NO. 99407-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner.

STATE'S ANSWER TO AMICI ON PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

NOAH G. PURCELL, WSBA 43492
Solicitor General

KARL D. SMITH, WSBA 41988
Deputy Solicitor General

CRISTINA SEPE, WSBA 53609
Assistant Attorney General

Office ID 91087
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-753-6200
karl.smith@atg.wa.gov

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I. INTRODUCTION

Amici's arguments in favor of review are based on issues not present in Grocery Manufacturers Association's (GMA) petition, mischaracterizations of the Court of Appeals decision, and misrepresentations of the record. This Court should deny review.

II. ARGUMENT

A. The Petition Does Not Present the First Amendment Issues Amici Ask This Court to Address

Several amici urge this Court to grant review of First Amendment issues, including the application of exacting scrutiny to the fine, or the "chilling effects" doctrine. Amicus Curiae Memorandum of the Institute for Free Speech in Support of Review (IFS Br.) at 3-7; Memorandum of Amici Curiae Bldg. Indus. Ass'n of Wash., Enter. Wash., and Wash. Farm Bureau (BIAW Br.) at 7-8; Memorandum of Amici Curiae State Legislators (State Legislators Br.) at 7-10. Those issues are not presented in this appeal, and, even if they were, entirely lack merit. This Court should not grant review of these issues.

This Court has already applied exacting scrutiny in the context of GMA's challenge to the application of the Fair Campaign Practices Act (FCPA). *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 461-69, 461 P.3d 334 (2020) (*GMA* II). GMA's current petition does not ask this Court to

re-visit that issue; it does not even use the term "exacting scrutiny." Amici's independent desire to relitigate this issue does not warrant review.

Similarly, the chilling effects doctrine is part of First Amendment analysis, but GMA has not asserted a First Amendment challenge to the amount of the fine. *See* Answer to Pet. for Rev. at 19-20. Amici cannot create an issue for appeal that GMA has failed to raise.

Even if this issue were presented by the petition, it would be meritless. The inquiry under the Excessive Fines Clause is fundamentally different than under the First Amendment, and the United States Supreme Court has expressly rejected attempts to conflate the two. *Alexander v. United States*, 509 U.S. 544, 558 n.3, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993) ("Questions of proportionality, however, should be dealt with directly and forthrightly under the Eighth Amendment and not be allowed to influence *sub silentio* courts' First Amendment analysis."). Indeed, amici have cited no case applying exacting scrutiny in the context of an excessive fines claim.

The consequences of accepting amici's novel argument are also profoundly troubling. At its core, amici's argument is that big spenders cannot be subjected to a proportional penalty for concealment because the size of a proportional penalty might have a chilling effect on speech by third parties. While there seems little dispute that an entity intentionally

concealing the true source of $1,100 could be subject to an $1,800 fine, under amici's argument, an entity intentionally concealing $11,000,000 could not be subject to a proportional fine of $18,000,000. This effort to privilege deep-pocketed entities has no place in the law.

Moreover, amici's professed concerns about a chilling effect are misplaced. The fine imposed on GMA is for its intentional, unprecedented, and highly culpable scheme to conceal the true source of contributions. The fine was not imposed for engaging in speech. GMA and all other speakers are welcome to participate in public debate over ballot measures. While the proportional fine imposed here may well have the effect of deterring active concealment of campaign contributions from the public, that is a positive development that advances the People's well-recognized interest in disclosure. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) ("[D]isclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

B. The Petition Does Not Call for Interpretation of Article I, Section 14

Amici BIAW suggests that "this case could allow the Court to decide if Washington's excessive fines clause provides greater protection

than its federal counterpart in these circumstances." BIAW Br. at 6. Not so. The Court of Appeals declined to consider the issue because it was not raised in the briefing. *State v. Grocery Mfrs. Ass'n*, 15 Wn. App. 2d 290, 300 n.2, 475 P.3d 1062 (2020) (*GMA* III). GMA does not seek review of that aspect of the decision; the petition for review does not even cite article I, section 14. Because this issue is not presented, it cannot justify review.

C. Amici State Legislators Rely on the Mistaken Premise that Discretion to Impose Penalties is Standardless

Amici State Legislators contend that the Court of Appeals decision "effectively provides for standardless discretion" in assessing civil penalties. State Legislators Br. at 3. This is not true. State law and the Constitution already impose multiple limitations on trial court discretion in assessing penalties.

To begin with, state law sets maximum penalty amounts based on the extent of the violation, allowing a penalty to be assessed based on the number of reports missed, the number of days a report is late, or the amount of concealed spending. RCW 42.17A.750(1). These limits meaningfully cabin the initial penalty amount, though they obviously and appropriately allow larger penalties for more significant violations. The Public Disclosure Commission has long set forth additional factors for use in assessing

penalties, *GMA* II, 195 Wn.2d at 474 (citing WAC 390-37-182), and the Legislature recently amended RCW 42.17A.750(1)(d) to adopt a "largely similar" list of 13 nonexclusive factors that trial courts may consider. *GMA* II, 195 Wn.2d at 474 n.9.

Next, in order to impose treble damages, the violation must be intentional. RCW 42.17A.780. As this Court emphasized, this is a meaningful limitation on the ability to impose civil penalties. *GMA* II, 195 Wn.2d at 473. And even when a violation is intentional, a court's decision about whether to treble the penalty amount "should be guided by factors that focus on the purposes underlying punitive damages awards." *Id.* at 474.

Finally, regardless of whether the penalty is trebled, it is subject to Eighth Amendment scrutiny under the Excessive Fines Clause using the considerations articulated in *United States v. Bajakajian*, 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). While Amici State Legislators ask this Court to "clearly articulate when penalties for campaign finance violations are (or are not) unconstitutionally excessive[,]" State Legislators Br. at 1, *Bajakajian* already provides the rules for making such assessments.

The concern underlying Amici State Legislators' argument appears to be the mistaken impression that the Court of Appeals did not correctly evaluate two of the *Bajakajian* factors: the "nature and extent" of the offense, and the "extent of the harm caused." State Legislators Br. at 3-4.

But the Court of Appeals carefully assessed these factors in ensuring that the penalty was not grossly disproportional to the gravity of GMA's offense. *GMA* III, 15 Wn. App. 2d at 301-06.

Regarding the nature and extent of GMA's offense, the first *Bajakajian* factor, the Court of Appeals considered the length and breadth of GMA's "serious and significant" violations. *Id.* at 302. Amici State Legislators propose that the Court of Appeals should have credited GMA for the No on 522 campaign's filings that reflected GMA's contributions. State Legislators Br. at 4 & n.3 (citing CP at 223, 225, 227, 229, 231). But the No on 522 campaign's compliance with the FCPA is not relevant to the nature and extent of offenses by GMA. Moreover, GMA did not challenge findings from the trial court that a large number of reports were filed late or not at all and the lateness of the eventual reporting shortly before the election. *GMA* III, 15 Wn. App. 2d. at 302 (citing CP at 4069). And beyond the reporting violations, the Court of Appeals emphasized GMA's actions in blocking Washington voters from knowing who spent millions to defeat I-522 by "intentionally shield[ing] its members' political activity from public scrutiny in a campaign involving a contentious ballot proposition." *Id.* at 303. This analysis is consistent with this Court's recognition that GMA took actions "for the improper purpose of concealment." *GMA* II, 195 Wn.2d at 470.

Amici State Legislators also contend that the Court of Appeals did not "conduct any analysis of the degree of harm caused by GMA's violations." State Legislators Br. at 4. But the Court of Appeals looked at this fourth *Bajakajian* factor and determined that the harm was substantial because GMA "intentionally denied the voters information related to substantial campaign contributions from otherwise unidentified parties over an extended period of the election season." *GMA* III, 15 Wn. App. 2d at 304-05. The identity of the contributors "is precisely the type of information that campaign finance disclosure laws are designed to ferret out." *GMA* II, 195 Wn.2d at 464 (internal quotation marks omitted). GMA thus undermined the transparency of the debate over I-522.

Far from exercising "standardless discretion," the Court of Appeals engaged in a fact-intensive analysis and thoughtfully applied the factors and principles articulated by *Bajakajian*, correctly concluding that the fine was not grossly disproportional to GMA's offense.[1]

[1] Because "any judicial determination regarding the gravity of a particular . . . offense will be inherently imprecise," the Supreme Court counsels against "strict proportionality" and relies on the "gross disproportionality" standard between the penalty and the gravity of the offense. *Bajakajian*, 524 U.S. at 336

D. Amici Trade Associations'[2] Argument Regarding Statutory Authorization is a Straw Man

The Court of Appeals appropriately looked at the penalties available under the FCPA as instructive—but not dispositive—to the constitutional question. *See GMA* III, 15 Wn. App. 2d at 303-04. To argue that the decision below would endorse any penalty that is statutorily authorized as constitutional, Amici Trade Associations simply misrepresent the Court of Appeals' opinion. *See* Amicus Curiae Memorandum of the Nat'l Ass'n of Mfrs., the Chamber of Com. of the U.S., the Forging Indu. Ass'n, and the Treated Wood Council in Support of Review (Trade Associations Br.) at 5.

To be clear, looking to other penalties and maximum penalties authorized is one of several guideposts courts use to resolve Excessive Fines challenges. In *Bajakajian*, the Court considered the maximum penalties that could have been imposed under the U.S. Sentencing Guidelines, 524 U.S. at 338-39, and explained that "the other penalties that the Legislature has authorized are certainly relevant evidence[,]" *id.* at 339 n.14. Given this guidance from the Supreme Court, federal and state courts regularly "consider the maximum penalty prescribed by [the legislature]" as part of their Excessive Fines analysis. *United States v. Mackby*, 339 F.3d 1013,

[2] "Amici Trade Associations" refers to amici curiae National Association of Manufacturers, Chamber of Commerce of the United States of America, Forging Industry Association, and Treated Wood Council.

1018 (9th Cir. 2003); *see, e.g.*, *United States v. Viloski*, 814 F.3d 104, 110 (2d Cir. 2016) (analyzing the four "traditional" *Bajakajian* factors, including "the maximum sentence and fine that could have been imposed"); *United States v. Jalaram, Inc.*, 599 F.3d. 347, 356 (4th Cir. 2010) (considering the amount of defendant's fine in "relationship to the authorized penalty"); *United States v. Bernitt*, 392 F.3d 873, 880 (7th Cir. 2004) (affirming the forfeiture "[g]iven the potential punishment the district court could have imposed on [the defendant]"); *Maher v. Ret. Bd. of Quincy*, 452 Mass. 517, 523, 895 N.E.2d 1284 (2008) (considering "the maximum penalties authorized by the Legislature as punishment for his offenses" among other factors); *County of Nassau v. Canavan*, 1 N.Y.3d 134, 802 N.E.2d 616, 622, 770 N.Y.S.2d 277 (N.Y. 2003) (considering, in part, the maximum penalty that could have been imposed).

Moreover, looking at the other penalties the Legislature has authorized for FCPA violations and the maximum penalties that could have been imposed aligns with a "particularly relevant" consideration required by the Supreme Court: "[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature," so courts should give substantial deference to legislative decisions. *Bajakajian*, 524 U.S. at 336.

The Court of Appeals did not treat the statutory range as "an Eighth Amendment safe harbor," Trade Associations Br. at 6-7, but instead weighed several factors and principles—including other authorized penalties—to hold that GMA's civil penalty was proportional to the gravity of GMA's offenses. The Court of Appeals determined that GMA's violations were "serious and significant" and that the violations were related to other illegal activities, looked at the other penalties available to confirm the proportionality of the fine imposed, and weighed the substantial harm GMA caused to the public. *See GMA* III, 15 Wn. App. 2d at 302-05; *see also* Answer to Pet. for Rev. at 6-16. The Court of Appeals' Excessive Fines inquiry appropriately considered the other penalties authorized by the Legislature, and importantly, its analysis did not stop there.

E. There is No Meaningful Issue Regarding Selective Prosecution

Amici BIAW and Trade Associations suggest that review is appropriate to provide guidance regarding selective prosecution and viewpoint discrimination. BIAW Br. at 8-9; Trade Associations Br. at 7-10. But it is undisputed that the State may not selectively seek larger penalties based on disagreement with an entity's viewpoint. And contrary to amici's argument, Trade Associations Br. at 5, the Court of Appeals did not refuse to consider this issue; rather, the Court properly accepted this premise and simply concluded that GMA had failed to meet its burden of proving

selective enforcement. *GMA* III, 15 Wn. App. 2d at 306-07. GMA's failure is unsurprising given that GMA never raised this issue in the trial court and thus developed no factual record to support it. *See* Answer to Pet. for Rev. at 16-17.

Amici Trade Associations' suggestion that this case implicates prohibitions on distinctions based on corporate identity is similarly inconsistent with reality. Trade Associations Br. at 9 (citing *Citizens United*, 558 U.S. at 365). Amici Trade Associations are correct that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Citizens United*, 558 U.S. at 365. But that did not occur here. Amici Trade Associations rely on alleged distinctions in treatment between GMA and Food Democracy Action!. Trade Associations Br. at 9. But GMA and FDA! were both corporate entities; neither was a natural person.

In short, amici fail to establish that review is warranted to address their unsupported allegation of selective prosecution.

III. CONCLUSION

Because amici base their arguments in support of review on issues not presented in the petition or on mischaracterizations of the facts and opinion below, their arguments provide no basis for granting review in this case.

If the Court does grant review, it should limit review to the issue that GMA raised to the Court of Appeals: Whether the $18 million fine imposed is grossly disproportional to the gravity of GMA's offense under the *Bajakajian* factors. *See* Opening Br. of Appellant at 42-49; *see also GMA* III, 15 Wn. App. 2d at 302-06 (applying *Bajakajian* factors). This Court should deny review of the First Amendment and article I, section 14 issues raised solely (and belatedly) by Amici.

RESPECTFULLY SUBMITTED this 6th day of April 2021.

ROBERT W. FERGUSON
Attorney General

NOAH. G. PURCELL, WSBA 43492
Solicitor General

s/ Karl D. Smith
KARL D. SMITH, WSBA 41988
Deputy Solicitor General

CRISTINA SEPE, WSBA 53609
Assistant Attorney General

Office ID 91087
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100
360-753-6200
karl.smith@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the above document to be served on counsel of record via the Court's electronic filing system.

Jackson Wilder Maynard, Jr.
Brooke Frickleton
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
300 Deschutes Way SW, Ste. 300
Tumwater, WA 98501-7719
jacksonm@biaw.com
brookef@biaw.com
Attorneys for Amici Curiae BIAW, Enterprise Washington, and Washington Farm Bureau

Paul Graves
13509 SE 83rd Street
Newcastle, WA 98059-3308
gravesp1982@gmail.com
Attorney for Amici Curiae BIAW, Enterprise Washington, and Washington Farm Bureau

Alan Gura
Owen Yeates
Ryan Morrison
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave, NW, Ste. 801
Washington, D.C. 20036
agura@ifs.org
oyeates@ifs.org
rmorrison@ifs.org
Attorneys for Amicus Curiae Inst. For Free Speech

Ryan P. McBride
LANE POWELL PC
1420 Fifth Avenue, Ste. 4200
P.O. Box 91302
Seattle, Washington 98111-9402
mcbrider@lanepowell.com
Attorney for Amicus Curiae Inst. For Free Speech

Patrick Hedren
Erica Klenicki
NATIONAL ASSOCIATION OF MANUFACTURERS
733 10th Street, NW, Suite 700
Washington, D.C. 20001
Attorneys for Amicus Curiae Nat'l Ass'n of Mfrs.

Tara S. Morrissey
Stephanie A. Maloney
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062
Attorneys for the Chamber of Commerce of the United States

Elizabeth Och
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202
elizabeth.och@hoganlovells.com
Attorney for Amici Curiae Nat'l Ass'n of Mfrs.

Sean Marotta
Benjamin A. Field
Patrick C. Valencia
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Attorney for Amici Curiae Nat'l Ass'n of Mfrs.

Andrew Stokesbary
CITIZEN ACTION DEFENSE FUND
1003 Main Street, Suite 5
Sumner, WA 98390
drew@citizenactiondefense.org
Attorney for Amicus Curiae State Legislators

Robert B. Mitchell
Aaron E. Millstein
Daniel-Charles Wolf
K&L GATES
925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
rob.mitchell@klgates.com
aaron.millstein@klgates.com
dc.wolf@klgates.com
Attorneys for Petitioner GMA

DATED this 6th day of April 2021, at Olympia, Washington.

s/Leena Vanderwood
LEENA VANDERWOOD
Legal Assistant

SOLICITOR GENERAL OFFICE

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- noah.purcell@atg.wa.gov
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- patrick.valencia@hoganlovells.com
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Address:
PO Box 40100
1125 Washington St SE
Olympia, WA, 98504-0100
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