No. 99407-2

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner.

MEMORANDUM OF *AMICI CURIAE* STATE LEGISLATORS

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IDENTITY AND INTEREST OF AMICI CURIAE

As explained in their motion for leave to submit this Memorandum, Amici are seven bipartisan members of the Washington State Legislature with a strong and compelling interest in fair and open election campaigns.

As regular candidates for public office, this bicameral and bipartisan group of Amici hope the Court will clearly articulate when penalties for campaign finance violations are (or are not) unconstitutionally excessive. In addition, legislative determinations are central to Eighth Amendment jurisprudence arising from the application of statutory penalties. *See, e.g.*, *State v. Grocery Mfrs. Ass'n* (*GMA III*) 15 Wn. App. 2d 290, 301 (2020) ("First, courts should give deference to the legislature's determination of the appropriate punishment for an offense.") (citing *United States v. Bajakajian*, 524 U.S. 321, 336 (1998)). Thus, as state legislators who play an integral role in proposing, negotiating, debating and voting on changes to Washington's Fair Campaign Practices Act (FCPA), ch. 42.17A RCW, Amici have a strong interest in the Court's adjudication of the Eighth Amendment issues raised in this case, particularly how *Bajakajian* should be applied to cases involving civil penalties under the FCPA.

Most importantly, Amici believe a fair and open electoral process necessitates sanctions for campaign finance violations that are fair and predictable and do not discourage protected political activity. Without this,

Amici fear would-be participants will withdraw from the political arena due to the risk of facing ruinous penalties that may appear to relate more closely to the participant's own political popularity or the zealousness of the State's enforcement, rather than the gravity of the error itself or the harm it caused. Therefore, Amici have a strong interest in seeing the Court accept review.

ARGUMENT

A. Allowing standardless discretion for civil penalties imposed in FCPA cases raises a significant constitutional question and is an issue of substantial public interest.

The FCPA provides exacting instructions to political committees regarding what and when to disclose. *See* RCW 42.17A.200-.270. When a committee violates those requirements, the FCPA contemplates remedies that are commensurate with the severity of the offense. *See* RCW 42.17A.750-.785. For the most trivial of errors, the PDC may "waive a fine for a first-time violation." Former RCW 42.17A.755(5). For the most severe offenses, if a court "finds that the violation of any provision of [the FCPA] by any [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."[1] RCW 42.17A.750(1)(a). For cases in between,

[1] The State has not alleged GMA's reporting violations affected the outcome of Initiative 522, and there is no evidence in the record of such an effect. *See* Clerk's Papers. The State did not seek to void the election results under RCW 42.17A.750(1)(a), and no court below considered or granted such a remedy. *See id.* The court of appeals' cursory analysis of

the PDC "shall hold a hearing," determine "whether an actual violation has occurred" and (if necessary) "issue and enforce an appropriate order following such determination," though in more serious cases the PDC "may refer the matter to the attorney general." Former RCW 42.17A.755(1)-(3).[2]

Underlying these legislatively-enacted enforcement provisions is an assumption that consistent, standards-based discretion will be exercised when civil penalties are assessed for FCPA violations. The decision below by the court of appeals, however, effectively provides for standardless discretion. Amici believe that not only does this raise a significant constitutional issue vis-à-vis the proper application of the *Bajakajian* test for determining whether a fine violates the Eighth Amendment, but is also a matter of substantial public interest because of the precedential impact GMA's fine will have on penalties imposed for future FCPA violations. For both reasons, the Court should grant review under RAP 13.4(b).

1. <u>The lack of standards applied to the penalties in this case necessitates Eighth Amendment review.</u>

The "nature and extent of the crime" and "extent of the harm caused" are two of the primary factors to be considered when determining

Bajakajian's "extent of the harm caused" test did not acknowledge that GMA's violations of the FCPA were evidently not severe enough to affect the outcome of the election.

[2] Former RCW 42.17A.755 as cited in this paragraph was in effect during the 2013 election cycle when Initiative 522 was on the ballot. RCW 42.17A.755 was amended by Laws of 2018, ch. 304, § 13, which maintains the general graduated approach to FCPA violations.

whether a fine is excessive. *State v. Grocery Mfrs. Ass'n* (*GMA II*), 195 Wn.2d 442, 476 (2020) (quoting *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004)). The *relative* differences in the nature of distinct FCPA violations, and the harm caused by such violations, typically are self-evident. For example, failing to disclose a contribution at all is clearly different from failing to disclose the source of the contribution. And the former surely causes more harm to the public because in the case of latter, the public at least knows the timing and amount of the contribution. Similarly, suppose two campaigns fail to disclose contribution details. Both violate the same rule, but if one campaign cures the failure before the election is held, the violation will result in less harm to the voting public (who will have pre-election access to the contribution details) than the non-disclosure violation that is not cured until after the election. Yet the court of appeals did not compare GMA's violations to those provisions of the FCPA that were properly followed,[3] nor did it conduct any analysis of the degree of harm caused by GMA's violations.[4] Compounding these errors, the court of appeals glossed over GMA's

[3] For example, amounts contributed to the political committee opposing Initiative 522 were timely filed. *See* Clerk's Papers at 223, 225, 227, 229, 231.

[4] As GMA points out in its Petition for Review, such an analysis yields stunning results—over the period from 2008 through 2018, GMA's penalty was 24 times larger than the next-largest FCPA penalty and nearly six times larger than the sum of all other fines imposed in FCPA cases brought by the Attorney General. Pet. for Review at 7-8.

concern that if the penalty authorized by former RCW 42.17A.750(1)(e) (current version at RCW 42.17A.750(1)(g)) is relied on as the standard for "other penalties that may be imposed for the violation" under *Bajakajian*, then no fine could ever be considered excessive, as potential penalties would be unlimited.[5] *GMA III*, 15 Wn. App. 2d at 304.

As expressed above, Amici have a deep interest in protecting the integrity of the state's electoral process. Basing FCPA fines on the total amount of money spent on a campaign, rather than any showing of harm caused (the practical result of *GMA III*), will distort and harm that process. Thus, Amici respectfully request that the Court accept review in order to properly apply the *Bajakajian* tests, so that sanctions are proportionate to the actual harm an FCPA violation causes to the electoral process.[6]

2. The lack of standards applied to the penalties in this case involves an issue of substantial public interest.

During its 2018 session, the Legislature enacted ESHB 2938, which updated and clarified various provisions of the FCPA. *See* Laws of 2018, ch. 304. In particular, Section 12(d) of the bill (codified at RCW 42.17A.750(d)) included a set of fourteen distinct factors for a court to

[5] There are no limits on contributions from individuals to political parties, caucus political committees or PACs, or from PACs, businesses and unions to political parties (for exempt functions only) or other PACs. *See* RCW 42.17A.405.

[6] In addition, Amici do not believe the Legislature intended to provide for unlimited penalties through the enactment of former RCW 42.17A.750(1)(e) (current version at RCW 42.17A.750(1)(g)) and hope the Court accepts review and articulates how this statute ought to be incorporated into excessive fines analyses under the Eighth Amendment.

consider, along with "the nature of the violation and any relevant circumstances," when assessing civil penalties for FCPA violations. These factors include "whether the noncompliance . . . had a significant or material impact on the public" and "[w]hether the respondent . . . benefited politically or economically from the noncompliance." *Id.* § 12. Amici, who voted for ESHB 2938, believe that Section 12(d) represented a clarification of existing law, rather than the creation of a new penalty scheme,[7] and respectfully suggest that the Court consider RCW 42.17A.750(d) in assessing the reasonableness (or lack thereof) of GMA's fine.

Even if the Court declines to consider RCW 42.17A.750(d) in its analysis, Amici believe *some* review of GMA's fine is still very much necessary. "Penalties imposed in factually similar cases" is another of the fourteen factors courts may consider when assessing penalties. RCW 42.17A.750(d)(xiii). Thus, any fine ultimately levied against GMA in this case will inevitably serve as a reference point for future FCPA sanctions under this factor. If left intact without additional review by this Court, the $18 million fine against GMA would create an unintended and paradoxical result, whereby fines in future FCPA cases to which RCW 42.17A.750(d)

[7] Indeed, the insertion of subsection (d) was the only revision to RCW 42.17A.750 made by ESHB 2938, which further suggests that the legislature's intent was to supplement, rather than alter, the remedies and sanctions a court could impose for violating the FCPA.

does apply will be anchored to the unprecedented result of a case to which the statute did not apply.

Therefore, Amici urge the Court to accept review of the Petition and apply a set of reasonable standards to GMA's civil penalties. Absent such review and standards-setting, this case will improperly bias future cases.

B. Ensuring fines do not have a "chilling effect" on political speech is a significant question of law under state and federal constitutions and an issue of substantial public interest.

As active and regular participants in political campaigns, Amici have a strong interest in ensuring the electoral process remains open to all and free from improper influence. Amici are deeply concerned that excessive, disproportionate or inconsistent enforcement of campaign finance laws will have a "chilling effect" on the voluntary political activity that is essential to our democracy. Thus, Amici believe Eighth Amendment scrutiny should be especially exacting in cases involving political activity.

Though the Eighth Amendment "protects against excessive civil fines" generally, *Hudson v. United States*, 522 U.S. 93, 103 (1997), most modern caselaw implicating the Excessive Fines Clause involves asset seizures, *see, e.g.*, *Timbs v. Indiana*, 586 U.S. ___, 139 S. Ct. 682 (2019), *Bajakajian*, 524 U.S. 321, *Austin v. United States*, 509 U.S. 602 (1993), *$100,348.00 in U.S. Currency*, 354 F.3d 1110. But even where Eighth Amendment cases have not raised the issue directly, the U.S. Supreme

Court has repeatedly drawn a connection between excessive fines and the suppression of other fundamental rights. *See, e.g.*, *Timbs*, 139 S. Ct. at 689 ("Exorbitant tolls undermine other constitutional liberties."), *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.* 492 U.S. 257, 267 (1989) ("[O]ur Excessive Fines Clause [should be read] as limiting the ability of the sovereign to use its prosecutorial power, including the power to collect fines, for improper ends."). As GMA points out in its petition, a chorus of lower courts and legal commentators agree. Pet. for Review at 17-19; *see also* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 23 (2018) ("The concern undergirding this attention to abuse of power . . . in the excessive fines context is that punishment will become too partisan, and in particular that it will serve to target those who are most politically vulnerable.").

Amici share this outlook, as well. As elected officials and candidates for office themselves, Amici rely on a robust electoral process in which *all* voters, not merely the most proactive or engaged voters, receive facts and opinions to inform their votes on the issues and candidates appearing on their ballot. While excessive campaign spending is frequently the subject of ire from voters and politicians alike,[8] political advertising is not only

[8] Not to mention subject to some (permissible) regulation under the Constitution. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) ("The Government may regulate corporate political speech through disclaimer and disclosure requirements . . . .").

protected speech but also necessary in a representative democracy because it reduces informational asymmetries between voters and candidates (or issues, in the case of initiative campaigns). This effect of campaign advertising increases the likelihood that voters will select candidates who share their own policy beliefs and preferences, and ultimately results in elected officials who are more representative of their constituents' views. In other words, political advertising *improves* democratic outcomes.

Because of this, Amici believe it is imperative that *all* competing sides in an election have the opportunity to make their voices heard. There are many reasons to avoid participation in the political process, but the one at issue in this case is the risk of an excessive fine. Even if the chilling effect of a fine is not a First Amendment violation itself, an excessive fine in the electoral context may nonetheless have a chilling effect on participation in the political process and requires constitutional scrutiny. Amici therefore agree with this Court's edict that "punitive fines should not be sought or imposed 'to retaliate against or chill the speech of political enemies.'" *GMA II*, 195 Wn.2d at 476 (quoting *Timbs*, 139 S. Ct. at 689).

Unfortunately, the court of appeals refrained from fully analyzing GMA's arguments through the lens of how such an excessive fine could chill other protected rights. *See GMA III*, 115 Wn. App. 2d at 306. Because this issue involves matters of both constitutional interpretation and

significant public importance, Amici respectfully request the Court grant review under RAP 13.4(b)(3) and 13.4(b)(4). The Court should articulate an enduring set of Eighth Amendment principles that apply to penalties for political conduct.

CONCLUSION

Both parties "agree[] the Eighth Amendment applies to GMA's civil penalty." *GMA III*, 115 Wn. App. 2d at 301. But Amici also believe civil penalties for FCPA violations should not be subject to standardless discretion, and that the risk of chilling fundamental rights should be considered when reviewing whether such penalties are unconstitutionally excessive. Because these matters involve questions of constitutional interpretation and are also critically important to the fairness of future elections (an issue of utmost public interest), the Court should grant review under RAP 13.4(b).

DATED this 12th day of March, 2021.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Andrew R. Stokesbary, declare, under penalty of perjury under the laws of the State of Washington, that on March 12, 2021, I electronically filed the foregoing document via the Washington State Appellate Courts' Portal, which will send email notification of such filing to all parties of record.

Signed in Auburn, Washington, this 12th day of March, 2021.

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