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No. 96604-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, *Petitioner*,

v.

GROCERY MANUFACTURERS ASSOCIATION, *Respondent*.

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GROCERY MANUFACTURERS ASSOCIATION, *Petitioner*,

v.

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

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

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## Table of Contents

INTEREST OF <i>AMICUS CURIAE</i> .....	1
INTRODUCTION .....	1
STATEMENT OF THE CASE.....	2
ISSUES ADDRESSED.....	3
ARGUMENT .....	3
I.    This Case Presents The Opportunity To Announce A Test For Exacting Scrutiny That Accounts For The Chill Imposed By The Specter Of Heavy Fines.....	5
II.   This Case Will Allow This Court To Explain How To Weigh Fines Imposed Where Core Constitutional Rights Are At Stake.....	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	11

## Table of Authorities

### Cases

<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	4, 6, 7
<i>Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth</i> , 556 F.3d 1021 (9th Cir. 2009) .....	6-7
<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310 (2010).....	5, 8, 9-10
<i>Cooper Indus. v. Leatherman Tool Grp., Inc.</i> , 532 U.S. 424 (2001).....	9
<i>Davis v. Fed. Election Comm’n</i> , 554 U.S. 724 (2008).....	6
<i>Doe v. Reed</i> , 561 U.S. 186 (2010).....	4, 6
Findings of Fact, Conclusions of Law and Order on Trial <i>State v. Grocery Mfrs. Ass’n</i> , No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).....	2
Letter Opinion, <i>State v. Grocery Mfrs. Ass’n</i> , No. 13-2-02156-8 (Thurston Cty. Super. Ct. Mar. 9, 2016).....	2
Order Confirming the Meaning of an Intentional Violation, <i>State v. Grocery Mfrs. Ass’n</i> , No. 13-2-02156-8 (Thurston Cty. Super. Ct. July 15, 2016).....	2
<i>Sampson v. Buescher</i> , 625 F.3d 1247 (10th Cir. 2010) .....	4, 7
<i>State v. Catlett</i> , 133 Wn.2d 355 (1997) .....	9
<i>State v. Clark</i> , 124 Wn.2d 90 (1994) .....	8, 9

<i>State v. Grocery Mfrs. Ass’n</i> , 5 Wn. App. 2d 169 (2018) .....	3, 7
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595 (1999) .....	9
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998) .....	4, 9
<i>Voters Educ. Comm. v. Pub. Disclosure Comm’n</i> , 161 Wn.2d 470 (2007) .....	6
<i>Williams-Yulee v. Fla. Bar</i> , 575 U.S. ___, 135 S. Ct. 1656 (2015) .....	1
<b>Constitutions</b>	
U.S. Const. amend. I .....	1, 2, 3, 4, 5, 6, 8, 10
U.S. Const. amend. VIII .....	2, 3, 4, 5, 8
Wash. Const. art. I, § 5 .....	4, 6
Wash. Const. art. I, § 14 .....	4, 5, 8
<b>Statutes and Rules</b>	
RCW 42.17A.005(37) .....	3
RCW 42.17A.765 .....	2
RCW 42.17A.775(1) .....	5
RAP 13.4(b)(3) .....	3, 5, 8, 10
<b>Other Authorities</b>	
Washington State Attorney General, <i>Grocery Manufacturers Assoc. To Pay \$18M, Largest Campaign Finance Penalty In US History</i> (Nov. 2, 2016), <a href="http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us">http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us</a> .....	1

## **INTEREST OF *AMICUS CURIAE***

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

## **INTRODUCTION**

In what the Attorney General has called a “historic decision,”<sup>1</sup> Washington authorities have imposed an unprecedented fine that will chill “speech about public issues and the qualifications of candidates for elected office,” a category that “commands the highest level of First Amendment protection.” *Williams-Yulee v. Fla. Bar*, 575 U.S. \_\_\_, 135 S. Ct. 1656, 1665 (2015). The Court of Appeals rejected the trebling of that penalty, but the Grocery Manufacturers Association (“GMA”) still faces a \$6,000,000 fine—a death sentence for most groups. Such substantial penalties for what is, after all, technical filing errors concerning political speech raise

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

questions under both the First and Eighth Amendments and their state equivalents. This Court should review the decision below and clarify a test for exacting scrutiny, as well as address how lower courts should weigh large fines imposed where core constitutional rights are at stake.

### **STATEMENT OF THE CASE**

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

The Superior Court later held that treble damages under RCW 42.17A.765 do not require “subjective intent to violate the law,” and that violators need merely “act[] with the purpose of accomplishing an” illegal act. Order Confirming the Meaning of an Intentional Violation at 2, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. July 15, 2016). Pursuant to that conclusion, the Superior Court held that GMA intentionally violated state law and ordered a civil penalty of \$6,000,000 and treble punitive damages. Findings of Fact, Conclusions of Law and Order on Trial at 23-24, *State of Wash. v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).

On September 5, 2018, the Court of Appeals held that GMA was a political committee under RCW 42.17A.005(37). *State v. Grocery Mfrs. Ass’n*, 5 Wn. App. 2d 169, 176-77 (2018). Applying exacting scrutiny, the Court of Appeals articulated the state’s interest in campaign finance disclosure but did not undertake a thorough analysis of the state’s disclosure regime’s tailoring to that interest—in particular, the burdens such enormous fines impose on the ability to speak about public issues. *See id.* at 194-95. While the Court of Appeals did reduce the fine, by reversing the trial court’s ruling that “GMA did not need to subjectively intend to violate the law in order to be subject to treble damages,” *id.* at 207, even without trebled damages, the fine remains \$6,000,000.

### **ISSUES ADDRESSED**

Between both petitions for review, this Court has been presented with a total of four questions. This brief focuses on the importance of the constitutional issues in this case and the need for this Court’s guidance on both the First and Eighth Amendment’s applicability to campaign finance regulation and penalties.

### **ARGUMENT**

This Court should grant review under RAP 13.4(b)(3) because this case presents multiple constitutional issues. At the heart of this case is the regulation of speech, implicating the First Amendment to the United States

Constitution and Article I, section 5 of the Washington Constitution. The enormous fine assessed against GMA also implicates the Eight Amendment’s excessive fines clause and its analogue in Article I, section 14, of the Washington Constitution.

In the First Amendment context, burdens on protected speech must meet at least exacting scrutiny, which “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Doe v. Reed*, 561 U.S. 186, 196 (2010); *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976) (per curium). And, “[t]o withstand this scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.’” *Doe*, 561 U.S. at 196. Those burdens include fines for non-compliance, especially where they are as devastating as the penalty imposed here. *Cf. Sampson v. Buescher*, 625 F.3d 1247, 1259-62 (10th Cir. 2010) (balancing interest against all the burdens created by Colorado’s ballot issue disclosure law).

Here, the Superior Court imposed an \$18,000,000 fine—which the Court of Appeals reduced to \$6,000,000—even though the violation involved a reporting offense for which “[t]he harm that [GMA] caused was also minimal,” *United States v. Bajakajian*, 524 U.S. 321, 339 (1998). GMA was fined despite having never hidden or understated its contributions to the anti-initiative committee, and despite the fact that GMA’s name is fully



descriptive of its economic interest in that campaign. Exacting scrutiny applies, therefore, because the fear of such an exorbitant fine—especially when it may be triggered by nothing more than errors made in the context of a complex and counterintuitive disclosure regime—is sure to chill protected activity. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 324 (2010) (noting that “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day”).<sup>2</sup>

This Court should take this case (I) to articulate a test for exacting scrutiny that accounts for the burdens heavy fines place on core political speech, and (II) to decide whether such a large fine is appropriate under the excessive fines clauses in the Eighth Amendment and Article 1, § 14 of the state constitution.

**I. This Case Presents The Opportunity To Announce A Test For Exacting Scrutiny That Accounts For The Chill Imposed By The Specter Of Heavy Fines.**

Pursuant to RAP 13.4(b)(3), this Court should review this case to announce a test for exacting scrutiny that includes balancing the state’s interest in disclosure against the burdens of compliance and fines for

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<sup>2</sup> This fear is particularly acute where, as here, enforcement is not left to government regulators with a duty to fairness and impartiality, but rather to political opponents with an incentive to advance marginal or hyper-technical claims. RCW 42.17A.775(1) (granting private right of action).

misinterpreting the law. Washington must articulate an approach to First Amendment campaign finance law that requires an inquiry into the costs of compliance, chill on core First Amendment activity, and other burdens actually imposed. And that test should also examine the value of the information actually obtained.

In the First Amendment context,<sup>3</sup> burdens on protected speech must meet at least exacting scrutiny, which “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Doe*, 561 U.S. at 196. And, “[t]o withstand this scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights.’” *Id.* (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744 (2008) and *Buckley*, 424 U.S. at 68, 71) (emphasis added).

The courts must weigh the state’s interest in disclosure against the actual burdens of compliance—which includes both the value of the information gleaned *and* the weight of fines for non-compliance, especially where they are as devastating as the penalty imposed here. *See, e.g., Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021,

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<sup>3</sup> This Court has held that “Article I, section 5 of the Washington Constitution does not provide greater protection against disclosure requirements than the First Amendment.” *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 497 (2007).

1034 (9th Cir. 2009) (balancing Montana’s zero-dollar disclosure threshold with compliance burdens); *Sampson*, 625 F.3d at 1259-62 (balancing interest against all the burdens created by law).

Applying *Buckley*’s requirement that disclosure justified under the informational interest “increase[] the fund of information concerning those who support” a candidate and thus “define more of the candidates’ constituencies,” *Buckley*, 424 U.S. at 81, a court reviewing a law in the ballot context “must . . . analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue,” *Sampson*, 625 F.3d at 1256. Disclosure of GMA’s expenditures in connection to a ballot measure is sufficient to inform the electorate. This is not a case where a measure’s opponents made up an anodyne name concealing their identities and economic interests. Rather, the information that was disclosed to the public fulfilled the purposes of the informational interest: the voters knew the constituencies opposing the measure.

The Court of Appeals’ tailoring analysis focused on the state’s interest in not misleading voters and whether regulating groups without the primary purpose of politics was overinclusive. *Grocery Mfrs. Ass’n*, 5 Wash. App. 2d at 195-96. The only examination of any burden of compliance was whether GMA (or its members) faced threats, harassment, or reprisals. *Id.* at 197. There was no analysis of whether the actual burdens

of disclosure were outweighed by the state’s interest—including whether large fines will chill speech.

This Court has the opportunity to guide how lower courts weigh, not just the government’s interest, but the burdens placed on speakers as well. Additionally, this Court should alleviate any potential tension with the governing federal precedent by requiring an inquiry into the utility of the specific disclosures demanded—including as applied to specific facts. This case is a good vehicle for articulating these standards.

**II. This Case Will Allow This Court To Explain How To Weigh Fines Imposed Where Core Constitutional Rights Are At Stake.**

Pursuant to RAP 13.4(b)(3), this case will allow this Court to decide whether such a large fine is appropriate under the excessive fines clauses in the Eighth Amendment and Article 1, § 14 of the state constitution. The standard of review for whether a fine is constitutionally permissible when it intrudes upon First Amendment activity appears to be a matter of first impression for this Court. But, in line with other disclosure requirements, the standard would be at the very least exacting scrutiny. *See, e.g., Citizens United*, 558 U.S. at 366.

On a pure analysis of the “excessive fines” clause, this Court has repeatedly looked to the federal standard. *State v. Clark*, 124 Wn.2d 90, 102 (1994) (applying cases from the Fourth and Eleventh Circuits as well as

federal district courts in California and Wisconsin), *overruled on other grounds by State v. Catlett*, 133 Wn.2d 355 (1997); *State v. WWJ Corp.*, 138 Wn.2d 595, 604 (1999) (applying *United States v. Bajakajian*, 524 U.S. 321 (1998)). That is because “of the near identity of the state and federal” constitutional provisions and this Court’s “conclu[sion that the] state analogue has similar implications for purposes of federal excessive fines analysis.” *Clark*, 124 Wn.2d at 103.

“[A] fine is excessive if it is grossly disproportional to the gravity of the defendant's offense.” *WWJ Corp.*, 138 Wn.2d at 604. But the gross disproportionality standard for reviewing excessive fines is “inherently imprecise.” *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001). Therefore, this Court has held that “[t]he government is entitled to rough remedial justice.” *Clark*, 124 Wn.2d at 102 (collecting cases).

The *Clark* decision held that the civil asset forfeiture of a home with just under \$31,000 in equity was not “excessive” when the costs of the costs of investigation and prosecution were at least \$26,000. *Id.* at 103. But that same decision noted cases that found that fines in the hundreds of thousands of dollars were “excessive.” *Id.* at 104 (collecting cases). The fine against GMA—trebled or not—is in the millions of dollars and is out of proportion to the costs of investigation or prosecution.

The campaign finance system is, by nature, very complex. *Citizens*

*United*, 558 U.S. at 324 (noting campaign finance law is “[p]rolix.”). Allowing fines in the millions of dollars for violations of such technical rules chills speech, as speakers fear to speak lest they be put out of business for misinterpreting a complex requirement. This Court should clarify how to weigh such punitive damage provisions against the chill of core First Amendment activity where “it is our law and our tradition that more speech, not less, is the governing rule.” *Id.* at 361.

### CONCLUSION

This case presents substantial questions of constitutional law. This Court should grant review under RAP 13.4(b)(3).

RESPECTFULLY SUBMITTED this 5th day of February, 2019.

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**CERTIFICATE OF SERVICE**

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**Superior Court Case Number:** 13-2-02156-8

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