FILED
SUPREME COURT
STATE OF WASHINGTON
2/15/2019 10:00 AM
BY SUSAN L. CARLSON
CLERK

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.

ANSWER TO STATE'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Grocery Manufacturers Association ("GMA") asks this Court to deny the State's petition for review.

II. ISSUES PRESENTED BY THE STATE'S PETITION

A. The Fair Campaign Practices Act ("FCPA") authorizes an award of punitive damages only where "the violation is found to have been intentional." Was the Court of Appeals correct in holding this standard required the State to prove that GMA intended to violate the FCPA before being subject to punitive damages?

B. The Court of Appeals' reading of the punitive-damage language in RCW 42.17A.765(5) (amended 2018)[1] is consistent with this Court's decisions, published Court of Appeals decisions, and the State's position in every known FCPA case other than its case against GMA. Has the State failed to show that review is warranted under RAP 13.4(b)?

C. The State's proposed interpretation would chill political speech and give the State unfettered discretion to punish speakers and speech it dislikes. Should this interpretation be rejected as fundamentally incompatible with the First Amendment?

[1] While this case was pending on appeal, the Legislature amended Chapter 42.17A RCW. As part of those amendments, which became effective June 7, 2018, the Legislature moved the language in RCW 42.17A.765(5) to a new section, RCW 42.17A.780. In this answer, GMA refers to the version of Chapter 42.17A RCW that was operative in 2013, when the case was filed.

III. STATEMENT OF THE CASE

GMA is a 111-year-old trade association of American food, beverage, and consumer-product makers. *See* CP 4052; RP 641–42. For several years debate raged over whether such companies should be required to disclose on food labels the presence of ingredients derived from genetically modified organisms, or GMOs. Trial Exhibit ("Ex.") 2, 139. GMA sought to educate consumers about GMOs. *Id.* GMA also recognized that complying with a patchwork of state-law GMO-labeling requirements would be costly, complex, and burdensome. *Id*. GMA thus favored uniform federal legislation and opposed state-level efforts to address this issue. RP 433, 654.

As explained in greater detail in GMA's Petition for Review,[2] GMA's experience in a 2012 campaign against a California GMO-labeling initiative led it to look for a solution to two big problems: (1) having insufficient financial resources to enable it to engage in meaningful political participation, and (2) having its members suffer death threats and boycotts in retaliation for their opposition to GMO labeling.

In August 2012 GMA staff discussed creating a "Defense of Brands Strategic Account" (the "Account") to solve these problems. Ex. 131; *see also* CP 4053–54. The Account would empower GMA to speak

[2] *See* Wash. S. Ct. Case No. 96604-4 (petition filed Dec. 7, 2018, at 11:25 a.m.).

for the industry on GMO labeling through lobbying, participation in ballot initiatives, issue advocacy, and consumer research and outreach, while reducing the risk that its members would suffer reprisals as they had in California. *See* Ex. 2, 21, 139; RP 441–43. Creation of the Account was approved on February 28, 2013.[3]

GMA was told that setting up the Account and having itself reported as the contributor to state and local GMO-labeling campaigns was lawful. *See* Ex. 16, 17, 23; RP 155–56. Starting January 4, 2013, William MacLeod of Kelley Drye & Warren LLP, GMA's outside counsel, participated in several planning meetings where the Account was discussed. RP 194–95; Ex. 8, 132, 136. MacLeod understood that the Account would enable "a wide range of possible activities" such as lobbying, litigation, and public-interest work. RP 209. MacLeod attended both a February 21 Executive Committee meeting where the Account was discussed and the February 28 Board meeting where it was approved. Ex. 150; CP 4058. At the latter meeting, MacLeod called the Account a

[3] According to the State and the lower courts, this was the moment—two months before I-522 even qualified for the ballot—when GMA became a "political committee" under Washington law, a political committee that should have registered within fourteen days and reported a host of internal information. Much of that information was not related to Washington electoral activities. As of February 28, 2013, GMA was tracking legislative efforts in Connecticut, Oregon, and Vermont as well as initiative efforts in Washington and other states. Ex. 6 at 4; Ex. 17; Ex. 21 at 4, 9.

"helpful way for GMA to have the flexibility to do what it deemed appropriate and feasible[.]" RP 222.

In April 2013, after a member company raised an FCPA question about the Account, GMA retained Rob Maguire of Davis Wright Tremaine LLP, an expert in Washington campaign finance law. CP 4063. Maguire drafted a memorandum on Washington campaign finance disclosure requirements, Ex. 59, and he later gave GMA a more detailed legal analysis, Ex. 80. Maguire concluded that, absent earmarking, contributions from the Account were properly reported "as contributions from GMA and not by individual members." *Id*.

Also in April 2013, GMA hired Karin Moore as in-house counsel. RP 459. In July 2013 Moore asked MacLeod about two post-February 28 draft memos addressing Washington campaign finance requirements for which GMA had been billed but that it had not seen. RP 479, 524–25. Moore obtained and reviewed these memos. RP 479, 509–12. She asked MacLeod about the FCPA questions they raised; he told her that his firm's analysis was incomplete and that she should look to Maguire for guidance on Washington campaign finance law. RP 258–59, 526. Moore then spoke with Maguire and reviewed case law to assure herself that GMA's position was lawful. RP 473, 518–20; Ex. 50 at 8.

In October 2013 the State sued GMA, alleging that GMA had failed to properly register and report as a political committee and that GMA had thereby concealed the sources of funds that it contributed in its own name to No on I-522. CP 18–24. GMA promptly registered the Account as a political committee, "Grocery Manufacturers Association Against I-522,"[4] and it disclosed members who had paid into the Account. CP 1690–92, 3858–60. This all occurred before the election.

The trial court granted the State's motion for summary judgment, finding that GMA had committed FCPA violations. After a penalty-phase trial, the court again found against GMA. Although GMA's failure to report as a political committee was not shown to have affected the election, the trial court imposed a $6 million penalty on GMA. Equating volitional acts with intentional violations of the law, the trial court then trebled its $6 million penalty to $18 million as punitive damages. On April 5, 2017, the trial court entered an amended judgment with a net judgment amount of $19,026,090. SCP 4354–57.

The Court of Appeals affirmed the trial court's liability determination but ruled that the trial court had improperly trebled its $6 million penalty. *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 425

[4] No such entity existed, but the PDC told GMA to act as if there were one and to treat all funds in the Account as member contributions to "Grocery Manufacturers Association Against I-522." CP 546. The Account included significant monies spent on non-Washington state activities. *See* CP 592–93, 601–10.

P.3d 927 (2018) ("*GMA*"). The State seeks to overturn the latter ruling and to reinstate the trial court's punitive-damage judgment.

IV. ARGUMENT

A. The Court of Appeals properly held that punitive damages may be imposed only for an intentional violation of the FCPA.

The FCPA permits a court to treble the amount of the judgment as punitive damages, but only if "the violation is found to have been intentional." RCW 42.17A.765(5). The Court of Appeals held:

> The plain language of RCW 42.17A.765(5) states that the ***violation*** must be intentional, not that the conduct giving rise to the violation must be intentional. This language makes it clear that a party must have knowledge that it was violating the law to be subject to treble damages. The fact that GMA deliberately engaged in conduct that the trial court ***later*** determined was a violation of the FCPA does not mean that GMA intended to violate the FCPA.

GMA, 5 Wn. App. 2d at 947 (emphasis by the Court of Appeals).

If a statute's meaning is plain on its face, courts must "give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002). The plain meaning "is discerned from all that the Legislature has said in the statute," as well as "related statutes which disclose legislative intent about the provision in question." *Id*. at 11.[5]

[5] The same rules of statutory construction apply to initiatives. *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011). Where the voters, acting in their legislative capacity, have clearly expressed their intent in the

The FCPA provides a range of substantial penalties in RCW 42.17A.750, including civil penalties of up to $10,000 per violation. RCW 42.17A.765(5) begins with a general rule ("In any action . . . the court may award" fees and costs) before addressing the circumstances in which punitive damages are permissible. For that purpose, the statute uses a conditional clause ("If . . . intentional") to signal that punitive damages are reserved for special circumstances. The plain language of the statute teaches that treble damages were intended to apply to a specific subset of FCPA violations—not all or most violations.

As the Court of Appeals recognized, the drafters' choice of "the violation" as the subject of this conditional clause, rather than "the conduct" or "the act or omission," is highly significant. "Violate" is a transitive verb. Inherent in the concept of a "violation" is that something—here, the law—was violated.[6] Hence, use of "violation" together with "intentional" means that a party must have intended to violate the law.

The verb tense used to link "violation" with "intentional"—namely, the violation must be "found to have been intentional"—further

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statute, a court need not look further but should apply the statute as written. *Id.*; *see also Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2000), *opinion corrected*, 27 P.3d 608 (2001).

[6] *Cf. Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 598, 278 P.3d 157 (2012) (discussing the legislature's use of verbs such as "cut" and "girdle" to denote direct acts that cause immediate injury).

reinforces the Court of Appeals' reading of the statute. This phrasing denotes that, for the provision to apply, one must have appreciated that one was violating the law when one committed the violation. *See, e.g.*, *Campbell & Gwinn*, 146 Wn.2d at 11 (recognizing that the rules of grammar must be employed in discerning the plain meaning of a statute); *State v. Bunker*, 169 Wn.2d 571, 578, 238 P.3d 487 (2010) (same).

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

The rest of RCW 42.17A.765(5)'s trebling provision further validates the Court of Appeals' reading, because it specifies that the treble

damages being authorized are meant to serve as "punitive damages." Trebling is "intended to punish and deter blameworthy conduct." *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 271, 306 P.3d 948 (2013). Deterrence requires knowledge. *See State v. Brown*, 140 Wn.2d 456, 472, 998 P.2d 321 (2000) (Madsen, J., concurring) ("Without a knowledge requirement," deterrence is unlikely to be advanced); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (for punitive damages, "a positive element of conscious wrongdoing is always required."). Thus, the statute's designation of treble damages as punitive damages, like its conditional construction, its use of the word "violation," and its choice of syntax, indicates that treble damages may be imposed only if a party knew, when it acted, that it was committing a violation of the FCPA.

Other aids to statutory construction support the same conclusion. Penal statutes (as opposed to remedial ones) must be strictly construed against the State, and treble damages are a "severe penalty." *Jongeward v. BNSF Ry. Co.*, 174 Wn.2d 586, 600–01, 278 P.3d 157 (2012). Public policy strongly disfavors punitive damages, which impose "a penalty generally reserved for criminal sanctions" and give the plaintiff "a windfall." *Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996). If the statute is ambiguous, it must be construed in GMA's favor. *See State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013).

The State's petition for review says nothing about all of this.[7] Nor does the State undertake to examine the statute's language, grammar, syntax, or context. Rather, the State insists that the statute must be read to make any voluntary act later found to violate the FCPA an "intentional violation"—a reading that would make treble damages available in nearly every case. The plain language of the statute rebuts the State's position.

B. The Court of Appeals' interpretation of the punitive-damage provision in the FCPA is consistent with this Court's decisions, published decisions by the Court of Appeals, and the State's own view in other cases.

The State asserts that "intentional" means the same thing at all times and in all places. But the very cases that the State relies on to make its argument belie the State's assertion.

According to the State, "the term [intentional] has a standard meaning that is applied in both criminal and civil contexts throughout state law." Pet. at 14. To support this claim, the State begins by paraphrasing, rather than quoting, RCW 9A.08.010(1)(a), which states: "INTENT. A person acts with intent or intentionally when he or she acts with the

[7] The State accuses the Court of Appeals of treating "violation" as a verb, Pet. at 18, but the court did no such thing. Rather, the court pointed out that "violation" has a different meaning than other terms that might have been chosen if the statute were meant to be applied as the State asserts. The court posits, as a counterfactual example, a statute that authorizes punitive damages if a person "intentionally ***failed to register*** as a political committee." *GMA*, 5 Wn. App. 2d at 209 (emphasis by the Court of Appeals). As the court points out, "the legislature did not use that language." *Id*.

objective or purpose to accomplish a result which constitutes a crime." Next, the State cites four cases that construe "intent" in the context of a lawyer disciplinary proceeding, an environmental trespass, a murder, and an insurance claim. In all these cases, the State asserts, "intent" means the same thing. The State is wrong.

The first case that the State cites, *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 211 P.3d 1008 (2009), disproves its point. Mr. Vanderveen pleaded guilty to violating a federal law that makes it a felony to willfully violate reporting requirements for cash transactions over $10,000. *See id.* at 601. "Willful" in that statute means "acting with the knowledge that one's conduct is unlawful." *Id*. at 605–06. Rejecting the lawyer's argument that he should not be found to have acted intentionally, this Court held that when he "pleaded guilty to acting 'willfully,' he pleaded guilty to acting 'intentionally,' i.e., ***with the knowledge that his conduct was unlawful***." *Id.* at 607 (emphasis added).[8]

In the second case the State cites, *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985), the Court quoted the Restatement (Second) of Torts (1965) for the proposition that "intent" means that an actor desires certain consequences or knows those

[8] The "word 'willful' is synonymous with 'intentional.'" *Vanderveen*, 166 Wn.2d at 607 n.19.

consequences are substantially certain to result from its conduct. *Id*. at 682. The defendant in *Bradley* had "known for decades" that it was emitting particulate metals from its smokestack and that gravity would cause those metals to settle on nearby properties. *Id*. The court held that the defendant acted intentionally because it knew about the substantially certain consequences of its actions. *Id*. at 683–84.

In this case, the consequence that the State had to show GMA desired or knew was substantially certain to result was "the violation" that the trial court, years later, held GMA committed. But GMA neither desired to violate the FCPA nor knew that being found in violation of the FCPA was a substantially certain consequence of being identified as the source of its own contributions. On the contrary, GMA was told by counsel that having its contributions reported in this manner was lawful.

To determine whether "intentional" as used in the FCPA refers to consciousness of the effect of an act (as in *Bradley*) or to consciousness that the effect of an act is unlawful (as in *Vanderveen*), a court must examine how "intentional" is used in the statute. *See State v. Wanrow*, 88 Wn.2d 221, 228, 559 P.2d 548 (1977) ("Words in a statute take their meaning from the context in which they are used."); *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 838–39, 215 P.3d 166 (2009) (courts consider "the ordinary meaning of words, basic rules of

grammar, and the statutory context.").[9] As demonstrated in the preceding section, such an examination fully supports the Court of Appeals' ruling.

This Court has already considered whether a "knowingly" mental state is required to find an intentional violation of the FCPA. In *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007), a case involving violations of criminal statutes relating to campaign disclosure, defendants argued that the FCPA provided exclusive penalties for their wrongdoing. The Court rejected their argument, observing: "Violations of chapter 42.17[A] RCW can occur that . . . would not involve a 'knowingly' mental state." *Id*. at 811. The Court then noted that violations found to have been intentional ***do*** require such a showing:

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

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

The Court of Appeals' reading of the FCPA's punitive-damage provision is entirely consistent with *Conte*. The State does not argue

[9] *Cf. Jongeward*, 174 Wn.2d at 605 n.15 (rejecting argument that common-law meaning of "trespass" as set forth in *Bradley* governs the meaning of "trespass" in the timber trespass statute). As this Court observed in that case, *Bradley* is "inapposite" where the issue before the Court is not what the common law requires but what a statute requires. This Court should once again "decline to conflate" statutory and common-law terms. *Id*.

otherwise. Indeed, the State does not mention *Conte* at all. Nor does it say anything about other cases in which punitive damages have been sought or awarded under the FCPA. That is likely because the State's position in this case is flatly inconsistent with its position elsewhere—namely, that an intentional violation of the FCPA requires knowledge of and a deliberate choice not to comply with the law.

For example, in *State of Washington ex rel. Public Disclosure Commission v. Washington Education Association*, the State argued to the trial court that the defendant's violations were intentional because the defendant had previously (1) campaigned against the imitative, which adopted the relevant FCPA provision, and (2) been fined under the same FCPA provision. SCP 4241. Based on the State's arguments, the trial court found that the defendant "intentionally chose not to comply with RCW 42.17.760." SCP 4236. In *State of Washington ex rel. Public Disclosure Commission v. Permanent Offense*, the State argued that the defendant's actions were intentional because she was "[w]ell aware of the PDC reporting requirements [but] nevertheless orchestrated the means to effect concealment of payment [in] a deliberate attempt to circumvent the reporting requirements of the [PDA]." SCP 4287; *see also* SCP 4283 (defendant well experienced as a campaign treasurer in Washington). As

these examples demonstrate, the State has previously treated the punitive-damage language in RCW 42.17A.765(5) as requiring a deliberate choice not to comply with the law.[10]

Punitive damages under the FCPA are reserved for circumstances where the defendant understood what it was supposed to do but chose nevertheless to flout the law. The Court of Appeals' reading of the statute is consistent with every case to have considered the issue, apart from the trial court's ruling in this case.

C. First Amendment principles require rejection of the State's proposed interpretation.

As GMA's Petition for Review establishes and *amici* submissions emphasize, the FCPA imposes a regulatory burden on core speech and associational freedoms. To exacerbate that burden by assessing punitive damages against a trade association that sought a lawful pathway through which it and its members could participate in the I-522 debate, while at the same time reducing the risk of deadly retaliation, is over-deterrence that cannot be constitutionally justified.

If, moreover, an "intentional violation" of the FCPA requires only that a person participating in a campaign decided to do something that is later found to be contrary to the FCPA, as the State here contends, then

[10] Additional examples of how the State has treated the intentional requirement and how trial courts have interpreted that requirement are available at SCP 4229–4316.

punitive damages are available in virtually every case. The State suggests circumstances in which its interpretation of the statute would ***not*** authorize punitive damages, but these circumstances are all variations on the "act of God" excuse—i.e., rare and unpredictable events. *See* Pet. at 16 n.5. Absent from the State's list is the situation where a person examines the law, seeks to conform its conduct to the law's requirements, believes that it has done so, and is later found to have been wrong. According to the State, this is no less blameworthy than knowing that the law forbids what one plans to do and doing it anyway.

The sort of enforcement regime for which the State advocates invites subjectivity and arbitrariness: The State could seek, and trial courts could impose, punitive damages whenever they disliked the speaker or the speaker's message. The First Amendment demands that political speech be given breathing space, not punished as a result of a public official's whim or pique. As this case shows, such concerns are not merely theoretical.

A speaker may attract official hostility for many reasons. One potential reason is the speaker's domicile. Here, as the State has emphasized, GMA hails from the ***other*** Washington.[11] Another potential

[11] On January 13, 2014, after GMA filed its counterclaim, the Attorney General issued a press release. The tag line read as follows: "Countersuit by out-of-state organization threatens transparency in Washington elections." *See* http://www.atg.wa.gov/news/news-releases/grocery-manufacturers-association-challenges-washingtons-campaign-finance-laws (last visited Feb. 12, 2019).

reason for hostility could be the speaker's audacity in challenging the State's regulatory regime. Here, GMA successfully argued that the FCPA's "ten-ten" rule[12] impermissibly limited the speech of out-of-state speakers such as itself.[13] GMA also resisted the State's reading of the "political committee" and "concealment" provisions in the FCPA. After the trial court imposed punitive damages on GMA, the Attorney General stated: "I took this case to trial because the GMA needed to be held accountable for their arrogance . . . ."[14]

A third potential reason for official hostility is the content of a speaker's message. Consider here the case of Food Democracy Action! ("Food Democracy"), an organization that solicited and received contributions to ***support*** I-522 and, in turn, contributed the money in its own name to the Yes on I-522 political committee. *State ex rel. Wash. St. Pub. Discl. Comm'n v. Food Democracy Action!*, 5 Wn. App. 2d 542, 544, 427 P.3d 699 (2018). Food Democracy knew that Washington law

[12] RCW 42.17A.442 provides as follows: "A political committee may make a contribution to another political committee only when the contributing political committee has received contributions of ten dollars or more each from at least ten persons registered to vote in Washington state."

[13] CP 363. GMA not only succeeded in having the "ten, ten" statute ruled unconstitutional; it also secured a permanent injunction against enforcement of that statute in initiative campaigns. CP 4331–34. The State did not appeal that decision.

[14] http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us (last visited Feb. 12, 2019).

required it to report the names of its over 7,000 contributors, but it failed to do so until after the election and after the PDC had opened an investigation. *Id*. at 545–46. The trial court granted partial summary judgment in favor of the State, leaving only the amount of penalties, costs, and fees for trial. *Id.* at 547.[15]

Food Democracy did not appear for trial. Yet, as the Court of Appeals noted, "[t]he State abandoned any argument that Food Democracy intentionally concealed the source of its contributions and did not seek treble damages for intentional violations of the state campaign finance disclosure laws." *Id*. There is no possible explanation for the disparate treatment of Food Democracy and GMA other than (a) the content of their messages or (b) the fact that GMA alone contested the State's penalty claim. Either way, an interpretation that permits such disparate treatment implicates core First Amendment concerns.

[15] Procedurally, this parallels GMA's case. Substantively, the principal differences are these: Unlike Food Democracy, GMA believed that making contributions in its own name was consistent with state law. GMA's name, unlike Food Democracy's, fully disclosed the economic interest of its contributors. GMA's members, unlike Food Democracy's contributors, had suffered death threats and boycotts when previously identified as opponents of state GMO-labeling requirements. Nevertheless, GMA, unlike Food Democracy, disclosed all of its contributors before the election. Not one of these differences supports the State's effort to punish GMA, but not Food Democracy, by assessing treble damages. (GMA is not suggesting that it endorses the penalties assessed against Food Democracy, still less that those penalties should be trebled. In that case, as here, draconian penalties raise significant First and Eighth Amendment concerns.)

As both the U.S. Supreme Court and this Court have recognized, it is especially appropriate to require knowledge of wrongdoing before imposing punitive damages in cases where the State would punish speech, particularly political speech. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (states may not authorize punitive damages for defamation absent showing of knowing falsity or reckless disregard for truth); *In re Boldt*, 187 Wn.2d 542, 549, 386 P.3d 1104 (2017) (recall petition alleging commission of unlawful act is factually insufficient unless petitioner shows that official had knowledge of and intent to commit that act).

The State plainly seeks to punish political speech in this case. The State's punitive-damage claim is tied directly to the amount of money GMA spent to engage in speech; indeed, it is justified on that basis.[16] The State has no evidence that any voter was misled or that the political process suffered any harm as a result of GMA's initial non-disclosure of the members that funded its speech. This makes the State's request for punitive damages here even more troubling.

Because statutes should, where possible, "be construed so as to avoid unconstitutionality," *Wash. State Republican Party v. Pub.*

[16] *See, e.g.*, Pet. at 1 (asserting that GMA "engaged in the largest concealment of campaign contributions in state history.") By this the State means that GMA spent a lot of money on political speech in its own name rather than registering with the State as a political committee, and the amount of money GMA spent (i.e., the amount of political speech that it engaged in) justifies the most severe sanction.

Disclosure Comm'n, 141 Wn.2d 245, 280, 4 P.3d 808 (2000), these considerations reinforce the same conclusion that follows from the plain language of the statute and from the cases discussed above: Punitive damages could properly be imposed in this case only if GMA knew it was violating the law. It did not. The Court of Appeals was correct to vacate the trial court's punitive-damage judgment, and this Court should deny the State's petition for review of that ruling.[17]

DATED this 15th day of February 2019.

Respectfully submitted,

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[17] If, despite the arguments presented above, this Court grants the State's petition and, on review, agrees with its interpretation of the punitive-damage provision while rejecting GMA's challenge to the lower courts' liability determination, the Court should remand the case to the Court of Appeals to consider GMA's Eighth Amendment challenge to the trial court's judgment. *See GMA*, 5 Wn. App. 2d at 177 n.2. Indeed, any penalty that is finally assessed in this case must be evaluated under the Excessive Fines Clause, and no appellate court has yet done this.

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February 15, 2019 - 10:00 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

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