GMA II*, 195 Wn.2d at 474–75. As this Court cautioned, affirming the trial court's determination that GMA's violations were intentional "does not necessarily mean that ***either*** the base penalty ***or*** the treble penalty that was actually imposed is constitutional." *Id.* at 476 (emphasis added). For a crime to be serious and significant enough to justify a $6 million fine, let alone an $18 million fine,[3] a defendant's conduct must be uniquely blameworthy and repugnant in comparison to the conduct of other FCPA offenders. GMA's is not.[4]

[3] Notwithstanding this Court's recognition that the base penalty and the trebling must be separately analyzed for excessiveness, the court of appeals lumped them together.

[4] No other violator of the FCPA has ever faced sanctions remotely close to those imposed on GMA, including serial offenders found to have acted intentionally and therefore subject to punitive damages. *Cf. State ex rel. Wash. State Pub. Disclosure Comm'n v. Permanent*

To be sure, as the court of appeals observed, GMA has been found to be in violation of the policy of the statute favoring full disclosure and avoidance of secrecy. But the same thing is true of every other person found liable for violating the FCPA's disclosure rules. Yet the court of appeals refused to examine how the fine imposed in this case compares with the penalties assessed against other violators of the same statute. *See* Appendices B and C.

Although the policy interests emphasized by Division Two apply in every case brought under the FCPA, the fine imposed in this case is without precedent or parallel. Over the 14-year period from 2005 through 2018, the average FCPA penalty in 41 cases was about $517,000.[5] If the GMA fine is excluded, that figure plummets to approximately $80,000. If suspended penalties are excluded, it drops further still to under $60,000. The $18 million GMA penalty is ***nearly six times the sum of all other fines*** imposed in FCPA actions brought by the AGO over this 14-year period. It is also more than 24 times larger than the next-largest penalty, a $735,000 fine

Offense, 136 Wn. App. 277, 280–81, 150 P.3d 568 (2006) (defendants Eyman and Karr conspired to create dummy corporation to conceal from the public Eyman's compensation by supposedly "grass-roots" campaign); CP 3636 (Eyman penalized $50,000 in 2002 for concealment of expenditures).

[5] *See AGO Case Outcomes*, WASH. STATE OFFICE OF THE ATT'Y GEN., https://www.atg.wa.gov/enforcement-campaign-finance-laws (last visited Jan. 6, 2021).

against the Washington Education Association for diverting nonmember agency fees to electoral purposes.[6]

2. GMA's violations were not related to other illegal activity.

Although GMA was fined for a unified course of conduct, the court of appeals held that GMA's conduct "involved multiple illegal activities" because it violated multiple FCPA sections. *GMA III*, 475 P.3d at 1069. This was error.

The question under *Bajakajian* is not whether GMA's conduct violated multiple provisions in the FCPA. After all, a "federal grand jury indicted respondent [Bajakajian] on three counts," based on four separate statutory provisions. *See* 524 U.S. at 325. *Bajakajian* instead directs courts to examine whether the conduct in question related to ***other*** illegal activity. Courts applying this factor, therefore, ask whether the punished conduct relates to some ***separate*** illegal act, such as tax evasion, money laundering, or receiving proceeds from a crime.[7] There is no such act in this case. GMA spent lawfully acquired funds on core political speech, a lawful—indeed, a constitutionally protected—activity.

[6] *See id.* Appendix D sets forth a graphic representation of FCPA penalty data.

[7] *See, e.g.*, *United States v. Abair*, 746 F.3d 260, 267 (7th Cir. 2014) (the defendant was convicted on eight separate counts, but unlike another case in which forfeiture was "upheld . . . in large part based on the . . . special risk of tax evasion or money laundering," "[t]here is no indication that Abair tried to avoid the reporting rules on other occasions or that her deposits were tied to any other criminal activity").

3. The other penalties available here demonstrate the gross disproportionality of an $18 million fine.

The court of appeals used the very statute that authorized the $18 million fine as the point of comparison for "other" possible penalties. In holding that "[t]he penalty imposed was well within the limits established by former RCW 42.17A.750(1)(f)" because it authorized a fine equal to the unreported amount, *GMA III*, 475 P.3d at 1070, the court failed to make any true comparison at all. ***Any*** penalty issued under that statute will ***always*** be within the authorized range; otherwise, it would violate the statute and there would be no need to reach the constitutional question. *See United States v. Beecroft*, 825 F.3d 991, 1002 n.9 (9th Cir. 2016) ("To hold otherwise would be tantamount to concluding that the Eighth Amendment simply does not apply to statutorily mandated forfeitures.").

As this Court stated, "a permitted statutory basis for determining a penalty . . . will not always be constitutional as applied." *GMA II*, 195 Wn.2d at 476. Yet the court of appeals ignored this, instead treating as dispositive the trial court's undisputed statutory authority to have fined GMA even more harshly than it did. By the same logic, the legislature could have authorized, and the trial court could have imposed, a billion-dollar penalty and there would be no constitutional violation.

The court of appeals' approach makes the Excessive Fines clause superfluous. The Eighth Amendment must, instead, be understood to be a check on the legislature's ability to authorize limitless fines. *See von Hofe v. United States*, 492 F.3d 175, 181 (2d Cir. 2007) ("The Eighth Amendment checks the government's power to punish."); *Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (*Bajakajian* is based on the concern that penalties could be "indefinite and unlimited . . . if the government could seize whatever . . . the unwitting 'exporter' happened to be carrying when caught"). The Eighth Amendment is no safeguard if it is treated as coextensive with whatever a statute may authorize.

The proper point of comparison in this case is the per-day and per-violation penalties authorized under RCW 42.17A.750(1)(c) and (d). If applied at their maximum levels, those penalties total $622,820; if trebled to $1.87 million, they would represent the largest FCPA fine ever imposed in Washington on anyone not named GMA. *See AGO Case Outcomes*, WASH. STATE OFFICE OF THE ATT'Y GEN., https://www.atg.wa.gov/enforcement-campaign-finance-laws. A fine of $18 million, which is nearly ten times that amount, is grossly disproportional under *Bajakajian*.

4. GMA's conduct caused no discernible harm.

The court of appeals acknowledged that it is impossible to know whether GMA's violation affected the outcome of the election. *GMA III*,

475 P.3d at 1070. To put a finer point on the matter: Even if GMA's ***protected speech***—its contributions to No on I-522—affected the election, there is no reason to believe that its FCPA violations gave the opponents of I-522 one iota of advantage. After all, every contribution that GMA made was disclosed as coming from "Grocery Manufacturers," and every ad published by No on I-522 disclosed that the principal sponsors were Monsanto, DuPont Pioneer, and GMA. No voter could have been deceived about the economic motivations of the initiative's opponents. Moreover, all of the information that the State says should have been disclosed was, in fact, disclosed before the voters cast their ballots.

Nevertheless, the court of appeals concluded that "the harm GMA caused . . . was substantial." *Id.* The only harm identified by the court was that GMA's conduct undermined the goal of promoting disclosure and transparency. Although vindicating that policy goal justifies some penalty, the court of appeals never explained how any harm caused by GMA is proportional to the fine imposed on GMA—or, for that matter, how such harm differs from the harm to the interest in transparency caused by every other party that has been found to have violated the FCPA.

The court simply ***assumed*** that harm was equal to the amount GMA spent on political expression:

> Because a major concern regarding the failure to disclose the source of campaign contributions is how that failure interferes with public information during the electoral process, the harm caused by concealing the source of contributions necessarily is tied to the size of the contributions.

Id.; *see also id.* at 1069 (citing "the large amount of funds not reported" as a factor that "relate[s] to the gravity of GMA's offense"). This was error. There is no basis for assuming a one-to-one ratio between the amount of funds involved and any harm, still less for ignoring that the name under which the funds were given in this case fully disclosed the donor's economic interests. *Bajakajian* rejects equating an undisclosed sum with the gravity of an offense. *See* 524 U.S. at 337 (an offense that involves withholding information about lawful conduct does not support a heavy penalty).

Even if the amount GMA expended were the touchstone for analysis, the size of its fine would remain grossly disproportional. Consider the $160,000 that Voters Education Committee was required to pay for failing to report and concealing a $1.5 million contribution. CP 3636. The penalty imposed in this case is 109 times higher. On a dollar-for-dollar basis, the concealed contributions in this case were penalized ***15.35 times more harshly*** than those made by Voters Education Committee. *See id.*

The court of appeals all but acknowledged what GMA has long maintained—namely, that it was punished for the amount it spent speaking on an issue vital to its members, not in proportion to any harm caused by the non-disclosure of the specific members who were the source of its funds. And this raises questions about whether the GMA fine was imposed for impermissible reasons.

B. The Court of Appeals Ignored Evidence of Anti-GMA Animus.

The penalty here exceeds the other potentially available fines for GMA's conduct by a factor of ten; it utterly dwarfs every other FCPA fine ever imposed. An $18 million fine (or even a $6 million fine) defies explanation in the law or in the history of FCPA enforcement. At best, this suggests improper equating of the "decibel level" of GMA's speech with the seriousness of its violations. At worst, the outsize fine that the State sought and the trial court imposed betrays discrimination against GMA, a trade association speaking on one side of a contentious public debate.

This Court, mindful of the seriousness of these issues, instructed the court of appeals to make sure that the fine was "based on constitutionally permissible considerations." *GMA II*, 195 Wn.2d at 477. Every justice on the Court emphasized this point. *See id.* at 480–82 (Johnson, J., concurring in part and dissenting in part); *id.* at 482 & 490–91 (Gordon McCloud, J.,

concurring in part and dissenting in part). But Division Two ducked its assignment. *See GMA III*, 475 P.3d at 1071.

As this Court knows, a speaker on the other side of the I-522 fight, Food Democracy Action! ("FDA"), also violated the FCPA. FDA's conduct was at least as culpable as GMA's if not more so:

- FDA knew about the requirement to disclose the identities of those who contributed more than $25 for FDA to use in the I-522 race. *FDA*, 5 Wn. App. 2d at 545 (notice posted on FDA's website so stated).[8]

- Despite this knowledge, FDA donated $200,000 to Yes on I-522 without disclosing that the funds came from 7,000 people, most of whom lived out of state. *Id.*

- FDA failed to file a corrective disclosure providing the required information before the election. *Id.*

- FDA did not bother to appear for trial. *Id*. at 547.

Despite all this, the State—trying its case against an empty chair—opted to waive "any argument that Food Democracy intentionally concealed the source of its contributions," and it "did not seek treble damages for intentional violations of the state campaign disclosure laws." *Id.*

The dramatic difference between the State's treatment of GMA, with its anti-labeling message, and pro-labeling FDA raises questions about

[8] *See also* CP 2980–90 (PDC's investigative report regarding FDA, quoting its fundraising newsletters).

the State's motives in pursuing draconian penalties against GMA.[9] There is simply no innocent explanation, and the State has not offered any. On the contrary, the State announced that GMA needed to be punished for its "arrogance," even though "the 'arrogance' of a violator is irrelevant to any . . . penalty inquiry." *GMA II*, 195 Wn.2d at 481 n.4 (Johnson, J., concurring in part and dissenting in part). The State also repeatedly painted GMA as a sinister out-of-state entity.[10] State officials viewed seeking and obtaining a massive fine against GMA as an opportunity for political gain as well as for filling the State's coffers.

In pursuing treble damages against GMA but not FDA, the State discriminated between speakers in the I-522 debate having different viewpoints. Viewpoint discrimination is unconstitutional. *See Matal v. Tam*, 582 U.S. __, 137 S. Ct. 1744, 1763 (plurality opinion of Justices Alito,

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[9] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that First Amendment law "has as its primary, though unstated, object the discovery of improper governmental motives. The doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them.").

[10] *See, e.g.*, *Status Report on AG Lawsuit Against Grocery Manufacturers Association,* WASH. STATE ATT'Y GEN. (Oct. 30, 2013), http://www.atg.wa.gov/news/news-releases/status-report-ag-lawsuit-against-grocery-manufacturers-association ("The Grocery Manufacturers Association (GMA) is a trade association, ***based in Washington DC*** . . . ."); LIBRARY PODCAST ("Washington State has won [sic] the most robust laws . . . that says you've got to disclose the money you get. . . . And . . . there was ***an outside group*** the Grocery Manufacturers Association . . . and they put in about 12 or 13 million dollars to defeat an initiative . . . . We brought a lawsuit and we received a penalty from a judge in Thurston County. It's the highest penalty ever awarded for [a] campaign finance lawsuit anywhere in the country ever. [Applause].").

Roberts, Thomas, and Breyer), 1765–1769 (concurring opinion of Justices Kennedy, Ginsburg, Sotomayor, and Kagan), 198 L. Ed. 2d 366 (2017); *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819, 828–829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995). On this basis alone, the treble damage award against GMA should not be allowed to stand.

C. The Court of Appeals Was Indifferent to the Chilling Effect of the GMA Fine on Free Expression.

The court of appeals ignored not only whether this massive fine was imposed for impermissible reasons but also the chilling effect of a multi-million-dollar fine on core political speech. As this Court explained in *GMA II*, "punitive fines should not be sought or imposed 'to retaliate against or chill the speech of political enemies." 195 Wn.2d at 476 (quoting *Timbs*, 139 S. Ct. at 689). By not following this Court's instructions, the court of appeals failed to protect free expression not just in the 2013 election but in future elections, too. After all, the key lesson that others would draw from watching this case is that it is very hazardous to contribute funds to a political campaign in Washington and, therefore, safer to remain silent.

The Framers of the Eighth Amendment knew well that large fines can be used to suppress speech. *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–67, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989) (explaining that the Framers based the Excessive Fines Clause

on a provision in the 1689 English Bill of Rights, adopted in response to heavy fines that were used to deter and suppress the King's political rivals). The court of appeals misapplied the Excessive Fines Clause when it refused to consider chilling effects on free speech as part of its excessiveness inquiry. *See GMA III*, 475 P.3d at 1070–71.

As demonstrated in Part V.A., GMA should prevail if *Bajakajian* is simply applied consistent with its terms. But constitutional claims must also be considered in context rather than compartmentalized. By conducting its *Bajakajian* analysis as if this were a civil forfeiture case rather than one involving the largest campaign finance penalty in U.S. history, the court of appeals deprived GMA of fundamental protections in the Bill of Rights. "Eighth Amendment-based proportionality protections overlap with free-speech protections insofar as governments impose especially punitive prohibitions on expressive conduct." Michael Coenen, *Four Responses to Constitutional Overlap*, 28 WM. & MARY BILL RTS. J. 347, 356 (2019).

Professor Coenen describes the concept of "penalty sensitivity"—that is, a limitation on how harshly the government may punish speech, even speech that the First Amendment allows to be punished. Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 999–1022 (2012). An example of this is the First Amendment limitation on defamation liability, which does

"not limit the state's power to impose liability" but does "limit the amount of damages the state could attach to this liability." *Id.* at 1007 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–350, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974)).

In *Gertz*, the Court held that "States may not permit recovery of presumed or punitive damages" unless the plaintiff shows "knowledge of falsity or reckless disregard for the truth." *Gertz*, 418 U.S. at 349. The Court noted "the potential . . . to inhibit the vigorous exercise of First Amendment freedoms" as well as the risk that damage awards otherwise could "punish unpopular opinion rather than . . . compensate . . . for injury . . . ." *Id.* This case presents the same potential for inhibition of First Amendment freedoms and for punishment of unpopular opinion. It requires an equally sensitive response.

The court of appeals, however, refused to recognize that applying Eighth Amendment standards should differ in a case involving core political speech than in a case involving hidden cash carried through an airport. *See GMA III*, 475 P.3d at 1070–71. Other courts recognize the relationship between the severity of a penalty and free speech interests. *See, e.g.*, *United States v. Mongol Nation*, 370 F. Supp. 3d 1090, 1120 (C.D. Cal. 2019) (rejecting forfeiture of motorcycle gang's logo as a penalty for its RICO violations). In *League of Women Voters of Florida v. Cobb*, 447 F. Supp.

2d 1314, 1322 (S.D. Fla. 2006) ("*LWVF I*"), independent voter registration groups challenged a law that imposed a $250 fine for each application that a registration group failed to submit within 10 days of receiving it from the applicant. The severity of the penalties made the statute constitutionally infirm:

> Defendants have not provided any evidence much less an explanation for the necessity of the amount of the fines . . . . Volunteers are simply not willing to spend their time and effort on voter registration activities when the consequences of imperfect compliance are significant fines.

Id. at 1338. The mere "threat of fines has . . . chilled Plaintiffs' exercise of free speech." *Id.* 1338–39.[11]

A fine that might satisfy the Eighth Amendment in one context could violate it a context that implicates an overlapping free speech interest. Professor Coenen draws the lesson:

> [C]ourts could frame penalty-sensitive free speech analysis . . . [by] reading the Eighth Amendment . . . to impose especially strict limits on the . . . power to punish expressive conduct.

Of Speech, 112 COLUM. L. REV. at 1023 n.147. Some punishments, even if "insufficiently excessive to give rise to a 'pure form' Eighth Amendment . . . violation," or "to a 'pure form' First Amendment violation, are

[11] When the law was amended to reduce the fine to $50 and cap annual penalties at $1,000, it was upheld. *See League of Women Voters of Fla. v. Browning*, 575 F. Supp. 2d 1298, 1322 (S.D. Fla. 2008) (these amended provisions "significantly reduce the concerns addressed in *LWVF I* that the fines could literally bankrupt a given organization.").

sufficiently ***punitive and speech-infringing*** to give rise to a hybrid constitutional violation." *Id.* (emphasis original).

The principle that Eighth Amendment protection should increase as the conduct that the State seeks to punish touches on free expression is reflected in Justice Ginsburg's observation: "***Exorbitant tolls undermine other constitutional liberties***. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies." *Timbs*, 139 S. Ct. at 689 (emphasis added). The absence from Division Two's opinion of any citation to *Timbs* reflects that court's failure to properly address this significant constitutional question or the substantial implications it has for participation in Washington elections.

VI. CONCLUSION

This Court should accept review of the decision in *GMA III* and hold that the trial court's $18 million penalty is a constitutionally excessive fine.

DATED this 8th day of January 2021.

Respectfully submitted,

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APPENDIX A

475 P.3d 1062
Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
GROCERY MANUFACTURERS ASSOCIATION, Appellant.
Grocery Manufacturers Association, Appellant,
v.
State of Washington, Respondent.

No. 49768-9-II Consolidated with No. 50188-1-II
|
Filed November 10, 2020

Synopsis

Background: State brought action against nationwide trade association that represented grocery manufacturers alleging that it violated Fair Campaign Practices Act (FCPA) by failing to register as political committee, failing to report financial contributions, and concealing true source of contributions in connection with state ballot initiative that would have required all packaged food products to identify ingredients containing genetically modified organisms (GMOs). The Thurston Superior Court, No. 13-2-02156-8, Anne Hirsch, J., entered summary judgment in favor of State with respect to liability, and, following bench trial on penalties, imposed $6 million civil penalty for association's multiple FCPA violations, which penalty was then trebled as punitive damages. Association appealed. The Court of Appeals, Maxa, C.J., 5 Wash.App.2d 169, 425 P.3d 927, affirmed in part, reversed in part, and remanded. Association's petition for review was granted. The Supreme Court, Yu, J., 195 Wash.2d 442, 461 P.3d 334, affirmed in part, reversed in part, and remanded.

Holdings: On remand, the Court of Appeals, Maxa, C.J., held that:

trebled penalty did not violate Eighth Amendment's excessive fines clause;

excessive fines analysis did not incorporate First Amendment exacting scrutiny standard for protected speech; and

assuming selective enforcement could be factor in excessive fines analysis, imposition of trebled penalty did not amount to selective enforcement.

Trial court's judgment affirmed.

Procedural Posture(s): Judgment.

***1064** Appeal from Thurston Superior Court, Docket No: 13-2-02156-8, Honorable Anne Hirsch, Judge

Attorneys and Law Firms

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PUBLISHED OPINION

Maxa, J.

¶1 The State filed a complaint alleging that the Grocery Manufacturers Association (GMA) failed to comply with the Fair Campaign Practices Act (FCPA), chapter 42.17A RCW, relating to a failed 2013 Washington ballot initiative, Initiative 522 (I-522). I-522 would have required all packaged food products to identify ingredients containing genetically modified organisms (GMOs). The trial court found on summary judgment that

GMA had committed multiple FCPA violations by not registering as a political committee and failing to disclose the source of millions of dollars of donations GMA made to the "No on I-522" campaign. After a bench trial, the court imposed a $6 million civil penalty against GMA for multiple violations of the FCPA and trebled the penalty to $18 million based on a finding that GMA's violation of the law was intentional.

¶2 GMA appealed, raising a number of statutory and constitutional issues. This court affirmed the trial court's ruling that GMA violated the FCPA by failing to register as a political committee and rejected GMA's constitutional challenges. However, the court held that the trial court erred in ruling that GMA did not need to subjectively intend to violate the law to be subject to treble damages under the FCPA. The court remanded the penalty for reconsideration under the proper legal standard without reaching GMA's argument that the total $18 million penalty was an excessive fine under the Eighth Amendment to the United States Constitution.

¶3 On review, the Supreme Court affirmed that GMA violated the FCPA by failing to register as a political committee and also by ***1065** concealing the source of contributions, and affirmed this court's constitutional holdings. But the court reversed on the requisite intent for treble damages, holding that the trial court had statutory authority to award treble damages. The court remanded the case to this court for consideration of GMA's Eighth Amendment excessive fines claim.

¶4 GMA argues that the $18 million penalty constitutes an excessive fine because it is grossly disproportionate to the gravity of the FCPA violations, which GMA characterizes as solely a reporting offense that did not harm the voting public. The State argues that the penalty is not an excessive fine because GMA not only failed to register as a political committee, it intentionally concealed its members' contributions to the No on I-522 campaign. The State asserts that these actions harmed the public by preventing Washington voters from knowing the identity of the companies that were spending millions of dollars to defeat the initiative.

¶5 We hold that the $18 million penalty does not violate the Eighth Amendment's excessive fines clause. Therefore, we affirm the trial court's imposition of an $18 million civil penalty on GMA.

FACTS

Background

¶6 Some of the relevant facts in this case are set out in this court's opinion and the Supreme Court's opinion in GMA's first appeal. *State v. Grocery Manufacturers Ass'n*, 5 Wash. App. 2d 169, 425 P.3d 927 (2018) (*GMA* I), *rev'd in part*, 195 Wash.2d 442, 461 P.3d 334 (2020) (*GMA* II). In addition, the trial court made extensive findings of fact before imposing the civil penalty. GMA did not challenge those findings, so they are verities on appeal.

¶7 GMA is a nationwide trade association that represents hundreds of food, beverage, and consumer product companies. Generally, GMA seeks to promote reasonable and national food labeling requirements.

¶8 In 2012, GMA opposed a ballot proposition in California, Proposition 37, which would have required producers of packaged food products to label products containing GMOs. Later that year, GMA learned about a similar proposed ballot initiative in Washington, I-522. In January 2013, GMA began planning for an aggressive campaign in Washington to oppose I-522 while at the same time avoiding state financial disclosure requirements. As part of the opposition campaign, GMA created the Defense of Brands (DOB) account to collect funds from some of its member companies and to use them to oppose I-522. Two purposes of the account were to "shield the contributions made from GMA members from public scrutiny" and to "eliminate the requirement and need to publicly disclose GMA members' contributions on state campaign finance disclosure reports." Clerk's Papers (CP) at 4059.

¶9 GMA made its first contribution to the No on I-522 campaign from the DOB account in May 2013. GMA solicited over $14 million in contributions from its member companies for the DOB fund and paid $11 million of that amount to the No on I-522 political committee. The payments to the No on I-522 campaign were attributed solely to GMA, with no indication of which member companies had provided the funds. In fact, contributing GMA members were instructed how to respond if they received inquiries about GMA's contributions, "in part to divert attention from the true source of the funds, namely, the individual GMA members." CP at 4061. And in June, GMA removed the names of its members from its website.

¶10 Until October 17, GMA did not register with the

Public Disclosure Commission (PDC) as a political committee or file any required political committee reports that would have disclosed the contributing members. GMA registered only after receiving a violation notice from the PDC. GMA first disclosed the members who contributed to the DOB account on October 17, a few weeks before the election. And GMA never fully disclosed the total contributions to the DOB account. The trial court found that there were at least 47 reports required under the FCPA that GMA failed to timely or properly file.

Procedural History

¶11 The State sued GMA for failing to register as a political committee, failing to ***1066** report financial contributions, and concealing the true source of contributions. The State sought a base penalty of $14,622,820 trebled to $43,868,460. This amount apparently was based primarily on the amount in the DOB fund that GMA failed to timely disclose.

¶12 On summary judgment, the trial court ruled that GMA was required to register as a political committee under former RCW 42.17A.005(37) (2011) when it created the DOB account, that GMA violated various FCPA reporting and disclosure requirements for political committees, and that GMA violated RCW 42.17A.435 by concealing the source of the contributions it made to oppose I-522.

¶13 After a bench trial on the issue of penalties, the court imposed a $6 million civil penalty against GMA based on (1) GMA's concealment of the amount in the DOB account, (2) GMA's concealment of the source of the contributions to the DOB account, (3) the multiple disclosure reports that were not timely or properly filed regarding finance activities of the DOB account, and (4) the number of days the required reports were late. The court then trebled the penalty to $18 million based on a finding that GMA's violation of the law was intentional.

¶14 GMA appealed. *GMA* I, 5 Wash. App. 2d at 182, 425 P.3d 927. In *GMA* I, this court held that the trial court did not err in granting summary judgment in favor of the State as to whether GMA qualified as a political committee under former RCW 42A.17.005(37) by receiving contributions for the DOB account to oppose I-522. *Id.* at 191, 425 P.3d 927. The court also rejected GMA's constitutional challenges. *Id*. at 191-206, 425 P.3d 927.

¶15 However, the court held that the trial court erred in ruling that GMA did not need to subjectively intend to violate the law in order to be subject to treble damages under former RCW 42.17A.765(5) (2010). *Id*. at 208-09, 425 P.3d 927. The court remanded for further proceedings for the trial court to determine whether GMA was subject to treble damages under the proper standard. *Id*. at 209, 425 P.3d 927. Because the court vacated the treble damages award, it did not address GMA's argument that the $18 million penalty was an excessive fine in violation of the Eighth Amendment.

¶16 Both parties petitioned for review in the Supreme Court, which granted review. *GMA* II, 195 Wash.2d 442, 461 P.3d 334. The Supreme Court affirmed that GMA constituted a political committee and also that GMA intentionally violated the FCPA's prohibition on concealment by using the DOB account to shield the names of contributing members. *Id*. at 453-61, 469-70, 461 P.3d 334. The court also held that the FCPA's registration and disclosure requirements did not violate the First Amendment to the United States Constitution as applied to GMA. *Id*. at 461-69, 461 P.3d 334. But the court reversed this court on the issue of the required intent for FCPA violations and held that the FCPA "requires only the intent to accomplish an illegal act," affirming the legal standard applied by the trial court. *Id*. at 475, 461 P.3d 334. The court remanded to this court to consider whether the penalty imposed against GMA is an unconstitutional excessive fine. *Id*. at 476, 461 P.3d 334.

¶17 The court stated, "[W]e caution that our affirming the trial court's statutory authority to impose a treble penalty in this case does not necessarily mean that either the base penalty or the treble penalty that was actually imposed is constitutional." *Id*. at 476, 461 P.3d 334. The court also noted, "On remand, this penalty must be scrutinized carefully to ensure that it is based on constitutionally permissible considerations and is not grossly disproportional to GMA's violations of the FCPA's registration and disclosure requirements for political committees." *Id*. at 477, 461 P.3d 334.

¶18 On remand, GMA challenges the trial court's $18 million penalty.

ANALYSIS

A. FAIR CAMPAIGN PRACTICES ACT

1. Public Policy

¶19 The purpose the FCPA is " 'to ferret out ... those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public ***1067** information.' " *Voters Educ. Comm. v. Pub. Disclosure Comm'n*, 161 Wash.2d 470, 480, 166 P.3d 1174 (2007) (alteration in original) (quoting *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wash.2d 503, 508, 546 P.2d 75 (1976)). RCW 42.17A.001[1] sets forth the declaration of policy of the FCPA, which includes:

> (1) That *political campaign* and lobbying *contributions and expenditures be fully disclosed to the public* and that *secrecy is to be avoided*.
>
> ....
>
> (10) That the *public's right to know of the financing of political campaigns* and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private.

(Emphasis added.)

¶20 In addition, RCW 42.17A.001 states that "[t]he provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying."

2. Political Committee Reports and Concealment

¶21 Under former RCW 42.17A.005(37), a "political committee" means "any person ... having the expectation of receiving contributions or making expenditures in support of, or in opposition to, any candidate or any ballot proposition." A political committee must file a statement of organization with the PDC "within two weeks after organization or within two weeks after the date the committee first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier." Former RCW 42.17A.205(1) (2011).

¶22 A political committee also must file reports with the PDC at various intervals that contain certain specified information. Former RCW 42.17A.235 (2011); former RCW 42.17A.240 (2010). This includes reporting to the PDC all contributions received and expenditures made. Former RCW 42.17A.235(1). And a political committee must disclose the name of each person contributing funds to the committee and the amount of the contribution. Former RCW 42.17A.235(3), former RCW 42.17A.240(2).

¶23 In addition, the FCPA prohibits concealing the source of contributions:

> No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

RCW 42.17A.435.

3. Penalties

¶24 Former RCW 42.17A.750(1) (2011) identifies a range of possible civil penalties for violations of provisions of the FCPA. In particular, former RCW 42.17A.750(1)(c) states that a person who violates any provision in chapter 42.17A RCW may be subject to a civil penalty of not more than $10,000 for each violation. Former RCW 42.17A.750(1)(d) states that a person who fails to timely file a statement or report may be subject to a civil penalty of $10 per day for each day the report or statement is delinquent. In addition, former RCW 42.17A.750(1)(e) states that a person who fails to report a contribution or expenditure as required may be subject to a civil penalty equivalent to the amount not reported. The court may impose one or more of these civil remedies. Former RCW 42.17A.750(1).

¶25 Under former RCW 42.17A.765(5), the court may treble the amount of an FCPA judgment as punitive damages "[i]f the violation is found to have been intentional."

B. EXCESSIVENESS OF $18 MILLION CIVIL

PENALTY

¶26 GMA argues that the trial court's total civil penalty of $18 million constituted an excessive fine in violation of the Eighth Amendment. We disagree.

***1068** 1. Legal Principles

¶27 The Eighth Amendment prohibits the imposition of "excessive fines." The Eighth Amendment excessive fines clause applies to the states through the due process clause of the Fourteenth Amendment. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).[2]

¶28 The excessive fines clause applies when the government requires payments as punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 328, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). The clause also applies to civil cases if the payment constitutes punishment. *Austin v. United States*, 509 U.S. 602, 609-10, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).

¶29 The Court in *Bajakajian* addressed the test for determining whether a punishment violates the Eighth Amendment: "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." 524 U.S. at 334, 118 S.Ct. 2028. Specifically, "If the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Id.* at 337, 118 S. Ct. 2028; *see also GMA* II, 195 Wash.2d at 476, 461 P.3d 334.

¶30 Courts may consider several factors, derived from *Bajakajian*, in determining the proportionality of a fine to an offense: " '(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused.' " *GMA* II, 195 Wash.2d at 476, 461 P.3d 334 (quoting *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)).

¶31 GMA repeatedly analogizes its case to *Bajakajian*, where the Court analyzed these factors. In that case, federal law required Bajakajian, who was leaving the United States, to declare that he was transporting more than $10,000 in currency. 524 U.S. at 324, 118 S.Ct. 2028. Bajakajian declared $15,000, but customs inspectors found a total of $357,144 after searching the family's belongings. *Id.* at 325, 118 S. Ct. 2028. The Court held that forfeiture of the entire $357,144 actually in his possession would violate the excessive fines clause because (1) it was "solely a reporting offense," (2) it was unrelated to any other illegal activity, (3) the maximum fine under the sentencing guidelines was $5,000, and (4) harm was minimal, as "the Government would have been deprived only of the information that $357,144 had left the country." *Id.* at 337-39, 118 S. Ct. 2028.

¶32 The Court in *Bajakajian* highlighted two other considerations. First, courts should give deference to the legislature's determination of the appropriate punishment for an offense. *Id.* at 336, 118 S. Ct. 2028. "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Id.* Second, "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise." *Id.*

¶33 We review de novo whether a civil penalty violates the excessive fines clause of the Eighth Amendment. *See Black v. Cent. Puget Sound Reg'l Transit Auth.*, 195 Wash.2d 198, 204, 457 P.3d 453 (2020).

2. Excessive Fines Analysis

¶34 The State agrees that the Eighth Amendment applies to GMA's civil penalty because the penalty is at least in part punishment for an offense. Therefore, the issue is whether the amount of the penalty was grossly disproportionate to the gravity of GMA's FCPA violations. *See Bajakajian*, 524 U.S. at 337, 118 S.Ct. 2028. We apply the factors stated in ***1069** *GMA* II, 195 Wash.2d at 476, 461 P.3d 334, in analyzing the proportionality of the civil penalty imposed against GMA.

¶35 First is the nature and extent of the offense. GMA minimizes the violation, stating that it was merely a reporting offense as in *Bajakajian*. And GMA points out that although Bajakajian knowingly lied, GMA believed that its description of itself as the source of its contributions was true.

¶36 In assessing the $6 million penalty for GMA's FCPA violations and trebling that amount, the trial court made an unchallenged finding regarding "factors that weigh in favor of the court imposing a more substantial penalty":

> Those factors include: violation of 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, the sophistication and experience of GMA executives, the failure of GMA executives to provide complete information to their attorneys, the intent of GMA to withhold from the public the true source of its contributors against Initiative 522, the large amount of funds not reported, the large number of reports filed either late or not at all, and the lateness of the eventual reporting just shortly before the 2013 election.

CP at 4069. These factors relate to the gravity of GMA's offense.

¶37 We conclude that GMA's FCPA violations were serious and significant. The trial court's finding quoted above supports this conclusion. GMA's penalty reflects more than failing to register as a political committee and submit various reports. GMA expressly designed the DOB account to intentionally shield its members' political activity from public scrutiny in a campaign involving a contentious ballot proposition. Because of GMA's intentional actions, Washington voters were deprived of knowing that multiple companies were spending millions of dollars to defeat I-522 and the identity of those companies. GMA infringed on the FCPA's first stated policy: "That *political campaign* and lobbying *contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided*." RCW 42.17A.001(1) (emphasis added).

¶38 Second is whether the violation was related to other illegal activities. GMA argues that its reporting offense involved no other illegal activities and emphasizes that its violations related to political speech. The State argues that GMA's failure to register was tied to its illegal efforts to conceal the true source of the funds GMA used to oppose I-522.

¶39 The Supreme Court held that GMA violated the FCPA by failing to register as a political committee in violation of former RCW 42.17A.205(1) and former RCW 42.17A.235. *GMA* II, 195 Wash.2d at 461, 461 P.3d 334. GMA focuses only on that violation. But the court also held that GMA intentionally violated RCW 42.17A.435, the prohibition on concealment. *Id.* at 469-70, 461 P.3d 334. The court emphasized the trial court's findings that GMA specifically intended to create a plan to allow its contributing members to remain anonymous and avoid state filing requirements and provided advice to its members on how to divert the media's attention from the true source of No on I-522 funding for the improper purpose of concealment. *Id.* at 470, 461 P.3d 334. Therefore, GMA's violation involved multiple illegal activities.

¶40 Third is whether other penalties may be imposed for the violation. In applying this factor, we look to the penalties the legislature authorized and the maximum penalties that could have been imposed. *$100,348.00 in U.S. Currency*, 354 F.3d at 1122. GMA argues that under former RCW 42.17A.750(1)(c) and (d), the $10,000 per violation and the $10 per day penalties for GMA's multiple violations would total only $622,820. Even trebling that amount would result in a maximum penalty of $1.87 million. GMA emphasizes that the actual penalty was nearly 10 times higher than this penalty.

¶41 However, as GMA must acknowledge, former RCW 42.17A.750(1)(f) authorized the trial court to impose a civil penalty *equal to the amount of the unreported contributions*. The trial court found that GMA contributed $11 million to the No on I-522 campaign, and collected over $14 million in the DOB account. The State actually requested a civil ***1070** penalty of $14,622,820, trebled to over $43 million, based on the value of these unreported contributions.

¶42 The $18 million penalty the trial court imposed was well within the maximum penalty that the trial court could have imposed under FCPA provisions. GMA claims that the amount undisclosed cannot be determinative because otherwise no disclosure penalty could ever be excessive. But the legislature's authorization of such a fine clearly is relevant to the excessive fines analysis. Because a major concern regarding the failure to disclose the source of campaign contributions is how that failure interferes with public information during the electoral process, the harm caused by concealing the source of contributions necessarily is tied to the size of the contributions.

¶43 Fourth is the extent of the harm. GMA argues that its violations caused minimal harm because the voting public knew that GMA's contributions were coming from grocery manufacturers and GMA did make the required disclosures before the election. And GMA notes the trial court's finding that it was impossible to know if GMA's violation affected the outcome of the election.

¶44 We conclude that the harm GMA caused with its FCPA violations was substantial. The harm was that GMA undermined the transparency of the ballot

proposition measure and intentionally denied the voters information related to substantial campaign contributions from otherwise unidentified parties over an extended period of the election season.

¶45 As the Supreme Court noted, the FCPA disclosure requirements are designed to allow the public to " 'follow the money' " regarding campaigns. *GMA* II, 195 Wash.2d at 455, 461 P.3d 334 (quoting *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010)). GMA began donating money to the No on I-522 campaign through the DOB fund in May 2013. But it was not until October 17 that GMA disclosed that it had been raising money as a political committee and identified the member companies that had donated to the DOB fund. Therefore, for most of the campaign period Washington voters were deprived of critical "follow the money" information – that individual companies were donating millions of dollars to defeat I-522.[3]

¶46 Considering all of these factors, we conclude that the trial court's $18 million penalty was not grossly disproportionate to the gravity of GMA's FCPA violations. Those violations were serious and significant, and represented an intentional attempt to conceal the identity of companies donating millions of dollars in a contentious ballot campaign. The penalty imposed was well within the limits established by former RCW 42.17A.750(1)(f) and former RCW 42.17A.765(5), and the legislature is entitled to some deference in authorizing those penalties. *Bajakajian*, 524 U.S. at 336, 118 S.Ct. 2028. In addition, GMA's offense caused significant harm. Voters evaluating I-522 were deprived of the opportunity to "follow the money" and determine what companies were opposing the initiative. And GMA's violations had the potential of eroding the public's confidence in Washington's electoral process.

¶47 Accordingly, based on our analysis of the *Bajakajian* factors endorsed in *GMA* II, we hold that the $18 million civil penalty imposed on GMA does not constitute an excessive fine in violation of the Eighth Amendment.

3. First Amendment Considerations

¶48 Amicus Center for Competitive Politics ("CCP") argues that the proportionality analysis must take into account First Amendment considerations. CCP asserts that because the $18 million penalty has the potential to chill constitutionally protected speech, we should incorporate an "exacting scrutiny" standard. This standard requires that burdens on protected speech have a substantial relation with a sufficiently important ***1071** governmental interest. *See Doe v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (addressing First Amendment challenges to campaign disclosure requirements).

¶49 However, CCP cites no United Sates Supreme Court or Washington authority or authority from any other jurisdiction to support its position that an exacting scrutiny standard must be included in the Eighth Amendment excessive fines analysis. And our Supreme Court in *GMA* II did not suggest that such a standard applies; it endorsed the *Bajakajian* factors. *See* 195 Wash.2d at 476, 461 P.3d 334.

¶50 Further, as the State points out, the $18 million penalty was not imposed because of GMA's speech. The penalty was imposed because GMA concealed the source of the funding for its speech, and GMA has identified no constitutional right to conceal the source of campaign constitutions.

4. Selective Enforcement

¶51 In its statement of additional authorities, GMA cites *State ex rel. Pub. Disclosure Comm'n v. Food Democracy Action!*, 5 Wash. App. 2d 542, 544-48, 427 P.3d 699 (2018), *review denied*, 195 Wash.2d 1030, 468 P.3d 620 (2020), on the issue of whether the State selectively pursued treble damages against GMA. GMA references a footnote in *GMA* II that stated: "We express no opinion as to whether the State selectively pursued treble damages in this case, but that issue may be relevant to GMA's excessive fines claim on remand." 195 Wash.2d at 473 n.6, 461 P.3d 334.

¶52 In *Food Democracy*, the trial court imposed a $319,281.58 penalty against an organization that supported I-522 for raising over $295,000 without registering as a political committee. 5 Wash. App. 2d at 547, 427 P.3d 699. However, the State did not seek treble damages. *Id.* GMA's implication apparently is that the State favored supporters of I-522 by not seeking treble damages against them while seeking treble damages against opponents of I-522.

¶53 However, the *Food Democracy* opinion does not contain sufficient facts to determine whether the State's failure to seek treble damages somehow was inappropriate. And nothing in the record of this case suggests that the State should have sought treble damages in that case. Conversely, the Supreme Court in *GMA* II

expressly held that the facts of this case supported the trial court's imposition of treble damages. 195 Wash.2d at 471-75, 461 P.3d 334.

CONCLUSION

¶54 We affirm the trial court's imposition of an $18 million civil penalty on GMA.

We concur:

WORSWICK, J.

LEE, C.J.

All Citations

475 P.3d 1062

Footnotes

1 The statute in effect at the time the complaint was filed, former RCW 42.17.010 (1975), was recodified as RCW 42.17A.001 effective January 1, 2012, and amended in 2019. Because the 2019 amendment does not affect our analysis we cite to the current statute.

2 Article I, section 14 of the Washington Constitution also prohibits excessive fines. In its statement of additional authority, GMA suggests that article I, section 14 is more protective than the Supreme Court's interpretation of the Eighth Amendment. However, GMA did not provide any argument in its briefing that this provision provides greater protection than the Eighth Amendment. Therefore, we do not consider this issue. RAP 10.3(a)(6); *Billings v. Town of Steilacoom*, 2 Wash. App. 2d 1, 33, 408 P.3d 1123 (2017).

3 GMA also suggests consideration of a fifth factor: whether an offender fits within the class of offenders targeted by the FCPA. GMA argues that the FCPA targets those who would use deceit to sway elections or hide contributions that influence elected officials, and that GMA does not fall into that category. But establishing a separate, undisclosed account to conceal the true source of campaign contributions is exactly the sort of activity the FCPA targets.

APPENDIX B

No. 49768-9-II

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.

APPELLANT'S MOTION FOR RECONSIDERATION

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1. IDENTITY OF MOVING PARTY

Grocery Manufacturers Association ("GMA") asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

GMA asks the Court to address the gross disparity between the penalty imposed in this case and penalties sought and imposed in other cases arising under the Fair Campaign Practices Act ("FCPA"), including *State ex rel. Pub. Disclosure Comm'n v. Food Democracy Action!*, 5 Wn. App. 2d 542, 427 P.3d 699 (2018) ("*FDA*").

3. FACTS RELEVANT TO MOTION

GMA appealed to this Court after the trial court imposed the largest penalty in the history of campaign finance enforcement. That penalty comprised a $6 million fine, itself a record, which was then trebled to $18 million. One of GMA's arguments on appeal was that the trial court's penalty assessment violated the Eighth Amendment.

This Court declined to address GMA's Eighth Amendment claim because it reversed the trial court's punitive-damage award and remanded to the trial court for a recalculation of damages. *See State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 177 n.2, 425 P.3d 927 (2018). The Washington Supreme Court then reversed this Court on its interpretation of the punitive-

damage statute and remanded to this Court for consideration of the Eighth Amendment claim. *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 461 P.3d 334 (2020).

On November 10, 2020, this Court issued a published opinion holding that the trial court's $18 million penalty did not violate the Eighth Amendment's prohibition of excessive fines. The opinion does not discuss the penalties assessed in any other case arising under the FCPA, apart from the $319,281.58 penalty imposed on Food Democracy Action! ("Food Democracy") for FCPA violations committed during the same initiative campaign. *See* Slip op. at 15–16.

The record in this case shows the following:

- The penalty imposed in this case is 20 times higher than the second-highest penalty imposed under the FCPA. CP 3636; *see also* CP 3716.
- As compared with the $160,000 that Voters Education Committee was required to pay for failure to report and for concealment of a $1.5 million contribution, the penalty imposed in this case is 109 times higher. *See* CP 3636.
- On a dollar-for-dollar basis, the concealed contributions in this case were penalized 15.35 times more harshly than those

at issue in *Voters Education Committee*.[1]

- Serial offender Tim Eyman was penalized $50,000 for concealment of expenditures. CP 3636.

This Court's analysis of the *FDA* case is brief: "the *Food Democracy* opinion does not contain sufficient facts to determine whether the State's failure to seek treble damages was inappropriate. And nothing in the record of this case suggest that the State should have sought treble damages in that case." This statement overlooks that the Public Disclosure Commission's investigative report regarding Food Democracy is part of the record in this case. *See* CP 2980–2990. We discuss that report and the *FDA* opinion below in Part 4.b.

4. GROUNDS FOR RELIEF AND ARGUMENT

a. A fine that is orders of magnitude higher than any other FCPA penalty is grossly disproportionate.

In evaluating GMA's Eighth Amendment arguments, this Court focuses on the public policy underlying the FCPA. *See* Slip op. at 6, 7, 11, 13, 14, 15. That policy may provide a basis to distinguish cases arising under other statutes, but it cannot distinguish cases arising under the self-same statute. Neither the record in this case nor any previous decision

[1] $11 million / $1.5 million = 7.33; 7.33 x $160,000 = $1,172,800; $18 million / $1,172,800 = 15.35.

suggests that the policy judgments underlying the FCPA apply differently to GMA than to other persons found to have violated the same statute in the same ways. Yet GMA has been punished to an extent that is wholly out of line with penalties imposed in other FCPA cases. This is incontrovertible evidence of gross disproportionality.

As the U.S. Supreme Court explained in *United States v. Bajakajian*, 524 U.S. 321, 336–37, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), the constitutional standard of "gross disproportionality" (rather than strict proportionality) reflects two considerations: legislative judgments about appropriate punishments merit deference, and judicial determinations regarding the gravity of particular offenses are inherently imprecise. It is an analytic error to treat deference to legislative judgments as a "factor" that merits consideration yet again when applying the constitutional standard of gross disproportionality. *See* Slip op. at 14.

In any case, the question here is not whether the Legislature could conclude that a fine up to the amount of an undisclosed contribution may in some cases be appropriate. It is, rather, whether the application of that permissive authority here resulted in an excessive fine. And that question cannot be answered without looking at how the same permissive authority has been applied in other cases. Particularly given the absence of any evidence that anyone was fooled about the economic motivations of I-522

opponents, the record in this case compels the conclusion that $18 million is a constitutionally excessive fine.

b. Comparison of the fine in this case with the penalty sought from Food Democracy shows impermissible discrimination.

Certainly Food Democracy was not fooled about the economic motivations of I-522 opponents. Food Democracy emailed two fundraising newsletters in mid-2013. Both discussed GMO labeling efforts across the country and "identified Monsanto, Grocery Manufacturers Association (GMA), and DuPont as '*pesticide, and junk food companies*' attempting '*to kill*' and '*declare war*' on the GMO labeling movement. The newsletters discussed that the same opponents helped to defeat Proposition 37, a GMO labeling initiative in California in 2012." CP 2983 (emphasis in the original).

Food Democracy's newsletters continued:

- "'*Click here to pitch in to defeat Monsanto and their cronies at the GMA - We know we can win this battle, but we can't do it without your help!'*
- *"'With a small contribution you can help us reach voters who might only hear the lies and propaganda of our deep-pocketed opponents. Help us reach our goal of $150,000 for*

Yes on 522 for GMO labeling by July 31. With your help, we'll win this November!'"

CP 2984 (emphasis in the original).

In *FDA*, 5 Wn. App. 2d at 545, this Court describes what came next:

> In the three months before the election, Food Democracy made five payments, for a total of $200,000, directly to the Yes on I-522 political committee. Food Democracy made those contributions in its own name. It did not disclose that the money it contributed to the I-522 campaign came from over 7,000 individuals, most of whom lived outside the state. The Yes on I-522 political committee filed a report with the PDC stating that the $200,000 in contributions came directly from Food Democracy.
>
> Food Democracy had some familiarity with the state campaign finance disclosure reporting requirements. An e-mail Food Democracy sent to its members referenced the "public disclosure records filed in Washington State" by the No on 522 political committee. Clerk's Papers (CP) at 130. As of two weeks before the election, Food Democracy's website stated that:
>
> > Washington State law requires [that Food Democracy] collect and report the name, mailing address, and the contribution amount for each individual whose contributions exceed $25 and the employer and occupation for each individual whose contributions exceed $100 in an election cycle. [The] contribution will be used in connection with Washington State elections and is subject to the limits and prohibitions of the Washington State Public Disclosure Commission.
>
> CP at 135-36. However, before the election, Food Democracy did not report the names of any individuals who contributed funds that Food Democracy then contributed in its own name.

The record in this case and this Court's *FDA* opinion show, therefore, that Food Democracy knew that Washington law required it to report the names of its more than 7,000 contributors, but it failed to do so until after the election. In *FDA*, as in *GMA*, the trial court granted partial summary judgment in favor of the State, leaving only the amount of penalties, costs, and fees for trial. *FDA*, 5 Wn. App. 2d at 547.

Food Democracy failed to appear for trial. The State had an empty chair for an opponent. Yet the State "abandoned any argument that Food Democracy intentionally concealed the source of its contributions and did not seek treble damages for intentional violations of the state campaign disclosure laws." *FDA*, 5 Wn. App. 2d at 547.

What could have prompted that decision? Certainly not the factual differences between the *FDA* case and this one. Unlike Food Democracy, GMA believed that making contributions in its own name was consistent with state law.[2] GMA's name, unlike Food Democracy's, fully disclosed the economic interest of its contributors. GMA's members, unlike Food Democracy's contributors, had suffered death threats and boycotts when previously identified as participants in the GMO-labeling debate. Yet

[2] While the trial court found that testimony about whether GMA intended to violate Washington campaign finance law was not credible, the trial court did not find—nor could it—that GMA believed its actions violated the FCPA. Rather, the trial court's finding was based, in part, on the fact that executives failed to give full information to GMA's legal counsel. *See* CP 4068-69.

GMA, unlike Food Democracy, disclosed all of its contributors weeks *before* the election.

Intentional conduct, the State has argued here, requires only intent to accomplish an unlawful act, not subjective knowledge that the act is unlawful. The Washington Supreme Court agreed. 195 Wn.2d at 471–72. But the Court also noted that, "if a violator *did* have subjective knowledge that its conduct was unlawful and acted anyway, that would likely be a strong factor favoring treble damages . . . ." *Id.* at 474–75 (emphasis in the original). It is clear from the PDC investigative report and this Court's decision in *FDA* that Food Democracy *knew* its conduct in failing to report its contributors before the election was unlawful. The State's decision to seek treble damages nevertheless from GMA while forgoing the same from Food Democracy has no innocent explanation.

A speaker may attract official hostility for many reasons. One potential reason is the speaker's home. In this case, as the State has emphasized, GMA hails from the *other* Washington.[3] Another potential

[3] An October 30, 2013, press release by the Attorney General reported:

> The Grocery Manufacturers Association (GMA) is a trade association, based in Washington DC, representing more than 300 food, beverage and consumer product companies. The GMA's political committee is the largest single donor to the No on 522 campaign, contributing more than $11 million to date.

http://www.atg.wa.gov/news/news-releases/status-report-ag-lawsuit-against-grocery-manufacturers-association (last visited Nov. 17, 2020).

reason for hostility could be the speaker's audacity in challenging the State's regulatory regime. In this case, GMA successfully argued that the FCPA's "ten, ten" rule[4] impermissibly limited the speech of out-of-state speakers such as itself.[5] GMA also resisted the State's reading of the "political committee" and "concealment" provisions in the FCPA. After the trial court imposed punitive damages on GMA, the Attorney General stated: "I took this case to trial because the GMA needed to be held accountable for their arrogance . . . ."[6]

In *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019), Justice Ginsberg wrote for the Court:

> For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history. Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies . . . .

The only possible explanations for the disparate treatment of GMA and Food Democracy are (a) the content of their messages or (b) hostility toward

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[4] RCW 42.17A.442 provides as follows: "A political committee may make a contribution to another political committee only when the contributing political committee has received contributions of ten dollars or more each from at least ten persons registered to vote in Washington state."

[5] CP 363. GMA not only had the "ten, ten" statute ruled unconstitutional; it also secured a permanent injunction against enforcement of the statute in initiative campaigns. CP 4331–34. The State did not appeal that decision.

[6] http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us (last visited Nov. 17, 2020).

GMA because it successfully challenged state law and contested the State's penalty claim. Either way, the difference in treatment implicates core First Amendment concerns. Those concerns may not be ignored.

DATED this 30th day of November 2020.

Respectfully submitted,

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APPENDIX C

Filed
Washington State
Court of Appeals
Division Two

December 9, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GROCERY MANUFACTURERS ASSOCIATION, Appellant.	No. 49768-9-II Consol. w/ 50188-1-II ORDER DENYING MOTION FOR RECONSIDERATION
GROCERY MANUFACTURERS ASSOCIATION, Appellant, v. STATE OF WASHINGTON, Respondent.	

Appellant Grocery Manufacturers Association moved for reconsideration of the court's November 10, 2020 opinion. Upon consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

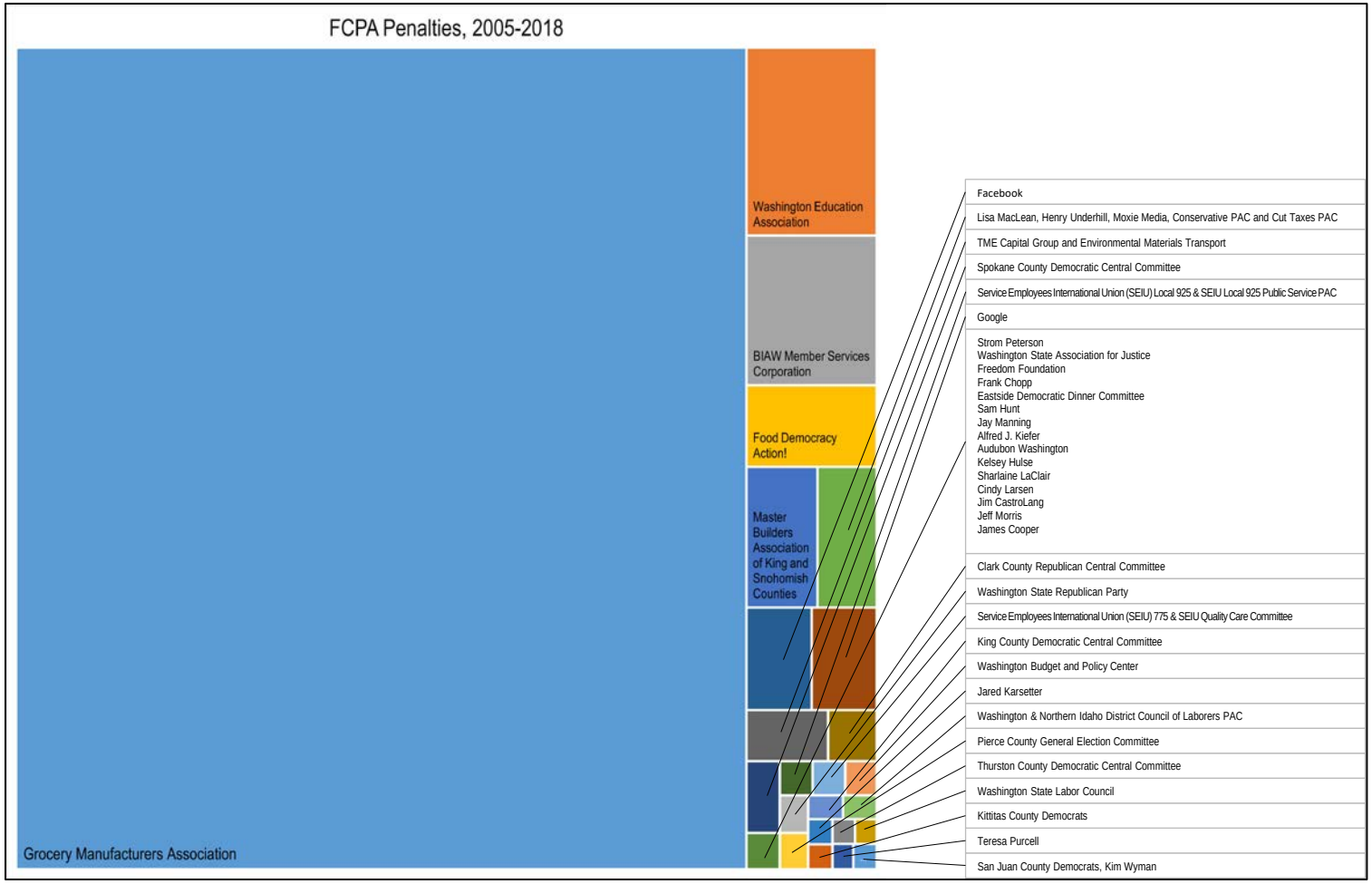
PANEL: Jj. Worswick, Maxa, Lee

FOR THE COURT:

Maxa, J.

MAXA, J.

APPENDIX D


FCPA Penalties, 2005-2018
Grocery Manufacturers Association
Washington Education Association
BIAW Member Services Corporation
Food Democracy Action!
Master Builders Association of King and Snohomish Counties
Facebook
Lisa MacLean, Henry Underhill, Moxie Media, Conservative PAC and Cut Taxes PAC
TME Capital Group and Environmental Materials Transport
Spokane County Democratic Central Committee
Service Employees International Union (SEIU) Local 925 & SEIU Local 925 Public Service PAC
Google
Strom Peterson
Washington State Association for Justice
Freedom Foundation
Frank Chopp
Eastside Democratic Dinner Committee
Sam Hunt
Jay Manning
Alfred J. Kiefer
Audubon Washington
Kelsey Hulse
Sharlaine LaClair
Cindy Larsen
Jim CastroLang
Jeff Morris
James Cooper
Clark County Republican Central Committee
Washington State Republican Party
Service Employees International Union (SEIU) 775 & SEIU Quality Care Committee
King County Democratic Central Committee
Washington Budget and Policy Center
Jared Karsetter
Washington & Northern Idaho District Council of Laborers PAC
Pierce County General Election Committee
Thurston County Democratic Central Committee
Washington State Labor Council
Kittitas County Democrats
Teresa Purcell
San Juan County Democrats, Kim Wyman

This chart was created with Microsoft Excel using data provided by the State at *AGO Case Outcomes*, WASH. STATE OFFICE OF THE ATT'Y GEN., https://www.atg.wa.gov/enforcement-campaign-finance-laws. The chart includes only those components of a judgment identified as a penalty (even if suspended). Certain blocks of the chart represent the sums of penalties in multiple cases, each less than $7,000. This permits display in the chart of the largest number of unique blocks. Penalties under $7,000 are so small in comparison with GMA's that they otherwise would not have appeared in the chart at all.

K&L GATES LLP

January 08, 2021 - 11:53 AM

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Appellate Court Case Title:	State of Washington, Respondent v. Grocery Manufacturers Association, Appellant
Superior Court Case Number:	13-2-02156-8

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