

NO. 49768-9-II

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**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 Washington,  
in his Official Capacity,

Respondent.

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**STATE OF WASHINGTON AND**  
**ATTORNEY GENERAL FERGUSON'S RESPONSE TO**  
**AMICUS CURIAE CENTER FOR COMPETITIVE POLITICS**

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## I. INTRODUCTION

The Center for Competitive Politics asks this Court to make three mistakes in reviewing the civil penalty imposed on Grocery Manufacturers Association (GMA) in this case. The Court should decline.

The Center first asks this Court to believe that GMA is being penalized for “constitutionally protected activity.” CPC Br. at 1. But that is false. GMA faces penalties not for its speech, but for concealing the source of who was funding its speech. Such subterfuge is not “constitutionally protected.”

Second, the Center asks this Court to apply an invented standard never applied by any Court to evaluate the penalty here. This Court should refuse. As shown in the State’s merits brief, GMA’s civil penalty is commensurate with its multiple, intentional violations of Washington’s campaign finance laws, including concealing over \$14 million in campaign contributions. This is all that the constitution requires. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001) (punishment must be “grossly disproportional” to the offense to violate constitution).

Finally, the Center asks this Court to find that GMA’s penalty does not serve the State’s interests. But the State has a significant interest “in promoting [election] integrity and preventing concealment that could harm

the public and mislead voters.” *State v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006). GMA deprived Washington voters of knowing the true “sources of election-related spending” and their ability “to make informed choices in the political marketplace.” *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (internal quotation marks omitted). Penalizing GMA for its egregious misconduct does not chill protected speech; rather it demonstrates that there is a significant cost to concealment and ensures that political contributions remain in the light. *C.f. Buckley v. Valeo*, 424 U.S. 1, 67, 96 S. Ct. 612, 46 L. Ed. 2d 65 (1976) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”). GMA’s penalty should be affirmed.

## II. ARGUMENT

### A. GMA’s Civil Penalty Comports with the Constitution

“The touchstone of the constitutional inquiry under the [Eighth Amendment’s] Excessive Fines Clause is the principle of proportionality[.]” *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Accordingly, a penalty will not violate the constitution unless it is “grossly disproportional” to the gravity of the offense. *Cooper Indus.*, 532 U.S. at 434 (citing *Bajakajian*, 524 U.S. at 334). As described in the State’s brief, courts look to a number of

criteria, including the defendant's culpability, to determine whether a penalty in a particular case satisfies this standard. State Br. at 46; *see also Cooper Indus.*, 532 U.S. at 435-36. Nevertheless, the Center contends that this analysis is inadequate and suggests that the Court should apply an additional "exacting scrutiny" test to the trebled, punitive damages portion of GMA's civil penalty. CPC Br. at 4-5.<sup>1</sup> This Court should decline.

The Center has cited no case, and the State is aware of none, that has applied the First Amendment "exacting scrutiny" test instead of or in addition to the "grossly disproportional" test when evaluating the constitutionality of a fine. This Court should not be the first to do so. Instead, this Court should apply the well-settled standard that asks whether the fine is "grossly disproportional" to the offense. *Cooper Indus.*, 532 U.S. at 434. Whether a penalty is grossly disproportionate depends on the facts. *Id.* In this case, as shown in the State's brief, applying the relevant criteria to the facts proves that GMA's civil penalty is not "grossly disproportional" to its multiple, intentional violations of Washington law. *See* State Br. at 47-49. No further inquiry is necessary to satisfy the Constitution.

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<sup>1</sup> At times, the Center seems to confuse whether it is suggesting this Court should apply this standard to the superior court's penalty, or whether the superior court should have applied this standard in the first instance. *Compare e.g.* CPC Br. at 4 *with* CPC Br. at 5-6. In either instance, the Center's proposal has no basis in law or fact and should be rejected.

The Center also contends that the additional inquiry is necessary because GMA's penalty targets "constitutionally protected speech." CPC Br. at 5. But, in making this claim, the Center distorts the nature of this case as there is no constitutional right to conceal the true source of campaign contributions from the public. *See* State Br. at 39-41. In fact, GMA's substantial penalty had nothing to do with its "speech" at all. Nothing in Washington law prohibited GMA from contributing to the No on 522 committee. Rather GMA's penalty reflects its intentional concealment of the source of over \$14 million in campaign contributions. *See* State Br. at 41-50. The Center's suggestion that GMA's penalty was "triggered by nothing more than errors," CPC Br. at 6, is simply wrong.

**B. GMA's Penalty Reflects Washington's Significant Interest in Protecting the Public from Deceit**

Even if this Court were to entertain the Center's suggestion and apply "exacting scrutiny" to the trebled, punitive damage portion of GMA's penalty, it easily satisfies this test, which requires exacting scrutiny requires "a substantial relation between the [] requirement and a sufficiently important governmental interest." *John Doe I v. Reed*, 561 U.S. 186, 195-96, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (internal quotation marks omitted).

**1. GMA’s Penalty Serves the Dual Purpose of Punitive Damages—Punishment and Deterrence**

Upon a violation of Washington’s campaign finance laws, RCW 42.17A.765(5) provides that the court may treble the judgment as punitive damages “[i]f the violation is found to have been intentional.” The purpose of this statute is to punish particularly egregious conduct and to deter future wrongdoing. *C.f. Cooper*, 532 U.S. at 432 (confirming object of punitive damages); *see also Clausen v. Icicle Seafoods*, 174 Wn.2d 70, 85-86, 272 P.3d 827 (2012) (affirming a punitive award for egregious conduct and that also served as a deterrent to other actors engaging in similar conduct). The Center contends that the superior court did not limit application of RCW 42.17A.765 to “subjective intent to violate the law” and “misconduct that was especially reprehensible,” CPC Br. at 8, but this simply is not so.

GMA’s actions and statements show that it knew and intended that its members’ contributions to the No on I-522 political campaign would go undisclosed to Washington voters. CP 4069 (FF 108). One of GMA’s stated purpose of the Account was to “provide anonymity and eliminate state filing requirements for contributing members” and to “shield [them] from public scrutiny.” CP 4059 (FF 47-48, 50) GMA directed its members to deny that they were financially supporting the No on 522 campaign to

“divert attention from the true source of the funds.” CP 4061 (FF 65). And “GMA either intentionally failed to provide full and accurate information to counsel” or “alternatively, created the Account without receiving any advice that such an account was legal under Washington law.” CP 4071 (CL 6). Based on the totality of this and the other evidence in the case, the superior court reasonably concluded, “GMA intentionally violated Washington State public campaign finance laws.” CP 4072 (CL 7). The superior court issued a significant penalty that correlates with GMA’s violations and reflects the State’s interest in “expressing moral condemnation and punishing egregious behavior.” *See* CPC Br. at 8.

GMA’s significant penalty also serves the purpose of deterrence. During the majority of the 2013 election cycle, GMA was able to solicit, receive, and conceal over \$14 million in contributions from its members. GMA’s \$18 million penalty for this and its other campaign finance violations demonstrates that there is a cost to concealment in Washington that is more than just the cost of doing business. It also signals that Washington will not tolerate willful disregard of its campaign finance laws.

Contrary to the Center’s claims, there is a substantial relationship between the State’s interests in prohibiting concealment and GMA’s

penalty. The superior court's decision to treble GMA's civil penalty for its intentional violations should be affirmed.

**2. GMA's Penalty Serves the Purpose of Disclosure—  
Shining a Light on Campaign Finances**

GMA's penalty also serves the State's "interest in disclosure in the first place." *See* CPC Br. at 9. As described in the State's brief, Washington's disclosure laws, including its prohibition against concealment, provide voters important information about who is funding efforts to sway their vote. *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). They ensure that the "governmental interest in 'providing the electorate with information' about the sources of election-related spending" is met without imposing a "ceiling on campaign-related activities" or "prevent[ing] anyone from speaking." *See Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)). GMA's penalty for intentionally concealing the source of its funds to oppose Initiative 522 reflects its violation of these fundamental tenets.

The Center nevertheless contends that the State's informational interests are overstated in this case, because GMA did not "[make] up an anodyne name concealing their identities and economic interests" and

voters allegedly “knew the constituencies opposing [Initiative 522].” CPC Br. at 10. The Center’s rationale is flawed. GMA intentionally served as a front for its members’ contributions specifically so the members’ financial opposition to Initiative 522 would be hidden from the public. In doing so, GMA violated “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.” CP 4069 (FF 108) (emphasis added); *see also Fritz v. Gorton*, 83 Wn.2d 275, 296, 517 P.2d 911 (1974) (“the right to receive information is the fundamental counterpart of the right of free speech”). The State certainly has an interest in ensuring that its citizens’ receive this vital information.

The Center also wrongly believes that “an earmarking requirement is needed for disclosure to educate voters about the financial constituencies of . . . ballot measures.” CPC Br. at 11. First, this ignores Washington cases rejecting the proposition that earmarking is necessary to require disclosure by political committees. *E.g., Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 416-17, 341 P.3d 953 (2015). Second, the Center’s reliance on out-of-state cases involving candidate electioneering, i.e., communications referring to a clearly identified candidate within a certain time before an election, is misplaced. Electioneering presents First Amendment speech issues completely unrelated to those at issue here. *See,*

*e.g.*, *Van Hollen, Jr. v. Fed. Election Comm’n*, 811 F.3d 486, 489-91 (D.C. Cir. 2016) (reciting history of federal regulation of electioneering communications); *Indep. Inst. v. Williams*, 812 F.3d 787 (10th Cir. 2016) (same as applied to Colorado’s electioneering statute). In any event, just like the United State Supreme Court did in *Citizens United*, these courts confirmed that the electioneering disclosure requirements at issue served the government’s informational purposes and upheld the laws. *Van Hollen*, 811 F.3d at 497-501<sup>2</sup>; *Indep. Inst.*, 812 F.3d at 791-800.

Finally, the Center’s arguments ignore that the State in this case *is* seeking to educate voters “about those in fact supporting or opposing a ballot measure.” *See* CPC Br. at 12-15. But for GMA’s intentional concealment of its members’ contributions, Washington voters would have known that it was not GMA, but a select subset of GMA’s members that were “in fact” financing the opposition to Initiative 522. Washington has long required “complete disclosure of all information respecting the financing of political campaigns.” RCW 42.17A.001. This case is a true demonstration of that principle. The Center’s contentions to the contrary are simply wrong.

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<sup>2</sup> The issue before the D.C. Circuit in *Van Hollen* was not actually whether the federal regulation satisfied exacting scrutiny under the First Amendment, but whether it was within the FEC’s regulatory authority under the Bipartisan Campaign Reform Act. *See Van Hollen*, 811 F.3d at 492.

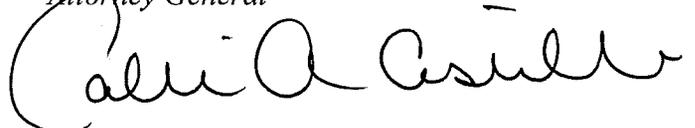
### III. CONCLUSION

The Center has challenged GMA's penalty based on an inaccurate understanding of the law and the facts. As shown in the State's brief and again here, the superior court fairly applied the law to GMA's unprecedented, egregious conduct. GMA's penalty should be upheld.

RESPECTFULLY SUBMITTED this 25th day of August 2017.

ROBERT W. FERGUSON

*Attorney General*

A handwritten signature in black ink that reads "Callie A. Castillo". The signature is written in a cursive style with a large initial "C".

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