NO. 96604-4
Court of Appeals No. 49768-9-II, Consol. w/ 50188-1-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent.

STATE OF WASHINGTON'S PETITION FOR REVIEW

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I. INTRODUCTION

Grocery Manufacturers Association (GMA) engaged in the largest concealment of campaign contributions in state history. GMA devised a scheme during the 2013 election in which it would serve as a front for its members' contributions to defeat Initiative 522 (I-522). GMA ultimately concealed over $14 million of its members' contributions, violating numerous provisions of the State's Fair Campaign Practices Act (FCPA). After a weeklong trial to determine the appropriate penalty for GMA's misconduct, the trial court ordered GMA to pay $6 million for its multiple violations and then trebled that amount based on the court's determination that GMA's violations were intentional.

The Court of Appeals correctly upheld the superior court's liability rulings and $6 million civil penalty, but erred by reversing the trebled portion of GMA's penalty, adopting a standard for intentional wrongdoing that is contrary to the law. The Court of Appeals held that a defendant must know it is violating the FCPA to be subject to a treble penalty. In other words, the Court of Appeals held that the trial court was required to find that GMA knew its conduct was illegal and acted anyway, a stricter standard than is required to establish intent in any other context—including criminal matters—and one that does not comport with state law.

Numerous courts, including this Court, have determined intent in both criminal and civil contexts by looking to whether the defendant engaged in an activity with the object or purpose of accomplishing a result that is illegal. The Court of Appeals' ruling turns this inquiry on its head,

asking instead whether the defendant knew its activity was illegal. The Court of Appeals' interpretation conflicts with the standard meaning of "intentional" applied by courts throughout state law, as well as conflicts with the plain meaning of the FCPA. It also creates an absurd incentive for anyone seeking to deceive Washington voters to remain ignorant of the law. Just as a criminal defendant cannot escape the consequences of their conduct by pleading ignorance, neither should a civil defendant, like GMA, who purposefully sets out to deceive state voters. To allow otherwise will most certainly harm the public's right to transparent and honest campaigns. This Court should grant review under RAP 13.4(b)(1), (2), and (4) to correct these conflicts, thus ensuring courts have the ability to impose real consequences on those who violate the State's campaign finance laws.

II. ISSUE

The Fair Campaign Practices Act permits courts to treble a judgment "[i]f the violation is found to have been intentional." RCW 42.17A.765(5).[1] Did the Court of Appeals err when it held that a defendant must subjectively know its conduct is illegal in order for this provision to apply?

III. STATEMENT OF THE CASE

A. GMA Created the Defense of Brands Account as a Shield for Its Members' Opposition to GMO-Labeling Initiatives

In 2012, California voters rejected an initiative that would have required labeling of genetically modified or engineered food (GMOs).

[1] Throughout the litigation of this case, the treble penalty provision was codified in RCW 42.17A.765(5). It is now found in RCW 42.17A.780. The text of the treble penalty provision remains the same. To remain consistent with the record in this case and the Court of Appeals' opinion, this petition cites to RCW 42.17A.765(5). A copy of the pre-2018 version of the statute is attached as an appendix for this Court's ease of reference.

CP 4053 (FF 9, 12).[2] Opponents spent $43 million to defeat the initiative, with almost $22 million of that amount coming from GMA, a food and beverage trade association, and its members. CP 4052-3 (FF 1, 10-11). Following the California election, some GMA members faced significant criticism for their role in funding the opposition to the initiative. CP 4053 (FF 13).

In June 2012, proponents filed I-522 to require labeling of GMO's in Washington. CP 4054 (FF 15). GMA believed there was a "high probability" that I-522 would qualify with the required number of signatures to be presented to the Legislature. Trial Ex. (Ex.) 4; *see also* CP 4054 (FF 14). GMA began taking steps to oppose I-522. Exs. 4, 7; CP 4054 (FF 20). As early as August 2012, GMA's Government Affairs Council, comprised of GMA staff and Executive Board members, began considering options to fight all GMO-labeling efforts, including state initiatives and legislation. CP 4052, 4054 (FF 2, 14).

By December 2012, GMA's overall strategy included defeating "the possible Washington state ballot measure" and "developing a plan and budget for fighting it if need be past January." Exs. 4, 6; CP 4054 (FF 19). GMA, however, had an insufficient budget to address the anti-labeling efforts. RP 73:15-25.[3] GMA members also wanted "greater predictability"

[2] The material facts are set forth in the Findings of Fact, Conclusions of Law and Order on Trial. CP 4052-72. GMA did not challenge the superior court's findings after trial and thus they are verities. *LK Operating, LLC v. Collection Group, LLC,* 181 Wn.2d 48, 73 n.11, 331 P.3d 1147 (2014).

[3] RP refers to the Verbatim Report of Proceedings, Volumes 1-6, of the trial that occurred in August 2016.

in funding future opposition to GMO-labeling. RP 80:16-81:10; *see also* Exs. 16, 19. GMA, therefore, needed "to develop a funding methodology that provide[d] significant financial support" to oppose ballot measures and state legislation and "shield" its members from public criticism. CP 4055 (FF 25); Exs. 14, 21.

During the January 19, 2013, GMA Board meeting, GMA staff, including President and CEO Pamela Bailey and former Executive Vice President of Government Affairs Louis Finkel, presented a proposal for addressing GMO-labeling initiatives nationwide and in Washington. CP 4054-55 (FF 23-24); *see also* Exs. 13-15, 17, 21. As noted in the Executive Committee's meeting minutes:

> To successfully oppose ballot measures and state legislation and advance a long-term plan to manage this issue, Mr. Finkel explained that GMA will need to develop a funding methodology that provides significant financial support. Mr. Finkel described the potential benefits of establishing a multiple use fund for this purpose that will provide greater budgeting certainty to the companies while also shield [sic] individual companies from public disclosure and possible criticism . . . . Mr. Finkel then reviewed the status of potential GMO labeling legislation and ballot initiatives in several states.

Ex. 14; *see also* CP 4055 (FF 25). Other Board committee discussions supported "developing a fund of member GMO contributions in advance of forming a state campaign. *By doing so, state GMO related spending will be identified as having come from GMA, which will provide anonymity and eliminate state filing requirements for contributing members*." Ex. 15 (emphasis added); CP 4054-56 (FF 23-24, 27). GMA staff told the Board that they were preparing an effort to defeat I-522 "based upon the

disposition of the board." Ex. 17. Ultimately, the Board directed GMA staff to develop a plan and budget to address these issues. CP 4056 (FF 29); Exs. 16, 17.

GMA staff presented its final plan to GMA's Executive Committee on February 18, 2013. CP 4057 (FF 32). This proposal included establishing a separate GMA fund that would "allow for greater planning for the funds to combat current threats and better shield individual companies from attack that provide funding for specific efforts." Ex. 23; *see also* CP 4057 (FF 32, 37). The fund, identified as the "Defense of Brand Strategic Account" (Account), was intended to allow GMA—rather than its member companies—to be identified as the source of funding. *Id*. Of the Account's proposed $17.3 million budget for 2013, GMA staff informed the Executive Committee that $10 million would "fight Washington State Ballot Measure." Ex. 23; CP 4057 (FF 36). GMA also provided a specific timeline for implementing these goals. CP 4057 (FF 36); Ex. 23.

A few days before the GMA Board considered formal approval of the Account, GMA CEO Bailey contacted GMA's outside counsel, William MacLeod. RP 102:16-103:2. Bailey informed MacLeod that GMA Board Chair Ken Powell would be asking him at the Board meeting to affirm whether the Account was "legal and appropriate." CP 4058 (FF 38); RP 103:3-16. Bailey did not give MacLeod further instructions or materials to consider, nor did she ask him to research Washington campaign finance laws. CP 4058 (FF 38). Executive VP Finkel later followed up with MacLeod. CP 4058 (FF 41). They discussed asking "the members whether

or not they would authorize seeking money" for Account activities and discussed what had happened in California. RP 220:15-21. MacLeod did not make any representations to Finkel regarding Washington disclosure obligations, nor did Finkel ask MacLeod to opine on the legality of the Account under Washington's campaign finance laws. CP 4058 (FF 41); RP 220:24-221:24. In fact, Finkel did not find it necessary to ask MacLeod those questions. RP 349:15-350:1. MacLeod ultimately did not research or determine whether the Account would trigger any Washington reporting obligations. CP 4058 (FF 42); RP 211:5-212:3.

On February 28, 2013, the Board approved creation of the Account. CP 4059 (FF 44-45); Ex. 29. During the meeting, Bailey and Finkel described the plans for establishing the fund and the "advantages of the funding mechanism—*a significant one being the ability to identify only GMA as the contributor*." *Id.* (emphasis added). MacLeod endorsed the "legal advantages" of proceeding along those lines, notably identifying GMA as the contributor to the effort and giving GMA flexibility to address emerging needs. *Id.*

> The Board discussed questions about whether the money might be segmented, for example whether funding efforts in Washington could be considered separately. Mr. Powell and Ms. Bailey noted that if the referendum in Washington were to pass, it could make success on other fronts very unlikely to succeed. As a consequence, *Washington was critical to the success of the overall objective*, but the overall objective remained the strategic goal.

Ex. 29 (emphasis added). The Board voted to approve the plan. CP 4059 (FF 44-45).

B. GMA Implemented the Account While Ignoring Questions About its Legality in Washington

On March 15, 2013, GMA sent its first Account invoice to certain GMA Board members and non-Board members. CP 4060 (FF 58); Ex. 38. In addition to describing the Account's purpose, Bailey provided recipients with an "Update on Washington State," including GMA's efforts to "assess the viability of a campaign to defeat I-522" and the results of GMA's polling. Ex. 38; *see also* CP 4061 (FF 59). The March Account invoice characterized the amount GMA billed its members as a "contribution" to GMA's Account and as the first of two installments. CP 4061 (FF 60); Ex. 38.

On April 3, 2013, a representative of GMA Board member Kraft Foods contacted Finkel with questions about the invoice and the legality of the Account. CP 4062 (FF 68); Ex. 40. Finkel forwarded her on to MacLeod. *Id.* A Kraft Foods attorney then contacted MacLeod wanting assurance "in writing" that the Account would be "used in accordance with relevant state and federal contribution laws." CP 4062 (FF 68); Ex. 44. When that request was relayed to Finkel, he indicated that MacLeod or his firm should "write something up." CP 4062 (FF 71); Ex. 44. Finkel later claimed that he never asked MacLeod to perform any work. CP 4062 (FF 71).

After his firm began looking into the issue, MacLeod verbally relayed to Finkel some concerns regarding GMA's reporting obligations under Washington law. CP 4061-62 (FF 73-74). MacLeod recommended that GMA contact a Washington lawyer with experience in campaign

finance laws. CP 4061-62 (FF 73). Without having ever looked into the issue, Finkel was confident that GMA was doing things correctly. *See* CP 4061 (FF 72); RP 234:6-21. MacLeod ultimately did not provide Finkel with a final written product, nor did Finkel ask for one. CP 4062-63 (FF 73-74); RP 243:3-15.

During this same period, GMA hired Karin Moore as General Counsel. RP 459:2-8. Shortly after starting, MacLeod told Moore to "keep an eye on things in Washington" because it was a "complicated area of the law" and required "attention from the lawyers and experts." CP 4063-64 (FF 77). Moore did not follow-up with him until July, when she received MacLeod's invoices. CP 4065 (FF 85). At Moore's request, MacLeod gave her two draft memos that his firm had prepared and which questioned the legality of the Account under Washington law. *Id.*; *see also* Exs. 93, 94. Moore took no further action on the memos. CP 4065 (FF 85).

GMA hired Washington attorney Rob Maguire in April 2013 to advise GMA on the legality of the Account structure under Washington law. CP 4063 (FF 75). On May 10, 2013, Maguire provided GMA with an overview of Washington's campaign finance laws for ballot measures. CP 4064 (FF 78). The overview covered Washington's reporting requirements for political committees, including the requirement that any group expecting to receive contributions or make expenditures to support or oppose any ballot proposition must register as a political committee and disclose the name of any entity contributing more than $25. *Id.*; Ex. 59.

When Finkel asked Maguire for additional advice, Maguire

requested details about the following: (1) how the fund was set up and funded; (2) whether contributions were voluntary; (3) documents stating the purpose of the fund; (4) how spending decisions were made; and (5) examples of solicitation memos describing the fund. CP 4064 (FF 79-80); Ex. 69. Finkel verbally gave Maguire a general description of the Account and his own view of GMA members' understanding of the purpose of the Account. CP 4064 (FF 81); *see also* Ex. 72. Finkel gave only two documents to Maguire: excerpts from Bailey's invoice memo to contributors (but not the invoice) and a version of GMA's proposed bylaw amendment for the Account. *Id.*; *see also* Ex. 70.

Based on the information provided, Maguire advised that the contributions should be reported as coming from GMA, not by individual members. Exs. 72, 80; *see also* CP 4064-65 (FF 82). But Maguire noted:

> If we were to get into a fight about it, the [Public Disclosure Commission] would push for more information to test whether the strategic fund is a sham, though. If GMA wants a detailed look at the issue, we could dive into those questions. For example, the memo indicates GMA's board approved spending plans before strategic fund invoices were sent to members. Did the board's spending plan have a specific amount budgeted for Washington? If so, how does that compare to the overall funds collected for the strategic fund and was the Washington amount communicated to all members contributing to the strategic fund? Did the invoices to members indicate a set amount for Washington or is there some other context making it plain to members how much of a contribution to the strategic fund would end up in Washington? Are assessments mandatory (essentially dues) or voluntary?

Ex. 72. Finkel provided no additional information for Maguire to resolve these questions or revise his memorandum opinion. CP 4064-65 (FF 82);

Ex. 80. When she became aware of the memo, Moore also saw no need to provide Maguire with additional information. RP 476:24-477:6.

On August 12, 2013, GMA sent its second invoice to the same GMA members and nonmembers, again labeling it as a "contribution" to the Account. CP 4066 (FF 86); Ex. 99. While most of the invoice recipients paid GMA's special assessment, some did not pay at all and some restricted use of their funds. Ex. 122. When Kraft Foods remitted its payment, it told GMA that "this contribution is unrestricted, *except that none of the funds may be expended in connection with the 'No on 522' campaign in Washington State*." Ex. 101 (emphasis added); CP 4066 (FF 87).

C. GMA Funneled its Members' Contributions to the No on 522 Campaign

In late April 2013, GMA anticipated making the first contribution to the No on 522 political committee. Ex. 74. GMA provided its members with initial press response protocols and promised that they would be notified when the funding would occur. *Id.*; *see also* CP 4061 (FF 64). A few weeks later, GMA notified its members of the first contribution, reminding them "GMA will be the disclosed funder." Ex. 55. The next day, GMA submitted its first contribution of $472,500 to the No on 522 committee. Ex. 76; CP 4063 (FF 76).

Shortly before the No on 522 committee publicly reported GMA's contribution, GMA gave its Board members "media guidance" regarding the campaign, saying:

> The Washington campaign finance situation differs

> significantly from that in California during the "No on Prop 37" campaign. *Virtually all of the financial support for "No on I-522" will come from GMA, not individual companies, and under Washington State law, the campaign will not have to report GMA's members on campaign finance reports or in any campaign advertising*.

Ex. 74 (emphasis added); *see also* CP 4061 (FF 65). Regarding possible questions on GMA member companies' "position on the ballot initiative" or their "financial support," GMA suggested the following response:

> Q: Is your company providing funding to the "No on I-522" campaign in Washington State?
>
> A: No. Company X is a member of the Grocery Manufacturers Association and supports the work the association does on product safety, health and wellbeing, sustainability and a host of other issues. We support GMA, its position on genetically modified ingredients and the association's opposition to I-522 in Washington State. GMA's views and financial support for the "No on I-522" campaign reflect the views of most food and beverage manufacturers in the United States.

Ex. 74. GMA also removed its membership list from its website. CP 4065 (FF 84). Both of these actions were to divert attention from the true source of the funds, namely, the individual GMA members. CP 4061 (FF 65-66); *see also* Ex. 67 (rejecting a statement that GMA "uses the funds at our discretion" because it "*will lead the press and or NGO groups right where we don't want them to go—meaning, 'are you assessing you [sic] members, or do you have a "secret" fund of some kind'* ") (emphasis added).

By December 2013, GMA had collected $14,283,140 in contributions from its members. CP 4066 (FF 88); Ex. 122. GMA contributed a total of $11,000,000 to the No on 522 committee, equating to 77 percent of the Account's total funds for 2013. CP 4066 (FF 89); Ex. 122; *see also* Exs. 104, 119-20.

D. The Trial Court Found GMA's Conduct Illegal, its Violations Intentional, and Trebled its Penalty under RCW 42.17A.765(5)

On October 16, 2013, the State sued GMA for failing to timely register and properly report a political committee, as well as concealing the source of the funds it used to contribute to the No on 522 political committee. CP 18-24. The superior court held that the undisputed facts established that GMA had committed multiple violations of Washington's campaign finance laws. CP 3339; *see also* CP 3187-95. The superior court also concluded GMA failed to show that the campaign finance laws were unconstitutionally vague as applied to it. CP 3339. The superior court, however, reserved for trial the question of the appropriate penalty amount and whether GMA intentionally violated RCW 42.17A. *Id.*

After a five-day trial, the superior court concluded that GMA's violations of the State's campaign finance laws were intentional. CP 4072. Looking to whether GMA acted with a purpose of accomplishing an illegal result under RCW 42.17A (CP 3684), the superior court found GMA intended to withhold from the public the true source of its contributions opposing I-522. CP 4069 (FF 108). The superior court found GMA never "fully, or accurately, disclosed all material facts to its attorneys." CP 4068 (FF 102). The superior court also found GMA staff's testimony regarding the intent and purpose of the Account and their belief that the Account conformed to Washington campaign finance law "not credible." *See* CP 4057 (FF 33-35), 4559 (FF 50), 4062 (FF 71), 4068-69 (FF 103-05). After considering mitigating and aggravating factors (CP 4069), the

superior court ordered GMA to pay a $6 million civil penalty for GMA's multiple violations of Washington law and ordered that the amount be trebled for GMA's intentional violations. CP 4072.

The Court of Appeals affirmed the superior court's summary judgment order, affirmed that the FCPA did not violate GMA's First Amendment rights, and affirmed that the FCPA was not unconstitutionally vague as applied to GMA. *State v. Grocery Mfrs. Ass'n (GMA)*, No. 49768-9-II, slip. op. at 12-32 (Wash. Ct. App. Sept. 5, 2018). The Court of Appeals, however, reversed the superior court's imposition of treble penalties and remanded for a determination whether GMA knew it was violating the law at the time it acted. *Id.* at 33-35. GMA asked the Court of Appeals to reconsider part of its decision. The Court of Appeals denied the request on November 7, 2018. The State now seeks review to correct the Court of Appeals' erroneous standard for intent.

IV. REASONS WHY REVIEW SHOULD BE GRANTED

A. The Court of Appeals Adopted a Standard for Intentional Wrongdoing that Conflicts with Case Law

The Court of Appeals adopted an overly restricted reading of RCW 42.17A.765 that conflicts with how courts have analyzed intentional conduct in myriad contexts throughout state law. This Court should grant review to resolve this conflict and reinstate the correct standard for trial courts seeking to hold accountable those who intentionally engage in activity that violates the FCPA.

RCW 42.17A.765(5) provides:

> In any action brought under this section, the court may award to the state all costs of investigation and trial, including reasonable attorneys' fees to be fixed by the court. *If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include costs, may be trebled as punitive damages.*

RCW 42.17A.765(5) (emphasis added). A plain reading of this statute requires a court to determine that a defendant intended to engage in activity that is punishable under the FCPA in order to impose treble penalties. It does not require the court to find that the defendant subjectively intended to violate the campaign finance laws, as the Court of Appeals wrongly concluded. *GMA*, slip op. at 34.

The FCPA does not define "intentional." But the term has a standard meaning that is applied in both criminal and civil contexts throughout state law. "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result" that constitutes a violation under the law. RCW 9A.08.010(1)(a) (defining "intent" for state criminal matters); *see also, e.g.*, *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 611, 211 P.3d 1008 (2009) (applying same definition for purposes of lawyer disciplinary proceedings); *Bradley v. Am. Smelting & Ref. Co.*, 104 Wn.2d 677, 682-84, 709 P.2d 782 (1985) (applying same definition for intentional tort of trespass); *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) (applying same definition to first degree murder charge); *Hansen PLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 58

Wn. App. 561, 571, 794 P.2d 66 (1990) (applying same definition in insurance claim action).[4]

"Intent is not, however, limited to consequences which are desired," but also applies to those consequences which "are certain, or substantially certain, to result." *Bradley*, 104 Wn.2d at 682 (quoting the Restatement (Second) of Torts Section 8a); *see also Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999) ("[A]n employer must at least discriminate *in the face of a perceived risk* that its actions will violate federal law [§1981] to be liable in punitive damages.") (emphasis added). In other words, under this standard, a court may infer that the actor intends the natural and probable consequences of his or her actions in order to find that the action was intentional. *Caliguri*, 99 Wn.2d at 506.

For example, in *Bradley*, this Court held that, because the defendant knew that its plant was emitting pollutants into the air and that these pollutants were likely to settle back to earth on others' property, the defendant had the requisite intent to commit civil trespass. *Bradley*, 104 Wn.2d at 682, 684. Likewise, in *Vanderveen*, this Court found that an attorney's acts of receiving cash payments and failing to record or report them could only be "characterized as nothing other than intentional," such that he had "the conscious objective or purpose to accomplish a particular result, *concealing* the receipt of the cash payments." *Vanderveen*, 166

[4] *Black's Law Dictionary* defines intentional as "done with the aim of carrying out the act." *Black's Law Dictionary* 932 (10th ed. 2014). Meriam Webster's Online Dictionary similarly defines "intentional" as "done by intention or design: intended." https://www.merriam-webster.com/dictionary/intentional (last visited Dec. 6, 2018).

Wn.2d at 611(internal quotation marks omitted) (emphasis added). And in *Caliguri*, this Court found that a defendant's statement that "the janitor's gonna go for sure" was evidence of his knowledge that a particular individual's death would result. *Caliguri*, 99 Wn.2d at 506. In each of these cases, as the trial court did below with GMA, the courts looked to whether the person acted with the purpose of accomplishing some act that was punishable by law in order to find that the defendant committed an intentional violation. The courts did not look to whether the defendant subjectively knew the law and intended to violate it.

The Court of Appeals ignored this weight of authority when it reversed the superior court and adopted GMA's view that "a party must have knowledge that it was violating the law to be subject to treble damages." *GMA*, slip op. at 34. The Court of Appeals found it irrelevant that a defendant like GMA would deliberately engage in an activity (e.g., concealing its members' contributions to oppose I-522) that violated the FCPA. *Id.* However, as the cases show, the relevant inquiry *is* whether the defendant acted with the purpose of accomplishing a violation of the State's campaign finance laws.[5] It is not simply whether the defendant knowingly intended to violate the law.

[5] Under this standard, not every violation of the FCPA would be subject to RCW 42.17A.765(5)'s treble penalty provision. There are many ways that a candidate or campaign committee might violate campaign finance law without doing so "intentionally," e.g., if a committee attempted to file a report on time but failed to do so because of a technology error; if a committee believed its treasurer filed a report when he actually did not; or if a committee treasurer believed he had reported all contributions but actually failed to list some because of a miscommunication with a candidate. The list could go on and on.

In essence, the Court of Appeals based its holding on an interpretation of "intentional" that overlooks the defendant's objective behavior in favor of the defendant's subjective knowledge of the law. Washington courts, however, have not required a defendant to know it was engaging in wrongdoing for an action to be "intentional." To do so would turn the principle *ignorantia legis neminem excusat* ("ignorance of law excuses no one") on its head. It would allow criminal and civil defendants to escape the reaches of the law simply by pleading ignorance. That is exactly what the Court of Appeals did with its standard for "intentional" under RCW 42.17A.765(5).

Under the Court of Appeals' view, a trial court could not impose treble penalties on a defendant that intentionally hides campaign finance information unless it also finds that the person knew what the law required and acted anyway. This cannot be the standard for intentional conduct under the FCPA as it would restrain trial courts' ability to impose significant consequences for egregious campaign finance violations. Just as a criminal defendant cannot escape the consequences of his or her actions by remaining ignorant of the law, a civil defendant, like GMA, should not be allowed to escape punishment simply by pleading it did not know what the campaign finance laws required. This Court should grant review to reinstate the proper standard of what it means to act intentionally under the law.

B. The Court of Appeals' Reading of RCW 42.17A.765(5) Conflicts with the Statute's Plain Text and Purpose

The Court of Appeals also departed from well-settled principles of statutory construction when it adopted GMA's erroneous reading of RCW 42.17A.765(5). The fundamental objective of statutory interpretation is to discern and implement the Legislature's intent. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011). The "surest indication" of legislative intent is the plain language of the statute examined in the context of the statutory scheme as a whole. *Id.* Courts are to give undefined statutory terms their "usual and ordinary meaning" unless a technical definition applies and may not read into a statute a meaning that it not there. *Burton v. Lehman*, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). The Court of Appeals failed to give effect to each of these principles when it reversed the trial court's imposition of treble penalties against GMA based on an incorrect reading of the statute.

The Court of Appeals ignored the statute's plain language by improperly treating the term "violation" as a verb. The Court of Appeals held that, under RCW 42.17A.765(5), "a party must have knowledge that it was *violating* the law to be subject to treble damages." *GMA*, slip op. at 34. The statute, however, uses the term in its ordinary usage as a noun: "[i]f the *violation* is found to have been intentional" then the court "may" treble the judgment. RCW 42.17A.765(5); *see also Black's Law Dictionary* 1800 (10th Ed. 2014) (1. An infraction or breach of the law; a transgression. See infraction. 2. The act of breaking or dishonoring the law; the contravention

of a right or duty). In other words, the trial court must find that the defendant committed an action that contravened the State's campaign finance laws (i.e., the violation) and then determine whether that violation (i.e., the illegal act) was intentional. The trial court need not find that defendant knew it was violating the law, as the Court of Appeals concluded.

If left to stand, the Court of Appeals' interpretation of RCW 42.17A.765(5) will improperly restrict the lower courts' ability to impose treble penalties on those who purposefully seek to deceive the public as to campaign finance information. It also creates absurd consequences. A defendant that simply never asked whether his or her conduct was legal could thereby avoid committing an intentional violation. Such a conclusion would not only allow egregious abuses of state law, but it would give candidates, committees, and others involved in state political campaigns a strong incentive not to check whether their conduct was legal, a result that the Legislature could never have intended. This Court should grant review to correct the Court of Appeals' error and give proper meaning to RCW 42.17A.765(5).

C. This Court Should Grant Review to Protect the Public's Significant Interest in Open and Honest Campaigns

Washington State has always set a high bar for transparency and disclosure in politics and government. When the people adopted the FCPA in 1972, they declared, "the public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain

secret and private." RCW 42.17A.001(10). The people also directed that these 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 that end, the State's campaign finance laws "seek[ ] to ferret out . . . those whose purpose is to influence the political process," *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508-09, 546 P.2d 75 (1976), and holds them accountable when they purposefully set out to hide who is spending money in the State to influence voters. The Court of Appeals unfortunately failed to consider these principles when it reversed GMA's civil penalty based on an overly restrictive interpretation of RCW 42.17A.765(5) that harms the public's interests. This Court should grant review to reinstate GMA's treble penalty and ensure GMA is held accountable for its intentional deception of Washington voters.

V. CONCLUSION

For these reasons, the State respectfully asks this Court to grant review and reverse the Court of Appeals on this issue of substantial public importance.

RESPECTFULLY SUBMITTED this 7th day of December 2018.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served, via electronic mail, pursuant to the parties' electronic service agreement, the foregoing document on all parties or their counsel of record on the date below:

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DATED this 7th day of December 2018, at Olympia, Washington.

s/ *Stephanie N. Lindey*
STEPHANIE N. LINDEY
Legal Assistant

in exchange for that interest, and the name and address of the person furnishing the consideration;

(j) A list, including legal or other sufficient descriptions as prescribed by the commission, of all real property in the state of Washington, the assessed valuation of which exceeds *ten thousand dollars in which a direct financial interest was held. If a description of the property has been included in a report previously filed, the property may be listed, for purposes of this subsection (1)(j), by reference to the previously filed report;

(k) A list, including legal or other sufficient descriptions as prescribed by the commission, of all real property in the state of Washington, the assessed valuation of which exceeds *twenty thousand dollars, in which a corporation, partnership, firm, enterprise, or other entity had a direct financial interest, in which corporation, partnership, firm, or enterprise a ten percent or greater ownership interest was held;

(l) A list of each occasion, specifying date, donor, and amount, at which food and beverage in excess of fifty dollars was accepted under RCW 42.52.150(5);

(m) A list of each occasion, specifying date, donor, and amount, at which items specified in **RCW 42.52.010(10) (d) and (f) were accepted; and

(n) Such other information as the commission may deem necessary in order to properly carry out the purposes and policies of this chapter, as the commission shall prescribe by rule.

(2) Where an amount is required to be reported under subsection (1)(a) through (m) of this section, it shall be sufficient to comply with the requirement to report whether the amount is less than *four thousand dollars, at least *four thousand dollars but less than *twenty thousand dollars, at least *twenty thousand dollars but less than *forty thousand dollars, at least *forty thousand dollars but less than *one hundred thousand dollars, or *one hundred thousand dollars or more. An amount of stock may be reported by number of shares instead of by market value. No provision of this subsection may be interpreted to prevent any person from filing more information or more detailed information than required.

(3) Items of value given to an official's or employee's spouse, domestic partner, or family member are attributable to the official or employee, except the item is not attributable if an independent business, family, or social relationship exists between the donor and the spouse, domestic partner, or family member. [2010 c 204 § 903; 2008 c 6 § 202; 1995 c 397 § 9; 1984 c 34 § 3; 1979 ex.s. c 126 § 42. Formerly RCW 42.17.241.]

Reviser's note: *(1) The dollar amounts in this section may have been adjusted for inflation by rule of the commission adopted under the authority of RCW 42.17A.110. For current dollar amounts, see WAC 390-24-301.

**(2) RCW 42.52.010 was amended by 2011 c 60 § 28, changing subsection (10)(d) and (f) to subsection (9)(d) and (f).

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

Purpose—1979 ex.s. c 126: See RCW 29A.60.280(1).

42.17A.715 Concealing identity of source of payment prohibited—Exception. No payment shall be made to any person required to report under RCW 42.17A.700 and no payment shall be accepted by any such person, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the payment or in any other manner so as to effect concealment. The commission may issue categorical and specific exemptions to the reporting of the actual source when there is an undisclosed principal for recognized legitimate business purposes. [2010 c 204 § 904; 1977 ex.s. c 336 § 4. Formerly RCW 42.17.242.]

Additional notes found at www.leg.wa.gov

ENFORCEMENT

42.17A.750 Civil remedies and sanctions—Referral for criminal prosecution. (1) In addition to the penalties in subsection (2) of this section, and any other remedies provided by law, one or more of the following civil remedies and sanctions may be imposed by court order in addition to any other remedies provided by law:

(a) If the court finds that the violation of any provision of this chapter by any candidate or political committee probably affected the outcome of any election, the result of that election may be held void and a special election held within sixty days of the finding. Any action to void an election shall be commenced within one year of the date of the election in question. It is intended that this remedy be imposed freely in all appropriate cases to protect the right of the electorate to an informed and knowledgeable vote.

(b) If any lobbyist or sponsor of any grass roots lobbying campaign violates any of the provisions of this chapter, his or her registration may be revoked or suspended and he or she may be enjoined from receiving compensation or making expenditures for lobbying. The imposition of a sanction shall not excuse the lobbyist from filing statements and reports required by this chapter.

(c) A person who violates any of the provisions of this chapter may be subject to a civil penalty of not more than ten thousand dollars for each violation. However, a person or entity who violates RCW 42.17A.405 may be subject to a civil penalty of ten thousand dollars or three times the amount of the contribution illegally made or accepted, whichever is greater.

(d) A person who fails to file a properly completed statement or report within the time required by this chapter may be subject to a civil penalty of ten dollars per day for each day each delinquency continues.

(e) Each state agency director who knowingly fails to file statements required by RCW 42.17A.635 shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars per statement. These penalties are in addition to any other civil remedies or sanctions imposed on the agency.

(f) A person who fails to report a contribution or expenditure as required by this chapter may be subject to a civil penalty equivalent to the amount not reported as required.

(g) Any state agency official, officer, or employee who is responsible for or knowingly directs or expends public funds in violation of RCW 42.17A.635 (2) or (3) may be subject to personal liability in the form of a civil penalty in an amount that is at least equivalent to the amount of public funds expended in the violation.

(h) The court may enjoin any person to prevent the doing of any act herein prohibited, or to compel the performance of any act required herein.

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(2) The commission may refer the following violations for criminal prosecution:

(a) A person who, with actual malice, violates a provision of this chapter is guilty of a misdemeanor under chapter 9.92 RCW;

(b) A person who, within a five-year period, with actual malice, violates three or more provisions of this chapter is guilty of a gross misdemeanor under chapter 9.92 RCW; and

(c) A person who, with actual malice, procures or offers any false or forged document to be filed, registered, or recorded with the commission under this chapter is guilty of a class C felony under chapter 9.94A RCW. [2013 c 166 § 1; 2011 c 145 § 6; 2010 c 204 § 1001; 2006 c 315 § 2; 1993 c 2 § 28 (Initiative Measure No. 134, approved November 3, 1992); 1973 c 1 § 39 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.390.]

Effective date—2013 c 166: See note following RCW 42.17A.055.

Findings—Intent—Effective date—2011 c 145: See notes following RCW 42.17A.005.

Intent—2006 c 315: "It is the intent of the legislature to increase the authority of the public disclosure commission to more effectively foster compliance with our state's public disclosure and fair campaign practices act. It is the intent of the legislature to make the agency's penalty authority for violations of this chapter more consistent with other agencies that enforce state ethics laws and more commensurate with the level of political spending in the state of Washington." [2006 c 315 § 1.]

Severability—2006 c 315: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [2006 c 315 § 4.]

42.17A.755 Violations—Determination by commission—Penalties—Procedure. (1) The commission may (a) determine whether an actual violation of this chapter has occurred; and (b) issue and enforce an appropriate order following such a determination.

(2) The commission, in cases where it chooses to determine whether an actual violation has occurred, shall hold a hearing pursuant to the administrative procedure act, chapter 34.05 RCW, to make a determination. Any order that the commission issues under this section shall be pursuant to such a hearing.

(3) In lieu of holding a hearing or issuing an order under this section, the commission may refer the matter to the attorney general or other enforcement agency as provided in RCW 42.17A.105.

(4) The person against whom an order is directed under this section shall be designated as the respondent. The order may require the respondent to cease and desist from the activity that constitutes a violation and in addition, or alternatively, may impose one or more of the remedies provided in *RCW 42.17A.750(1) (b) through (e). The commission may assess a penalty in an amount not to exceed ten thousand dollars.

(5) The commission has the authority to waive a fine for a first-time violation. A second violation of the same rule by the same person or individual, regardless if the person or individual committed the violation for a different political committee, shall result in a fine. Succeeding violations of the same rule shall result in successively increased fines.

(6) An order issued by the commission under this section shall be subject to judicial review under the administrative procedure act, chapter 34.05 RCW. If the commission's order is not satisfied and no petition for review is filed within thirty days, the commission may petition a court of competent jurisdiction of any county in which a petition for review could be filed under that section, for an order of enforcement. Proceedings in connection with the commission's petition shall be in accordance with RCW 42.17A.760. [2011 c 145 § 7; 2010 c 204 § 1002; 2006 c 315 § 3; 1989 c 175 § 91; 1985 c 367 § 12; 1982 c 147 § 16; 1975-'76 2nd ex.s. c 112 § 12. Formerly RCW 42.17.395.]

***Reviser's note:** RCW 42.17A.750 was amended by 2013 c 166 § 1, changing subsection (1)(b) through (e) to subsection (1)(b) through (f), effective January 1, 2014.

Findings—Intent—Effective date—2011 c 145: See notes following RCW 42.17A.005.

Intent—Severability—2006 c 315: See notes following RCW 42.17A.750.

Additional notes found at www.leg.wa.gov

42.17A.760 Procedure upon petition for enforcement of order of commission—Court's order of enforcement. The following procedure shall apply in all cases where the commission has petitioned a court of competent jurisdiction for enforcement of any order it has issued pursuant to this chapter:

(1) A copy of the petition shall be served by certified mail directed to the respondent at his or her last known address. The court shall issue an order directing the respondent to appear at a time designated in the order, not less than five days from the date thereof, and show cause why the commission's order should not be enforced according to its terms.

(2) The commission's order shall be enforced by the court if the respondent does not appear, or if the respondent appears and the court finds, pursuant to a hearing held for that purpose:

(a) That the commission's order is unsatisfied;

(b) That the order is regular on its face; and

(c) That the respondent's answer discloses no valid reason why the commission's order should not be enforced or that the respondent had an appropriate remedy by review under RCW 34.05.570(3) and failed to avail himself or herself of that remedy without valid excuse.

(3) Upon appropriate application by the respondent, the court may, after hearing and for good cause, alter, amend, revise, suspend, or postpone all or part of the commission's order. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and the action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) The court's order of enforcement, when entered, shall have the same force and effect as a civil judgment.

(5) Notwithstanding RCW 34.05.578 through 34.05.590, this section is the exclusive method for enforcing an order of the commission. [2010 c 204 § 1003; 1989 c 175 § 92; 1982 c 147 § 17; 1975-'76 2nd ex.s. c 112 § 13. Formerly RCW 42.17.397.]

Additional notes found at www.leg.wa.gov

42.17A.765 Enforcement. (1) The attorney general and the prosecuting authorities of political subdivisions of this

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state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17A.750.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or produce the accounts, bills, receipts, books, papers, and documents that may be relevant or material to any investigation authorized under this chapter, he or she shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. The order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or the prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and the action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) A person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself or herself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.

(a) This citizen action may be brought only if:

(i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after the notice;

(ii) The person has thereafter further notified the attorney general and prosecuting attorney that the person will commence a citizen's action within ten days upon their failure to do so;

(iii) The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice; and

(iv) The citizen's action is filed within two years after the date when the alleged violation occurred.

(b) If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he or she shall be entitled to be reimbursed by the state of Washington for costs and attorneys' fees he or she has incurred. In the case of a citizen's action that is dismissed and that the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including reasonable attorneys' fees to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he or she shall be awarded all costs of trial, and may be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington. [2010 c 204 § 1004; 2007 c 455 § 1; 1975 1st ex.s. c 294 § 27; 1973 c 1 § 40 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.400.]

42.17A.770 Limitation on actions. Except as provided in RCW 42.17A.765(4)(a)(iv), any action brought under the provisions of this chapter must be commenced within five years after the date when the violation occurred. [2011 c 60 § 26; 2007 c 455 § 2; 1982 c 147 § 18; 1973 c 1 § 41 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.410.]

CONSTRUCTION

42.17A.900 Effective date—1973 c 1. The effective date of this act shall be January 1, 1973. [1973 c 1 § 49 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.900.]

42.17A.904 Construction—1973 c 1. The provisions of this act are to be liberally construed to effectuate the policies and purposes of this act. In the event of conflict between the provisions of this act and any other act, the provisions of this act shall govern. [1973 c 1 § 47 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.920.]

42.17A.905 Chapter, section headings not part of law. Chapter and section captions or headings as used in this act do not constitute any part of the law. [1973 c 1 § 48 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.930.]

42.17A.906 Repealer—1973 c 1. Chapter 9, Laws of 1965, as amended by section 9, chapter 150, Laws of 1965 ex. sess., and RCW 29.18.140; and chapter 131, Laws of 1967 ex. sess. and RCW 44.64 [chapter 44.64 RCW]; and chapter 82, Laws of 1972 (42nd Leg. 2nd Ex. Sess.) and Referendum Bill No. 24; and chapter 98, Laws of 1972 (42nd Leg. 2nd Ex. Sess.) and Referendum Bill No. 25 are each hereby repealed. [1973 c 1 § 50 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.940.]

Appendix

SOLICITOR GENERAL OFFICE

December 07, 2018 - 10:44 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	State of Washington, Respondent v. Grocery Manufacturers Association, Appellant (497689)

The following documents have been uploaded:

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