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NO. 49768-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Appellant.

**STATE OF WASHINGTON AND ATTORNEY GENERAL
FERGUSON'S RESPONSE TO AMICUS BRIEF OF PROFESSORS
MICHAEL MUNGER AND JEFFREY MILYO**

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I. INTRODUCTION

Professors Munger and Milyo parrot three arguments already made by Grocery Manufacturers Association and refuted by the State: (1) the public does not have an interest in knowing which specific GMA members contributed to the opposition of Initiative 522; (2) GMA had a constitutional right to shield its members' contributions from public scrutiny; and (3) the State's disclosure requirements are overly burdensome in relation to its interests. *See* State's Br. at 35-41. Such repetition by amici does not serve the purpose of RAP 10.3(e) and is not helpful to the Court. *See Pleas v. City of Seattle*, 49 Wn. App. 825, 825 n.1, 746 P.2d 825 (1987) (“[T]he purpose of an amicus brief is to help the court with points of law and not to reargue the facts.”), *overruled on other grounds*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

In any event, this Court should reject Amici Professors' arguments. There is no blanket constitutional right to conceal the identity of those funding ballot measure campaigns. Rather, Washington has a well-established interest in disclosing to the public who is actually funding ballot measure campaigns in the state. Holding GMA accountable for intentionally concealing the true source of its contributions to the No on 522 campaign substantially serves this important governmental interest by providing the public with vital information about who stood to benefit from Initiative

522's defeat. GMA cannot hide behind the First Amendment to escape the consequences of its attempted subterfuge. This Court should affirm.

II. ARGUMENT

Amici Professors admit that state campaign finance disclosure laws are subject to exacting scrutiny. Prof. Br. at 10. Nevertheless, they ask this Court to apply a more “strict” form of scrutiny because—according to Amici—this case “arises in the ballot-initiative setting” and involves less-powerful governmental interests than other disclosure circumstances. *Id.* at 10-11.¹ Like courts before it, this Court should reject Amici Professors’ claim. *See, e.g., Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2011) (rejecting as “without merit” contention that requiring disclosures for ballot measures “serves no important governmental interest”); *see also State v. Evergreen Freedom Found.*, No. 50224-1-II, 2017 WL 5150343 (Wash. Ct. App. Nov. 7, 2017) (finding state’s interests in educating voters and preventing concealment apply with “equal strength” to ballot measure disclosure laws).

¹ Amici Professors cite *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 356, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), for this proposition but neglect to point out that the Supreme Court specifically distinguished mandatory disclosure of campaign-related expenditures from the mandatory disclosure at issue in that case, *i.e.* the identity of the author of anonymous campaign literature. *See McIntyre*, 514 U.S. at 353-55. The Supreme Court found the former acceptable, the latter not. *Id.*

As shown in the State’s brief, Washington has an important—even compelling—governmental interest in informing the electorate about exactly who is financing ballot measure campaigns in the state. *See, e.g., Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005-07 (9th Cir. 2010) (informing voters about “who is lobbying for their vote” for ballot measures is “critical”); *State v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006) (“Washington State has a substantial interest in providing the electorate with valuable information about who is promoting ballot measures and why they are doing so.”). As the Ninth Circuit noted when affirming the State’s disclosure laws:

Campaign finance disclosure requirements [] advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. *An appeal to cast one’s vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.* The increased “transparency” engendered by disclosure laws “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”

Human Life of Wash., Inc., 624 F.3d at 1008 (emphasis added) (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).

Notwithstanding the courts’ recognition of this “critical” governmental interest, Amici Professors take up GMA’s contention that

Washington voters had no need to know in this case “which *specific* grocery manufacturers” gave money to GMA to oppose Initiative 522. Prof. Br. at 7. Amici Professors contend that disclosure of GMA’s name alone was sufficient to provide voters “all the information they would need to weigh the relevant speaker’s motivations.” Prof. Br. at 12. But, while Amici Professors make a variety of statements to this regard, they provide no evidence or support that their proposition is true. *See, e.g.*, Prof. Br. at 10, 12. And, in fact, the record in this case shows that it is not—not even GMA believed that the public had no interest in knowing which of its specific member companies gave money to oppose the Initiative. *See, e.g.*, RP 132:21-134:2 (GMA CEO Bailey admitting GMA removed its membership list from its website two days after No on 522 reported GMA’s contribution because it would appear that all of GMA’s membership were “contributing to the GMO issue” when in fact it was only certain board members).

Amici Professors also contend that Washington’s informational interest does not justify requiring GMA to disclose its individual members’ contributions because of their purported First Amendment interests in anonymity. *See* Prof. Br. at 8, 13-15. But there is no blanket First Amendment right to conceal campaign contributions. *See Buckley v. Valeo*, 424 U.S. 1, 74, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). Rather, if an entity

resists disclosure based on an “uncontroverted showing” of threats or reprisal, *Buckley*, 424 U.S. at 69, courts apply the same exacting scrutiny as for all state disclosure laws. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 369-71, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); *John Doe I v. Reed*, 561 U.S. 186, 200-01, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). The State has already shown that GMA meets none of the criteria that courts have considered when determining whether certain, exceptional associational groups—like the NAACP or the Socialist Workers Party—should be exempt from state disclosure requirements. *See State’s Br.* at 39-41. Further, even if GMA had provided sufficient evidence to show “a reasonable probability” that its members’ First Amendment associational rights were in fact burdened—which the State maintains it did not—the State’s compelling interests in disclosure and preventing concealment outweighs GMA’s interest in anonymity here. *See Citizens United*, 558 U.S. at 371 (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); *Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 483, 166 P.3d 1174 (2007) (“The constitutional safeguards which shield and protect

the communicator, perhaps more importantly also assure the public the right to receive information in an open society.”).

Finally, Amici Professors attack the State’s policy interests in campaign finance disclosure requirements as overly broad and burdensome. Prof. Br. at 15-20. To make their arguments, however, Amici Professors only give hyperbolic examples and then suggest that this case could open their door. *Id.* at 16-17. But Amici Professors fail to acknowledge that Washington courts have already grappled with their proposed scenarios and construed the State’s definition of political committee to avoid overreach in those instances. *See State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002); *see also Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 427, 341 P.3d 953 (2015).

More importantly, the facts of this case are nothing like that posed by Amici Professors. GMA did not merely solicit funds from its members for a general policy initiative and then later choose to use those funds to oppose a ballot initiative; rather GMA specifically sought contributions from its members to oppose Initiative 522 and then intentionally concealed that information from Washington voters. The State now seeks to hold GMA accountable for its deception. While Amici Professors may believe this is “bad policy,” Prof. Br. at 18, the people of the State certainly do not. *See, e.g., RCW 42.17A.001* (declaring the State’s public policy “to promote

complete disclosure of all information respecting the financing of political campaigns”); *Fritz v. Gorton*, 83 Wn.2d 275, 296, 517 P.2d 911 (1974) (the public’s right to receive information is the fundamental counterpart of the right of free speech).

III. CONCLUSION

Amici Professors seek to upend the State’s campaign finance disclosure laws. This Court should politely decline and reaffirm that Washington has a compelling interest in informing its electorate about who is financing, and thus stands to benefit from, a ballot measure’s defeat. Holding GMA accountable for its subterfuge in hiding that information from the public substantially fulfills the State’s interests in this regard. The Court should affirm.

RESPECTFULLY SUBMITTED this 29th day of November 2017.

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