FILED
6/21/2017 3:49 PM
Court of Appeals
Division II
State of Washington

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.

OPENING BRIEF OF APPELLANT

Robert B. Mitchell, WSBA #10874
Aaron E. Millstein, WSBA #44135
Daniel-Charles Wolf, WSBA #48211
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Bert W. Rein (*pro hac vice*)
Carol A. Laham (*pro hac vice*)
Matthew J. Gardner (*pro hac vice*)
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7301

Attorneys for Appellant

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

III. STATEMENT OF THE CASE 3

A. Political controversy over GMO labeling 3

B. Creation of the Defense of Brands Strategic Account 4

C. GMA's involvement with I-522 6

D. Legal advice to GMA regarding the Account and I-522 6

E. Procedural history 8

IV. ARGUMENT 14

A. Standard of review 14

B. The trial court erred in granting the State summary judgment. 14

C. The FCPA provisions that GMA was held to have violated are unconstitutionally vague as applied to GMA. 18

1. The definition of "political committee" is unconstitutionally vague as applied to GMA 19

a. The political-committee statute failed to give GMA fair notice that creating a multipurpose fund gave it an "expectation" of receiving contributions for Washington electoral purposes. 20

b. The State's enforcement action against GMA contradicts authority limiting the political-committee statute to entities that have a primary purpose to influence elections 26

2. The statute forbidding "concealment" of "the source" of a contribution is impermissibly vague. 27

3. As applied to GMA, the FCPA fails exacting scrutiny 31

a. The State presented no evidence that the FCPA, as applied here, actually advances any interest in fair elections. 32

b. When applied without a "primary-purpose" test, the definition of "political committee" is over-inclusive..... 33

c. Requiring GMA to register burdens its members' associational rights in disproportion to the State's interest..... 35

D. The trial court abused its discretion by excluding evidence of GMA's communications and cooperation with the State..... 37

E. The trial court incorrectly construed the FCPA's standard for imposing punitive damages..... 38

F. The trial court imposed an unconstitutionally excessive fine..... 42

1. The nature of the offense..... 44

2. No other illegal activity..... 44

3. Extent of harm..... 45

4. Targeted class..... 46

5. Other potential penalties..... 47

6. The trial court's penalty is unconstitutional..... 48

G. GMA is entitled to an award of its attorneys' fees and costs..... 49

V. CONCLUSION.....50

APPENDIX..... A-1

Table 1: Expected versus actual outcomes in the State's application of the political-committee statute..... A-1

Table 2: Comparison of excessive-fines cases..... A-4

TABLE OF AUTHORITIES

Page(s)

Table of Cases

Averill v. City of Seattle,
325 F. Supp. 2d 1173 (W.D. Wash. 2004).....37

In re Boldt,
187 Wn.2d 542, 386 P.3d 1104 (2017).....41

Buckley v. Valeo,
424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).....27, 31, 37

Citizens United v. FEC,
558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).....46

City of Seattle v. Evans,
184 Wn.2d 856, 366 P.3d 906 (2015).....19

Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.,
532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674
(2001).....43

Dailey v. N. Coast Life Ins. Co.,
129 Wn.2d 572, 919 P.2d 589 (1996).....41

Doe v. Reed,
561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493
(2010).....27, 36

Eugster v. City of Spokane,
121 Wn. App. 799, 91 P.3d 117 (2004).....36, 37

State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n,
111 Wn. App. 586, 49 P.3d 894 (2002)..... *passim*

Gentile v. State Bar of Nevada,
501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888
(1991) 23

Gertz v. Robert Welch, Inc.,
418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) 41

Grid Radio v. FCC,
278 F.3d 1314 (D.C. Cir. 2002) 48, 49

Human Life of Wash., Inc. v. Brumsickle,
624 F.3d 990 (9th Cir. 2010) 22, 31, 32, 46

Human Life of Wash., Inc. v. Brumsickle,
No. C08-0590-JCC, 2009 WL 62144 (W.D. Wash. Jan.
8, 2009), *aff'd,* 624 F.3d 990 (9th Cir. 2010) 21, 24, 25

Jametsky v. Olsen,
179 Wn.2d 756, 317 P.3d 1003 (2014) 14

Kitsap Cty. v. Mattress Outlet,
153 Wn.2d 506, 104 P.3d 1280 (2005) 14

Kolstad v. Am. Dental Ass'n,
527 U.S. 526, 119 S. Ct. 2118, 144 L. Ed. 2d 494
(1999) 41

McIntyre v. Ohio Elections Comm'n,
514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426
(1995) 33, 34, 36

Moore v. Harley-Davidson Motor Co.,
158 Wn. App. 407, 241 P.3d 808 (2010) 14

NAACP v. Alabama,
357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) 35, 36

O'Day v. King Cty.,
109 Wn.2d 796, 109 P.2d 142 (1988) 19

Ofuasia v. Smurr,
198 Wn. App. 133, 392 P.3d 1148 (2017) 14, 15

State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.,
135 Wn.2d 618, 957 P.2d 691 (1998) 45

Qwest Corp. v. Minn. Pub. Utils. Comm'n,
427 F.3d 1061 (8th Cir. 2005) 43

RGB Bush Planes, LLC v. Alaska Pub. Offices Comm'n,
361 P.3d 886 (Alaska 2015) 49

Rivard v. State,
168 Wn.2d 775, 231 P.3d 186 (2010) 28

San Juan Cty. v. No New Gas Tax,
160 Wn.2d 141, 157 P.3d 831 (2007) 49

Scrivener v. Clark Coll.,
181 Wn.2d 439, 334 P.3d 541 (2014) 14

Sjogren v. Props. of the Pac. Nw., LLC,
118 Wn. App. 144, 75 P.3d 592 (2003) 16

Snyder v. Phelps,
562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011) 35

Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.,
32 Wn. App. 814, 650 P.2d 231 (1982) 14

State v. (1972) Dan J. Evans Campaign Comm.,
86 Wn.2d 503, 546 P.2d 231 (1976) 21, 22

State v. Conte,
159 Wn.2d 797, 154 P.3d 194 (2007) 28, 40, 41

State v. Eaton,
168 Wn.2d 476, 229 P.3d 704 (2010) 40

State v. Reeves,
184 Wn. App. 154, 336 P.3d 105 (2014) 41

State v. Smith,
111 Wn.2d 1, 759 P.2d 372 (1988) 19

State v. Witherspoon,
180 Wn.2d 875, 329 P.3d 888 (2014) 43

Still v. Comm'r of Emp't & Training,
39 Mass. App. Ct. 502, 657 N.E.2d 1288 (1995), *aff'd*,
423 Mass. 805, 672 N.E.2d 105 (1996) 40

United States v. $100,348 in U.S. Currency,
354 F.3d 1110 (9th Cir. 2004) 44

United States v. Bajakajian,
524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314
(1998) ..... *passim*

United States v. Beecroft,
825 F.3d 991 (9th Cir. 2016) 48

United States v. Ford Motor Co.,
442 F. Supp. 2d 429 (E.D. Mich. 2006) 45, 46

United States v. Harriss,
347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954) 31

United States v. Stevens,
559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435
(2010) 19

Utter v. Bldg. Indus. Ass'n of Wash.,
176 Wn. App. 646, 310 P.3d 829 (2013), *rev'd*, 182
Wn.2d 398, 341 P.3d 953 (2015) 28

Utter v. Bldg. Indus. Ass'n of Wash.,
182 Wn.2d 398, 341 P.3d 953 (2015) ..... *passim*

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) 42

Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n,
161 Wn.2d 470, 166 P.3d 1174 (2007) 31

Wash. State Pub. Disclosure Comm'n v. Permanent Offense,
136 Wn. App. 277, 150 P.3d 568 (2006) 28, 29, 30

Wash. State Republican Party v. Pub. Disclosure Comm'n,
141 Wn.2d 245, 4 P.3d 808 (2000) 42

Wood v. Battle Ground Sch. Dist.,
107 Wn. App. 550, 27 P.3d 1208 (2001) 16, 17

Statutes

42 U.S.C. § 1988 49

Fair Campaign Practices Act, ch. 42.17A RCW ..... *passim*

Pub. L. 114-214 6

RCW 9A.08.010 39

RCW 39.30.020 40

RCW 42.17A.001 46

RCW 42.17A.005 ..... 14, 20, 28

RCW 42.17A.205 ..... 15, 28

RCW 42.17A.235 15

RCW 42.17A.435 ..... 19, 28

RCW 42.17A.442 10

RCW 42.17A.750 ..... 39, 48

RCW 42.17A.765 ..... *passim*

Other Authorities

1973 Letter Op. Att'y Gen. No. 114 34

1973 Op. Att'y Gen. No. 14 ..... 26, 33

CR 12(c) 24

MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/expect 20

OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/expectation 20

RAP 18.1 50

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. VIII ..... *passim*

Wash. Const. art. 1, § 14 43

I. INTRODUCTION

Grocery Manufacturers Association ("GMA"), a nationwide trade association, contributed what it considered its own funds to a campaign opposing a state GMO-labeling initiative. GMA believed that it was acting lawfully by having itself reported as the contributor. But the State later argued, and the trial court held, that GMA was mistaken: It should have registered as a Washington political committee and disclosed the members that gave funds to GMA—funds spent pursuing GMA's national goals.

Even though GMA's alleged mistake was not shown to have affected the election, the trial court imposed a $6 million penalty on GMA. Then, equating volitional acts with intentional violations of the law, the trial court trebled its $6 million penalty to $18 million as punitive damages. The court's judgment requires reversal. It is inconsistent with Washington law and violates both the First and the Eighth Amendments.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in granting summary judgment to the State and finding GMA liable as a matter of law for violations of the Fair Campaign Practices Act ("FCPA"), chapter 42.17A RCW.
2. The trial court erroneously held that, as applied to GMA, the definition of "political committee," the anti-concealment rule, and the disclosure

requirements in the FCPA satisfy First Amendment requirements.

3. The trial court erred in making conclusions of law 1, 2, 3, 4 in its summary judgment order, CP 3339, and conclusions of law 1, 2, 3, 4, 5, and 7 in its order on trial, CP 4070-72.
4. The trial court erroneously excluded evidence of GMA's interactions with the State as irrelevant.
5. The trial court misconstrued the FCPA's "intentional violation" standard when it awarded a trebled penalty as punitive damages.
6. The trial court imposed an unconstitutionally excessive fine.

Issues Pertaining to Assignments of Error

1. Did the trial court err in granting the State's motion for summary judgment by weighing the evidence, drawing inferences in the State's favor, and making findings to resolve genuine issues of material fact? (A/E 1, 3)
2. Did the trial court wrongly hold GMA liable for failing to register and report as a political committee, where the State's enforcement of the law departed from precedent, rested on a vague standard, and did not substantially relate to a legitimate State interest? (A/E 1, 2, 3)
3. Did the trial court abuse its discretion in excluding evidence of GMA's compliance efforts, which were relevant to whether GMA's violation was intentional and to the amount of any penalty? (A/E 4)

4. Did the trial court err in awarding punitive damages under a provision that authorizes trebling of penalties for violations "found to have been intentional," where there was no evidence that GMA intended to violate the law? (A/E 5)
5. Does the trial court's massive and unprecedented penalty violate the Eighth Amendment? (A/E 6)

III. STATEMENT OF THE CASE

Established in 1908, GMA is a trade association of American food, beverage, and consumer-product makers. *See* CP 4052; RP 641-42.[1] GMA has long been interested in promoting uniform and reasonable national food-labeling requirements. *See* RP 642-44.

A. Political controversy over GMO labeling

Debate raged for years over whether manufacturers should be required to disclose on food labels the presence of ingredients derived from genetically modified organisms, or GMOs. Trial Exhibit ("Ex.") 2, 139. Proponents argued that consumers were entitled to know about GMOs; opponents argued that labeling could unfairly stigmatize GMO products. *See* Ex. 2. GMA sought to educate consumers about GMOs. *Id.* GMA also recognized the challenges its members would face if they had to comply with a patchwork of inconsistent GMO-labeling requirements.

[1] "RP" refers to the Verbatim Report of Proceedings. Unless otherwise indicated by a

Id. GMA thus opposed state and local GMO-labeling efforts and lobbied for uniform federal legislation. *See* Ex. 2, 139; RP 433, 654.

GMO-labeling proponents pursued labeling requirements in state legislatures and through ballot initiatives. *See* CP 4053-54; RP 441-42. A 2012 California initiative campaign was the first big contest. *See* Ex. 139; CP 4053; RP 442. GMA discovered that its own financial resources could not provide the sums needed to oppose the California initiative. RP 433-34; *see also* Ex. 2. GMA encouraged its members to contribute directly to the California "no" campaign; it also solicited—and disclosed—member contributions that were earmarked for that campaign. *See* Ex. 139; RP 277-78, 440-41. Because member companies had not planned for large unbudgeted expenses, they found it hard to respond promptly to pleas for help. *See* Ex. 13. When they did respond and their contributions were disclosed, many of them received threats and suffered boycotts. *See* RP 180-81; CP 4053.

B. Creation of the Defense of Brands Strategic Account

In August 2012 GMA staff began discussing the creation of a "Defense of Brands Strategic Account" (the "Account") to address the problems GMA discovered in California—namely, inadequate resources for consumer education and electoral campaigns, plus the harassment,

---

preceding date, all RP citations refer to the transcript of the trial in August 2016.

boycotts, and threats that members faced for voicing their political views. Ex. 131; *see also* CP 4053-54. Louis Finkel, then GMA's executive vice-president for government affairs, led this effort; CEO Pamela Bailey was also involved. *See* RP 274-75, 289; Ex. 13, 14. The contemplated Account would give GMA the resources it needed to seek uniform federal labeling legislation and to oppose state-specific labeling requirements. Ex. 21, 139; RP 441-43. GMA also expected to use Account funds for consumer research and to help it "communicate the benefits of packaged food . . . ." RP 651, 657.

GMA put the Account proposal on the August 2012 Board agenda. *See* Ex. 131. Staff then refined the Account proposal for presentation at a January 2013 Board meeting, where it was preliminarily approved. Ex. 6, 17, 133. To seek final approval, staff drafted a three-year budget of $37.9 million, including an assumed $10 million per year to address state GMO ballot measures. Ex. 21. On February 28, 2013, GMA's Board approved the Account. At that time, GMA was tracking legislative efforts in Connecticut, Oregon, and Vermont as well as initiative efforts in Washington and other states. Ex. 6 at 4; Ex. 17; Ex. 21 at 4, 9.

GMA first invoiced its members for Account funds in March 2013. CP 4060. Once members paid into the Account, the money came under GMA's discretionary control. CP 918, 1473-76; RP 297, 303, 338, 654;

see also Ex. 148. GMA ultimately used the money to challenge a Vermont labeling statute in court, to promote a smartphone bar-code-scanning app, and to pursue federal GMO-labeling legislation, among other things. RP 654. Federal legislation was enacted in July 2016. *See* Pub. L. 114-214.

C. GMA's involvement with I-522

When the Account was first discussed in August 2012, GMA knew virtually nothing about Washington Initiative 522. RP 436; *see also* CP 4054. In November 2012 Finkel informed Bailey about the Washington initiative process. Ex. 4. In January 2013 GMA commissioned a poll to determine whether it might be feasible, and what would be required, to defeat I-522 should it be placed on the fall ballot. Ex. 9, 137; CP 2337-38; RP 296-97, 329. GMA planned to decide whether to oppose I-522 based on the results of this poll. CP 2337-38; RP 296-97, 329. GMA did not receive the first polling results until March 2013. Ex. 32 at 2.

I-522 qualified for the November ballot on April 28, 2013. CP 605. On May 8, GMA made its first contribution to the No on 522 Committee ("No on I-522"). *See* Ex. 76. That and later contributions were disclosed to the Public Disclosure Commission (PDC) as coming from GMA. *Id.*

D. Legal advice to GMA regarding the Account and I-522

GMA wanted to oppose GMO-labeling initiatives while reducing the risk that its members would suffer the kind of reprisals they faced in

California. *See* Ex. 2. GMA believed that the Account would give it funds that were under its control and that it could use in its own name to achieve those goals. Ex. 16, 17, 23.

GMA was told that its approach was lawful. *See* RP 155-56.[2] Starting January 4, 2013, William MacLeod of Kelley Drye & Warren LLP, GMA's outside counsel, participated in several planning meetings where the Account was discussed. RP 194-95; Ex. 8, 132, 136. MacLeod understood that the Account would enable "a wide range of possible activities" such as lobbying, litigation, and public-interest work. RP 209. At the Board chair's request, Bailey and Finkel asked MacLeod to attend and to offer his opinion at a February 21 Executive Committee meeting where the Account was discussed and the February 28 Board meeting where it was approved. Ex. 150; CP 4058. At the latter meeting, MacLeod called the Account a "helpful way for GMA to have the flexibility to do what it deemed appropriate and feasible[.]" RP 222.

In April 2013, after a member company raised a question about the Account, GMA retained Rob Maguire of Davis Wright Tremaine LLP, an expert in Washington campaign finance law. CP 4063. Maguire drafted a memorandum on Washington campaign finance disclosure requirements,

[2] Shortly before the original trial date of April 11, 2016, GMA waived the attorney-client privilege as to communications predating the State's lawsuit. CP 3644-45, 3637; *see also* 4/1/16 RP at 7; 4/11/16 RP at 14-18.

Ex. 59, and he later gave GMA a more detailed legal analysis, Ex. 80. Maguire concluded that, absent earmarking, contributions from the Account were properly reported "as contributions from GMA and not by individual members." *Id.*

Also in April 2013, GMA hired Karin Moore as in-house counsel. RP 459. In July 2013 Moore asked MacLeod about two draft memos addressing Washington campaign finance requirements for which GMA had been billed but that it had not seen. RP 479, 524-25. Moore obtained and reviewed these memos. RP 479, 509-12. She asked MacLeod about the FCPA questions they raised; he told her that his firm's analysis was incomplete and that she should look to Maguire for guidance on Washington campaign finance law. RP 258-59, 526. Moore then spoke with Maguire and reviewed case law to assure herself that GMA's position was lawful. RP 473, 518-20; Ex. 50 at 8.

E. Procedural history

In September 2013 proponents of I-522 filed a citizen complaint for non-disclosure against No on I-522 and GMA. RP 687. GMA retained Michael Ryan, then with K&L Gates LLP. *Id.* The proponents dismissed GMA from their suit, but they also filed a citizen action letter with the PDC. *Id.* at 687, 700. The PDC asked GMA for information related to the citizen complaint, and GMA promptly provided complete documentation

of the Account's development in hopes of quickly resolving any potential concern. *Id.* at 687-88; CP 2506-07, 2491, 2691-727. Instead, the State sued, alleging that GMA had failed to properly register and report as a political committee and that GMA had thereby concealed the sources of funds that it contributed in its own name to No on I-522. CP 18-24.

Based on the State's interpretation of the FCPA, GMA promptly registered a political committee, "Grocery Manufacturers Association Against I-522,"[3] and disclosed its alleged contributors. CP 1690-92, 3858-60. GMA also agreed to disclose all amounts spent to oppose I-522. CP 1690-92, 3859-62. The State told GMA to disclose only the funds that had been contributed to date to No on I-522, with the understanding that further contributions would be reported later, if made. CP 1692-94. Thus, GMA did not disclose Account funds that it had not spent in Washington, as GMA had yet to determine if, where, or how such funds would be spent. *Id.*; *see also* RP 332 (GMA might have stopped spending on No on I-522 had continuous polling indicated that additional spending would not help). GMA's reports were filed before voting took place. *E.g.*, Ex. 207.

Despite GMA's cooperation with the State, the State amended its complaint to allege that GMA's initial reports had failed to disclose $3.8

[3] No such entity existed, but the PDC told GMA to act as if there were one and to treat funds in the Account as member contributions to "GMA Against I-522." CP 546.

million that was not spent until after the initial reports were filed. CP 25-33. The State also alleged that, in addition to failing to register as a political committee, GMA had failed to comply with the requirement in RCW 42.17A.442 that it raise $10 each from ten Washington voters before contributing to the "No" campaign. *Id.*

GMA's answer asserted a First Amendment defense to all claims. CP 34-47. GMA also filed a parallel civil rights action against the attorney general in his official capacity. CP 4100-10. The cases were consolidated, CP 4111-12, and GMA sought judgment on the pleadings, CP 64-90. In July 2014 Judge Schaller granted GMA's motion in part, holding the $10/ten-voter rule unconstitutional as applied to ballot measure committees. CP 362-79.

Judge Schaller rotated off the civil calendar. After Judge Hirsch was assigned, both parties moved for summary judgment. GMA presented evidence that it retained control over the funds in the Account and had discretion over how and when to spend them. CP 2337-40. GMA also presented evidence that the purpose of the Account was national in scope—Washington was only a possible component—and that the budget showing expenditures in Washington was illustrative of potential electoral costs. CP 2254-68, 2272, 2298-301, 2311-15, 2341, 2346, 2428-29. When the Account was conceived and a tentative budget developed, GMA's

evidence showed, it did not know that there would be a ballot measure in Washington. CP 2274-75. Because GMA did not receive its polling data until March 2013, it had made no final determinations about I-522 when the Account was approved. *See, e.g.*, CP 2337-39. GMA's members were, therefore, uncertain about whether their contributions would be spent in Washington to oppose I-522. *See* CP 2254, 2303-05, 2310-15.

Despite this evidence, Judge Hirsch granted the State's motion for summary judgment. CP 3187-95, 3335-40. She ruled that GMA had violated Washington campaign-finance law by failing to register as a political committee within 14 days after the Board approved the Account, and by then failing to file timely reports. CP 3339. The summary judgment order has 27 findings of fact, including a finding that the Account was created to hold funds for work "specifically in Washington." CP 3337.

The court's summary judgment order narrowed the scope of trial, which would address only "whether GMA intentionally violated the law and if so, whether the judgment in this case should be trebled as punitive damages." CP 3340. GMA prepared for trial based on this limited scope. The State moved *in limine* to exclude evidence of GMA's cooperation with the State after the State's complaint was filed in October 2013. CP 3199-204. GMA objected: Its efforts to comply were highly relevant, because they went to the question of whether GMA intended to violate the

law or whether it worked in good faith to correct an alleged mistake resulting from differing interpretations of Washington disclosure law. CP 3313. But Judge Hirsch granted the State's motion, excluding any communications GMA had with the State related to compliance efforts. *See* CP 3371.[4]

GMA moved before trial to confirm that the term "intentional" as used in RCW 42.17A.765(5) (authorizing treble damages for violations "found to have been intentional") meant that a defendant knowingly chose not to comply with the law. CP 3647-59. Judge Hirsch disagreed, ruling that an "intentional" violation did not require knowledge that one's actions were illegal. CP 3684. Rather, the State merely had to show that GMA intended to take an action that was later determined to be a violation of chapter 42.17A RCW. *See id.*

GMA argued at trial both that it did not intentionally violate the law and that any penalty should be relatively low because of mitigating factors such as its cooperation with the investigation, lack of harm, and lack of bad-faith noncompliance. CP 3690-91, 3703-14. GMA argued that its violation was inadvertent. CP 3691. It introduced expert testimony that its failure to disclose did not impact the election. RP 724-74. GMA also

[4] At trial GMA proffered evidence of its communications with the State, but the court excluded that evidence. CP 3702-03, 3857-922; RP 701-05.

noted that all State-required contribution information was disclosed before the November 2013 election, which meant voters had access to that information when they voted. CP 3708-09.

On November 2, 2016, Judge Hirsch issued Findings of Fact and Conclusions of Law and Order on Trial. CP 4049-72. Finding that GMA had intentionally violated the FCPA, the court imposed a $6 million penalty and trebled that amount to $18 million as punitive damages. CP 4072. With respect to the amount of the penalty, the court found mitigating factors such as GMA's lack of prior violations and its cooperation with the PDC once the case was filed. CP 4069. The court also found aggravating factors, including "violation of the public's right to know the identity of those contributing to campaigns . . . on issues of concern to the public," GMA's level of sophistication and experience, and the amount of funds subject to disclosure. CP 4069.

After the trial court entered judgment, GMA timely appealed. CP 4073-77. GMA also moved for a permanent injunction against the $10/ten-voter rule, which the trial court granted on January 26, 2017. SCP 4331-34. Both parties sought attorneys' fees and costs. On April 5, 2017, the trial court entered an amended judgment reflecting a net judgment amount of $19,026,090. SCP 4354-57. GMA timely appealed the amended judgment, SCP 4361-67, and the appeals were consolidated.

IV. ARGUMENT

A. Standard of review

In reviewing an order granting summary judgment, this Court "engages in the same inquiry as the trial court." *Ofuasia v. Smurr*, 198 Wn. App. 133, 141 (2017). Even where basic facts are undisputed, "if the facts are subject to reasonable conflicting inferences, summary judgment is improper." *Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.*, 32 Wn. App. 814, 821 (1982). All facts and their reasonable inferences are construed "in the light most favorable to the nonmoving party." *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 444 (2014).

Statutory interpretation is a question of law, reviewed de novo, *Jametsky v. Olsen*, 179 Wn.2d 756, 761 (2014), as is a statute's constitutionality, *Kitsap Cty. v. Mattress Outlet*, 153 Wn.2d 506, 509 (2005). Rulings on relevance are reviewed for abuse of discretion. *Moore v. Harley-Davidson Motor Co.*, 158 Wn. App. 407, 425 (2010).

B. The trial court erred in granting the State summary judgment.

The trial court granted the State's motion for summary judgment despite genuine disputes of material fact in the summary judgment record about whether and when GMA became a political committee.[5] These

[5] The FCPA requires a person with "the expectation of receiving contributions or making expenditures in support of or opposition to" a candidate or ballot measure to register as a political committee. RCW 42.17A.005(37). Political committees must make detailed

disputes involved the Account's creation, its purpose, and how its funds were controlled. The court was wrong to grant summary judgment in such circumstances. *See Ofuasia*, 198 Wn. App. at 147-50.

The trial court's misguided findings of fact on summary judgment resolved disputes on several material factual issues. *See* CP 3335-40.[6] The court specifically found the following:

- GMA first considered the Account after the California campaign ended in November 2012. CP 3337 (finding 9).
- A primary purpose of the Account was to shield GMA's members from public scrutiny. *See id.* (findings 12, 14).
- The Account "would be and was created to hold funds from GMA members to address the GMO strategy and work nationwide and also specifically in Washington." *Id.* (finding 15).
- GMA commingled funds in the Account. CP 3338 (finding 17).

These findings were critical to the trial court's decision that GMA was liable as a matter of law for not registering as a political committee, which automatically led to the reporting violations that the court also found. It was improper to make findings about GMA's and its members' expectations, given conflicting evidence in the record. Questions of mental state should not be resolved on summary judgment. *See Ofuasia*, 198 Wn. App. at 148-49 (reversing summary judgment where genuine issue of

---

disclosures of their contributions and expenditures. *See* RCW 42.17A.205, .235.

[6] The trial court characterized these findings as "undisputed" despite GMA's explaining that the evidence presented a dispute and, indeed, disproved the findings. *See* CP 3294-305 (detailing factual inaccuracies in summary judgment findings); CP 4050 (court's

material fact existed about defendant's knowledge of boundary dispute); *Sjogren v. Props. of the Pac. Nw., LLC*, 118 Wn. App. 144, 149 (2003) (reversing summary judgment where issue of fact existed as to whether plaintiff was aware of an obvious danger); *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 567 (2001) (reversing summary judgment for plaintiff where defendants' knowledge was at issue).

The question in *Wood* was whether school-board members knew they were violating the Open Public Meetings Act ("OPMA"). Although evidence showed that board members contemplated the possibility that their email conversation might violate OPMA, they submitted declarations stating that they did not know they were violating the law. *See id.* at 566-67. Because "reasonable persons viewing the evidence could differ as to whether the members knew their emails violated the OPMA," this Court reversed the trial court's summary judgment order. *Id.* at 567.

Here, reasonable persons viewing the summary judgment evidence could differ as to whether GMA established the Account in order to fund opposition to I-522. GMA submitted evidence that it first conceived of the Account in August 2012—before the California campaign ended and before GMA knew about I-522. *See* CP 2261 ("And as early as August 2012, . . . we began internal deliberations about the best way to deal with

---

"correcting" the summary judgment findings after trial).

this issue on multiple fronts."); CP 2263 (GMA was unaware of the Washington initiative in August 2012).

The minutes of GMA's Board meeting on February 28, 2013, undermine the trial court's purportedly undisputed finding that a primary purpose of the Account was to shield members from disclosure. CP 1908. The minutes describe the Account's five "strategic objectives":

> 1. To oppose all state efforts that would impose mandatory labels while efforts are taken to pursue a federal solution;
> 2. To develop a transparency and disclosure platform based on consumer research;
> 3. To pursue statutory federal preemption which does not include a labeling requirement;
> 4. To engage in efforts that protect the image of the industry while engaging in these efforts[;]
> 5. And to develop a long range funding mechanism for GMA companies to support these efforts and other Board approved initiatives in defense of the industry brands that provides greater financial certainty and reduces companies' exposure to criticism.

Id.

GMA's evidence also contradicted the court's finding about "commingled" funds. "Commingling" implies that funds in the Account had separate, dedicated purposes. But when the Account was created, GMA had made no final decision about using it in Washington or any other state. To the contrary, GMA was waiting for its polling results to assess the feasibility of opposing I-522. *E.g.*, CP 1468-71 (GMA requested

polling to determine whether to spend money in Washington if initiative qualified for ballot), 1477 (GMA did not decide to contribute to No on I-522 until after I-522 qualified for ballot in April 2013), 1525-27 (GMA had not decided to oppose I-522 during January Board meeting because it would not make any decisions until polling results indicated that an opposition campaign could succeed), 1529-31 ("no decision is made to mount a campaign until we have the results from the consultants that demonstrate, if we're going to do that, we'll be able to be successful").[7] At all times GMA retained discretion over how to spend the funds in the Account. CP 918, 1473-76. No evidence suggested that the Account, or members' financial commitments to it, would have changed had I-522 not gone on the ballot.

In granting summary judgment on liability, the trial court ignored genuine issues of material fact and drew evidentiary inferences against GMA even though it was not the moving party. This is reversible error.

C. The FCPA provisions that GMA was held to have violated are unconstitutionally vague as applied to GMA.

As applied here, the FCPA is impermissibly vague. To prevail in its "as-applied" challenge, GMA need only show that "the statute in the

[7] To the extent the trial court relied on budgets showing money for Washington, GMA submitted evidence that line items for Washington were mere placeholders approximating what costs could be. *E.g.,* CP 1473 (Finkel's deposition testimony that he "would make decisions about the amount and timing of . . . contributions [to No on I-522]"); CP 1529

specific context of [its] actions . . . is unconstitutional." *City of Seattle v. Evans*, 184 Wn.2d 856, 862 (2015).[8] A statute is unconstitutionally vague if it does not give citizens notice of the conduct it regulates or if it invites arbitrary and discriminatory enforcement. *See State v. Smith*, 111 Wn.2d 1, 4-5 (1988). Rooted in due-process concerns, vagueness doctrine demands even greater specificity "where First Amendment freedoms are at stake." *O'Day v. King Cty.*, 109 Wn.2d 796, 810 (1988).

The State has applied the definition of "political committee" in an erratic way that made it impossible for GMA to know whether the funds in the Account could be treated as GMA's own money or if, instead, GMA would be required to disclose as "contributions to a political committee" the money it received from members. The anti-concealment statute, RCW 42.17A.435, is no less vague: Its prohibition on concealing "the source" of a contribution invites discriminatory enforcement whenever parties may reasonably differ over a contribution's "source."

1. <u>The definition of "political committee" is unconstitutionally vague as applied to GMA.</u>

The FCPA defines "political committee" as

("This was . . . an attempt to show in a very general way what the cost would look like.").

[8] This contrasts with a facial challenge, which seeks to show that a statute violates the First Amendment in a "substantial number of its applications . . . judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010).

> any person (except a candidate or individual dealing in his or her own funds or property) having 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). Courts interpret an "expectation of receiving contributions" to require contemporaneous near-certainty about the funds' intended use. Courts also hold that only entities with a "primary purpose" to influence elections can be political committees. *See infra.*

In light of this precedent, GMA could not have understood that creating a flexible resource to pursue federal GMO-labeling rules would trigger GMA's being treated as a Washington "political committee," just because a Washington election might invite GMA's participation.

a. The political-committee statute failed to give GMA fair notice that creating a multipurpose fund gave it an "expectation" of receiving contributions for Washington electoral purposes.

The FCPA does not define "expectation." Dictionaries define it as a "strong belief that something will happen or be the case," OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/expectation, or the state of considering something "probable or certain," MERRIAM-WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/expect.

Courts have read the statute consistent with these definitions: An expectation of receiving contributions in support of or opposition to a ballot proposition or candidate exists if those providing the funds have

"actual or constructive knowledge" that their money "***will be***" used for that purpose. *Human Life of Wash., Inc. v. Brumsickle*, No. C08-0590-JCC, 2009 WL 62144, at *2 (W.D. Wash. Jan. 8, 2009), *aff'd,* 624 F.3d 990 (9th Cir. 2010) (emphasis added); *accord State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 603 (2002) ("*EFF*") (teachers' union was not a political committee because members "had no actual or constructive knowledge that their membership dues ***would be*** used for electoral political activity.") (emphasis added); *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508 (1976) ("The record reflects no expenditures for the purpose of supporting or opposing a ***specific*** candidate or ballot proposition.") (emphasis added).

An "expectation" thus appears to require near-certainty, contemporaneous with making a contribution, that the money will be used for a qualifying purpose. A reader would reasonably infer that, if contributions were ***not*** solicited specifically for use in a Washington election (i.e., earmarked), then the funds became GMA's and were not received "in support or opposition to" a ballot measure.

This reading comports with the fact patterns of precedent cases, which illustrate that political-committee status exists when money is given with the understanding that it ***will be*** used for a Washington election, but not when there is only a ***possibility*** that the funds may be so used.

Compare Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1015-16 (9th Cir. 2010) (soliciting donations for campaign opposing aided-dying initiative would render group a political committee) *and Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 417-18 (trier of fact could find that group became political committee by soliciting pledges to support candidate), *with Dan J. Evans*, 86 Wn.2d at 508 (no political committee status where funds were given not to particular candidate but to party committee) *and EFF*, 111 Wn. App. at 603 (union not a political committee, even though members knew it was opposing initiative, where dues went to general fund and were only later diverted to fight initiative).

Despite the courts' view of what an "expectation" requires, the State has not applied the distinction between "will be" and "may be" consistently. Occasionally, as in this case, the State has disregarded the standard of near-certainty altogether. Such inconsistency renders the "political committee" definition impermissibly vague as applied to GMA.

GMA created the Account to finance lobbying, campaigning, issue advocacy, and consumer research on GMO-labeling issues across the country. At the time the Account was approved, GMA had no firm estimate of how much of the funds, if any, would go to I-522 versus elections in other states—or to advocacy purposes unrelated to elections, such as lobbying, market research, or consumer outreach. CP 2272, 2317;

RP 652-54. But despite case law suggesting that near-certainty about the funds' intended destination is required, the State asserted that GMA was a political committee so long as its members knew that their money "***may be*** spent to support or oppose a Ballot Proposition in Washington." CP 2826-27 (emphasis added).

The tension between this interpretation of the political-committee statute and the case law creates a vague standard. *Cf. Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050 (1991) ("a trap for the wary as well as the unwary"). Underscoring that vagueness is the fact that the State has often refused to require political-committee registration even where a group's members undeniably ***knew*** that their payments could be used in Washington elections. Table 1 (App. A-1) illustrates the State's erratic enforcement of the political-committee statute. The State's determination of a group's political-committee status cannot be reconciled with either the test that case law appears to require (near-certainty) or the one the State purported to apply here ("may be"). When it created an advocacy fund with several possible, but no certain, uses for the money, how could GMA have known whether this made it a "political committee," when the State has been unable to come up with a predictable way to answer that very question? Such unpredictability reflects a vague statutory standard that, despite judicial narrowing attempts, has eluded evenhanded enforcement.

The trial court in this case was also inconsistent regarding the level of certainty that an entity or its members must have about the destination of contributed funds. In partly denying GMA's CR 12(c) motion, Judge Schaller noted that "if a donor contributed to an organization that did not ***at the time*** expect to use the money for a ***particular campaign***, then there is no . . . risk that the donor was trying to circumvent the disclosure laws." CP 370 (emphasis added). Like the cases cited above, this statement suggests that a contributor must have contemporaneous near-certainty about the intended destination for the funds that contributor gives.

But when Judge Hirsch evaluated the State's motion for summary judgment, she took a very different view. She found that "the . . . account, ***from its inception***, held funds from a number of companies and ***was intended to be used*** to support activities in Washington, ***in other states, and nationally***." CP 3337 (emphasis added). This finding acknowledges that GMA's members gave the funds for general purposes—promoting uniform labeling requirements, educating consumers, and conducting research—and authorized GMA itself to decide how best to achieve those purposes. But despite this implicit recognition that GMA's members lacked near-certainty about the intended destination of funds that they provided, the court then held that "[a]s a receiver of contributions, GMA qualified as a political committee under" *EFF*, *Utter*, and *Human Life*, the

very cases that suggest a need for near-certainty about where such funds will end up. CP 3339.

After trial, Judge Hirsch dispensed altogether with the requirement that GMA's expectation of receiving funds must be tied with ***any*** degree of certainty to a particular destination: She held that "GMA formed a political committee . . . as a receiver of contributions . . . by creating an expectation of receiving contributions to the Defense of Brands Account." CP 4071. This holding suggests that ***any*** money given to GMA by its members would make it a political committee. Judge Hirsch's holding does not even apply the statutory requirement that the funds must be for or against a candidate or ballot proposition, still less the requirement of contemporaneous near-certainty that the Judge Schaller adopted in her CR 12(c) ruling and that Judge Hirsch's citation to *Utter*, *Human Life*, and *EFF* on summary judgment would support.

Far from giving clear notice to GMA, the political-committee statute has been a moving target depending on who is applying it. Vagueness doctrine forbids this sort of nebulous standard, which prevents an entity desiring to participate in electoral advocacy from knowing whether it can spend its own money or whether regulators will treat it as a front for those who provided the money.

b. The State's enforcement action against GMA contradicts authority limiting the political-committee statute to entities that have a primary purpose to influence elections.

Washington courts have long held that, to be a political committee because one is "making expenditures," a person must have a primary purpose of influencing an election. *See Utter*, 182 Wn.2d at 427 (citing *Dan J. Evans*, 86 Wn.2d at 509); *EFF*, 111 Wn. App. at 598-99. An entity "must have as its primary purpose, or one of its primary purposes, to affect, directly or indirectly, governmental decision making by supporting or opposing candidates or ballot propositions." *Utter*, 182 Wn.2d at 423 (emphasis deleted). This narrowing construction of the statutory definition "is necessary to satisfy First Amendment concerns." *Id.* at 427; *see also* 1973 Op. Att'y Gen. No. 14 at 25-26 ("primary purpose" requirement avoids absurd results).

Though the "primary purpose" test has not yet been formally applied to the contributions prong of the statutory definition, it certainly should apply there. The Washington Supreme Court has said as much:

> Clearly . . . an entity can meet the definition of a "political committee" under either the "receiving contributions" or "making expenditures" portion of the statutory definition, ***plus*** whatever "purpose" test might also be added onto that statutory definition.

Utter, 182 Wn.2d at 416 (emphasis added). For the same reasons that courts employ "a primary purpose" test under the expenditure prong, they

must do so under the contributions prong. Hence, an entity is a political committee only if (1) it has a primary purpose of influencing Washington elections, and (2) those who give the entity money know that their money will be used to influence the outcome of a Washington election.

GMA, a nationwide, multipurpose entity with no "primary purpose" to influence Washington elections, lacked fair notice that its conduct made it a "political committee." The trial court faulted GMA for failing to adhere to a standard of conduct that neither GMA nor a similarly situated person of ordinary intelligence would have thought applied to it.[9] In such circumstances, the State's lawsuit was an ambush.

2. <u>The statute forbidding "concealment" of "the source" of a contribution is impermissibly vague.</u>

The anti-concealment statute provides as follows:

> No contribution shall be made . . . directly or indirectly, in a fictitious name, anonymously,[10] 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.***

[9] If the Court determines that the record is insufficient for it to determine that GMA lacks a primary purpose of electioneering, it should remand for fact-finding on the relative primacy of GMA's electoral pursuits compared to its other activities.

[10] A blanket prohibition on anonymous contributions is unconstitutional if applied to GMA. Such a prohibition also makes the statute substantially overbroad, as the First Amendment may require anonymity where there is a "reasonable probability" that compelled disclosure could result in retaliation by governmental or private parties. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *Doe v. Reed*, 561 U.S. 186, 200 (2010).

RCW 42.17A.435 (emphasis added). The bolded words render this statute unconstitutionally vague and invite selective enforcement.[11]

The trial court held that GMA violated the anti-concealment statute by failing to register as a political committee and, thus, not disclosing the members who had given to the Account. Because RCW 42.17A.205 directly requires political committee registration (which in turn imposes disclosure obligations), the anti-concealment statute cannot be interpreted as being violated just by failing to register as a political committee without making the statute redundant. *See Rivard v. State*, 168 Wn.2d 775, 783 (2010) ("[W]e interpret a statute . . . so as to render no portion . . . superfluous.").

To avoid superfluity, the anti-concealment statute must be read to require an ***independent*** act or omission (i.e., something more than mere failure to make a disclosure required elsewhere in the FCPA) that is intended to, and does, mislead as to a contribution's source. This reading is confirmed by *Washington State Public Disclosure Commission v. Permanent Offense*, 136 Wn. App. 277 (2006). There, Karr and Eyman

[11] The FCPA does not define these words, and none of the cases citing the anti-concealment statute address its potential vagueness. *See* RCW 42.17A.005; *Utter v. Bldg. Indus. Ass'n of Wash.*, 176 Wn. App. 646, 653 (2013) (citing statute in statement of facts), *rev'd,* 182 Wn.2d 398 (2015); *State v. Conte*, 159 Wn.2d 797, 805 (2007) (examining whether civil penalty provisions of ch. 42.17A RCW prevented state from criminally charging defendants under statute regulating similar conduct); *Wash. State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 288-89 (2006) (discussed in text).

created a political action committee ("PAC"), with Karr as treasurer, as well as a corporation with Karr as secretary. *Id.* at 280-81. Eyman provided services to the PAC, which paid the corporation, which in turn paid Eyman. The court held that Karr violated the anti-concealment statute because "[t]he whole purpose of . . . the corporate entity in this case was to conceal Eyman's receipt of compensation for what otherwise appeared to be grassroots effort." *Id.* at 284. Although "using a corporate structure to provide services to the PAC was not itself a violation of the law," it was a violation when accompanied by evidence of Karr's specific intent to hide payments to Eyman. *Id.* at 289. The court found separately that Karr had violated disclosure requirements by failing to disclose Eyman's services and the amounts owed for them. *Id.* at 290.

Here, by contrast, there is no evidence that GMA independently acted or failed to act in a way that concealed anything. It disclosed its support for No on I-522 and, at the same time, its economic stake in the issue. Nor is there evidence that GMA tried to mislead anyone. It just believed that it could augment its own discretionary funds to achieve broad policy goals, while shielding its members from reprisals. That does not constitute intent to mislead. GMA's failure to register under a statute that it did not know applied was not an independent act of concealment. GMA thought it was following the law—a reasonable belief, given

Permanent Offense and how canons of construction require the anti-concealment statute to be read. In holding otherwise, the trial court enforced a vague standard against GMA.

This error is compounded by the vagueness of the word "source." GMA could not have known whether, to "identi[fy] the source" of its contributions, it was sufficient to disclose (as No on I-522 did) that they came from an association of grocery manufacturers opposed to I-522, or whether GMA instead needed to disclose each member that gave to the Account. GMA believed itself to be the source and that using its own name was sufficient to avoid concealing contributions to No on I-522. For GMA to contribute ***as GMA*** would both shield members from harassment, threats, or reprisals ***and*** let voters understand its economic biases.

The trial court's refusal to acknowledge that trade associations (like unions) are single entities distorted its understanding of the "source" of their contributions. Whether it is sufficient to identify the entity as itself or as representing a class of contributors is a matter of subjective judgment. The same is true of the word "conceal." Where there is no act or desire to create a false impression, how much information must one reveal to avoid the proscribed concealment? GMA could not have known.

To be sure, the statute prohibits using a "fictitious" name, so that obviously constitutes prohibited concealment. But unlike *Permanent*

Offense, this was not a case of "special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. 612, 625 (1954). "Grocery Manufacturers Association" communicates sufficient detail about the members of the association for their biases regarding a GMO-labeling rule to be inferred. With a factually descriptive name, was GMA in the clear, or did it still risk committing concealment? The statute gives no notice, and answering the question, GMA learned, depended on the State's subjective determination. Thus, as applied to GMA, the anti-concealment statute fails to establish a discernable standard of conduct and is impermissibly vague.

3. <u>As applied to GMA, the FCPA fails exacting scrutiny.</u>

The First Amendment requires that campaign-finance disclosure statutes withstand "exacting scrutiny." *See Human Life*, 624 F.3d at 1003, 1005. The State has the burden to show that the FCPA's requirements, as applied to GMA, are substantially related to a sufficiently important government interest. *See Buckley v. Valeo*, 424 U.S. 1, 64-66 (1976) (level of scrutiny); *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482 (2007) (State's burden).

Although the State has an acknowledged interest in promoting fair elections through disclosure of campaign contributions, it must pursue that goal in a permissible way. To establish that the requirements it imposed on

GMA are substantially related to its interest, the State must show that (1) the FCPA, as applied, actually advances its interest, i.e., that not applying the FCPA in this way would frustrate the State's interest in fair elections; (2) the current application to GMA is not over-inclusive with respect to the State's interest; and (3) the burdens on GMA's speech are not disproportional to the State's interest. *See Human Life*, 624 F.3d at 1012-13. Here, the State's means are insufficiently tailored to its goals.

a. The State presented no evidence that the FCPA, as applied here, actually advances any interest in fair elections.

Requiring GMA to register and report does not meaningfully enhance voters' ability to evaluate campaign messages, and declining to impose such requirements on GMA would not frustrate voters' ability to evaluate campaign messages. No evidence suggested that any voter was misled by non-disclosure of GMA members' identities and contributions to the Account. *See* CP 2641. On the contrary, GMA's name gave voters constructive knowledge of its motivations for opposing I-522.

Voters knew that an association of food, beverage, and consumer-product makers, together with other corporate interests, was funding the opposition to I-522. *See* CP 2636-39. Requiring political-committee registration and detailed disclosures imposed a heavy burden on GMA's expression while providing little if any incremental value to voters. *See*

id.; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995) (banning anonymous political flyers did not promote transparency, because *inter alia*, "the name and address of the author add little, if anything, to the reader's ability to evaluate the . . . message" that they received from a stranger).

b. When applied without a "primary-purpose" test, the definition of "political committee" is over-inclusive.

Shortly after the FCPA was enacted, the State acknowledged that it was not intended to apply to general-purpose entities like GMA. Applying it that way is over-inclusive as to the State's interest. *See* 1973 Op. Att'y Gen. No. 14 at 25-26 (concluding that, though literal reading of statute would require a corporation giving money to a political committee to register as one, too, applying statute to entities with no "primary purpose" to influence elections would be an "absurd" construction). As the Attorney General recognized, the FCPA must be read to apply to narrower-purpose entities such as PACs. Applying the FCPA to entities for which participating in state electoral campaigns is but a slice of their total activity imposes a disproportionate burden. *See id.*

By requiring disclosure ***before*** contributed funds are spent, even when not all funds may be spent on a Washington electoral campaign, the FCPA also requires disclosures not implicating any state interest. This is

especially obvious here, where the funds were in an account focused on a national campaign involving many states—not just Washington. What justification can there be for requiring disclosure here of funds that may be spent in Oregon or Vermont, or on consumer research? Nevertheless, the State faulted GMA for failing to disclose money that was never contributed to No on I-522 and did not implicate the State's interests. *See* CP 424, 427, 434.

The State argued that, by setting aside funds for general political and educational purposes, GMA became a political committee. *See* 1973 Letter Op. Att'y Gen. No. 114 (describing segregated-funds test). But this position substantially burdens GMA's core political speech on national issues without actually furthering any legitimate state interest.

The segregated-funds test may help the State prevent traditional, in-state PACs from circumventing campaign disclosure laws: When such entities segregate or earmark dues but do not disclose them, members might be trying to avoid disclosure because they know their group participates only in Washington elections and, having done so before, will do so again. *See id.* (distinguishing Washington State Council of Police Officers, which sometimes gave to candidates from general dues without members' knowledge or consent, from Seattle Firefighters Union, which

regularly supported candidates and set aside some dues into "legislative fund" from which members approved expenditures for that purpose).

With respect to GMA, a nationwide trade group that only sporadically engages in electoral activities, the segregated-funds test risks labeling innocuous budgeting activity as pernicious. Just as individuals allocate money to food or housing, so GMA allocated funds for research and development, payroll, legal expenses, marketing, and advocacy. GMA's decision to set funds aside for political advocacy, among other activities, does not compel the inference that its members were attempting to conceal their support for such advocacy. Using such an inference as the basis for imposing disclosure obligations makes it all but impossible for GMA ever to have money of its own to spend on its own political speech.

c. Requiring GMA to register burdens its members' associational rights in disproportion to the State's interest.

As applied to GMA, the FCPA strikes at the First Amendment's most important protection: the right to advocate controversial political views. *See Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[T]he point of all speech protection is to shield just those choices of content that in someone's eyes are misguided."); *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view,

particularly controversial ones, is undeniably enhanced by group association." (emphasis added)).

For this reason, associations seeking to shield their members "can prevail under the First Amendment if they show a reasonable probability that the compelled disclosure . . . will subject [the members] to threats, harassment, or reprisals from either Government officials or private parties." *Doe v. Reed*, 561 U.S. 186, 200 (2010); *see also Eugster v. City of Spokane*, 121 Wn. App. 799, 808-09, 812-14 (2004) (to compel a nonparty corporation that allegedly wanted revenge against plaintiff to produce records of its "contributions to political candidates and political action committees" would violate corporation's associational rights); *cf. McIntyre*, 514 U.S. at 357 (striking down Ohio's ban on anonymous campaign literature and noting that "[a]nonymity is a shield from the tyranny of the majority"). This protection applies to corporations. *Eugster*, 121 Wn. App. at 807.

GMA's members faced threats and boycotts for voicing their opposition to California's GMO initiative. *Cf. NAACP*, 357 U.S. at 462 (refusing to compel production of NAACP's member rolls where "on past occasions, revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"). This

experience created a "reasonable probability" that GMA's members would again face chilling consequences for openly advocating their views in Washington and elsewhere. *See Buckley*, 424 U.S. at 74 (holding that "specific evidence of past . . . harassment of members due to their associational ties . . . [or a] pattern of threats or specific manifestations of public hostility" may be sufficient to establish a "reasonable probability" of reprisals as to prevent compelled disclosure); *cf. Averill v. City of Seattle*, 325 F. Supp. 2d 1173, 1180 (W.D. Wash. 2004) (holding that city campaign-finance disclosure rules would violate minor political party's speech and associational rights if it were forced to reveal its contributors).

As applied here, the FCPA imposes disproportionate constitutional burdens on GMA as compared to the limited value of more disclosure. *See Eugster*, 121 Wn. App. at 808-09, 812-14. The trial court's rejection of GMA's First Amendment defense and § 1983 claim should be reversed.

D. The trial court abused its discretion by excluding evidence of GMA's communications and cooperation with the State.

The excluded evidence shows GMA's good-faith behavior and efforts at compliance. It supports GMA's argument that it believed it was following the law in creating the Account. It explains why GMA filed its reports and disclosed funds in the way it did. Ex. 245; CP 3857-916; RP 566-68, 701-06. The evidence also shows that GMA promptly and fully

cooperated with the PDC's pre-suit investigation and the State's instructions to register and report. CP 2391, 2491. It shows that the State never required GMA to file continuing reports, undermining the State's urging at trial that GMA should be punished for not including in its initial report $3.8 million in unspent funds. CP 3857-916, RP 566-68, 701-06.

This evidence could well have resulted in a smaller penalty, had it been admitted. *See* RP 846-48 (State's closing argument). Yet the trial court excluded it as irrelevant.[12] This was an abuse of discretion.

E. The trial court incorrectly construed the FCPA's standard for imposing punitive damages.

The FCPA permits a court to treble the amount of the judgment "as punitive damages," but only if "the violation is found to have been intentional." RCW 42.17A.765(5). The trial court ruled that whether GMA knew it was violating the FCPA or intended to do so was irrelevant: GMA need only have recognized that, by making contributions in its own name (as it believed it was entitled to do), it would shield its members from boycotts and threats like those that they had faced in California. This was error.

[12] *See* RP 568-69 ("I don't think it is relevant to the remaining issues . . . and is not appropriate in determining a penalty."), 682-83 ("I can tell you that off the top of my head my intention that I recall was that communications with the PDC were not going to be admitted."); RP 34 (Mar. 25, 2016) ("Anything that occurred after [February 28, 2013] does not apply to what GMA's intent was in proposing, creating, and implementing the Defense of Brands account.").

The FCPA provides a range of remedies in RCW 42.17A.750(1), including civil penalties of up to $10,000 per violation. The State argued that the same facts justifying those penalties also justified trebling them as punitive damages, because "intentional" requires only that GMA intended the consequences of its actions. CP 3661. The trial court agreed:

> To determine whether a violation is intentional under RCW 42.17A.765, Washington law requires the Court to look at whether the person acted with the purpose of accomplishing an illegal act under RCW 42.17A.
>
> "Intentional" for purposes of RCW 42.17A.765 is not limited to . . . those instances where the person subjectively knew that their actions were illegal and acted anyway.

CP 3684. The trial court's interpretation contradicts the language of the statute, case law, and sound public policy.

Under Washington law, "a person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). If this standard is applied here, the "result" that GMA needed to have intended under RCW 42.17A.765(5) is to commit a ***violation*** of the law—not, as the trial court held, to commit an act later held to constitute a violation. The syntax of subsection (5) reinforces this reading: The violation must be found "to ***have been intentional***" —that is, the person must have intended to violate the law at the precise moment that the person acted. (Emphasis added.)

Parallel language can be found only in RCW 39.30.020, which establishes civil penalties for contracts made in willful violation of the law. It then says: "If, as a result of criminal action, the ***violation is found to have been intentional***, the municipal officer shall immediately forfeit his or her office." (Emphasis added.) The statute equates "violations found to have been intentional" with knowing violations, i.e., acts committed with the *mens rea* required to support a criminal conviction.[13] *Cf. Still v. Comm'r of Emp't & Training*, 39 Mass. App. Ct. 502, 503-04 (1995), *aff'd*, 423 Mass. 805 (1996) (a "knowing violation" of an employer's rule or policy is one that is "found to have been intentional, i.e., the employee not only must be aware of the existence of the rule or policy but must also be aware at the time she acted that she was violating it.").

The Washington Supreme Court understands the FCPA the same way: Only intentional violations for which a sufficiently culpable *mens rea* can be shown warrant punitive damages. Not every violation of the FCPA qualifies: "Violations of chapter 42.17[A] can occur that . . . would not involve a 'knowingly' mental state." *State v. Conte*, 159 Wn.2d 797, 811 (2007). But as the Court explained, violations found "to have been intentional" ***do*** require such a showing:

[13] Generally, every crime must contain an actus reus (the wrongful deed) and a mens rea (the state of mind that the prosecution must prove a defendant had when committing the crime). *State v. Eaton*, 168 Wn.2d 476, 480-81 (2010).

> The defendants point out that if a violation . . . is intentional, penalties may be trebled. . . . Therefore, they contend, the act includes a mens rea requirement. However, this does not mean that ***all*** violations of chapter 42.17[A] RCW would necessarily occur with a "knowingly" mental element . . . .

Id. at 811 n.6 (emphasis in the original).[14]

Public policy in Washington strongly disfavors punitive damages, because they impose "a penalty generally reserved for criminal sanctions," and give the plaintiff "a windfall beyond full compensation." *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574 (1996). If the statute is at all ambiguous, the rule of lenity requires that it be construed in GMA's favor. *See State v. Reeves*, 184 Wn. App. 154, 163 (2014). Both considerations support construing RCW 42.17A.765(5) to require proof of a ***knowing*** violation of the law before punitive damages may be imposed. *See Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (for punitive damages, "a positive element of conscious wrongdoing is always required.").

Requiring knowledge of wrongdoing before imposing punitive damages is especially appropriate where the State seeks to punish core political speech. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (states may not authorize punitive damages for defamation absent showing of knowing falsity or reckless disregard for truth); *In re Boldt*, 187 Wn.2d

[14] In other FCPA cases the State has argued, and courts have held, that an intentional violation of the FCPA requires knowledge of and a deliberate choice not to comply with

542, 548 (2017) (recall petition alleging commission of unlawful act is factually insufficient unless petitioner shows that official had knowledge of and intent to commit such act).[15] And statutes should, where possible, "be construed to avoid unconstitutionality." *Wash. State Republican Party v. Pub. Disclosure Comm'n*, 141 Wn.2d 245, 280 (2000).

Here, punitive damages could properly be imposed only if GMA knew it was violating the law. The trial court did not find a knowing violation, nor could it. Its error in construing and applying the FCPA's test for punitive damages requires de-trebling any lawful penalty.

F. The trial court imposed an unconstitutionally excessive fine.

There was no evidence that GMA's failure to timely disclose its members' identities and contributions misled any voter. Yet the trial court punished GMA with an $18 million fine—the largest disclosure penalty ever imposed in this country. *See* CP 3717; *cf.* Enforc't of Campaign Finance Laws, http://www.atg.wa.gov/enforcement-campaign-finance-laws (last visited June 19, 2017) (listing penalties in other FCPA cases).

---

the law. SCP 4229-43, 4253-91, 4301-12.

[15] Vagueness concerns are magnified if a statute imposes criminal or other punitive measures rather than civil penalties and especially if it "threatens to inhibit the exercise of constitutionally protected rights." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982). Conversely, a strict scienter requirement can mitigate a law's vagueness, "especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id.*

The Eighth Amendment's Excessive Fines Clause prevents the government from imposing fines that are "grossly disproportional" to the gravity of an offense.[16] *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998). This rule applies to corporations, *see, e.g.*, *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, 427 F.3d 1061, 1069-70 (8th Cir. 2005), and to the states via the Fourteenth Amendment's Due Process Clause, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-34 (2001).[17]

In *Bajakajian*, the defendant tried to leave the country with $357,144 in cash. 524 U.S. at 324-25. A customs agent instructed him to declare anything over $10,000 but he lied, saying that he carried only $15,000. *Id.* After the full amount was discovered and seized, he pleaded guilty to willful failure to report. *Id.* at 325-26. The trial court fined him $5,000 and ordered forfeiture of $15,000. *Id.* at 326. The government, which had sought forfeiture of the entire $357,144, appealed. *Id.* The U.S. Supreme Court held that such a forfeiture—even though authorized by statute—would be grossly disproportional. *Id.* at 344.

Courts following *Bajakajian* determine whether a fine is grossly disproportional by considering (1) the nature of the offense; (2) whether

[16] A payment is a "fine" if it constitutes punishment for an offense. *See United States v. Bajakajian*, 524 U.S. 321, 328 (1998). By definition, "punitive" damages assessed under RCW 42.17A.765(5) constitute punishment for violating the FCPA.

[17] Article 1, section 14 of the Washington Constitution also prohibits excessive fines. Wash. Const. art. 1, § 14. This clause is at least as protective as its federal analogue. *See*

the conduct relates to other illegal activity; (3) the extent of the harm caused; (4) whether the violated statute targets a class to which the defendant belongs; and (5) the other potential penalties for the violation. *See id.* at 337-40; *United States v. $100,348 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004). Applying these factors here requires reversal.

1. The nature of the offense.

In holding the proposed fine against Bajakajian excessive, the Supreme Court noted that his crime was "solely a reporting offense," since he could have traveled with the money had he reported it. 524 U.S. at 337. Here, even more than in *Bajakajian*, GMA's only offense involved reporting. Whereas Bajakajian knowingly lied in response to a customs agent's instruction, GMA simply described itself as the source of its contributions, which it believed to be true. Even more firmly than in *Bajakajian*, therefore, this factor favors a finding of disproportionality.

2. No other illegal activity.

Courts consider whether a reporting offense involved other illegal activity by assessing the funds' origin and intended use. In *Bajakajian*, "[t]he money was the proceeds of legal activity and was to be used to repay a lawful debt." *Id.* at 338. In this case, money in the Account indisputably represents lawful earnings, lawfully given to GMA, to enable

---

State v. Witherspoon, 180 Wn.2d 875, 887 (2014).

GMA's core political speech. *See State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 624 (1998) ("The constitutional guarantee of free speech has its fullest and most urgent application in political campaigns."). This factor, too, favors finding the $18 million penalty grossly disproportional.

3. Extent of harm.

Courts assess whether a fine reflects the harm that a defendant's conduct actually caused or would have caused, had it gone undetected:

> The harm that [Bajakajian] caused was also minimal. . . . Had his crime gone undetected, the Government would have been deprived only of the information that $357,144 had left the country.

Bajakajian, 524 U.S. at 339. Courts recognize that large penalties for reporting offenses suggest gross disproportionality even where nondisclosure harms the public fisc. *See United States v. Ford Motor Co.*, 442 F. Supp. 2d 429, 436 (E.D. Mich. 2006) (seeing "no distinction" between Ford's failure to report goods subject to import duties and Bajakajian's reporting offense).

GMA's contributions to No on I-522 were all disclosed as coming from an association of grocery manufacturers. GMA's very name telegraphed its biases and interests sufficiently to inform the voting public. There is no evidence that any voters were misled about GMA's opposition

to I-522. To the extent that any voters may not have known why a group of grocery manufacturers opposed GMO labeling, knowing GMA's members' identities would not have helped.

GMA also disclosed before the election all sources and amounts of its contributions to No on I-522. Thus, even if there were evidence that someone was initially deceived, GMA's pre-election disclosure would have cured such deception: Voters knew that GMA contributed to No on I-522, and by Election Day, they knew who had given to GMA.[18] GMA's conduct caused *no* actual harm, and any potential harm would have been small. It is *a fortiori* clearer here than in *Ford*—where a smaller fine was excessive relative to a larger undisclosed amount that kept the government from collecting tax revenue—that the fine imposed on GMA is excessive.

4. Targeted class.

Bajakajian did not "fit into the class of persons for whom the statute was principally designed"—namely, money launderers, drug dealers, or tax evaders. 524 U.S. at 338. The FCPA targets those who would use deceit to sway elections or hide contributions that influence elected officials. *See* RCW 42.17A.001. GMA does not fit that bill.

[18] GMA registered "GMA Against I-522" as a political committee in mid-October, weeks before the election. *Cf. Citizens United v. FEC*, 558 U.S. 310, 334 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."); *Human Life*, 624 F.3d at 1019 (remarking on "the unique importance of the temporal window immediately preceding a vote")."

GMA's desire to spend its own funds in the GMO debate and to spare its members from retaliation is very different from a desire to mislead voters.

The State may argue that the FCPA promotes disclosure for its own sake. If so, GMA is among its targets, but so is everyone else. Disclosure is required of every political committee; profit-motivated groups are not targeted more than groups with other agendas. And if the FCPA targets everyone, then this factor deserves little weight. Unlike a forfeiture statute, which "flags" activity known to be correlated with illegal conduct to separate innocuous from illicit conduct, a campaign disclosure law aimed at everyone who spends money in elections targets no one in particular.

5. Other potential penalties.

"In considering an offense's gravity, the other penalties the Legislature has authorized are certainly relevant evidence." *Bajakajian*, 524 U.S. at 339 n.14. This factor requires courts to analyze potential penalties other than the one being challenged as excessive. And here, adding the maximum per-violation penalty of $10,000 (42.17A.750(1)(c)) to a $10-per day penalty for each day that a required report was late (42.17A.750(1)(d)) yields a total penalty amount of $622,820. CP 3453-54. Trebling this amount (which, as explained above, would be improper) yields maximum punitive damages of $1.87 million.

To be sure, RCW 42.17A.750(1)(f) permits a court to impose a civil penalty "equivalent to the amount not reported as required." The possibility that this subsection might yield a greater penalty than the one imposed here does not affect the scrutiny required of (1)(f). If it did, ***any*** penalty amount would be effectively unreviewable, since the penalty will always be within statutory limits and always could have been more, had more money been involved. *Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (concern underlying *Bajakajian* is that penalties for illegal export of currency would be "indefinite and unlimited . . . if the government could seize whatever . . . the unwitting 'exporter' happened to be carrying when caught"); *see also 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."). Here, the penalty imposed was nearly ten times higher than the maximum possible under other FCPA provisions.

6. <u>The trial court's penalty is unconstitutional.</u>

At least four of five *Bajakajian* factors indicate that the trial court's penalty was grossly disproportional to GMA's conduct. The fifth factor, the statute's targeted class, has less weight in the campaign-disclosure context. The "touchstone" of the excessiveness inquiry is the

comparison between the amount of the fine and the gravity of the conduct at issue. *Bajakajian*, 524 U.S. at 334.

Here, as in *Bajakajian*, comparing all the factors confirms that GMA's conduct did not merit a $6 million fine, let alone an $18 million one. Courts hold that a penalty is unconstitutional if it exceeds about 11% of the funds that a defendant did not disclose. *See* App. A-4, Table 2.[19] The Eighth Amendment's Excessive Fines Clause is particularly concerned with statutes that impose potentially boundless, open-ended penalties. *See Grid Radio*, 278 F.3d at 1322. The fine imposed on GMA was grossly disproportional, especially compared with GMA's conduct in initially failing, but ultimately agreeing, to disclose the members that gave it lawfully obtained funds, which GMA spent for a lawful—indeed, constitutionally protected—purpose, and where the belated disclosure caused no harm.

G. GMA is entitled to an award of its attorneys' fees and costs.

GMA is entitled to reasonable attorneys' fees under both 42 U.S.C. § 1988 and RCW 42.17A.765(5). "Reasonable attorney fees should always be awarded to the prevailing private party under [42 U.S.C. § 1988], absent some rare, special circumstance." *San Juan Cty. v. No New Gas*

[19] Although *RGB Bush Planes, LLC v. Alaska Pub. Offices Comm'n*, 361 P.3d 886 (Alaska 2015), looks like an outlier, that case involved illegal expenditures as well as a reporting offense, and the fine imposed was a function of a fixed per-day penalty rather

Tax, 160 Wn.2d 141, 172 (2007). GMA therefore asks for an award of its reasonable attorneys' fees and costs at trial and on appeal. *See* RAP 18.1.

V. CONCLUSION

The trial court's judgment should be reversed and the case remanded with instructions to enter judgment for GMA. Alternatively, the court's summary judgment should be reversed and the case remanded for trial on liability. If the trial court's liability determination is allowed to stand, its penalty and punitive-damages award should be vacated and the case remanded for determination of an appropriate penalty based on all relevant evidence and consistent with the Eighth Amendment.

DATED this 21st day of June 2017.

Respectfully submitted,

K&L GATES LLP

By Robert B. Mitchell

Robert B. Mitchell, WSBA # 10874
Aaron E. Millstein, WSBA # 44135
Daniel-Charles Wolf, WSBA #48211

Bert W. Rein (*pro hac vice*)
Carol A. Laham (*pro hac vice*)
Matthew J. Gardner (*pro hac vice*)
Wiley Rein LLP

Attorneys for Appellant Grocery Manufacturers Association

---

than the potentially limitless statutory provision that ostensibly authorized the fine here.

APPENDIX

Table 1: Expected versus actual outcomes in the State's application of the political-committee statute

Enforcement action name	**Substantive message, perspective, or purpose**	**Basis for members' knowledge**	**Members' certainty as to destination of payments**	**Expected outcome under near-certainty standard**	**Expected outcome under "will or may be" standard**	**Actual outcome**
National Education Association CP 2941-47.	National Education Association (NEA): a public-school teachers' labor union	NEA created a segregated fund for "ballot measures and legislative crises" funded via a special dues increase. CP 2941-42, 2945-46.	Members constructively knew that dues would "assist state affiliates in dealing with ballot measures." *See* CP 2941.	Not a political committee (no specific Washington election)	Political committee	NEA was **not** a political committee. CP 2946.
Wash. State Labor Council PDC Case No. 05-067, CP 3024-42 . (2004 WSLC case)	Wash. State Labor Council (WSLC): an AFL-CIO affiliated policy and advocacy arm of various Washington unions	WSLC engaged in electoral advocacy, CP 3029, such as "candidate recruitment and endorsements," and "coordinate[d] candidate contributions." CP 3035. WSLC's president wrote to members touting WSLC's past and future political efforts. CP 3040-42.	Members constructively knew their dues would support pro-labor political candidates. *See* CP 3040-42.	Political committee	Political committee	WSLC was **not** a political committee. CP 2957.

Wash. State Trial Lawyers Ass'n PDC Case No. 06-007, CP 2934-37.	Wash. State Trial Lawyers Ass'n (WSTLA): an association of plaintiffs' attorneys opposing tort reform	Letter to members stated that dues were being increased to oppose tort reform, including Washington's I-330, capping damages in medical malpractice cases. CP 2939.	Members constructively knew that their dues "will or may be" used to oppose Wash. State Ballot I-330. *See* CP 2939.	Not a political committee	Political committee	WSTLA was **not** a political committee. CP 2934-37.
American Civil Liberties Union et al. PDC Case No. 13-019, *available at* https://www.pdc.wa.gov/browse/cases/13-019; CP 2972-78.	American Civil Liberties Union of Washington (ACLU-WA): Washington affiliate of national group advocating civil liberties and individual rights	State's investigation did not examine ACLU-WA's communications to members, but revealed that it was a consistent contributor to various ballot measures. CP 2961-65.	Members at least constructively knew, based on ACLU-WA's past, regular contributions, that it might do so again in the future. *See* CP 2962, 2964-65.	Not a political committee	Political committee	ACLU-WA was **not** a political committee. CP 2977-78.
Food Democracy Action! PDC Case No. 14-007, *available at* https://www.pdc.wa.gov/browse/cases/14-007; CP 2980-90.	Food Democracy Action! (FDA): a group supporting GMO-labeling requirements, and in particular, I-522	FDA sent e-newsletters to supporters asking for donations to help reach fundraising goal for supporting I-522. CP 2983-84.	Donors knew their contributions would go to supporting I-522. *See* CP 2983-84.	Political committee	Political committee	FDA **was** a political committee. Transmittal Letter to AGO, PDC Case No. 14-007 (May 1, 2014), *available at* https://perma.cc/NPZ4-WC8J

Supporters of I-522 PDC Tracking No. T14-053, *available at* https://perma.cc/C2R8-SU9T; CP 2919-32.	Organic Consumers Ass'n (OCA) & Organic Consumers Fund (OCF): two groups favoring GMO-labeling requirements	Newsletter and donation solicitations stating that funds would go toward I-522 efforts. CP 2930-32.	Donors constructively knew their funds would go to support I-522	Political committee	Political committee	OCA and OCF were **not** political committees. CP 2919-28.
WSLC PDC Case No. 1543, *available at* https://www.pdc.wa.gov/browse/cases/1543 (2015 WSLC case)	WSLC	WSLC contributed general funds to various PACs, including ones affiliated with it, which in turn contributed to pro-labor candidates.	Members constructively knew, based on WSLC's past electoral activity, that some portion of dues would again go to pro-labor candidates.	Political Committee	Political Committee	WSLC was **not** a political committee. Transmittal Letter to AGO, PDC Case No. 1543 (Dec. 21, 2015), *available at* https://perma.cc/T4CW-P8TG.
This case	GMA: a food-industry trade association representing food, beverage, and consumer-product companies. CP 4052.	*See* trial court's findings of fact and conclusions of law, CP 4053-61, ¶¶ 13-61.	Members knew that some portion of funds deposited in the Account would likely go toward opposing I-522. CP 3337-38.	Not a political committee	Political committee	GMA **was** a political committee, Judge Hirsch ruled.

Table 2: Comparison of excessive-fines cases

Case	Facts	Amount undisclosed	Amount of fine at issue	Fine as % of undisclosed amount	Nature of offense	Other possible penalties	Other factors	Outcome
United States v. Bajakajian, 524 U.S. 321 (1998)	Defendant falsely stated amount of money he was carrying out of the country. *Id.* at 324-25.	$357,144. *Id.*	$357,144. *Id.* at 325-26.	100%	Reporting offense only, but surrounded by suspicious circumstances. *Id.* at 327.	$5,000 under sentencing guidelines. *Id.* at 328.	Money was obtained from and destined for legal purposes. *Id.* at 337-38.	**Excessive**. *Id.* at 324.
United States v. 3814 Thurman St. 164 F.3d 1191 (9th Cir. 1999)	*In rem* forfeiture action against property purchased with loan obtained by borrower's false statements inflating her actual income in mortgage refinance application. *Id.* at 1194.	$200,686 (increased equity in property due to fraudulently obtained loan proceeds). *Id.* at 1196.	$200,686 . *Id.* at 1195.	100%	Not simply a reporting offense, but no harm to government or lender, since lender would be fully reimbursed from sale before any amount was forfeited. *Id.* at 1198.	$5,000 under sentencing guidelines. *Id.*	Total forfeiture unconstitutional, even though owner was culpable, where extent of harm was minimal. *Id.*	**Excessive**. *Id.*
Cox for U.S. Senate Committee v. FEC, No. 03 C 3715, 2004	Campaign committee failed to report candidate's loaning his own	$219,507.47. *Id.* at *1.	$22,150. *Id.* at *2.	10.09%	Reporting offense only. *Id.* at *1.		Regulation set fine at $100 + (.10 x amount not timely reported). *Id.* at *14.	Constitutional. *Id.*

WL 783435 (N.D. Ill. Jan. 22, 2004)	money to his campaign. *Id.* at *1.							
United States v. $100,348.00, 354 F.3d 1110 (9th Cir. 2004)	Facts similar to *Bajakajian*. District court initially ordered full forfeiture, then reduced penalty to $10,000, citing *Bajakajian*. *Id.* at 1113.	$100,348. *Id.* at 1115-16.	$10,000. *Id.*	9.96%	Solely a reporting offense. Owner possessed items associated with drug trade, but was never charged and no independent illegality established. *Id.* at 1122.	$5,000 or $30,000 depending on whether reckless disregard of source of funds could be established. *Id.*	Government initially sought forfeiture of full amount, and district court reduced it citing 8th Amendment. *Id.* at 1115-16.	Constitutional. *Id.* at 1123-24.
United States v. Ford Motor Co., 442 F. Supp. 2d 429 (E.D. Mich. 2006)	Statute imposed forfeiture equal to undisclosed amount if importer failed to report taxable goods and pay associated duties. Ford failed to report and pay duties on imported car parts diverted to dutiable uses. Ford later paid the duties but	$18,920,899 (value of diverted goods subject to duty). *Id.*	$12.4 million (forfeiture amount reduced by amount of already-paid duty). *Id.*	65.4%	*Mostly* a reporting offense. "Had Ford's reporting errors gone undetected, at most the government would have been deprived the duty that Ford ultimately paid–$391,804. The Government is seeking more than 31 times that amount." *Id.* at 437.			**Excessive**. *Id.*

	resisted forfeiture. *Id.* at 431.							
United States v. Malewicka, 664 F.3d 1099 (7th Cir. 2011)	Over 6-year period, defendant withdrew millions from bank account in separate withdrawals just under the $10,000 reporting limit. She was convicted of structuring bank transactions to avoid reporting. *Id.* at 1102.	$2.4 million total, but only $279,500 alleged in connection with transaction-structuring indictment. *Id.* at 1103.	$279,500. *Id.*	11.6% of all funds involved in scheme; 100% of amount alleged in indictment.	A reporting offense; however, the frequency and duration of the crime "kept information regarding numerous transactions from the government over a period of years" and "inhibited the government's ability to effectively uncover and identify fraud." *Id.* at 1107.	Statutory maximum of $5.75 million, but sentencing guideline maximum of only $10,000. *Id.* at 1106.	No other illegal acts proven, *but see U.S. v. Abair*, 746 F.3d 260, 267 (7th Cir. 2014) (noting that *Malewicka*'s result is based "in large part" on the fact that she was almost certainly evading taxes)	Constitutional. *Malewicka*, 664 F.3d at 1103.
Combat Veterans for Congress PAC v. FEC, 983 F. Supp. 2d 1 (D.D.C. 2013)	PAC failed to timely file disclosure reports. *Id.* at 7.	Three late-filed reports with $75k - $99,999k of activity; $50k-$74,999 of activity; and $25k-$49,999 of activity, respectively. Conservative estimate: $150,000,	$8,690. *Id.* at 9.	5.79%	Reporting offense only. *Id.* at 8.		11 C.F.R. § 111.43 set fines as mathematical function of amount of activity in report, number of days late, and number of previous violations. *Id.* at 18-19.	Constitutional. *Id.* at 19.

		based on low band of above ranges. *Id.* at 7-8.						
RGB Bush Planes, LLC v. Alaska Pub. Offices Comm'n, 361 P.3d 886 (Alaska 2015)	Charter flight company violated Alaska's ban on direct contributions from corporations by under-charging for charter flights. *Id.* at 887.	$1,288.25 (amount by which candidates underpaid for flights). *Id.* at 894.	$25,500 fine (not including $29,768 in costs & attorneys' fees). *Id.*	1,979.4%	***Not*** a reporting offense; defendant violated ban on corporate contributions. *Id.* at 895-896.		Penalty was based on mechanical application of per-day $50 statutory penalty. *Id.* at 890 n.14.	Constitutional. *Id.* at 897.
This case	GMA failed to timely disclose contributions from its members. CP 4071.	~$14,000,000	$18 million	128.5%	Reporting offense; *see* CP 4071.	$1.87 million		Question presented on appeal

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that, on June 21, 2017, I caused a copy of the foregoing document to be delivered via email, per agreement of the parties, to the following:

Linda A. Dalton
(linda.dalton@atg.wa.gov)
Callie A. Castillo
(callie.castillo@atg.wa.gov)
Garth Ahearn
(garth.ahearn@atg.wa.gov)
Stephanie Lindey
(stephanie.lindey@atg.wa.gov)
CFU Resource Mailbox
(SGOOlyEF@atg.wa.gov)
Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98501

Signed this 21st day of June, 2017 at Seattle, Washington.

Benita Gould

K&L GATES LLP

June 21, 2017 - 3:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49768-9
Appellate Court Case Title:	State of Washington, Respondent v. Grocery Manufacturers Association, Appellant
Superior Court Case Number:	13-2-02156-8

The following documents have been uploaded:

- 3-497689_Briefs_20170621151336D2454407_6475.pdf
  This File Contains:
  Briefs - Appellants
  The Original File Name was Opening Brief of Appellant.PDF

A copy of the uploaded files will be sent to:

- SGOOlyEF@atg.wa.gov
- Stephanie.lindey@atg.wa.gov
- TorTacEF@atg.wa.gov
- aaron.millstein@klgates.com
- calliec@atg.wa.gov
- cfuolyef@atg.wa.gov
- gartha@atg.wa.gov
- lindad@atg.wa.gov

Comments:

Sender Name: Robert B. Mitchell - Email: rob.mitchell@klgates.com
Address:
925 4TH AVE STE 2900
SEATTLE, WA, 98104-1158
Phone: 206-623-7580 - Extension 7640

Note: The Filing Id is 20170621151336D2454407