

No. 49932-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION TWO

FOOD DEMOCRACY ACTION,

Appellant,

v.

STATE PUBLIC DISCLOSURE COMMISSION,

Respondent.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
The Honorable Gary R. Tabor, Presiding

**OPENING BRIEF OF APPELLANT FOOD DEMOCRACY
ACTION**

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I. INTRODUCTION

This matter arose as a consequence of the involvement of Appellant “Food Democracy Action!” (hereinafter, “FDA”) in the effort to support the passage of Initiative 522 (hereinafter “I-522”), which, had it passed, would have required “most raw agricultural commodities, processed foods, and seeds and seed stocks, if produced using genetic engineering as defined, to be labeled as genetically engineered when offered for retail sale.”

To that end, in the summer of 2013, in advance of the November 5, 2013 election, when I-522 would be presented on statewide ballots to the voters, FDA contributed \$200,000.00 to the effort supporting passage of I-522. Parenthetically, the effort to pass I-522 failed by 51.09% (those voting “no”) to 48.91% (those voting “yes”).

This is a straightforward case of unintentional and admitted failure to register as a political committee, late reporting of its receipt of campaign contributions, and its expenditure of funds in the electoral process. FDA fully admitted and rectified its late reporting mistakes as soon as it was made aware of them.

As a two-employee, Iowa-based organization with no prior experience in Washington politics, FDA was unaware of Washington’s requirements to register as a political committee and file reports of its contributions and expenditures, found in

Washington's "Fair Campaign Practices Act" (hereinafter "FCPA"), codified in RCW 42.17A et seq.

Upon learning of these obligations, FDA admitted full responsibility, promptly registered and filed the late financial reports, and cooperated fully with Respondent State of Washington, ex rel., Washington State Public Disclosure Commission's (hereinafter "PDC") investigation.

From the beginning, FDA indicated it would stipulate to its late reporting violations. Instead of responding substantively to this offer, the PDC instead chose to file suit, and then ignored FDA's numerous overtures to stipulate to the facts and violations and reach a reasonable, proportionate settlement.

It is still unclear why the PDC expended the trial court's and the public's resources in bringing a motion on issues that FDA had openly admitted since 2013. FDA never disputed that, although it was not aware of the requirement, it *should* have registered as a political committee and *should* have filed reports of its contributions and expenditures. Thus, it did not contest the PDC's Motion for Partial Summary Judgment on *those* bases.

FDA did (and does), however, contest the PDC's claim that its late reporting equated to "concealment" of the true source of contributions under RCW 42.17A.435.

It is undisputed (even by the PDC) that FDA's noncompliance was a mistake. The PDC did not put forth any facts,

or even allege, that FDA's conduct was part of a knowing or intentional plan to conceal donor identities. Instead, the PDC interpreted RCW 42.17A.435 to impose liability for concealment any and all times that a group is unaware it is a political committee and ends up reporting contributions late. Pursuant to the PDC's reasoning (adopted by the trial court), *any* time a contribution report is late, it would be a *per se* act of concealment.

Contrary to the PDC's interpretation, as adopted by the trial court, the plain language of the statute and the common and ordinary meaning of "concealment" required the PDC to establish that FDA engaged in affirmative conduct intended or known to be likely to keep another from learning facts. The PDC failed to do so, and the trial court agreed that it had no such burden to do so.

II. SUMMARY OF THE ARGUMENTS

This appeal essentially turns on three questions.

The first is whether the trial court erred in granting the PDC's "Partial Motion for Summary Judgment" as it related to the allegation that FDA violated RCW 42.17A.435, which holds:

No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, 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.

As noted above, while FDA conceded that it had failed, in a timely way, to register as a political committee, to report the contributions it had collected from its donors, and to report its expenditures on behalf of the I-522 effort, it denied that it had violated RCW 42.17A.435, in that there was no evidence of any effort or intent to conceal anyone's identity or the source of any contributions.

Nonetheless, the trial court accepted the PDC's argument that RCW 42.17A.435 imposes, in effect, strict liability, in the sense that no mental state need be shown if the identities of contributors or the sources of contributions are not disclosed in reporting documents. The trial court therefore granted summary judgment, and left for trial the sole issue of the penalties to be imposed for FDA's various violations.

The second question is whether the actual penalties imposed by the trial court were appropriate as a matter of law.

The total civil penalty imposed by the trial court was **\$319,281.58**, which the trial court reduced to writing in its "Judgment Summary, Findings of Fact, Conclusions of Law, and Final Judgment," as follows:

\$295,661.58 (Representing the contributions *received* by FDA from its donor base);
\$18,000.00 (Representing 18 untimely registration and disclosure reports, at \$1,000.00 per missing report); and

\$5,620.00 (Representing the aggregate number of days the required reports were filed late, 1,124 days at \$5.00 per day).

To those civil penalties, the trial court added an additional: **\$93,046.52** to its Judgment, as follows:

\$2,131.32 (Representing the State's costs of investigation);

\$90,590.20 (Representing the State's reasonable attorneys' fees);

and

\$325.00 (Representing the State's costs of trial).

Therefore, the total of penalties, fees, and costs entered against FDA was **\$412,328.10**.

The third question to be decided is whether these various penalties, fees, and costs are excessive as a matter of constitutional law, in violation of the Eighth Amendment's prohibition against the imposition of excessive fines.

As will be discussed below, this constitutional issue is being raised for the first time in this appeal. It was not raised in the trial court, as FDA was unrepresented by counsel at trial and in post-trial proceedings, and, in fact, FDA was not even *present* for trial and for post-trial proceedings.

III. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

A. Assignments of Error.

1. The trial court erred in granting the PDC's "Partial Motion for Summary Judgment," to the extent that it ruled there was no genuine dispute as to any material fact – specifically, with regard to FDA's assertion that to the extent the sources of donations were not visible in its filings, there was no intentional concealment or intention to conceal.

2. The trial court erred in imposing civil penalties of **\$319,281.58** and **\$93,046.52** in fees and costs against FDA for its unintentional violations of the FCPA.

3. The penalties, fees, and costs imposed offend the Eighth Amendment's prohibition against excessive fines.

B. Issues Pertaining to the Assignments of Error.

1. Did the trial court err in granting the PDC's "Partial Motion for Summary Judgment," when it weighed the evidence, drew inferences in the PDC's favor, and made findings to resolve a genuine issue of material fact? (A/E 1)

2. Did the trial court err in granting that part of the PDC's "Partial Motion for Summary Judgment," to the extent that it ruled, as a matter of law, that FDA concealed the identities of its contributors and thus violated RCW 42.17A.435? (A/E 1)

3. Did the trial court err in concluding that the PDC had no duty to establish that FDA acted with either intent or knowledge,

nor that the PDC had any duty to establish that FDA had to undertake an affirmative act to attempt concealment? (A/E 1)

4. Did the trial court abuse its discretion in the manner of its imposition of civil fines/penalties in light of FDA's unintentional violation of the FCPA? (A/E 2)

5. In light of the relative lack of severity of the violations – i.e., the lack of reprehensibility, was the imposition of the financial sanctions against FDA disproportionate to the gravity of FDA's conduct, and thus excessive as a matter of constitutional law (the Eighth Amendment)? (A/E 3)

6. Under the circumstances in the instant matter, can the issue of the constitutionality of the fines/penalties be raised for the first time on appeal? (A/E 3)

IV. STATEMENT OF THE CASE

1. Factual Background

Food Democracy Action is a small, Iowa-based organization dedicated to building a healthy and sustainable food system. At the time relevant to this case, it had only two staff members, it had no Washington presence, and had never been involved in any Washington political activity prior to I-522 (or since). Declaration of David Murphy (hereinafter “Murphy Decl.”) (CP 28) at ¶ 2.

Although FDA is a small organization, it allows anyone in the world who may be interested in similar food system issues to sign up

for its e-mail newsletters. Thus, its communications reach is disproportionate to its actual size. With a simple click of an e-mail “send” feature, FDA’s e-mail newsletters reach thousands of people around the globe. *Id.* at ¶ 3.

In 2013, FDA was made aware of I-522 – a Washington State Initiative seeking to require labeling of genetically-modified organisms in food – and decided that this Initiative aligned with its mission. FDA included “asks” (i.e., requests for donations) in four of its e-mail newsletters in order to try to help pass I-522. FDA received such donations, and then chose to make contributions directly to the “Yes on I-522” campaign, which reported them in full. *Id.* at ¶ 4.

FDA was unaware of Washington’s requirement that it register immediately as a political committee and report its contributions and expenditures in the State of Washington. Indeed, it had no prior familiarity with Washington’s public disclosure laws at all. *Id.* at ¶ 5.

Once FDA became aware of its noncompliance with Washington’s public disclosure laws, it admitted full responsibility and promptly hired Washington counsel for support in order to help it comply with its obligations. FDA promptly registered as a political committee; filed its contribution and expenditure reports; timely answered all questions posed by PDC staff; and timely provided to the PDC all information and documents requested. *Id.* at ¶ 6.

Since the PDC commenced its enforcement action on November, 13, 2013, only 8 days following the election, FDA consistently and repeatedly sought to stipulate to the facts and violations related to late filing and reach a reasonable and proportionate settlement. But it was not to be.

2. Procedural facts.

On December 16, 2014, Respondent PDC filed its “Summons” (CP 4) and “Complaint for Civil Penalties and for Injunctive Relief for Violations of RCW 42.17A” in the Thurston County Superior Court (CP 5).

In addition to setting forth its factual allegations that make specific reference to the various reports and other filings FDA failed to make within the time required, *id.* at ¶¶ 7-21 (none of which FDA ever contested), the PDC noted that while the FDA eventually did submit the required filings, they were anywhere between 18 days and 158 days late (depending on the requirements for each type of document). *Id.*

In addition, the PDC also noted five claims for which it was seeking relief. The first three claims (found in Section V. of the Complaint, entitled “Claims,” at ¶¶ 1 – 3 therein) represent assertions that FDA concedes.

The fourth and fifth claims, however (likewise found in Section V. of the Complaint, entitled “Claims,” at ¶¶ 4 – 5 therein), have been and remain contested, as they assert violations of RCW

42.17A.435, and allege “concealment” of the identity and source of funds used to make contributions to the “Yes on 522” committee, and for which relief was sought.

FDA filed its Answer to the Complaint on February 17, 2015 (CP 10), and following a pre-trial conference, various scheduling orders were issued and various trial dates were set.

On February 26, 2016, the PDC filed a “Partial Motion [sic] for Summary Judgment” (CP 22), supported by the Declaration of Kurt Young, a PDC investigator, with attachments (CP 20) and the Declaration of Linda Dalton, counsel for the PDC, with attachments (CP 21). The Motion indicated that two issues were presented:

1. Was FDA required to register a political committee subject to Washington State’s disclosure requirements? and
2. Did FDA engage in prohibited concealment when it failed to disclose the true source of the moneys it received and used to support initiative 522? (CP 22 at 6).

With regard to the issue of “concealment,” the PDC’s Motion asserted that “Every time that FDA made a contribution in its own name instead of identifying the real people from whom the money actually came, FDA engaged in concealment in violation of RCW 42.17A.435. Each of the five contributions to the Yes on I-522 political committee constitutes a separate act of concealment.” *Id.* at 10.

On March 14, 2016, FDA filed its “Partial Opposition to State of Washington’s Partial Motion for Summary Judgment” (CP 27), supported by the Murphy Decl. (CP 28). As noted above, FDA conceded its failures to register and to submit timely disclosure reports. *Id.* at 4 – 5. Likewise, as noted above, FDA disputed the PDC’s positions vis-à-vis the issue of “concealment” per RCW 42.17A.435, and urged the trial court to deny the PDC’s motion for summary judgment as it related to its concealment claim. *Id.* at 6 – 11.

On April 22, 2016, the trial court heard the oral arguments of the parties. RP I.¹ Following the arguments of counsel, the trial court announced its oral ruling, granting summary judgment as to FDA’s failure to register as a political committee, as well as on the violation of RCW 42.17A.435 regarding concealment. RP I at 19 – 22.

Finally, the trial court advised that all that remained for purposes of trial was “the penalty for violating in several ways or several times the requirements” of the law. *Id.* at 23. At the conclusion of the hearing, the trial court signed and entered the PDC’s “Order Granting the State’s Motion for Partial Summary Judgment on Violations and Setting Trial Issue” (CP 40).

¹ RP refers to the Verbatim Report of Proceedings. In the instant matter, there were three hearings on the record. RP I refers to the April 22, 2016 hearing on the PDC’s “Partial Motion for Summary Judgment.” RP II refers to the November 21, 2016 trial in this matter (at which FDA was not present or represented by counsel). RP III refers to the December 16, 2016 hearing (at which FDA was not present or represented by counsel) for presentation of the PDC’s Order regarding penalties, fees, costs, and attorney’s fees.

On August 10, 2016, FDA's then-counsel (Gregory J. Wong of the Pacifica Law Group, LLP) filed his "Notice of Intent to Withdraw," which became effective on or about August 20, 2016 (CP 43).

On August 19, 2016, a Pre-Trial Conference noted for that date was set over to August 26, 2016. FDA was not present, nor was it represented by counsel, at either hearing. At the conclusion of the August 26, 2016 hearing, the trial court issued a "Pre-Trial Order, and set a bench trial date of September 19, 2016 (CP 46).

Shortly before trial, principals for FDA requested, via e-mail, a continuance to secure new counsel (*see* CP 67 at 2). Trial was thus continued to November 21, 2016 (CP 55). On the eve of trial, "the same individuals sought to continue the trial again but did not make any motion to the court. The matter proceeded to trial on November 21, 2016 and no one appeared for Defendants" (CP 67 at 2).

On November 21, 2016, with FDA neither present nor represented by counsel, the trial court heard the PDC's witnesses, considered the PDC's exhibits that had been admitted, and the State's closing argument (*id.*).

On December 16, 2016, counsel for the PDC appeared before the trial court for a short hearing, at which time the court signed the PDC's proposed Cost Bill. As noted, FDA was neither present nor represented by counsel. RP III at 3 – 5.

On January 6, 2017, the trial court entered its “Judgment Summary, Findings of Fact, Conclusions of Law and Final Judgment” (CP 67). The trial court concluded that FDA “committed multiple violations of Washington’s campaign finance disclosure laws,” including, *inter alia*, by “concealing the true sources of the contributions received and expenditures made in supporting Initiative 522 in violation of RCW 42.17A.435.” *Id.* at 7-8.

Accordingly, the court entered judgment against FDA as set forth in Section II (“Summary of the Arguments”) at 4 – 5, *supra*.

On February 2, 2017, new counsel for FDA (C. James Frush) filed a Notice of Appeal as to the April 22, 2016 grant of summary judgment (CP 40) and as to the final judgment entered on January 6, 2017 (CP 67).² This timely appeal followed.

V. ARGUMENT

A. Standard of Review.

1. Summary Judgment

To prevail on summary judgment on its concealment claim, the PDC must have demonstrated that “there is no genuine dispute of material fact” and that it is entitled to summary judgment as a matter of law. *Atherton Condo. Apartment-Owners Ass’n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516 (1990); CR 56(c). “Any

² On June 22, 2017, Mr. Frush moved to withdraw. By letter ruling issued on July 5, 2017 by Commissioner Bearse of this Court, Mr. Frush’s motion to withdraw was granted. On August 1, 2017, undersigned counsel appeared as counsel of record for FDA.

doubt as to the existence of a genuine issue of material fact is resolved against” the PDC. *Id.* at 516.

The trial court must have “consider[ed] the facts submitted and all reasonable inferences from those facts in the light most favorable” to FDA. *Heg v. Alldredge*, 157 Wn.2d 154, 160 (2006).

In reviewing an Order granting summary judgment, this Court “engages in the same inquiry as the trial court.” *See, e.g., Ofuasia v. Smurr*, 198 Wn. App. 133, 141 (2017). Even when the basic facts are undisputed, “if the facts are subject to reasonable conflicting inferences, summary judgment is improper.” *See, e.g., Southside Tabernacle v. Pentacostal Church of God, Pacific NW District, Inc.*, 32 Wn. App. 814, 821 (1982).

Moreover, all facts and their reasonable inferences are construed in the light most favorable to the *non-moving party*. *See, e.g., Scrivener v. Clark College*, 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 County v. Mattress Outlet*, 153 Wn. App. 506, 509 (2005).

2. *Constitutional Claim Raised for the First Time on Appeal*

As noted previously, FDA was absent and unrepresented at trial. As explained above, shortly before trial, principals for FDA (an organization staffed by only two individuals) requested, via e-mail, a

continuance to secure new counsel (*see* CP 67 at 2). Trial was thus continued to November 21, 2016 (CP 55). On the eve of trial, “the same individuals sought to continue the trial again but did not make any motion to the court. The matter proceeded to trial on November 21, 2016 and no one appeared for Defendants” (CP 67 at 2).

Thus, whatever the merits of FDA’s inability to participate, it did not have the opportunity to assert, in the trial court, the claim that the fines and penalties imposed were excessive in violation of the Eighth Amendment to the United States Constitution.³ It could not do so in the one proceeding in which it did appear – the proceeding to adjudicate the PDC’s summary judgment motion – because the trial court had set for trial the scope of the penalties that would be imposed for the violations of the FCPA it had already found.

In construing RAP 2.5(a), our Supreme Court has decided that civil parties may raise constitutional issues on appeal if they satisfy the criteria listed in RAP 2.5(a)(3), which holds:

- (a) **Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

³ The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

See, e.g., *State v. WWJ Corp.*, 138 Wn.2d 595, 601 (1999); *Richmond v. Thompson*, 130 Wn.2d 368, 385 (1996).

The question for the appellate court considering whether a constitutional claim raised for the first time on appeal warrants review pursuant to RAP 2.5(a)(3) is whether the asserted error is “manifest” and “truly of constitutional magnitude.” *State v. McFarland*, 127 Wn.2d 322, 333 (1995).

The Eighth Amendment’s Excessive Fines Clause prevents the government from imposing fines that are “grossly disproportional” to the gravity of an offense. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998). Moreover, Article 1, section 14 of the Washington Constitution also prohibits excessive fines, and is at least as protective as its federal analog. See, e.g., *State v. Witherspoon*, 180 Wn.2d 875, 887 (2014).

It is likewise clear that this rule applies to corporations as well as individuals, 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 Group, Inc.*, 532 U.S. 424, 433-34 (2001).

As will be discussed in greater detail *infra*, based on an analysis of the nature of the offense, whether the conduct relates to

other illegal activity, the extent of the harm caused, whether the violated statute(s) targets a class to which the defendant belongs, and other potential penalties for the violation (*see Bajakajian, supra*, 524 U.S. at 337-40), FDA asserts that there was manifest error of constitutional magnitude in the imposition of the fines and penalties that permit this Court to review this claim for the first time in this appeal.

B. The Trial Court Erred in Granting Summary Judgment on the PDC's Concealment Claim

1. The PDC's concealment claim failed as a matter of law because filing disclosure reports late due to a mistake does not rise to the level of concealment.

Washington's public disclosure laws prohibit the "concealment" of the source of financial contributions. As noted at p. 3, *supra*, RCW 42.17A.435 provides:

No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, 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.

The PDC asserted that "[p]roof of intentional concealment is not required" to establish a claim for concealment under RCW 42.17A.435. CP 22 at 9. The PDC provided no authority to support that proposition, however. *See* CP 22 at 9-10. "Concealment" is

undefined, and no Washington court has considered the meaning of the term in this context.

In construing the meaning of a statute, Washington courts first look to its plain language. *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n of State of Wash.*, 133 Wn.2d 229, 241 (1997) (“It is a fundamental principle that we are to derive the intent behind a given statute solely from its language.”).

The Court’s “fundamental purpose in construing statutes is to ascertain and carry out the intent of the legislature.” *W. Plaza, LLC v. Tison*, 184 Wn.2d 702, 708 (2015). “If the plain language is subject to only one interpretation, [the Court’s] inquiry ends because plain language does not require construction.” *HomeStreet, Inc. v. State, Dep’t of Revenue*, 166 Wn.2d 444, 451 (2009).

Washington courts give undefined terms their “common and ordinary meaning.” *HomeStreet, id.* at 451; *State v. Smith*, 117 Wn.2d 263, 271 (1991) (“Words are given the meaning provided by the statute or, in the absence of specific definition, their ordinary meaning.”).

The common and ordinary meaning of “concealment” encompasses only conduct that is intentional or known to be likely to keep another from learning facts. Black’s Law Dictionary defines “concealment” as “[t]he *act of preventing disclosure* or refraining from disclosing; esp., the injurious or *intentional suppression* or nondisclosure of facts that one is obliged to reveal; cover-up. . . .; The act of removing from sight or notice; hiding.” Bryan Garner, *Black’s Law Dictionary* (10th ed. 2014)(emphasis added).

Specifically,

Concealment is an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned.

Id. (citing Restatement (Second) of Contracts § 160 cmt. a (1979)) (emphasis added); *see also* Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, Geo. L. J. 449-96 (2012) (analyzing the meaning of concealment, fraud, and deception across areas of law and stating: “Concealment requires acting *with the purpose of hiding* material information, . . . which suggests that there is no such thing as mistaken, negligent, or even reckless concealment.”). (Emphasis added.)

This definition is consistent with Washington case law that addresses violations of RCW 42.17A.435. In *State ex rel. Washington State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 289 (2006), concealment was found where defendants had intentionally formed an organization for the “*primary purpose* of concealing” the source of contributions. (Emphasis added.) Likewise, in *State v. Conte*, 159 Wn.2d 797, 800 (2007), the concealment statute was invoked as relevant where defendants were charged with conspiracy for *knowingly* causing innocent persons to file false records. Thus, intent or knowledge of the scheme to conceal is required.

Further, this definition is consistent with the meaning of “concealment” in other contexts. *See, e.g., Sloan v. Thompson*, 128 Wn. App. 776, 787 (2005) (claim for fraudulent concealment of a construction defect requires proof that the defendant had “actual, subjective knowledge of the defect”); *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 452 (2000) (same). For example, an action for fraudulent concealment requires proof that the defendant “engaged in some conduct *of an affirmative nature* designed to prevent the plaintiff from becoming aware of the defect.” *Giraud*,

102 Wn. App. at 452 (emphasis added). In other words, the plaintiff must establish “actual subjective knowledge by the defendants of the wrong done, i.e., scienter, and some affirmative action on his part in concealing the wrong.” *Id.* (citing *Taylor v. Wilmington Med. Ctr., Inc.*, 538 F. Supp. 339, 342 (1982)); *see also Sloan*, 128 Wn. App. at 788 (holding that builder had requisite knowledge where he was aware of the applicable building codes but built a frame that did not comply with them).

The PDC cited no authority for its proposition that concealment applies as broadly as it suggested. As this case illustrates, the PDC’s interpretation would mean that every straightforward case of late registration as a political committee, and therefore late reporting of contributions, results in a finding of concealment. *See* CP 22 at 10: (“[e]very time the FDA made a contribution in its own name instead of identifying the real people from whom the money actually came, FDA engaged in concealment in violation of RCW 42.17A.435.”).

If a group does not even know that it is obligated to register as a political committee, then it likely does not know that the contribution and expenditure reporting requirements are triggered.

Consequently, it will likely not report who its contributors are in a timely way, and those contributors will likely not be disclosed until the report is filed. Under the PDC's theory, these facts would *always* amount to concealment.

This interpretation, adopted by the trial court (*see* CP 40 at 4 – 5; RP I at 21 – 22), is not only contrary to the meaning of “concealment” as discussed above, but it also renders RCW 42.17A.435 superfluous and duplicative of the existing requirements of law to register as a political committee and report contributions and expenditures, for which there are separate penalties from concealment. *See* RCW 42.17A.205; WAC 390-16-031; WAC 390-16-041.

This result is contrary to the rule that statutes should be construed “so no clause, sentence or word shall be superfluous, void, or insignificant.” *HomeStreet, Inc., supra*, 166 Wn.2d at 452.⁴

Even if this Court finds that the plain language of RCW 42.17A.435 is ambiguous, which FDA contends it is not, this

⁴ Tellingly, in *Permanent Offense*, Division One of the Court of Appeals analyzed the late reporting and concealment violations as separate claims. *See* 136 Wn. App. at 289-90.

interpretation is supported by the voters' intent in enacting the underlying initiative measure. Only if the statutory language is ambiguous will the Court "apply other general rules of statutory construction and go behind the language of the statute to attempt to understand the intent of the Legislature, or . . . the people, in passing the statute." *Senate Republican Campaign Comm., supra*, 133 Wn.2d at 241-42. RCW 42.17A.435 was approved by the voters in 1972 as part of Initiative Measure 276. *See* RCW 42.17A.435.⁵

Among other purposes, that measure was enacted to "address a concern over secrecy in government," level the political playing field, and ensure that certain individuals and organizations do not exercise undue control over the political process. RCW 42.17A.400(1); *Nast v. Michels*, 107 Wn.2d 300, 304 (1986) (*citing* 1972 Voters Pamphlet, at 10).

Extending liability to individuals and entities that make mistakes, as the PDC asserted below, does nothing to effectuate that intent. Imposing liability for *affirmative conduct* intended to or

⁵ The legislature amended the statute in 1975 to add the phrase "or in any other manner so as to effect concealment." Laws of 1975, 1st Ex. Sess., ch. 294, § 8.

known to be likely to obscure material facts, on the other hand, extends the statute only as far as the voters intended it to reach.

Those who make mistakes are still held accountable through penalties for late reporting. They should not also be held liable *per se* for concealment. Accordingly, the trial court's adoption of the PDC's concealment claim failed as a matter of law.

2. The PDC's concealment claim was unsupported by the facts.

The PDC did not assert, or prove, that FDA took any "affirmative act intended or known to be likely to keep another from learning of a fact," nor could it. There is *nothing* in the record that supports such a theory. To the extent the PDC asserted that FDA's contributions in support of California's Proposition 37 were relevant to this action, the argument fails.

The PDC alleged that FDA contributed money in its own name to the "Yes on 37 For Your Right to Know Committee," the political committee supporting California's Proposition 37 (relating to similar subject matter as Washington's I-522. *See* the Declaration of Linda Dalton, CP 21, at ¶ 9; Exh. F.

FDA filed a financial report as a major donor for its calendar year donations. *Id.*, at Exh. F. But FDA did *not* register as a political committee or report its donors in California. *See* Cal. Secretary of State, *Cal-Access*, Campaign Finance: Food Democracy Action!, <http://cal-access.ss.ca.gov> (search “Food Democracy Action” in the “Cal-Access Search” field). CP 27 at 10.

Thus, FDA’s involvement in California would not have alerted it to Washington’s requirements related to political committee and contribution reporting.

In sum, the PDC presented no evidence that FDA engaged in *affirmative conduct* intended or known to be likely to obscure the identity of donors. Accordingly, the trial court erred in finding and concluding that PDC proved its concealment claim as a matter of law, and thus, the trial court’s ruling must be reversed.

C. The Trial Court Erred in Imposing the Civil Penalties

Starting in July, 2013, after learning of Washington’s Initiative 522, FDA sent four newsletters (three solicitations for contributions in July, 2013 and one in October, 2013) seeking financial contributions from its members and supporters to support the GMO labeling efforts in Washington. FDA members and

supporters began sending money on July 30, 2013, and continued contributing money through November 1, 2013. CP 67 at 4.

FDA received a total of \$250,036 in cash contributions, and acquired an additional \$45,625.58 referred to as “in-kind” contributions, for a total of \$295,661.58 as contributions to support I-522. CP 67 at 4.

Of the total of \$250,036.00 raised in cash, FDA donated \$200,000.00 of it to the “Yes on I-522” committee in five installments, beginning on August 16, 2013, and ending on October 30, 2013. FDA reported itself as the source of the contributions to the “Yes on I-522” committee. *Id.*

As noted above, the trial court concluded that FDA violated the FCPA in multiple ways: by soliciting and receiving contributions from its members and supporters and then not registering as a political committee; by failing to timely identify a treasurer and bank account for FDA; by failing to timely file reports of contributions received from its members and supporters, and the expenditures made from those contributions; and by concealing the true sources of the contributions received and expenditures made in supporting I-522. CP 67 at 7 – 8.

As a result of those conclusions, the trial court imposed a civil penalty of **\$319,281.58** for those violations, as follows:

\$295,661.58 (Representing the cash and “in-kind” contributions *received* by FDA from its donor base);

\$18,000.00 (Representing 18 untimely registration and disclosure reports, at \$1,000.00 per missing report); and

\$5,620.00 (Representing the aggregate number of days the required reports were filed late, 1,124 days at \$5.00 per day).

The trial court offered no explanation or rationale for imposing as a penalty the entire sum, a combination of actual cash and non-cash, or “in-kind” contributions it received from its donor base. Not only was this a far cry from the \$200,000.00 FDA *actually* contributed to the effort to pass I-522, the trial court provided this Court, on review, with no rationale for how it arrived at the penalty it chose.

Using the total figure of cash and non-cash contributions received by this Iowa-based non-profit organization as the basis for non-reporting and non-disclosure penalties in Washington is arbitrary and capricious, with no clue as to the trial court’s reasoning.

Moreover, that figure is based on the trial court's determination regarding FDA's "concealing both the amount accumulated in and source of contributions received." CP 67 at 8.

Thus, in addition to having no rational relationship, it is based on a theory regarding concealment (argued above) that this Court ought to reject. The **\$295,661.58** concealment penalty should be reversed.

FDA does not quarrel with being penalized for the 18 registration and disclosure reports that were not timely or properly filed, but contends that \$1,000.00 per report is excessive.

Likewise, while FDA understands that it filed required reports late, the trial court aggregated the total number of days each required report was late, such that the late filings of reports of between 18 days late and 158 days late aggregated to 1,124 days. At \$5.00 per day, this then mushroomed to \$5,620.00. Thus, the trial court penalized FDA's failure to timely file reports in two separate, double-counted ways, imposing combined penalties of **\$23,620.00** for essentially the same acts.

D. The Penalties Imposed by the Trial Court Violate the Excessive Fines Clause of the Eighth Amendment

In *United States v. Bajakajian*, 524 U.S. 321 (1998), the defendant therein attempted to leave the United States with over \$350,000 in cash. Despite being instructed by a Customs agent to declare any amount over \$10,000, Bajakajian lied, and declared only

\$15,000. The full amount he was carrying was discovered, and he entered a plea to willfully failing to report the true amount. *Id.* at 324-26.

The trial court fined Bajakajian \$5,000 and ordered forfeiture of an additional \$15,000. The government appealed, as it was seeking forfeiture of the *entire* amount he was actually carrying. On appeal, the Supreme Court held that even though forfeiture was authorized by statute, the amount of the forfeiture was grossly disproportional. *Id.* at 344.

As noted at page 17, *supra*, the Court in *Bajakajian* analyzed 5 factors in reaching its determination.

Regarding the factor of the nature of the offense, the Court noted that Bajakajian's crime was "solely a reporting offense," in that traveling with cash was not, by itself, a crime. *Id.* at 337. Likewise, FDA's activity in soliciting contributions and then donating them to the "Yes on I-522" committee was not a crime, or wrongful in any other way beyond the failure to file certain reports.

Regarding the factor of whether or not there was other illegal activity involved, the Court determined that the source of Bajakajian's money proceeded from lawful activity, and not the fruits of crime. *Id.* at 338. Likewise, there was no showing in the instant case that the funds FDA collected and distributed were the product of any other unlawful activity. Rather, the funds were collected for, and intended solely, to enable FDA to engage in core

political speech. *See, e.g., PDC v. 119 Vote No! Committee*, 135 Wn.2d 618 (1998), holding that the constitutional guarantee of free speech has its “fullest and most urgent application in political campaigns.” *Id.* at 624.

Moreover, the penalty at issue here *targets* constitutionally protected speech. In the First Amendment context, burdens on protected speech require a “substantial relation” between the disclosure requirement and a “sufficiently important government interest.” *See, e.g., Doe v. Reed*, 561 U.S. 186, 196 (2010). In the instant case, the disclosure required by the State is not substantially related to its informational interest.

Regarding the extent of the harm the conduct actually caused or would have caused if it had gone undetected, the Court concluded that the government would only have been minimally harmed by not having the information that over \$350,000 in cash had left the country, a further indication of disproportionality. *Bajakajian, supra*, 524 U.S. at 339. Likewise, FDA’s contributions in its own name did not mislead voters. Any interested voter ultimately could have discovered that FDA contributed \$200,000.00 to the effort to promote GMO labeling, and the identities of the allegedly 7,000 individual contributors to FDA would have disclosed nothing of any relevance to the voters.

Regarding the factor of whether Bajakajian fit into the “class of persons for whom the statute was principally designed,” namely,

money launderers, drug dealers, or tax evaders, the Court concluded that he did not. *Id.* at 338. By contrast, the FCPA targets those who would use deceit to sway elections or hide contributions that influence elected officials. *See* RCW 42.17A.001. There was no evidence that FDA fits into that category – no evidence that FDA used deceit to seek to influence the outcome of the vote on I-522.

Finally, regarding the factor of other potential penalties available to agencies and the courts, the Court held that “in considering an offense’s gravity, the other penalties the Legislature has authorized are certainly relevant evidence” (i.e., penalties other than the one being challenged as excessive). *Bajakajian, supra*, 524 U.S. at 339, n.14.

FDA is aware that the trial court disregarded some of the PDC’s requests for greater penalties than were actually imposed. For example, the PDC requested imposition of a **\$10,000.00** per violation penalty for the failure to file reports (CP 48 at 6) and **\$10.00** per day for the number of aggregated days the reports were filed late (CP 48 at 6). These penalties were authorized by statute. *See* RCW 42.17A.750(1)(c) and (d). Nonetheless, the trial court imposed penalties using multiples of **\$1,000.00** and **\$5.00**, respectively (CP 67 at 8).

The fact that the “other penalties” imposed on FDA were not as severe as they could have been does not render the significant other penalties actually imposed unreviewable under an excessive

fine analysis. To hold otherwise would be tantamount to concluding that “the Eighth Amendment simply does not apply to statutorily mandated forfeitures.” *See, e.g., United States v. Beecroft*, 825 F.3d 991, 1002 n.9 (9th Cir. 2016).

Taking into account an analysis of all of the *Bajakajian* factors, it is clear that the penalty of **\$319,281.58** (*before* adding on an additional **\$93,046.52** in attorneys’ fees and costs) imposed by the trial court were grossly disproportional to FDA’s conduct, and thus repugnant to the Eighth Amendment.

E. FDA Seeks an Award of its Attorney’s Fees

Should it prevail in this appeal, FDA would be entitled to reasonable attorney’s fees under both 42 U.S.C. § 1988 and RCW 42.17A.765(5). FDA therefore asks for an award of its reasonable attorney’s fees and costs at trial and on appeal. *See* RAP 18.1.

VI. CONCLUSION

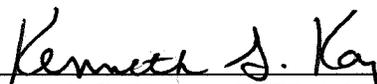
Upon discovering that its involvement in I-522 obligated it to register as a political committee, FDA admitted full responsibility and rectified its mistakes. The PDC’s assertion, and the trial court’s adoption of that assertion, that FDA’s conduct amounted to prohibited concealment, extends RCW 42.17A.435 beyond its reach.

Concealment encompasses only affirmative conduct intended or known to be likely to obscure material facts. The PDC failed to establish the FDA engaged in such misconduct here. Accordingly, the trial court erred in granting summary judgment as to the PDC's claim for concealment under RCW 42.17A.435. This Court should reverse that determination.

The civil penalty imposed by the trial court was grossly excessive and constituted manifest error of a truly constitutional magnitude. Not only may it be raised for the first time in this appeal, but this Court should conclude that the trial court's action offends the Eighth Amendment.

Respectfully submitted this 9th day of October, 2017.

**LAW OFFICE OF
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⁶ Counsel for FDA wishes to acknowledge with gratitude the valuable assistance provided by Robert B. Mitchell, Aaron E. Millstein, Daniel-Charles Wolf and the law firm of K&L Gates, LLP. Additional thanks go to Gregory J. Wong and the Pacifica Law Group.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on October 9, 2017, I caused a copy of the foregoing document to be delivered via e-mail, per the agreement of the parties, to the following:

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Signed this 9th day of October, 2017 at Seattle, WA.



Kenneth S. Kagan

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October 09, 2017 - 2:57 PM

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