

Nos. 497689 and 501881

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
*Respondent,*

v.

GROCERY MANUFACTURERS ASSOCIATION,  
*Appellant.*

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GROCERY MANUFACTURERS ASSOCIATION,  
*Appellant,*

v.

ROBERT W. FERGUSON, ATTORNEY GENERAL OF THE STATE OF  
WASHINGTON, IN HIS OFFICIAL CAPACITY,  
*Respondent.*

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***AMICI CURIAE* BRIEF OF PROFESSORS  
MICHAEL MUNGER AND JEFFREY MILYO**

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### **IDENTITY AND INTEREST OF *AMICI CURIAE***

Professor Michael Munger is an economist and political scientist at Duke University. He has extensive expertise in the field of campaign finance and election systems. His recent work closely examines how burdensome governmental approval and disclosure requirements needlessly interfere with the freedom of everyday Americans to engage in political speech. Professor Munger maintains a strong interest in this case because it involves sprawling regulatory requirements that have significant potential to chill political speech and dampen meaningful policy engagement.

Professor Jeffrey Milyo is an economist at the University of Missouri and a Senior Fellow at the Cato Institute. He also served on the research staff for President Obama's Commission on Election Administration. Professor Milyo's areas of expertise are American political economics and public policy evaluation. His recent research examines the effects of campaign finance regulations on political corruption, trust in government, voter turnout, and the competitiveness of elections. He has also analyzed how campaign finance disclosure regulations for political committees chill political speech and participation. Professor Milyo maintains a strong interest in this case because it involves excessive government regulations of political speech and public engagement in the

policy process and is not narrowly tailored to prevent corruption or the appearance of corruption.

*Amici* submit this brief to provide the Court with a more thorough understanding of the important First Amendment issues that this case raises. In its thirst for endless disclosure, the State of Washington lost sight of the fact that speech “concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 84, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). In other words, speech “has a structural role to play in securing and fostering our republican system of self-government.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Stevens, J., concurring). The First Amendment’s central purpose is to foster that exchange of ideas. The Washington law at issue here is being applied in a way that chills that important exchange. As a consequence, the state law must yield to the Constitution.

## INTRODUCTION & STATEMENT OF THE CASE

The Grocery Manufacturers Association (“GMA”) is a nationwide trade association composed of food and beverage companies. *See* Appellant’s Opening Br. at 3. GMA has an interest “in promoting uniform and reasonable national food-labeling requirements.” *Id.* To that end, GMA and its members, in 2012, opposed a California ballot initiative to require genetically modified organism (“GMO”) labeling on packaged food products. *See* Findings of Fact, Conclusions of Law and Order on Trial at 5, *State of Wash. v. Grocery Mfrs. Ass’s*, No, 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016). The ballot initiative was rejected. *Id.*

But that does not mean that grocery manufacturers emerged unharmed. As a result of their advocacy efforts in California, grocery manufacturers and individuals associated with them faced retaliation in the form of threats and boycotts. *See id.* As the record demonstrates, there were even death threats. *See* Appellant’s Reply Br. at 3. The industry therefore needed to find a way to continue to participate in this important debate while minimizing this type of intimidation.

To ensure its members could continue to engage in advocacy without fear of harm, GMA established a “Defense of Brands Account.” Appellant’s Opening Br. at 4-5. This time-honored associational approach permitted GMA members to pool together resources for nationwide

advocacy on labeling requirements, *see id.* at 5-6 (describing the use of the account to challenge a Vermont statute, pursue federal labeling legislation, and engage in other efforts), safe from the kinds of politically motivated retaliatory behavior they had experienced in California, *see* Superior Ct. Findings of Fact at 6-7. In other words, these companies availed themselves of their core First Amendment right to participate in associational speech on an anonymous basis. *See generally* *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 466, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

In early 2013, Initiative 522 (“I-522”)—which would have required GMO labeling on packaged food products in Washington State—qualified for the November 2013 ballot. Superior Ct. Findings of Fact at 6. Through the Defense of Brands Account, GMA donated \$11 million to the No on 522 political committee to defeat I-522. *See id.* at 18. Each of GMA’s expenditures were publicly disclosed in its own name to the State Public Disclosure Commission (PDC). Appellant’s Opening Br. at 6. Accordingly, Washington voters knew that the association that represents the interests of grocery manufacturers across the nation opposed I-522 and the label regime the initiative would have required.

In 2013, a citizen suit was filed against GMA alleging violations of Washington public campaign finance law. Superior Ct. Findings of Fact at 18. The State of Washington, in turn, sued GMA, contending that GMA had improperly failed to register as a political committee and had wrongly concealed the identity of the members who had donated funds to the Defense of Brands Account in violation of the Fair Campaign Practices Act (“FCPA”), Chapter 42.17A RCW. *See* Appellant’s Opening Br. at 9.

The trial court sided with the State. *See* Superior Ct. Findings of Fact at 23; RCW 42.17A.205, RCW 42.17A.210. Of particular relevance here, the trial court held that state law required GMA to disclose the identity of every person or entity making a contribution to, and every expenditure from, its Defense of Brands Account—whether or not the funds were contributed or expended for the purpose of speaking against I-522. *See* Findings of Fact at 23; RCW 42.17A.235(1) (requiring reporting of “all contributions received and expenditures made”); RCW 42.17A.240.

This Court should reverse. The right to engage in political speech lies at the heart of the First Amendment. *See McIntyre*, 514 U.S. at 347; *see also State ex rel. Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 623-24, 957 P.2d 691 (1998) (“The constitutional guarantee of free speech has its ‘fullest and most urgent application’ in political campaigns.”). That is why campaign disclosure laws are permissible only

where there is a “substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Doe v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (internal quotation marks omitted). Courts must be vigilant in ensuring that the government is not misusing election-related interests to punish and restrict policy advocacy.

The only significant governmental interest that the State claims in supports of its requirement that GMA disclose its membership information is in “informing the electorate about who is financing ballot measure committees” so that the voters can meaningfully evaluate the campaign messages they receive. Respondent’s Br. at 36; *see also Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005-06 (9th Cir. 2010). But this interest was fulfilled when each of GMA’s expenditures to defeat I-522 was accurately disclosed as having come from GMA. *See* Appellant’s Opening Br. at 6. Once the identity of GMA—the trade association that represents grocery manufacturers nationwide—was publicly disclosed, no Washington voter could fairly claim a lack of information needed to evaluate this message based on its financing.

The State admits that it maintains an additional interest in making sure that individual members of the industry publicly admit to their food labeling preferences. *See* Respondent’s Br. at 33-34. But the State of

Washington has no significant governmental interest in imposing its own view of accountability on the grocery industry by requiring GMA members to state their support for a GMA account that funds initiatives all over the country. Washington's significant governmental interest is in ensuring that its citizens have adequate information to decide whether to support the political candidates and ballot initiatives before them in State elections. *See Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000). That interest was satisfied here. Any marginal increase in the relevant information available to State citizens through disclosure of which *specific* grocery manufacturers funded the Defense of Brands account is woefully insufficient.

The State nevertheless alleges that GMA members wanted to “‘shield’ their identities,” GMA was a “front” for its members, and GMA’s plan had to be “eventually exposed.” *See* Respondent’s Br. at 1. Indeed, the State goes so far as to ask: “If that information did not matter, why did GMA go to such great lengths to hide it?” *Id.* at 37. But, of course, the government is required to show why it needs to infringe a core constitutional right—not the other way around. That the State believes that members must justify their decision to exercise the right to speak through an association highlights the State’s lack of respect for the rights of speakers. To the State, there are

no countervailing interests—all that should matter is its bottomless desire for extensive disclosure.

But that is wrong. Members of associations have a core right under the First Amendment to engage in political speech without disclosing their identity in a way that will subject them to potential threats, retaliation, and boycotts. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 91-92, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982); *Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1176-78 (W.D. Wash. 2004). So long as an association—especially a trade association like GMA—publicly discloses its use of an association to engage in political advocacy, it is entitled to speak in its own name in order to preserve its members' First Amendment rights and keep individual members from being targeted for harassment and threats. Put simply, the association's disclosure fully meets the electorate's informational needs. Rather than promote political discourse, affirming the decision below would significantly depress participation in political discourse for fear of retribution.

Last, not only did Washington's application of its PAC requirements unduly burden associational free speech, but the decision below could cause a domino effect requiring extensive reporting from a wide range of associations that goes far beyond any interest Washington could have in providing information to its voters. The State's disclosure burdens are

sufficiently severe that they may dampen political expression—harming the public interest that Washington claims its reporting requirements are designed to protect.

### **ARGUMENT**

Requiring GMA to disclose the names of its contributors violates the First Amendment for several reasons. First, any “substantial” government interest in requiring disclosure of those publicly advocating for or against proposed ballot initiatives was met when GMA’s participation was disclosed. Requiring GMA to disclose its individual members, especially given that it is a trade association with self-evident interests and motivations, provides voters with little or no additional useful information. Second, that gratuitous disclosure is not costless here. It would infringe these companies’ First Amendment rights by exposing them to threats, harassment, and reprisals. Third, the Court may not be able to cabin this ruling to GMA members. This overly expansive disclosure regime will deter a wide range of voices across the political spectrum from engaging in the public square. This strong deterrent to engaging in political speech would, ultimately, harm the very people the State claims to protect—the voters of Washington.

**I. GMA’s publicly disclosed expenditures satisfied the State’s informational interests while protecting GMA members’ First Amendment rights.**

Campaign disclosure requirements are constitutional under the First Amendment only if they survive “exacting scrutiny.” *Utter v. Building Indus. Ass’n of Wash.*, 182 Wn.2d 398, 425, 341 P.3d 953 (2015). To satisfy that standard, there must be a “‘substantial relation’ between the disclosure requirement and a ‘sufficiently important government interest.’” *Citizens United v. FEC*, 558 U.S. 310, 366-67, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). In short, this is not rational basis review. It is a “strict test.” *Buckley v. Valeo*, 424 U.S. 1, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). There must be “a fit that ... employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.” *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57, 118 L. Ed. 2d 468 (2014) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 388 (1989)).

The Court’s review here is especially strict given that the disclosure requirement arises in the ballot-initiative setting. The government interests that dominate the Supreme Court’s disclosure jurisprudence, *viz.*, “detering actual corruption and avoiding any appearance thereof,” *McConnell v. FEC*, 540 U.S. 93, 196, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003), are absent here. “[D]ifferent and less powerful state interests” are at stake when the

government seeks to mandate broad disclosure in the course of regulating “referenda or other issue-based ballot measures.” *McIntyre*, 514 U.S. at 356. “[B]allot initiatives do not involve the risk of ‘quid pro quo’ corruption present when money is paid to, or for, candidates.” *Rippie*, 213 F.3d at 1139 (quoting *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 203, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999)); cf. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (op. of Roberts, C.J.). The main justification for disclosure requirements on ballot initiatives, in contrast, is informational—a way for States to educate voters about the identity and motivations of the groups funding the campaigns to sway their votes. *Buckley*, 424 U.S. at 66-67.

The question before the Court, therefore, is not whether disclosure laws are generally constitutional. They are. But “compelled disclosure ... cannot be justified by a mere showing of some legitimate governmental interest.” *Id.* at 64. The question is whether the particular disclosure requirement before the Court here imposed an “unconstitutionally onerous burden” on GMA—a question with a “strong factual component.” *Utter*, 182 Wn.2d at 430. This Court must “address the specific reporting requirements” at issue in the case and “balance the burden of the disclosure requirements for the specific time period in that particular case against the government’s interest in providing the public with campaign finance

information.” *Id.* The trial court incorrectly struck that First Amendment balance here.

Disclosure of GMA’s own name satisfied the State’s relevant informational disclosure interest. This association’s name—Grocery Manufacturers Association—makes the identity of the group’s members and their interests eminently clear. GMA, through its public statements and actions, has made clear that it is an association of grocery manufacturers who of course would have an interest in weighing in on legal requirements to govern the labeling of their food products. That disclosure educated Washington voters and provided them all the information they would need to weigh the relevant speaker’s motivations.

To be narrowly tailored a disclosure requirement must provide meaningful information that assists voters in taking a position on the ballot initiative before them. *See Rippie*, 213 F.3d at 1139 (searching for a “logical explanation” of how that disclosure requirement enhanced the voters’ understanding in a “meaningful way”). There is little or no relevant additional information to be learned about the interested entities opposing I-522 by requiring GMA to register as a political committee and disclose specific member names. Listing specific food and beverage companies in connection with I-522 is not any more informative than the disclosure of GMA itself, which revealed the exact amounts that the entire association of

grocery manufacturers was spending to oppose I-522. The State may claim an interest in further disclosure—but it is not a “substantial” interest.

Contrary to the facts present here, several previous cases finding a sufficient governmental interest in requiring individual group members to disclose contributions have involved group names that obscured any meaningful understanding of the members’ relevant interests. For example, in *McConnell v. FEC*, the Supreme Court found an adequate state interest in requiring individual disclosures of electioneering spending because of the “dubious and misleading names” of the group who had been expending funds. 540 U.S. at 196-97. For example, “business organizations opposed to organized labor” had donated to “The Coalition of Americans Working for Real Change”—a nondescript title. *Id.* at 197. And “Citizens for Better Medicare” had been funded by members of the pharmaceutical industry—an affiliation nowhere apparent in the group name regarding Medicare. *Id.* As explained, that is not the situation in this case.

Not only does Washington State’s own minimal informational interest fail to justify applying political committee registration requirements to GMA, the GMA members’ competing rights to freely associate and speak without threat of retaliation further undermined the trial court’s ruling. *See Buckley*, 424 U.S. at 64 (indicating that the Court had “repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of

association and belief guaranteed by the First Amendment”). Even if there were a substantial interest in requiring disclosure of an association’s individual members, such a requirement is still unconstitutional if there is “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Id.* at 74.

Establishing that the fear of reprisal is significant enough to thwart disclosure requirements is a fact-bound analysis. *See Citizens United*, 558 U.S. at 370. The facts of this case are alarming. Before associating together to fund the Defense of Brands Account, GMA’s members had individually contributed to the “no” campaign against GMO labeling in California. *See Superior Ct. Findings of Fact* at 5. Upon disclosing their contributions in California, GMA’s members experienced harassment and boycotts from proponents of GMO labeling. *See id.* This harassment included death threats and other threats of reprisal directed at both GMA and its individual members. *See Appellant Reply Br.* 3. This caused concern. Among other important considerations, GMA’s creation of the “Defense of Brands Account” helped to shield its members from further threats, harassment, or reprisals—the precise harm the Supreme Court has consistently recognized. *See Appellant’s Opening Br.* at 4-5.

This is just the type of showing that warrants judicial intervention. In *Averill v. City of Seattle*, the U.S. District Court for the Western District of Washington excused members of a local political party from disclosure requirements because of past harassment via threats and crank calls. *See* 325 F. Supp. 2d at 1178. Similarly, this Court should recognize the dangers of chilled speech through forced disclosure and come down “on the side of protecting those freedoms which are essential to the continuing health of our republic.” *See id.* The evidence from the 2012 advocacy in California indicated that GMA’s members were at risk of suffering “threats, harassment, and reprisals” by disclosing their identities in Washington State. Coupled with the fact that GMA had already made extensive disclosures concerning its contributions, there was no justification for forcing GMA to disclose its members’ identities as a prerequisite for participation in this important debate.

**II. The State’s registration requirements are so overbroad as to chill political speech.**

As interpreted and applied in this case, Washington’s vague PAC disclosure requirements could have an unanticipated, far-reaching, and stifling impact. Taken to their logical end, these disclosure rules may have the effect of forcing a host of national entities to register as political

committees—each with a more attenuated connection to Washington voters’ informational interests than the last.

Washington classifies as a “political committee” those people or entities who “hav[e] the expectation of *receiving* contributions or *making* expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37) (emphasis added). By these statutory terms, entities may become subject to Washington’s extensive political committee disclosure requirements through *either* (i) contribution or (ii) expenditure activities. *See State ex rel. Evergreen Freedom Found v. Washington Educ. Ass’n*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002) (“EFF”) (describing the “two alternative prongs under which an ... organization may become a political committee”).

This Court has attempted to narrow the State’s open-ended political committee definition to conform to the First Amendment by placing “a primary purpose” restriction on the expenditure prong of this requirement. *See id.* at 598-99; *Utter*, 182 Wn.2d at 427 (observing that some type of “primary purpose” limitation is required to address First Amendment concerns). Thus, only those entities with a primary purpose of influencing ballot initiatives or candidate elections would fall prey to political committee requirements under the expenditure prong. *See EFF*, 111 Wn. App. at 598-99 (imposing on the expenditure prong a requirement that the

organization making expenditures have at least *a* primary purpose “to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions”) (internal quotation marks omitted).

But Washington courts have not, to date, imposed a similar restriction on the contribution prong of the political committee test as it has not been before them. Any entity that solicits, or even just expects to receive, contributions for use toward election goals apparently qualifies as a political committee under this prong. *See Utter*, 182 Wn.2d at 416-17. Thus, an enterprising citizen or the Attorney General could claim that not only should groups like GMA register as political committees, but so should other entities with national policy objectives who solicit funds that might be used in Washington State.

For example, a national environmental group that solicits funds to further an anti-development agenda might find itself faced with a claim of registration violation if it decides to use those funds to support or oppose a Washington ballot initiative or in a Washington political campaign. And if required to register, the group then would have to account for all its contributions and expenditures nationwide. Challenges of this kind may seem extreme. But the decision below, if not reversed, would open the door to them. With Washington law permitting private parties to enforce

disclosure requirements, it is likely that wielding Washington law in this unhealthy troubling manner will become a favored political tactic.

This level of threat—especially when combined with the unwieldy regulatory requirements imposed on political committees—bears no resemblance to a balanced constitutional regime where disclosure rules are only as burdensome as necessary to further a substantial governmental interest. *See Buckley*, 525 U.S. at 192 (“[T]he First Amendment requires us ... to guard against undue hindrances to political conversations and the exchange of ideas.”). Nor is there *any* relevant informational interest in ballot initiative voters having access to the names of the contributors to cause-oriented associations whose interests and motivations are self-evident. *See Rippie*, 213 F.3d at 1139; *cf.* Dick M. Carpenter II, Inst. for Justice, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 11 (Mar. 2007) (reporting survey results indicating that only about a third percent of voters knew how to access, or even had an interest in accessing, donor records prior to an election).

But not only are burdensome disclosure rules unconstitutionally restrictive; they are also bad policy. Within our constitutional system, “[c]itizen participation in politics is the cornerstone of democratic governance.” *See* Michael C. Munger, Inst. for Justice, *Locking Up Political Speech* 3 (June 2009). Overly extensive restrictions on political advocacy

have a “chilling effect” on that participation. *Id.* at 15. With uncertainty about potential liability, and to avoid the risk of being ensnared in an unexpected enforcement action, many individuals and organizations will be forced to disengage from the political process so as to avoid the kind of situation that GMA has endured here. Not only will this undermine First Amendment protections and chill political speech directly, it will have an indirect chilling impact on discourse between citizens and organizations that are potentially engaged in important policy discussions. The ultimate effect will be to suppress and depress political speech and related forms of political and social advocacy not directly tied to supporting or opposing candidates or ballot propositions.

Put differently, overly burdensome disclosure requirements are “expensive, intrusive, and time-consuming”—imposing “severe costs on political speech.” *Id.* at 18 (discussing the impact of electioneering communications regulations on nonprofit organizations). Ultimately, by dampening political engagement, these strict requirements harm the public interest that Washington State says its laws aim to protect. *See, e.g., Buckley*, 424 U.S. at 71 (observing that when speech is chilled, “the public interest also suffers ... [due to] reduction in the free circulation of ideas”); *Carpenter II*, *supra*, at 1-2, 7, 9 (surveying over 2,000 voters across six

ballot initiative states and finding that most voters would hesitate before making political contributions subject to disclosure requirements.

### **CONCLUSION**

This Court should reverse the trial court's decision and hold that the State of Washington's political committee disclosure requirements violate the First Amendment as applied to GMA.

RESPECTFULLY SUBMITTED this 6th day of October, 2017.

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing Amici Curiae Brief of Professors Michael Munger and Jeffrey Milyo to be served on counsel of record via ecf service.

Dated 6 October 2017.

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