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

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STATE OF WASHINGTON,

Respondent,

v.

FOOD DEMOCRACY ACTION!, and FOOD DEMOCRACY ACTION!  
Yes on I-522 COMMITTEE TO LABEL GMOs in Washington,

Appellant.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON**

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ROBERT W. FERGUSON  
*Attorney General*

LINDA A. DALTON, WSBA 15467  
*Senior Assistant Attorney General*

S. TODD SIPE, WSBA 23203  
*Assistant Attorney General*

Office ID 91087  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
360-753-6200

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. STATEMENT OF ISSUES.....2

III. STATEMENT OF THE CASE .....3

    A. Overview of Campaign Finance Law .....3

    B. Factual History.....5

    C. Procedural History .....10

        1. Complaint .....10

        2. Summary Judgment Motion .....10

        3. August 2016 Pre-Trial Conferences .....12

        4. September 19, 2016, Trial Date.....13

        5. November 21, 2016 Trial .....14

IV. ARGUMENT .....15

    A. Standard of Review.....15

    B. FDA Admitted Multiple Violations of State Campaign Finance Disclosure Laws for Failing to Timely Register and Timely Report Contributions and Expenditures .....17

    C. FDA Concealed the True Source of Almost \$300,000 in Contributions and Expenditures to Support Initiative 522 .....18

        1. RCW 42.17A.435 Does Not Require the State to Prove That FDA Intended to Violate the Statute.....19

        2. FDA’s Actions Can and Did Violate Both State Disclosure Requirements and the Concealment

Statute When It Hid the True Identity of the Sources of Contributions It Received and Made.....	26
3. “Fraudulent Concealment” Cases Cited by FDA Have No Relevance to a RCW 42.17A.435 Claim .....	27
4. Conclusion.....	28
D. FDA Waived Any Challenge to the Penalties Imposed Against It by Failing to Attend the Trial, and Even if This Argument Were Allowed, the Penalties Imposed by the Trial Court Were Appropriate.....	28
1. FDA Waived Any Challenge to the Amount of Penalties by Not Attending the Trial That Was Set Specifically to Determine Penalties and of Which It Had Notice.....	29
2. Even if FDA Were Permitted to Challenge the Penalties for the First Time on Appeal, FDA’s Penalties Were Appropriate and Not Excessive .....	31
E. FDA Waived Any Constitutional Challenge to the Penalties Imposed Against It by Failing to Attend the Trial, And Even if This Argument Was Allowed, the Penalties Imposed Do Not Violate the Eighth Amendment to the U.S. Constitution.....	35
1. FDA Waived Its Constitutional Challenge to the Penalties by Failing To Raise the Issue before the Trial Court .....	36
2. Even if FDA Were Permitted Challenge the Penalties on Appeal Based on the Eighth Amendment, FDA’s Penalty is Not Excessive .....	39
F. Attorney Fees and Costs Should Be Awarded to the State for This Appeal .....	45
V. CONCLUSION .....	45

## TABLE OF AUTHORITIES

### Federal Cases

<i>Combat Veterans For Cong. Political Action Comm. v. FEC</i> , 983 F. Supp. 2d 1(D.D.C. 2013).....	42
<i>Grid Radio v. FCC</i> , 278 F.3d 1314 (D.C. Cir. 2002) .....	42
<i>Human Life of Washington, Inc. v. Brumsickle</i> , 624 F.3d 990(9th Cir. 2010) .....	43
<i>Newell Recycling Co. v. EPA</i> , 231 F.3d 204 (5th Cir. 2000) .....	42
<i>United States v. \$100,348.00 in U.S. Currency</i> , 354 F.3d 1110 (9th Cir. 2004) .....	40, 42
<i>United States v. Bajakajian</i> , 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).....	40-42
<i>United States v. Beecroft</i> , 825 F.3d 991 (9th Cir. 2016) .....	42
<i>United States v. Mackby</i> , 261 F.3d 821 (9th Cir. 2001) .....	40

### State Cases

<i>Am. Legion Post 149 v. Dep't of Health</i> , 164 Wn.2d 570, 192 P.3d 306 (2008).....	21
<i>Bour v. Johnson</i> , 80 Wn. App. 643, 910 P.2d 548 (1996).....	30
<i>Chelan County Deputy Sheriffs' Ass'n v. Chelan County</i> , 109 Wn.2d 282, 745 P.2d 1 (1987).....	15

<i>City of Seattle v. Evans</i> , 184 Wn.2d 856, 366 P.3d 906 (2015) <i>cert. denied sub nom. Evans v. City of Seattle, Wash.</i> , 137 S. Ct. 474, 196 L. Ed. 2d 384 (2016).....	16
<i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	20
<i>Fisher Prop., Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990).....	16
<i>Greater Harbor 2000 v. City of Seattle</i> , 132 Wn.2d 267, 937 P.2d 1082 (1997).....	16
<i>Griffin v. Thurston County</i> , 165 Wn.2d 50, 196 P.3d 141 (2008).....	21
<i>Haner v. Quincy Farm Chems., Inc.</i> , 97 Wn.2d 753, 649 P.2d 828 (1982).....	24
<i>In re Estate of Haviland</i> , 177 Wn.2d 68, 301 P.3d 31 (2013).....	20
<i>Landstar Inway, Inc. v. Samrow</i> , 181 Wn. App. 109, 325 P.3d 327 (2014).....	16
<i>LK Operating, LLC v. Collection Grp., LLC</i> , 181 Wn.2d 48, 331 P.3d 1147 (2014).....	16
<i>Mangat v. Snohomish County</i> , 176 Wn. App. 324, 308 P.3d 786 (2013).....	30
<i>Mueller v. Wells</i> , 185 Wn.2d 1, 267 P.3d 580 (2016).....	16
<i>Ofuasia v. Smurr</i> , 198 Wn. App. 133, 392 P.3d 1148 (2017).....	16
<i>State ex rel. Pub. Disclosure Comm'n v. Permanent Offense</i> , 136 Wn. App. 277, 150 P.3d 568 (2006), <i>review denied</i> , 162 Wn.2d 1003 (2007).....	24, 45

<i>State v. (1972) Dan J. Evans Campaign Comm.,</i> 86 Wn.2d 503, 546 P.2d 75 (1976).....	4
<i>State v. Conte,</i> 159 Wn.2d 797, 154 P.3d 194 (2007).....	25
<i>State v. Hunley,</i> 175 Wn.2d 901, 287 P.3d 584 (2012).....	17
<i>State v. Johnson,</i> 119 Wn.2d 167, 829 P.2d 1082 (1992).....	35
<i>State v. Knutz,</i> 161 Wn. App. 395, 253 P.3d 437 (2011).....	36
<i>State v. Lilyblad,</i> 163 Wn.2d 1, 177 P.3d 686 (2008).....	22
<i>State v. Lindsey,</i> 177 Wn. App. 233, 311 P.3d 61 (2013).....	29
<i>State v. Lynn,</i> 67 Wn. App. 339, 835 P.2d 251 (1992).....	36, 37
<i>State v. The Mandatory Poster Agency, Inc.,</i> 199 Wn. App. 506, 398 P.3d 1271 (2017).....	17, 31
<i>State v. WWJ, Corp.,</i> 138 Wn.2d 595, 980 P.2d 1257 (1999).....	36, 37, 39, 40
<i>Tingey v. Haisch,</i> 159 Wn.3d 652, 152 P.2d 1020 (2007).....	20
<i>Utter v. Bldg. Indus. Ass'n of Wash.,</i> 182 Wn.2d 398, 341 P.3d 953 (2015).....	20
<i>Wash. Fed. Sav. v. Klein,</i> 177 Wn. App. 22, 311 P.3d 53 (2013).....	29
<i>Wells v. W. Wash. Growth Mgmt. Hr'gs Bd.,</i> 100 Wn. App. 657, 997 P.2d 405 (2009).....	30

**Federal Statutes**

26 U.S.C. § 501(c)(4)..... 5

**State Statutes**

Former RCW 42.17.120  
    (re-codified as RCW 42.17A.435)..... 24

RCW 19.86 ..... 24

RCW 40.16.030 ..... 25

RCW 42.17A..... 20, 25-26, 39, 44

RCW 42.17A.001..... 3, 4, 23, 41, 44

RCW 42.17A.005(35)..... 4

RCW 42.17A.005(37)..... 4

RCW 42.17A.120..... 25

RCW 42.17A.205..... 11, 26

RCW 42.17A.205(1)..... 17

RCW 42.17A.210..... 11

RCW 42.17A.215..... 11

RCW 42.17A.235..... 4, 11, 18, 26

RCW 42.17A.240..... 4, 11, 26, 41

RCW 42.17A.245..... 11, 26

RCW 42.17A.435..... passim

RCW 42.17A.750..... 14, 29, 31, 33

RCW 42.17A.750(1)(c) .....	5, 32
RCW 42.17A.750(1)(d) .....	5, 32
RCW 42.17A.750(1)(f).....	5, 32-34
RCW 42.17A.765(5).....	5, 21, 32, 45-46

**State Rules**

RAP 2.5.....	29
RAP 2.5(a)(3).....	36-37, 40
RAP 18.1.....	46

**Other Authorities**

<i>Black’s Law Dictionary</i> 349 (10th ed. 2014).....	28
Gregory Klass, <i>Meaning, Purpose, and Cause in the Law of Deception</i> 100 <i>Geo. L.J.</i> 449, 461 (2012) .....	22
Restatement (Second) of Contracts §160 (Am. Law Inst. 1979).....	22
25 <i>Washington Practice: Contract Law and Practice</i> § 16:20 (3d ed.).....	28
33 <i>Washington Practice: Construction Law Manual</i> § 16.6 (2017-18 ed.) .....	28

## I. INTRODUCTION

In 2013, Food Democracy Action! and Food Democracy Action! Yes on I-522 Committee to Label GMOs in Washington (collectively FDA) solicited nearly \$300,000 from its members and supporters and then expended \$200,000 of those funds to support a Washington State ballot proposition (Initiative 522). When FDA identified itself as the source of the contributions—without disclosing the actual identities of the sources of the funds—it violated state campaign finance disclosure laws. FDA admits that it violated the law. FDA admits that it failed to register as a political committee as defined by Washington law and failed to timely file 17 mandatory contribution and expenditure reports that were due before the 2013 general election.

With those admissions, the trial court correctly concluded that FDA violated the law. The only objection FDA has to the trial court's determination of its liability is the court's conclusions that FDA's actions were also unlawful because they had the effect of concealing the identity of its contributors—who remained unknown to the public until after the election. FDA's sole defense to improperly concealing its contributors is to assert that it did not intentionally violate the law. This attempt to insert a non-existent intentionality limitation into the State's concealment statute was properly rejected by the trial court. The contention is inconsistent with

the plain terms of the applicable statute and has no support in the law. The trial court's ruling should be affirmed.

FDA also improperly contends for the first time on appeal that the civil penalties imposed against it by the trial court were excessive and unconstitutional. FDA is wrong, but because FDA failed to attend the trial dedicated to the penalty issue (despite being provided ample opportunities to do so) and failed to raise any issue regarding the penalties to the trial court, FDA's objections to the penalties have been waived and should not be considered.

Moreover, even if FDA's arguments regarding the penalties were to be considered, FDA's objections have no legal merit. The trial court operated well within its statutory discretion in imposing penalties that precisely tracked the formulation set forth in the applicable statute. Indeed the total amount of the penalties is far less than the full amount authorized by statute based on the number of violations, the extent of the violations, and the dollar amount involved. The penalties assessed against FDA were appropriate because they were proportionate to both the seriousness of the violations and public harm that resulted from FDA's conduct.

## **II. STATEMENT OF ISSUES**

1. Was summary judgment proper when the undisputed evidence established that FDA solicited, received, and concealed contributions from

its members to support Initiative 522?

2. Should FDA's request for a review of the civil penalty imposed against it be denied where FDA, having receiving ample notice, failed to attend the trial set specifically to determine the penalty and failed to raise any argument or submit any evidence to the trial court relating to the penalty?

3. Should FDA's civil penalty be upheld when it is well within the trial court's statutory discretion, supported by uncontroverted evidence that FDA committed multiple violations of state campaign disclosure laws, including concealing its members' contributions from public disclosure, and not grossly disproportionate to the gravity of FDA's concealment and other offenses?

### **III. STATEMENT OF THE CASE**

#### **A. Overview of Campaign Finance Law**

In 1972, voters declared that it is "the public policy of the state of Washington: (1) That political campaign . . . contributions and expenditures be fully disclosed to the public and that secrecy is to be avoided . . . (10) That the public's right to know of the financing of political campaigns . . . far outweighs any right that these matters remain secret and private." RCW 42.17A.001. Voters also directed that campaign disclosure laws be liberally construed "so as to assure continuing public confidence of fairness

of elections and governmental processes, and so as to assure that the public interest will be fully protected.” RCW 42.17A.001.

To these ends, Washington campaign disclosure laws “seek to ferret out . . . those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the Act in the interest of public information.” *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976). This includes registration and disclosure requirements for “political committees,” which the law defines as “any person . . . 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). “Person” includes organizations of all sorts, including “association[s].” RCW 42.17A.005(35).

Thus, an organization qualifies as a political committee “by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures” for any candidate or ballot proposition. Under Washington’s finance disclosure law, all “political committees” are required to register with the Public Disclosure Commission (PDC) and file regular reports with the PDC of all contributions received and expenditures made. RCW 42.17A.235, .240. FDA concedes that it was a “political committee” and violated Washington law by failing to timely register and report its contributions and expenditures. FDA Br. at 1, 2, 4, 8.

In addition, to ensure that the true source of all contributions and expenditures is transparent to the public, RCW 42.17A.435 provides that “[n]o contribution shall be made and no expenditure shall be incurred . . . in such manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.”

The law provides Washington courts with options for assessing penalties when these requirements are violated. These remedies include imposing *one or more* of the following penalties: (1) a “per violation” penalty of not more than \$10,000; (2) a penalty equal to \$10 per day for every day a required report is late; and (3) a penalty equal to the amount that went undisclosed. RCW 42.17A.750(1)(c), (d), (f). The court may also award “to the state all costs of investigation and trial, including reasonable attorneys’ fees to be fixed by the court.” RCW 42.17A.765(5).

## **B. Factual History**

FDA is registered with the Internal Revenue Service as a 26 U.S.C. § 501(c)(4) non-profit organization with its base of operations in Clear Lake, Iowa. CP at 239 (Finding of Fact 1<sup>1</sup>). Prior to participating in the 2013 Initiative 522 election in Washington, FDA participated in lobbying activities in the states of Connecticut and Maine, and in 2012 it actively

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<sup>1</sup> The trial court’s findings shall be referred to as “FF” for this brief.

participated in supporting a California ballot measure (Proposition 37) that, if it had passed, would have required labeling packaged food products to identify GMOs (genetically modified organisms). CP at 240 (FF 5, 6). FDA made at least two contributions in its own name totaling \$115,000 to support Proposition 37. CP at 240 (FF 7).

On June 29, 2012, Initiative 522 was submitted to the Washington Secretary of State as an initiative to the legislature. CP at 240 (FF 9). If adopted, Initiative 522 would have “require[d] 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.” CP at 240 (FF 9).

After the legislature took no action, Initiative 522 was submitted to Washington voters and placed on the November 5, 2013 General Election statewide ballot. CP at 240 (FF 10); 258, (FF 4). Starting in July 2013, FDA sent four newsletters seeking money from its members and supporters to support the GMO labeling efforts in Washington, including Initiative 522. CP at 241 (FF 12). FDA sent three solicitations for contributions in July 2013 and a similar request in October 2013. CP at 241 (FF 13). FDA specifically labeled these efforts as a fundraising campaign to raise and receive money to support Initiative 522. CP at 241 (FF 12).

FDA started receiving contributions from its members and supporters in late July 2013 and continued to receive contributions through November 1, 2013. CP at 241 (FF 15). Over 7,000 people gave money to FDA. CP at 259 (FF 7). Most of those people were from outside the state of Washington. CP at 259 (FF 7). In total, FDA raised \$295,661.58 in cash and in-kind contributions for its fundraising campaign to support Initiative 522, \$250,036 of which was cash. CP at 241 (FF 16, 18).

FDA sent \$200,000 in contributions to the Yes on I-522 political committee from the amount it collected. CP at 241 (FF 17). FDA sent the following cash contributions to the Yes on I-522 political committee: (a) a \$50,000 contribution on August 16, 2013; (b) a \$50,000 contribution on October 15, 2013; (c) a \$50,000 contribution on October 24, 2013; (d) a \$25,000 contribution on October 25, 2013, and (e) a \$25,000 contribution on October 30, 2013. CP at 241 (FF 17).

FDA represented itself as the source of these contributions, rather than the individuals who gave the money to FDA. CP at 241 (FF 18). FDA collected and spent these contributions to support Initiative 522 without registering as a political committee in Washington. CP at 242 (FF 24).

On November 5, 2013, Initiative 522 was rejected by voters. CP at 240 (FF 10). About a week earlier, on October 28, 2013, the Attorney General's Office received citizen allegations that FDA improperly

identified itself as the source of the contributions made to the Yes on 522 committee. CP at 260 (FF 12). On November 13, 2013, eight days after the election and approximately 120 days late, FDA registered defendant Food Democracy Action! Yes on I-522 Committee to Label GMOs in Washington (FDA PAC) as a political committee. CP at 242 (FF 24).

FDA did not file any Cash Receipts Monetary Contributions Reports (Form C-3) until November 22, 2013. CP at 242 (FF 20). On that date, FDA PAC filed twelve late C-3 Reports disclosing the receipt of \$295,661.58 in contributions, including \$250,036 in monetary contributions received during the period of July 30, 2013 through October 30, 2013. CP at 241-242, 244 (FF 18-20, 37). The twelve contribution reports were filed a cumulative total of 541 days late. CP at 242 (FF 21).

FDA PAC did not file any Campaign Summary Receipts & Expenditures Reports (C-4 Reports) until January 15, 2014. CP at 242 (FF 22). On that date, FDA PAC filed five C-4 Reports a cumulative total of 491 days late, disclosing \$295,661.58. CP at 242, 244 (FF 22-23, 36-37).

In total, FDA admitted to filing 18 untimely registration and disclosure reports, all after the 2013 election. CP at 242 (FF 25-26). FDA failed to disclose the identity of the contributors to FDA PAC until November 22, 2013. It also failed to timely disclose \$295,661.58 in contributions received from those contributors. CP at 241, 243 (FF 16, 31-

32). FDA committed these violations even though the PDC makes information available to filers about what and how to file disclosure reports through the PDC website and having PDC compliance staff available to answer questions. CP at 242 (FF 27).

During 2013, the PDC's website recorded over 85,000 unique visitors. CP at 243 (FF 29). Those visitors accessed approximately 1.7 million pages on the PDC website, and of those pages, approximately one million were for the PDC contribution and expenditure database. CP at 243 (FF 29); RP V at 25-26.<sup>2</sup> Members of the public including candidates, political committee representatives, political party representatives, members of the media, and others seek disclosure information from the PDC website. CP at 243 (FF 30); RP V at 2.

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<sup>2</sup> There are six transcripts from proceedings before the trial court. They will be referred to in this brief as "RP I" for the summary judgment motion heard on April 22, 2016; "RP II" for the first Pre-Trial Conference on August 19, 2016; "RP III" for the second Pre-Trial Conference on August 26, 2016; "RP IV" for the first trial date on September 19, 2016; "RP V" for the second trial commenced on November 21, 2016; and "RP VI" for the presentation of the judgment on December 16, 2016.

## **C. Procedural History**

### **1. Complaint**

The State initiated this enforcement proceeding against FDA on December 16, 2014, in Thurston County Superior Court. In its Complaint, the State asserted five claims. CP at 9-10. The first three claims asserted that FDA violated state finance disclosure laws by: (1) failing to timely register with the PDC as a political committee; (2) failing to identify a treasurer; and (3) failing to timely file contribution and expenditure reports with the PDC. CP at 9-10. FDA admits to these three claims. FDA Br. at 9.

In the fourth claim, the State asserted that FDA's actions had "the effect of concealing the identity and source of funds used to make contributions to the Yes on 522 committee . . . ." CP at 10. Finally, the State asserted that FDA's actions were negligent and/or intentional. CP at 10.

### **2. Summary Judgment Motion**

On February 26, 2016, the State filed a motion for partial summary judgment seeking findings that: (1) FDA was required to and failed to register as a political committee subject to Washington disclosure requirements, and (2) FDA engaged in prohibited concealment when it failed to disclose the true source of the moneys it received and used to support Initiative 522. CP at 72. In briefing and in argument, FDA conceded that it failed to timely register as a political committee and also failed to

timely file contribution and expenditure reports with the PDC, but disputed the State's concealment claim. CP at 147-48.

On April 22, 2016, the trial court granted the State's partial summary judgment motion. CP at 261. In support of its ruling, the trial court made the following conclusions of law:

1. FDA violated RCW 42.17A.205 by failing to timely register . . . as a political committee in Washington within two weeks after the date it first had the expectation of receiving contributions or making expenditures in the election campaign to oppose Initiative 522, namely, July 16, 2013.
2. FDA violated RCW 42.17A.210 and RCW 42.17A.215 by failing to timely identify a) a treasurer for Defendant [FDA PAC], and b) a depository for its funds.
3. FDA violated RCW 42.17A.235, .240 and .245, by failing to regularly, timely, and electronically report the financial activities of Defendant [FDA PAC].
4. FDA violated RCW 42.17A.435 by concealing the identity and source of contributions it received that it then used to make contributions to the Yes on I-522 committee as well as the value of in-kind contributions made to the Yes on I-522 committee.
5. RCW 42.17A.435 does not require a showing that FDA intended to violate state campaign finance disclosure laws in order to establish a violation of this statute.

CP at 261. Specifically, the trial court stated:

I base my decision primarily upon the language of RCW 42.17A.435 . . . [N]ot only is it required that the failure to report the names of the individuals be in a manner as to conceal, which it was, because nobody knew who those 7,000 people were, but look at the last phrase, "or in any

other manner so as to effect concealment.” That’s the primary basis for my ruling is that listing the contributions in the name of FDA and not the names of the 7,000 people was in a manner so as to effect concealment. Anyone looking to try to understand who it was that contributed in this would not have been able to do so had this not been pressed.

RP I at 22:11-25.

### **3. August 2016 Pre-Trial Conferences**

After the trial court granted partial summary judgment, the case proceeded “on the sole issue of the appropriate penalty to be assessed against FDA for their established violations of RCW 42.17A . . .” CP at 262. Following the summary judgment decision, the trial court issued an updated case schedule order which set a pre-trial conference for August 19, 2016, with an anticipated trial date of September 19, 2016. CP at 268.

Shortly before the pre-trial conference, FDA’s counsel filed notice of his intent to withdraw from the case effective August 20, 2016. CP at 269-70. During the August 19, 2016, conference, FDA’s counsel reiterated his intent to withdraw, noting “repeated attempts to communicate with” his clients. RP II at 3:14-21. The trial court left the trial date intact but instructed FDA counsel to advise FDA that the court expected a response from FDA on its position on the September trial date. RP II at 4:21-5:6, 5:17-19, 5:25-6:6. The trial court required FDA to either submit its intentions with regard to the case in writing or to appear personally. RP II at 5:1-6. FDA did neither. RP III at 3-4.

Despite the rescheduling to provide FDA the opportunity to declare its intentions, no one appeared on behalf of FDA at the August 26, 2016 pre-trial conference. RP III at 3; RP IV at 4:7-14; *see also* RP IV at 6:14-22. During the August 26 pre-trial conference, the trial court entered a pretrial order that set deadlines for, among other things, witness lists, exhibit lists, motions in limine, and trial briefs in anticipation of the September 19, 2016 trial. RP IV at 4:7-14; CP at 273-75. In addition to setting deadlines, the pretrial order provided that “parties shall be in the court room, ready at 8:30 a.m. on the first morning of the trial [September 19, 2016].” CP at 275.

#### **4. September 19, 2016, Trial Date**

The State complied with all of the Court’s deadlines set in in August 26, 2017 pre-trial order and served FDA with all trial filings. RP IV at 4:23-5:4; CP at 184-212. On September 19, 2016, the day that the trial was set to begin, David Murphy, the president and treasurer of FDA, emailed the trial court requesting a continuance of trial. RP IV at 5:5-22; *see also* RP IV at 7:5-8:10. The State was prepared to present its case, but the trial court granted Mr. Murphy’s request and continued the trial date until November 21, 2016 (RP IV at 12:5-25), and set a deadline until October 7, 2016 for FDA to identify its new counsel. RP IV at 12:13-15; CP at 276-77. A copy of this order was delivered to Mr. Murphy and he confirmed receipt of the order. RP V at 5:6-11.

## **5. November 21, 2016 Trial**

FDA did not retain counsel, and once again nobody appeared on behalf of FDA at the November 21, 2016 trial for determining the appropriate penalty for FDA. RP V at 4:10-11. Again, FDA attempted to seek a continuance by emailing the trial judge directly with its request. RP V at 4:3-9, 4:22-5:9. The trial court did not grant the request and proceeded with the trial as scheduled. RP V at 5:10-15.

During the trial, the State presented its case on penalties and fees, requesting a civil penalty under RCW 42.17A.750 in the amount of \$487,181.58 consisting of: (1) \$180,000 penalty for the 18 late filed reports (\$10,000 each); (2) \$11,520 for the cumulative days late (\$10 per day); and (3) \$295,661.58, as the amount equal to the amount that went unreported. The State requested \$2,895.16 in investigation costs, plus an award of reasonable attorneys' fees. RP V at 7:20-52:11.

The trial court issued a penalty substantially less than the State requested. RP V at 54:19-55:22. It awarded \$295,661.58 (the amount withheld from the public), plus \$18,000 (\$1,000 for each of the 18 late filed reports), plus \$5,410 (\$5 per day for the cumulative 1082 days that the reports were late). RP V at 54:19-55:22. The total civil penalty award was \$319,281.58. CP at 245.

On December 16, 2016, the trial court considered the final judgment in the matter. CP at 216-20; RP VI at 4:8-5:8. Again, FDA failed to attend. RP VI at 3:25-4:7. The trial court agreed that reasonable attorneys' fees and costs were appropriate. RP VI at 4:8-13.

On January 6, 2017, the trial court entered its final judgment imposed a civil penalty of \$319,281.58, \$2,131.32 for the costs of the investigation, \$90,590.20 for attorneys' fees, and \$325 for trial costs. CP at 245. The final judgment contained findings of fact and conclusion of law, which included the conclusion of law that FDA had "committed multiple violations of Washington's campaign finance disclosure laws by . . . [c]oncealing the true sources of the contributions received and expenditures made in supporting Initiative 522 in violation of RCW 42.17A.435." CP at 244-45 (CL 3(d)).

FDA timely appealed this judgment. CP at 246-47.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

Appellate courts use the same inquiry as trial courts when reviewing orders on summary judgment. *Chelan County Deputy Sheriffs' Ass'n v. Chelan County*, 109 Wn.2d 282, 294, 745 P.2d 1 (1987). Summary judgment is appropriate if there are no genuine issues as to material facts and the moving party is entitled to judgment as a matter of law. *Id.* A

material fact is one that affects the outcome of the litigation. *Greater Harbor 2000 v. City of Seattle*, 132 Wn.2d 267, 279, 937 P.2d 1082 (1997). All reasonable inferences are drawn in favor of the nonmoving party. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 132, 325 P.3d 327 (2014). However, where the nonmoving party asks the court to draw an unreasonable inference, the inference will not create a material issue of fact. *Landstar Inway, Inc.*, 181 Wn. App. at 132. Summary judgment may be affirmed on any grounds supported by the record. *Ofuasia v. Smurr*, 198 Wn. App. 133, 141, 392 P.3d 1148 (2017).

There is a presumption in favor of findings of fact after a trial. *Fisher Prop., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Here, FDA does not challenge any of the trial court's post-trial findings of fact. The findings are thus verities on appeal. *LK Operating, LLC v. Collection Grp., LLC*, 181 Wn.2d 48, 73 n.11, 331 P.3d 1147 (2014). The only question for this appellate court is whether the trial court's unchallenged findings of fact support the court's conclusions of law. *Mueller v. Wells*, 185 Wn.2d 1, 9, 267 P.3d 580 (2016).

FDA's sole constitutional challenge to the penalty imposed here is reviewed *de novo*. See *City of Seattle v. Evans*, 184 Wn.2d 856, 909, 366 P.3d 906 (2015), *cert. denied sub nom. Evans v. City of Seattle, Wash.*, 137 S. Ct. 474, 196 L. Ed. 2d 384 (2016). This Court must "presume [the]

statutes are constitutional and place the burden to show unconstitutionality . . . on the challenger.” *Id.* (alteration in original) (internal quotation marks omitted). Application of the campaign finance statutes to FDA’s specific actions must be found to be unconstitutional “beyond a reasonable doubt.” *See State v. Hunley*, 175 Wn.2d 901, 908, 287 P.3d 584 (2012).

Finally, this court reviews the trial court’s assessment of civil penalties within the statutory limits for abuse of discretion. *State v. The Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 525, 398 P.3d 1271 (2017).

**B. FDA Admitted Multiple Violations of State Campaign Finance Disclosure Laws for Failing to Timely Register and Timely Report Contributions and Expenditures**

As it did before the trial court, FDA admits here that it committed multiple violations of state campaign finance disclosure laws by failing to timely register and file mandated contribution and expenditure reports until after the 2013 election had taken place. FDA Br. at 1, 2, 4, 8.

- **Admitted Reporting Violation 1:** FDA failed to file a committee registration report until November 13, 2013. CP at 242 (FF 24). FDA should have filed this report no later than July 16, 2013 (14 days from when the committee was formed). *See* RCW 42.17A.205(1). The committee registration report was filed approximately 120 days late. CP at 242 (FF 24).

- **Admitted Reporting Violations 2-13:** FDA failed to timely file 12 Form C-3 reports disclosing \$295,661.58 in contributions from its supporters until November 22, 2013. CP at 242-44 (FF 20, 32, 37). FDA should have started filing these reports at the end of July 2013. CP at 241 (FF 15). The 12 contribution reports were filed a cumulative total of 541 days late. CP at 242-43 (FF 21, 33).
- **Admitted Reporting Violations 14-18:** FDA failed to timely file 5 Form C-4 expenditure reports until January 15, 2014. CP at 242 (FF 22). These reports were due monthly starting in August 2013, more frequently closer to the general election, and then as a final report when FDA's activity concluded in December 2013. *See* RCW 42.17A.235. These five expenditure reports were filed a cumulative total of 491 days late. CP at 242, 244 (FF 23, 36).

Since FDA does not dispute these failures, the Court can quickly dispose of any argument that FDA should not have been penalized for its violations and the State was entitled to reasonable costs and fees for the bringing of this action.

**C. FDA Concealed the True Source of Almost \$300,000 in Contributions and Expenditures to Support Initiative 522**

Although FDA openly admits that it did not disclose its contributions and expenditures supporting Initiative 522 (including the

identity of the actual sources of the funds it contributed) until after the election, FDA nevertheless denies that it acted in a manner “so as to effect concealment” of those contributors in violation RCW 42.17A.435. In making this contention, FDA seeks to import a requirement into this statute that would limit the law’s application to only those persons the State could prove *intentionally* acted to hide information from the public. This requirement is not contained in the plain language of the statute. It should not be read into it.

FDA’s conduct in withholding the identity of true source of the funding for contributions to Initiative 522 fits within the plain language of RCW 42.17A.435. The same applies to its expenditures. Its conduct had the effect of concealing contributions and expenditures under the law. The trial court judgment should be affirmed.

**1. RCW 42.17A.435 Does Not Require the State to Prove That FDA Intended to Violate the Statute**

Contrary to FDA’s claim, RCW 42.17A.435 does not require the State to prove that FDA knowingly violated the law. Rather, the pivotal conduct is any action that *has the effect* of concealing the “identity of the source of the contribution.” RCW 42.17A.435 provides:

No contribution[s] shall be made and no expenditure shall be incurred, directly or indirectly, . . . 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* (emphasis added).

Under this language, the State satisfied its burden when it proved that the “effect” of FDA’s actions resulted in concealing the true source of contributions. FDA does not (and cannot) dispute that by making contributions to the Yes on I-522 political committee in its own name, rather than in the names of supporters from whom it solicited the money, the “effect” was to conceal the identity of the true sources of those contributions.

FDA concedes that this Court need look no further than the plain language of RCW 42.17A.435 to decide whether FDA violated the statute. FDA Br. at 18. If the statute’s meaning is plain on its face, then a court must give effect to that plain meaning as an expression of the legislative’s intent. *In re Estate of Haviland*, 177 Wn.2d 68, 76, 301 P.3d 31 (2013).<sup>3</sup> Plain meaning is “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Tingey v. Haisch*, 159 Wn.3d 652, 657, 152 P.2d 1020 (2007); *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002). The courts do not employ canons of

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<sup>3</sup> Laws such as RCW 42.17A enacted through the initiative process are construed in the same manner. See *Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 410 n.3, 341 P.3d 953 (2015).

statutory construction if the statutory language is unambiguous. *Griffin v. Thurston County*, 165 Wn.2d 50, 55, 196 P.3d 141 (2008). Nevertheless, FDA would have this Court look beyond the plain language of the statute to interject an intent requirement that does not exist.

If proof of a defendant’s subjective intent was required to show a violation of RCW 42.17A.435, this requirement would have been set forth in this section as it is set forth elsewhere in the campaign finance disclosure statute. For example, proof of intentional misconduct is specifically required to treble a judgment, pursuant to RCW 42.17A.765(5), which provides that “[i]f the violation is found to have been *intentional*, the amount of the judgment . . . may be trebled.” (Emphasis added.) “Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *Am. Legion Post 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). Only by finding no similar intent is required under RCW 42.17A.435 can one harmonize these two related statutory provisions.

Further, FDA’s reference to the definition of “concealment” from *Black’s Law Dictionary*—“the act of preventing disclosure or refraining from disclosing”—also does not support inserting an intentionality

requirement into RCW 42.17A.435.<sup>4</sup> FDA Br. at 19. As an initial matter, the statute must be read as whole, not by taking a single word in isolation. “All words must be read in the context of the statute in which they appear, not in isolation or subject to all possible meanings found in a dictionary.” *State v. Lilyblad*, 163 Wn.2d 1, 9, 177 P.3d 686 (2008). When read as whole, the language of the statute prohibits all conduct that effects concealment of the true sources of contributions, which is precisely what occurred here.

In any event, the trial court’s ruling fully comports with the definition of concealment contained in *Black’s Law Dictionary* by finding that FDA *did* act to prevent and refrain from disclosing the identities of its contributors. These acts included (1) asking its members and supporters for money to support Initiative 522; (2) accepting money from its members and supporters for the express purpose of supporting Initiative 522; (3) making contributions to the Yes on I-522 committee using its own name instead of the people from whom it received the money; and (4) withholding the names of the true contributors by failing to file required contribution reports until

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<sup>4</sup> FDA provides two other citations on the meaning of concealment that are both misleading and inapplicable here. *See* FDA Br. at 19. The citation to the Restatement (Second) of Contracts relates to concealment in a specific context where a person’s actions that are intended to prevent another from learning a fact are therefore treated as an assertion that the fact does not exist. Restatement (Second) of Contracts §160 (Am. Law Inst. 1979). And FDA’s citation to a law review article is similarly inapposite since the cited quote is contained in a discussion of fraudulent concealment, which, as discussed below, is a very different legal concept from that at issue here. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 Geo. L.J. 449, 461 (2012).

after the 2013 election. CP at 241-44. These are acts admitted by FDA. These “acts” admitted by FDA, taken together, also constitute concealment in violation of RCW 42.17A.435.

Next, FDA argues that mistakes should not be treated as violations of RCW 42.17A.435. It incorrectly asserts that the purpose of the campaign finance disclosure statute is effectuated by only imposing liability on “*affirmative conduct* intended to or known to be likely to obscure material facts.” FDA Br. at 23-24. In making this contention, FDA’s attempt to narrow RCW 42.17A.435 to intentional conduct is directly at odds with the liberal construction of the statute mandated by voters:

The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns and lobbying, and the financial affairs of elected officials and candidates, and full access to public records so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected.

RCW 42.17A.001. Finding that FDA violated RCW 42.17A.435 is wholly consistent with the statute’s purpose of providing the public with all information with respect to who has contributed to a political campaign.

Furthermore, FDA’s claim that prior Washington cases supports its claim that the State must prove intent to satisfy its burden is also false. FDA Br. at 20-21. In fact, no Washington court has limited RCW 42.17A.435 in

this manner. To the contrary, Washington courts have declined to construe “intent” as a required element for finding conduct to have deceived the public where no such requirement is set forth in the statute. For example, to demonstrate an action is “unfair or deceptive” under the state Consumer Protection Act, RCW 19.86, courts have held that a demonstration of intent is not required if the action has the capacity to deceive the purchasing public. *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 759, 649 P.2d 828 (1982).

FDA’s reliance on *State ex rel. Pub. Disclosure Comm’n v. Permanent Offense*, 136 Wn. App. 277, 150 P.3d 568 (2006), *review denied*, 162 Wn.2d 1003 (2007), is similarly misplaced. Nothing in the *Permanent Offense* opinion suggests an intentionality requirement for RCW 42.17A.435 violations. In *Permanent Offense*, the State brought claims against the officers of a political committee who formed a for-profit corporation to receive contributed funds in a manner that concealed the ultimate recipient of the expenditures. *Id.* at 280. In finding the officers liable under former RCW 42.17.120 (re-codified as RCW 42.17A.435), the *Permanent Offense* court never held that proof of intent was required. *Id.* at 289. The court instead pointed to the statutory provision’s “broad” language as prohibiting persons from acting in “any” manner “so as to effect of concealment, especially considering the stated policy of interpreting the

statute liberally.” *Id.* at 288-89 (“[T]he State has a substantial interest in promoting integrity and preventing concealment that could harm the public and mislead voters.” *Id.* at 284).

Likewise, FDA’s reliance on *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007), is misguided. In *Conte*, the county prosecutor charged criminal defendants with violating RCW 40.16.030, a statute which specifically requires a showing of knowledge.<sup>5</sup> *Conte*, 159 Wn. 2d at 801. There, the defendants invoked RCW 42.17A only to argue it barred their prosecution under RCW 40.16.030. *Conte*, 159 Wn. 2d at 805-07. The court did not apply former RCW 42.17.120, nor did it discuss the breadth of the term “concealment” as used in the statute. Thus, *Conte* offers no support to FDA’s attempt to impose intent into RCW 42.17A.435 in contravention of the plain language of the statute.

Here, as previously argued and proved, FDA’s conduct concealed the fact that the source of its contributions was its members and supporters. Accordingly, FDA violated RCW 42.17A.435 by acting in a manner that resulted in concealment of those contributors from the public. FDA does

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<sup>5</sup> RCW 40.16.030: Offering false instrument for filing or record. Every person who shall *knowingly* procure or offer any false or forged instrument to be filed, registered, or recorded in any public office, which instrument, if genuine, might be filed, registered or recorded in such office under any law of this state or of the United States, is guilty of a class C felony and shall be punished by imprisonment in a state correctional facility for not more than five years, or by a fine of not more than five thousand dollars, or by both. (italics emphasis added).

not (and cannot) provide any legal basis for imposing a intentionality restriction that does not appear in the statute, and runs contrary to the stated policy mandating that state campaign finance disclosure laws be interpreted liberally.

**2. FDA's Actions Can and Did Violate Both State Disclosure Requirements and the Concealment Statute When It Hid the True Identity of the Sources of Contributions It Received and Made**

FDA argues without support that its actions cannot violate both the registration and reporting obligations of RCW 42.17A and the concealment prohibition of RCW 42.17A.435 in the absence of proof of intent. FDA Br. at 21-22. In making this claim, FDA contends allowing both violations here would mean that *all* persons who failed to timely register and properly report their contributions would be automatically liable for concealment. FDA Br. at 21-22. This argument fundamentally misconstrues the separate obligations set out in two separate statutes.

As stated above, FDA admits to violating RCW 42.17A.205 by failing to timely register as a political committee, and then RCW 42.17A.235, .240, and .245 by failing to regularly, timely, and electronically report the financial activities of its political committee. Separate and apart from those violations, a political committee may also conceal the true source of its contributions in violation of RCW 42.17A.435.

In this instance, after FDA solicited funds from contributors to support Initiative 522, it took the affirmative step of transferring the money it received from its solicitations to the Yes on I-522 political committee. CP at 149. By *both* choosing to make those contributions in its own name and failing to disclose its contributing members, FDA acted in a manner having the effect of concealment as defined by the statute. Had FDA sent its contributions to the Yes on I-522 political committee in a manner that disclosed its members and supporters as the true source of those contributions from the outset, it still could be charged with failing to timely register and report as a political committee, but not with acting in manner so as to effect concealment. Contrary to FDA’s claim, RCW 42.17A.435 is not duplicative, but instead constitutes a separate violation applicable in those instances when a person’s conduct has the effect of concealing true identity of contributors as occurred here.

**3. “Fraudulent Concealment” Cases Cited by FDA Have No Relevance to a RCW 42.17A.435 Claim**

FDA’s reliance on plainly inapposite “fraudulent concealment” cases underscores the lack of legal merit for its arguments that RCW 42.17A.435 is limited to knowing violations. FDA Br. at 20-21. “Fraudulent concealment” is a tort claim generally asserted for construction defects or to seek an extension of a statute of limitations when the defendant

alone is alleged to have been aware of a defect or wrongdoing. *See* 33 *Washington Practice: Construction Law Manual* § 16.6 (2017-18 ed.); 25 *Washington Practice: Contract Law and Practice* § 16:20 (3d ed.). The distinction between the *term* “concealment” and the *claim* of “fraudulent concealment” is emphasized by their respective definitions in *Black’s Law Dictionary*. *Black’s* definition of *concealment* (set forth above) does not require intent, while *fraudulent concealment* is defined as “[t]he affirmative suppression or hiding, with the intent to deceive or defraud, of a material fact . . .” *Black’s Law Dictionary* 349 (10th ed. 2014). The term “concealment” contained in RCW 42.17A.435 has no relationship to the claim of “fraudulent concealment” and FDA is wrong to conflate these two entirely different legal concepts.

#### **4. Conclusion**

FDA concealed the true identity of the source of funds that made up its contributions to the Yes on 522 political committee. The Court should affirm the trial court’s determination that FDA violated RCW 42.17A.435.

#### **D. FDA Waived Any Challenge to the Penalties Imposed Against It by Failing to Attend the Trial, and Even if This Argument Were Allowed, the Penalties Imposed by the Trial Court Were Appropriate**

FDA failed to appear at trial despite a number of opportunities to ensure its attendance. Now it seeks to overturn the penalty it failed to contest

at trial. Even though the trial court imposed civil penalties in accordance with the express terms of the applicable statute (RCW 42.17A.750) and for substantially less than the amount permitted by statute or sought by the State, FDA contends that the trial court erred in imposing the civil penalties. FDA Br. at 25-28.

FDA failed to attend the trial specifically held to determine the amount of the penalties, even after it had been postponed to accommodate FDA's last minute requests and failure to communicate with counsel. As a result, FDA waived its challenge to these penalties. Further, even if this argument had not been waived, the contention that the civil penalties imposed by trial court were impermissibly excessive is baseless.

**1. FDA Waived Any Challenge to the Amount of Penalties by Not Attending the Trial That Was Set Specifically to Determine Penalties and of Which It Had Notice**

Under RAP 2.5, the appellate court may refuse to review any claim of error which was not raised at trial. "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Wash. Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013). The purpose behind this rule is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013).

Here, FDA had repeated notices of the trial dates. *See, e.g.*, RP IV at 6:14:-7:4; CP at 194-201; 202-04; 205-07; 208-10; 211-12; 269-71. And yet, it failed to attend the trial and therefore failed to raise any objection to the State's request for a civil penalty. The trial was dedicated specifically to the issue of penalties and was first scheduled for September 19, 2016. CP at 273. FDA did not appear in court for the September 19, 2016 trial. CP at 275. Nevertheless, the trial court agreed to postpone the trial more than two months, until November 21, 2016, to accommodate an email request made by the President of FDA for additional time to retain counsel. CP at 277; RP IV at 5:5-22. Despite being provided this additional time, FDA again failed to appear at the rescheduled trial for determining penalties on November 21, 2016. RP V at 3-5. Through its own actions, FDA elected to not make any arguments on the issue of penalties to the trial court.

Accordingly, FDA's argument that the civil penalties were excessive has been waived and should not be considered in this appeal. *See, e.g., Bour v. Johnson*, 80 Wn. App. 643, 650, 910 P.2d 548 (1996) (failure to raise defense in the trial court waived review in the appellate court); *Mangat v. Snohomish County*, 176 Wn. App. 324, 334, 308 P.3d 786 (2013) (declining to consider arguments made for the first time on appeal that were not made to the trial court); *Wells v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 100 Wn. App. 657, 681, 997 P.2d 405 (2009) (same).

**2. Even if FDA Were Permitted to Challenge the Penalties for the First Time on Appeal, FDA’s Penalties Were Appropriate and Not Excessive**

Even if this Court were to allow FDA to object to the penalties assessed against it despite having failed to attend the trial that was set on this very issue, FDA’s contention that the penalties were “excessive” has no legal merit. To the contrary, the penalties assessed against FDA were well below the amount expressly authorized by statute for FDA’s multiple violations of state campaign disclosure laws. This court reviews the trial court’s assessment of civil penalties within the statutory limits for abuse of discretion. *State v. The Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 525, 398 P.3d 1271 (2017).

The trial court’s options for assessing a penalty against FDA are set out in RCW 42.17A.750. Under this section, the trial court was authorized impose *one or more* of the following remedies for FDA’s violations:

(1) a “per violation” penalty of not more than \$10,000;

(2) a penalty equal to \$10 per day for every day a required report is late; and

(3) a penalty equal to the amount that went undisclosed.

RCW 42.17A.750(1)(c), (d), (f). In addition to these penalties, the trial court was also authorized to award “to the state all costs of investigation and trial, including reasonable attorneys’ fees to be fixed by the court.” RCW 42.17A.765(5).

Based on FDA’s multiple violations that the State proved and FDA admitted, the State requested civil penalties totaling \$487,181.58: \$10,000 for each of the 18 missing report (\$180,000); \$10 per day for the days late of each report (\$11,520), and \$295,661.58 as the amount that went unreported. RP V at 8:17-9:14; CP at 197-99.

In addition to these penalties, the State requested reimbursement for \$2,895.16 in investigation costs for the Public Disclosure Commission and \$93,810.36 for its reasonable attorneys’ fees and trial costs in accordance RCW 42.17A.765(5). CP at 199, 216-20.

Although the penalties requested by the State were expressly authorized by the applicable statute, the trial court exercised its discretion to impose penalties that were *substantially less* than the State’s request. First, the trial court imposed only a \$1,000 penalty for each late report, rather than the \$10,000 permitted by the statute. CP at 245. This resulted in a penalty of \$18,000 for the 18 late filed reports instead of the \$180,000 authorized and requested by the State. CP at 245. In addition, the trial court imposed only a \$5 penalty for each of the cumulative days that the reports

were filed late, rather than the \$10 per day permitted by the statute and requested by the State. CP at 245. This resulted in a penalty of \$5,620 for the days that the reports were filed late. CP at 245. It did approve the amount of \$295,661.58 as the amount unreported.

Based on these reductions, the trial court assessed a total penalty of \$319,281.58 (in addition to reimbursing the State for its costs and fees), which is substantially less than \$478,181.58 authorized by the RCW 42.17A.750 and requested by the State. CP at 245.

In its opening brief, FDA inaccurately claims that the trial court “offered no explanation” and “no rationale” for the penalty that it assessed. FDA Br. at 27. FDA also asserts that penalty is “excessive,” “arbitrary and capricious,” and “double-counts” its admitted failure to timely file reports. FDA BR. at 27-28. FDA’s contentions have no factual or legal merit.

As set forth above, the penalties assessed by the trial court against FDA are those expressly provided for in RCW 42.17A.750. The largest portion of the penalty represents the value of contributions FDA received that were concealed by FDA’s misconduct until after the election. CP at 243-45 (FF 31-32, 37) (CL 3(d)); RCW 42.17A.750(1)(f). FDA concedes that \$295,661.58 is the amount of contributions that it failed to timely disclose in violation of state disclosure laws. FDA Br. at 1, 2, 4, 8, 27.

RCW 42.17A.750(1)(f) expressly provides that the trial court may assess a civil penalty “equivalent to the amount not reported as required.”

Contrary to the FDA’s claim, the trial court’s findings of fact and conclusions of law provide more than sufficient rationale for this penalty. The trial court’s conclusions of law set forth the multiple violations FDA itself admitted to, as well as the conclusion that it “conceal[ed] the true sources of the contributions and expenditures made in supporting Initiative 522 in violation of RCW 42.17A.435.” CP at 245 (CL 3(d)).

FDA has not established that the trial court acted arbitrarily in setting a penalty within the statutory limitations. To the contrary, the trial court followed the formulation of the applicable statute and assessed a penalty far less than the amount authorized. Further, the trial court did not “double count” the late-filed reports as claimed by FDA (FDA Br. at 28), but rather counted the number of late reports (18) and then assessed for the number of days late to arrive at the \$23,620 portion of the penalty. FDA fails to support its argument that \$1000 per late report is excessive. FDA Br. at 28. That is because it is not excessive.

FDA fails to demonstrate that the trial court abused its discretion in assessing its penalty against FDA for its multiple violations of the state campaign finance disclosure laws. It should be affirmed.

**E. FDA Waived Any Constitutional Challenge to the Penalties Imposed Against It by Failing to Attend the Trial, And Even if This Argument Was Allowed, the Penalties Imposed Do Not Violate the Eighth Amendment to the U.S. Constitution**

The trial court's \$319,281.58 penalty against FDA is within statutory limits and based on uncontroverted findings that FDA violated state law. Also, if the Court were to consider FDA's constitutional claim, the penalty also comports with the U.S. Constitution because it is not "grossly disproportionate" to FDA's misconduct.

And yet, for the first time on appeal, FDA contends that the penalties imposed violate the excessive fines provision of the Eighth Amendment.<sup>6</sup> FDA Br. at 28-32. Because FDA failed to raise this constitutional argument (or any issue with respect to the penalties) with the trial court, and because the penalties do not constitute a "manifest error," this argument has been waived and cannot be raised for the first time on appeal. Further, even if the Court were to consider FDA's arguments, this constitutional claim has no legal merit since the penalties were not excessive, but were instead entirely appropriate in light of FDA's multiple, significant, and admitted violations of state campaign finance disclosure laws.

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<sup>6</sup> FDA makes a passing reference to article I, section 14 of the State Constitution, FDA Br. at 16, but provides no argument as to its application. The Court need not consider it. *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (court does not review constitutional issues unsupported by considered argument).

**1. FDA Waived Its Constitutional Challenge to the Penalties by Failing To Raise the Issue before the Trial Court**

FDA's contention that the penalties are unconstitutional was not raised before the trial court. FDA does not dispute this fact, but instead contends that the argument should still be considered based on RAP 2.5(a)(3), which permits a party to raise a claim of a "manifest error affecting a constitutional right" for the first time on appeal. Because the trial court's ruling on penalties was proper and not a "manifest error," RAP 2.5(a)(3) has no application to FDA's argument and FDA's constitutional claim should be deemed waived and not considered for this appeal.

Generally, a party cannot raise new arguments on appeal. *State v. WWJ, Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). The exception set out in RAP 2.5(a)(3) is narrowly construed by courts to apply only in circumstances where there has been a "manifest error affecting a constitutional right." *WWJ, Corp.*, 138 Wn. 2d at 601. While FDA purports to assert a constitutional claim, the Washington Supreme Court has noted that "RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal." *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); *see also State v. Knutz*, 161 Wn. App. 395, 406, 253 P.3d 437 (2011) ("[c]haracterizing an alleged error as a violation of a

constitutional right . . . does not automatically meet the RAP 2.5(a)(3) threshold”). To fall within this narrow exception, the party seeking review must demonstrate that the error sought to be reviewed is “manifest.” *Lynn*, 67 Wn. App. at 344 (“[I]t is important that ‘manifest’ be a meaningful and operational screening device if we are to preserve the integrity of the trial and reduce unnecessary appeals.”).

Under this analysis, “an alleged error is manifest only if it results in a concrete detriment to the claimant’s constitutional rights, *and* the claimed error rests upon a plausible argument that is supported by the record.” *WWJ, Corp.*, 138 Wn.2d at 603. “To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding.” *Id.* at 603. “If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted.” *Id.* at 602.

As detailed below, FDA’s constitutional challenge to the penalties as excessive being raised for first time in the appeal has no legal or factual basis in the record. Indeed, the trial record includes no factual submissions or legal arguments from FDA regarding the penalties because FDA did not attend the trial specifically dedicated to determining the appropriate

penalties.<sup>7</sup> To the contrary, the State presented evidence supporting its penalty request. RP V at 11-52. The trial court then issued findings of fact supporting, among other things, its conclusions that FDA committed 18 violations for late disclosures totaling 1,152 days, that no disclosures were made by FDA until after the 2013 election had taken place, that FDA had concealed true sources of the contributions received and expenditures made, that the undisclosed amount included \$295,661.58 in contributions, that FDA had prior experience with ballot measures in other states, and that the PDC website providing the campaign disclosure information to the public had more than 85,000 unique visitors in 2013. CP at 241-44. While FDA contends that its multiple violations were unintentional or a mistake (CP at 147-48), the trial court made no such factual finding and no evidence supporting that contention was presented at the trial.

FDA also failed to refute evidence relating to the extent of public harm caused by its conduct. The State provided evidence and the trial court found that the PDC website providing contribution and expenditure

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<sup>7</sup> In its opening brief, FDA makes the suggestion that its failure to attend the trial should be a factor *favoring* allowing it to raise arguments relating to the penalty for the first time on appeal. FDA Br. at 5, 15 (“FDA was not even *present* at the trial and post-trial proceedings”; “[W]hatever the merits of FDA’s inability to participate [at the trial], it did not have the opportunity to assert . . .”). FDA then fails to provide this court with information on the circumstances that led to its failure to attend the trial. However, as detailed herein, FDA was provided multiple opportunities to appear and make its arguments at the trial specifically scheduled (and re-scheduled for the benefit of FDA) to address the penalty. It did not do so. It should not now be allowed to raise issues that it had the opportunity to do earlier.

information had more than 85,000 unique visitor in 2013, who accessed approximately one million pages from the contribution and expenditure database. CP at 243 (FF 29); *see also WWJ, Corp.*, 138 Wn.2d at 605-06 (affirming appellate court refusal to review Eighth Amendment excessive fine contention because record lacked data needed to determine full extent of harm caused by misconduct).

As in the *WWJ, Corp.* case, where the Washington Supreme Court affirmed the appellate court's refusal to consider an Eighth Amendment excessive fine claim that was raised for the first time on appeal based on the "manifest error" requirement, FDA's similar claim should also be rejected because its merits cannot be supported by the trial court record as it exists.

**2. Even if FDA Were Permitted Challenge the Penalties on Appeal Based on the Eighth Amendment, FDA's Penalty is Not Excessive**

In the event that this Court decides to review FDA's constitutional challenge to the penalties assessed against it, the trial court's ruling on penalties was proper and should be affirmed. Many options exist for imposing a penalty under RCW 42.17A. The penalty here appropriately reflects the nature of its misconduct and is within the statutory framework for penalties. FDA concealed the sources of nearly \$300,000 in contributions, failed to register as a political committee and report as the law requirements, and withheld that information from the public at the very

time it needed it, before the 2013 election.

“A fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense, and (2) the payment is grossly disproportionate to the gravity of the defendant’s offense.” *United States v. Mackby*, 261 F.3d 821, 829 (9th Cir. 2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 327-28, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)). While it is uncertain whether FDA’s civil penalty qualifies as a “punishment for an offense,” the penalty is not grossly disproportionate to FDA’s conduct.<sup>8</sup>

To determine whether a penalty is grossly disproportionate, courts consider a number of factors, including (1) the nature and extent of the violation, (2) whether the violation was related to other illegal activities, (3) whether other penalties may be imposed for the violation, and (4) the extent of the harm caused. *See, e.g., United States v. \$100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004). A proper consideration of these factors supports affirming FDA’s penalty.

In its opening brief, FDA attempts to minimize its conduct as merely the “failure to file certain reports.” FDA Br. at 29. Quite to the contrary,

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<sup>8</sup> In *WWJ, Corp.*, the Washington Supreme Court declined to rule on whether the Eighth Amendment excessive fine limitation applies to civil penalties, but rather “assumed” that it did only for purposes of determining whether the constitutional claim was “manifest” under RAP 2.5(a)(3). *Id.* at 604.

FDA failed to timely file *all* its reports that were due before the 2013 election. And FDA's penalty reflects more than its failure to timely register a political committee and to report the contributions and expenditures. FDA's penalty is based on the trial court's conclusion that FDA concealed the true source of nearly \$300,000 in contributions it received following its solicitations for such money to support I-522. This information was concealed from Washington voters until after the election. CP at 243-45 (FF 31-32, 37), (CL 3(d)). As stated above, Washington law requires disclosure of all funds FDA received, regardless of whether it ultimately gave all funds received to the Yes on I-522 committee. RCW 42.17A.235, .240.

FDA's violations are thus markedly different from those that were at issue in *Bajakajian*. That case involved a single isolated transaction in which a defendant attempted to leave the country without reporting currency he was carrying and the harm was deemed to have affected *only one party*—the government—in a relatively minor way. *Bajakajian*, 524 U.S. at 338-39. By contrast, FDA admitted to not filing all required reports and concealed the identity of its contributors from the public until after the election causing injury to the public by undermining their right to information relevant to their vote. RCW 42.17A.001 ("The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns . . . so as to

assure continuing public confidence of fairness of elections . . . and so as to assure that the public interest will be fully protected.”)

With regard to the third factor, courts look to “other penalties that the Legislature . . . authorized” and the “maximum penalties that could have been imposed.” *\$100,348.00 in U.S. Currency*, 354 F.3d at 1122; *see also Bajakajian*, 524 U.S. at 336 (“judgments about the appropriate punishment for an offense belong in the first instance to the legislature”). Where a penalty is less than authorized by statute, it is extremely unlikely to violate the Eighth Amendment. *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) (“No matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.”).<sup>9</sup> Here, FDA’s penalty of \$319,281.58 is well below the maximum penalty statutorily allowed. Because FDA’s penalty was within the statutory bounds, it should not be deemed “excessive” for purposes of the Eighth Amendment.<sup>10</sup> *Id.*

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<sup>9</sup> *See also Grid Radio v. FCC*, 278 F.3d 1314, 1322 (D.C. Cir. 2002) (statutorily authorized penalty was neither indefinite, unlimited, or excessive in view of violation); *Combat Veterans For Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 19 (D.D.C. 2013) (fine in compliance with statutory guidelines does not offend the Excessive Fines Clause).

<sup>10</sup> The only case cited by FDA on this issue actually supports the State’s position. In *United States v. Beecroft*, 825 F.3d 991, 1001-02 (9th Cir. 2016), the court found that forfeitures in amounts less than the allowable fine were not excessive, while single forfeiture that was more than 100 times greater than the maximum allowable fine was excessive. As stated, the total amount of the penalty imposed on FDA for its misconduct

With respect to the fourth factor, FDA contends that the harm to the State from its violations was minimal because “FDA’s contributions in its own name did not mislead voters” and that the identities of its contributors “would have disclosed nothing of relevance to the voters.” FDA Br. at 30. FDA, however, provides no support for these assertions and, as noted, failed to present any evidence to trial court relevant to the public harm caused by its misconduct. The undisputed fact is that FDA’s actions prevented Washington voters from knowing the identity of thousands of persons who were spending money to support Initiative 522, one very important to Washington voters. The State provided evidence and the trial court found that the PDC website providing contribution and expenditure information had extensive traffic in 2013. CP at 243 (FF 29); RP V at 25-27. FDA’s argument that its disclosures were not significant stands at odds to the importance that the people of Washington place on an open and transparent electoral system—an importance that the courts have repeatedly recognized. *See, e.g., Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010). Washington disclosure laws, including its prohibition on concealment, provide voters important information about who is funding efforts to sway their vote. *Id.* at 1005.

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was far less than allowable under law. Contrary to FDA’s suggestion, the State has shown that the penalty imposed on FDA was fully consistent with the requirements of the Eighth Amendment.

Finally, FDA's claims that its penalty is excessive because there was no evidence that it "used deceit to influence the outcome of the vote." FDA Br. at 31. This is an unduly narrow reading of Washington's campaign finance disclosure laws. These laws target anyone who fails to disclose their contributions or expenditures to support or oppose a ballot measure, not just those who commit intentional violations. The voters enacting RCW 42.17A intended for "campaign . . . contributions and expenditures [to] be fully disclosed to the public" and "secrecy [ ] to be avoided." RCW 42.17A.001. FDA's conduct violated these fundamental principles of the State's campaign finance laws and the penalty imposed by the trial court was based on the formula expressly set out in those same laws for this misconduct.<sup>11</sup>

In sum, FDA's civil penalty is proportional to the gravity of FDA's offenses. The \$319,281.58 penalty accurately reflects the nature and extent of FDA's multiple violations, is below the maximum amount authorized by law, and is reasonable in light of FDA's conduct, the dollar amounts involved, and the harm that FDA caused the public during the 2013 election.

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<sup>11</sup> Contrary to FDA's false claim, the penalty imposed on it did not "target[] constitutionally protected speech." FDA Br. at 30. Nothing in the law restricted FDA from contributing to the Yes in 522 committee. Rather, FDA was penalized for failing to disclose its financial activities and concealing the true financial sources of its contributions, thereby denying the public's right to know the identities of those supporting Initiative 522.

**F. Attorney Fees and Costs Should Be Awarded to the State for This Appeal**

In the event the Court rejects FDA's appeal and affirms the trial court award, the State requests the award of attorney fees and costs associated with its work on this case on appeal. *See* RCW 42.17A.765(5); *Permanent Offense*, 136 Wn. App. 295.

**V. CONCLUSION**

For all of these reasons, the trial court's penalty and award of costs and fees should be affirmed. The trial court correctly ruled that FDA's conduct of failing to disclose the identity of its contributors supporting Initiative 522 had the effect of concealing those contributors and their contributions from the public in violation of Washington law.

Furthermore, while FDA waived any objection to the penalty that was assessed by the trial court by choosing not to attend the trial, the record makes clear that the trial court also acted appropriately and well within its discretion in assessing its penalty against FDA. The penalty for FDA's misconduct was based the formulation expressly set forth in the applicable statute, in an amount that was substantially less than what is authorized by that statute, and it was proportionate to the number of violations, the dollar amounts involved, and the duration of FDA's delay in making the required disclosures after the election had already taken place.

Finally, this court should affirm the award of attorney fees and costs to the State by the trial court and award the State its reasonable attorney fees and costs on appeal. RCW 42.17A.765(5); RAP 18.1.

RESPECTFULLY SUBMITTED this 8th day of December 2017.

ROBERT W. FERGUSON  
*Attorney General*



LINDA A. DALTON, WSBA 15467  
*Senior Assistant Attorney General*

S. TODD SIPE, WSBA 23203  
*Assistant Attorney General*

Office ID 91087  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
360-753-6200

**Certificate of Service**

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via regular United States Postal Service mail and electronic mail, a true and correct copy of the Brief of Respondent State of Washington, upon the following:

Kenneth Kagan  
Law Office of Kenneth S. Kagan, PLLC  
600 First Avenue, Suite 512  
Seattle, Washington 98104-2253  
(206) 264-1590

DATED this 8th day of December 2017, at Olympia, Washington.

  
Connie Chapman

**OFFICE OF THE ATTORNEY GENERAL CAMPAIGN FINANCE UNIT**

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