FILED
SUPREME COURT
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STATE OF WASHINGTON
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Supreme Court 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 BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, ENTERPRISE WASHINGTON, AND WASHINGTON FARM BUREAU

JACKSON WILDER MAYNARD, JR.
WSBA No. 43481

BROOKE FRICKLETON
WSBA No. 55580

PAUL GRAVES
WSBA No. 39410

Attorneys for Amicus Curiae Building Industry Association of Washington, Enterprise Washington and Washington Farm Bureau

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I. INTRODUCTION

When this case was previously before it, this Court left open the issue now presented: whether the excessive fines clauses in the state and federal constitutions allow a $6 million penalty for campaign public disclosure violations, and an additional $12 million in punitive damages. *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d 442, 475-476, 461 P.3d 334, 353 (2020). Two Justices wrote separate opinions, both of which noted the importance of the issue, especially as it also raises issues involving the free speech clauses of our constitutions, the chilling effect on non-parties, and the prospect of selective prosecution. *Id.* at 479, 461 P.3d at 355-56 (Johnson, J., concurring and dissenting in part); *Id.* at 490, 461 P.3d at 360 (Gordon McCloud, J., concurring and dissenting in part).

Now that the Court has the benefit of decision below, it is the right time for this Court's review. Granting review would fit comfortably within the rules governing discretionary review. First, the issue is of substantial public importance. RAP 13.4(b)(4). More than 1,200 organizations were involved in Washington's 2020 elections, and they deserve this Court's considered guidance on fines for disclosure violations, and when they cross the constitutional line. Second, the Petition presents several unaddressed

and significant questions about the state and federal constitutions. RAP 13.4(b)(3). Those questions merit the Court's review.

II. ARGUMENT

A. There is substantial public interest in how the excessive fines clauses apply to campaign disclosure violations.

In 2020, more than 1,200 organizations filed as committees with the Public Disclosure Commission (PDC). *See* https://www.pdc.wa.gov/browse/more-ways-to-follow-the-money/committees/continuing?category=Committees (last visited Mar. 8, 2021). Representing millions of Washingtonians, they set out to exercise that most fundamental right: to persuade their fellow citizens to vote for or against something on the ballot.

Those organizations operate under beneficial but relatively complex public disclosure laws. Those laws provide hefty fines for missteps- fines that could bankrupt any group. There are some protections against ruinous fines in the statutes themselves, but Washingtonians who engage in elections need to know whether the constitutions provide protection as well.

This Court recognized the importance of the issue in its previous opinion in this case. It noted that the State sought "an apparently unprecedented base penalty of $14,622,820," and requested that amount be trebled. *Grocery Mfrs. Ass'n*, 195 Wn.2d at 476, 461 P.3d at 353. While that

may be "a permitted statutory basis for determining a penalty…it will not always be constitutional as applied." *Id.* (citation omitted). Justice Johnson called it "concerning that the penalty imposed in this case is an extreme outlier." *Id.* at 481, 461 P.3d at 355. And Justice Gordon McCloud sought to "instruct the trial court to consider the Eighth Amendment excessive fines clause proportionality requirements before imposing *any* FCPA penalties (based or trebled)." *Id.* at 490, 461 P.3d at 360 (emphasis in original).

The issue is important, and underdeveloped. The Court, and the parties in the current round of briefing, focus almost exclusively on an excessive fines case from 1998 involving a crime, namely, the under-disclosing of currency when traveling abroad, *United States v. Bajakajian*, 524 U.S. 321 (1998), and a recent decision about forfeiting a car for drug crimes, *Timbs v. Indiana,* 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019). Both involved crimes, and neither involved fines for campaign-related acts. In fact, it does not appear that any court in the country has decided when penalties for campaign violations cross the line into excessive fines.

Washingtonians have proven themselves active participants in their government and in the elections that affect them. They deserve to know what their potential exposure is when they band together and try to persuade their fellow citizens. They deserve to know what rules, if any, protect against selective prosecution that is such a danger when politics are

involved. They need clarity on the constitutional rules presented by this petition. The Court should grant review under RAP 13.4(b)(4) to address this issue of substantial public importance.

B. Applying the Excessive Fines provisions to fines for campaign violations is a significant question of law.

The Court should also grant review under RAP 13.4(b)(3), because a fine of this size presents significant questions under both the state and federal constitutions.

1. Unanswered questions about the Excessive Fines provisions are significant.

The Eighth Amendment to the federal Constitution forbids "excessive fines." So does Article I, Section 14 of our State's Constitution. To date, most cases under those provisions address criminal punishments, *e.g.*, *Bajakajian*, 524 U.S. at 334, fines for civil infractions that monetarily damage people or the government, *e.g.*, *US v. Mackby*, 261 F. 3d 821 (9th Cir. 2001), or, more recently, civil asset forfeiture related to criminal punishments, *Timbs*, 139 S. Ct. 682, 203 L. Ed. 2d 11 (2019).

The standards that courts have fashioned in those contexts are not a good fit for cases involving civil fines for campaign violations. The leading case, *Bajakajian*, directs courts to consider "the nature and extent of the crime," "whether the violation was related to other illegal activities," "the

other penalties that may be imposed for the violation," and "the extent of the harm caused." *Bajakajian*, 524 U.S. at 334. Those considerations make sense for run-of-the-mill criminal punishments or acts that deprive people or the government of money, but they are ill-suited to address campaign disclosure violations.

The briefing on this Petition illustrates the challenges. The parties dispute whether failure to disclose donors is "serious and significant" (Answer to Pet. for Review at 7) or a "garden-variety FCPA violation," (Pet. for Review at 5), even though *Bajakajian*'s first standard is "the nature and extent of the crime" and a civil violation of a campaign disclosure law is clearly not a crime. That dispute travels down the line, as the parties then argue whether an action that might violate more than one section of the public disclosure statute counts as "other illegal activities." (Answer to Pet. for Review at 10.)

The relevant statutes authorize and delimit the fines available, so "other penalties that may be imposed" is not an illuminating consideration, the way it might be for a defendant charged with misdemeanor burglary who could have been charged with felony assault. And "the extent of the harm caused" presents a new, categorical issue—whether the harm is voters not knowing the source of campaign funds, (Answer to Pet. for Review at

13-16), or instead whether a violation had an impact on an election result, (Pet. for Review at 10-13), or perhaps some other consideration.

Maybe *Bajakajian* provides the right standards for campaign violations, and it is only a matter of shoehorning the facts of this case to fit them. In that case, the Court's guidance is needed for how the shoehorning should go. Maybe those standards, crafted as they were for criminal punishments, are not the right ones for violations of civil campaign laws. In that case, the Court's guidance is needed for what the right standards are. Either way, the Court's guidance is needed on this significant question of constitutional law.

In addition, this case could allow the Court to decide if Washington's excessive fines clause provides greater protection than its federal counterpart in these circumstances. The Court has already concluded that Article I, Section 14's prohibition on cruel punishment is more protective than the Eighth Amendment to the federal Constitution. *See State v. Bassett*, 192 Wn.2d 67, 428 P.3d 343, 348 (2018). It remains an open question whether that Section's excessive fines clause is similarly more protective, either in general, or particularly when it comes to fines for campaign violations. This case presents a good opportunity to answer that question.

2. It is significant how rules about free speech, chilled speech, and selective prosecutions are applied to fines for campaign activities.

Beyond the excessive fines clauses themselves, this case also presents three significant questions about how those clauses interact with other aspects of the First Amendment and our own Article I, Section 5: free speech for the defendant, chilled speech for others, and selective prosecution.

First, massive fines threaten the speech and political activities of the defendant. Speaking about issues on the ballot, banding with others to persuade voters, communicating about ideas and candidates—activities like those are at the center of free speech rights. Ruinous fines related to them, even fines for violations of tangential activity like disclosing donors, should be judged exactingly. *Grocery Mfrs. Ass'n*, 195 Wn.2d at 477, 461 P.3d at 353. Surely, at some point, a fine is so large it violates the free speech rights of a defendant. *Amici* submit that the largest fine ever for a campaign finance violation in the nation's history is past that point. In any event, the Court should grant review to clarify where, if anywhere, that point is.

Second, massive fines threaten to chill the political activities of non-parties. In the pure speech context, the chilling effects doctrine allows defendants to raise the potential but chilled speech of others. *Ashcroft v. Free Speech Coal.*, 535 US 234 (2002). The doctrine recognizes that

punishment for speech, even constitutionally valid punishment, discourages others from speaking. *Reno v. ACLU*, 521 US 844, 872-73 (1997). That doctrine should apply to punishments for political activities too. There is a real risk that Washingtonians may be reluctant to engage in elections if, by doing so, they expose themselves to large fines.

The State, in its Response to the Petition, observes that such an argument is novel, (Answer to Pet. for Review at 19-20), but that is only because fines as large as those here have not been considered by other courts. Indeed, when this case was last here, both the majority opinion and Justice Johnson's concurrence warned about the chilling effect of large fines. *Grocery Mfrs. Ass'n*, 195 Wn.2d at 476, 480, 461 P.3d at 353, 355. Granting review will give the Court the opportunity to decide whether and how to apply the chilling effects doctrine to fines for political activities.

Third, these kinds of fines run the risk of selective prosecution. State law provides a number of ways to calculate fines for disclosure violations. The parties here have made arguments, keyed to the relevant statutes, that the proper base penalty should have been $622,820 (Pet. for Review at 10) or more than $14 million, *Grocery Mfrs. Ass'n*, 195 Wn.2d at 476, 461 P.3d at 353.

Such wild deviation invites excessive fines against those who are politically unpopular. That may have even happened in this case, as a

committee on the opposing side of the initiative at issue received a much smaller fine and no trebling for essentially the same conduct. *Grocery Mfrs. Ass'n*, 195 Wn.2d at 480-481, 461 P.3d at 355 (Johnson, J., concurring and dissenting). This Court's guidance would help address and limit the risk of selective prosecution.

Those three questions—free speech for the defendant, the chilling effect on others, and the risk of selective prosecution—are plainly presented here. The Court in fact identified each of those issues the last time this case was here. The majority opinion noted the risk that fines for campaign activities could be "sought or imposed to retaliate against or chill the speech of political enemies[.]"*Grocery Mfrs. Ass'n*, 195 Wn.2d at 476, 461 P.3d at 353 (quotation marks and citation omitted).

Additionally, Justice Johnson observed that "where the conduct entails involvement in the political process and the government punishes an aspect of that involvement, care must be exercised." *Id.* at 480, 461 P.3d at 355 (Johnson, J., concurring and dissenting). Citing the First Amendment, he warned against "attempts to disfavor certain subjects or viewpoints." *Id.* (citation omitted). And he wrote that when the government "misuse[s] the statutory punitive damages to target political speakers[,]…the focus is on impermissible chilling of political speech." *Id.*

III. CONCLUSION

Fines for political activities can violate the excessive fines clauses of our constitutions. They can also violate the free speech rights of defendants, impermissibly chill the political activities of non-parties, and invite selective prosecution. Each of those is an important issue of constitutional law, and an issue of substantial public interest. The Court should grant review to address them. RAP 13.4(b)(3), (4).

Respectfully submitted this 11th day of March, 2021,

By: _____

JACKSON WILDER MAYNARD, JR.
GENERAL COUNSEL
WSBA No. 43481

_____

BROOKE FRICKLETON
ASSOCIATE GENERAL COUNSEL
WSBA No. 55580

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON
300 DESCHUTES WAY SW, SUITE 300
TUMWATER, WA 98501
(360) 352-7800

___s/Paul Graves_____

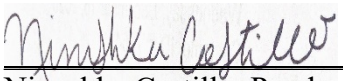
PAUL GRAVES
WSBA No. 39410

Attorneys for Amicus Curiae Building Industry Association of Washington, Enterprise Washington and Washington Farm Bureau

DECLARATION OF SERVICE

I, Ninoshka Castillo, hereby 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' Secure Portal which will send e-mail notifications of such filing to all parties of record.

Signed in Tumwater, Washington, this 11th day of March, 2021



Ninoshka Castillo, Paralegal

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

March 11, 2021 - 10:21 AM

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Superior Court Case Number:	13-2-02156-8

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