No. 96604-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner and Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent and Petitioner.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent and Petitioner,

v.

ROBERT W. FERGUSON, Attorney General of the State of Washington, in his Official Capacity,

Petitioner and Respondent.

GMA'S ANSWER TO MEMORANDUM OF *AMICUS CURIAE* INSTITUTE FOR FREE SPEECH

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

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

Attorneys for Grocery Manufacturers Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

ANSWER TO *AMICUS* MEMORANDUM OF
THE INSTITUTE FOR FREE SPEECH

The Institute for Free Speech (the "Institute") asks this Court to examine the penalties imposed in *State v. Grocery Mfrs. Ass'n,* 5 Wn. App. 2d 169, 425 P.3d 927 (2018), and to grant review in order to properly apply "exacting scrutiny" to the State's attempt to punish political speech. GMA offers this brief response.

A. Large fines raise serious constitutional issues.

As the U.S. Supreme Court recently held, the Eighth Amendment's Excessive Fines clause applies to the states just as it does to the federal government. *Timbs v. Indiana,* ___ U.S. ___, ___ S. Ct. 2d ___, No. 17-1091 (Feb. 20, 2019). Writing for the Court, Justice Ginsburg stated:

> For good reason, the protection against excessive fines has been a constant shield throughout Anglo-American history: Exorbitant tolls undermine other constitutional liberties. Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies . . . . Even absent a political motive, fines may be employed "in a measure out of accord with the penal goals of retribution and deterrence," for "fines are a source of revenue," while other forms of punishment "cost a State money."

Slip op. at 6 (internal citations omitted).

GMA argued in opposing the State's petition for review that the doctrine of constitutional avoidance, together with the plain language of the statute and relevant case law, supports the Court of Appeals' ruling on

punitive damages. But as the Institute points out, the Court of Appeals left undisturbed the trial court's $6 million fine, so large as to be ruinous for most organizations. Moreover, a $6 million fine bears no relationship to any potential harm to the electoral process. The electorate always knew about the economic interests of those opposing I-522.[1] The State did not try to demonstrate otherwise. Regardless, any penalty that is finally assessed in this case must be evaluated under the Eighth Amendment's Excessive Fines Clause. *See* Answer to State's Petition for Review at 20 n.17.

B. Exacting scrutiny requires courts to examine the benefits and burdens of the State's regulation as applied.

The Institute argues that the specter of heavy fines, and the chilling effect that they will have on protected speech, must be weighed in the balance when courts apply constitutionally mandated "exacting scrutiny" to the State's disclosure requirements. GMA believes, and case law supports, that "exacting scrutiny" requires actually looking at the marginal benefit of additional disclosure versus the marginal cost to free expression resulting from acceptance of the State's position. In this case the marginal

[1] Every ad run by "No on I-522" listed its prime sponsors as Grocery Manufacturers Association, Monsanto, and DuPont. *See* https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer_id=NO522%20%20507&election_year=2013 (last accessed Feb. 27, 2019); *see also* CP 788 (proponents of I-522 identified Monsanto, GMA, and DuPont as their chief adversaries).

cost far outweighs the marginal benefit, and this is true even if the Court ignores the penalty that the trial court imposed upon GMA and the chilling effect of such draconian penalties upon it and other would-be speakers.[2]

Consider first the marginal benefit to be gained from requiring disclosure of the members who funded GMA's speech. The State failed to explain, still less offer any evidence to prove, how voters would ever know more about the interests of those seeking to influence their votes than is obvious from the name "Grocery Manufacturers Association."[3] In *Wash. Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000), the court held that the State's interest in disclosing campaign finance information to voters is "insufficient to override the First Amendment burden imposed by" a statute that required disclosure of paid signature gatherers' names and addresses:

> Although Washington has expressed its interest in full disclosure as a means to educate voters and promote confidence in government, . . . there is no logical explanation of how a voter who signs an initiative petition would be educated in any meaningful way by learning the circulator's name or address . . . nor how that disclosure

[2] According to the State, compelled disclosure is justified because more information is always better than less information. This argument not only is circular; it also reduces "exacting scrutiny" to no scrutiny at all.

[3] As the Ninth Circuit observed, "'knowing who backs or opposes a given initiative' will give voters 'a pretty good idea of who stands to benefit from the legislation.'" *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1007 (9th Cir. 2010), quoting *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1106 (9th Cir. 2003).

> would assist a voter in judging the credibility of individual petition circulators.

Id. at 1139.

Next, consider the cost. Undisputed evidence shows that compelled disclosure threatened the safety and the business of GMA's members. The trial court found that member companies "received negative responses from the public . . ., including threats and boycotts." CP 4053.[4] *See also* CP 3188 (trial court cites "death threats"), 1540 (testimony about death threats), 2742 (new threat to GMA and its counsel); RP 180-81 (continuing boycotts of member companies), 207 (retaliation), 690-91 (threats and attacks). "There can be no doubt that the compelled disclosure of this information chills political speech." *Rippie*, 213 F.3d at 1137.

DATED this 5th day of March 2019.

Respectfully submitted,

K&L GATES LLP

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

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

Attorneys for GMA

[4] This finding is a verity on appeal.

K&L GATES LLP

March 05, 2019 - 10:53 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96604-4
Appellate Court Case Title:	State of Washington v. Grocery Manufacturers Association
Superior Court Case Number:	13-2-02156-8

The following documents have been uploaded:

- 966044_Briefs_20190305104940SC298822_8987.pdf
  This File Contains:
  Briefs - Answer to Amicus Curiae
  The Original File Name was Answer to IFS amicus brief by GMA.pdf

A copy of the uploaded files will be sent to:

- TorTacEF@atg.wa.gov
- aaron.millstein@klgates.com
- adickerson@ifs.org
- benee.gould@klgates.com
- calliec@atg.wa.gov
- cfuolyef@atg.wa.gov
- dc.wolf@klgates.com
- franco@workerlaw.com
- gartha@atg.wa.gov
- lindad@atg.wa.gov
- mary.klemz@klgates.com
- mcbrider@lanepowell.com
- oyeates@ifs.org
- robbins@workerlaw.com

Comments:

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

Note: The Filing Id is 20190305104940SC298822