No. 99407-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner,

v.

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

Respondent.

GMA'S ANSWER TO AMICUS MEMORANDA IN SUPPORT OF GMA'S PETITION FOR REVIEW

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I. INTRODUCTION

This Court has received four amicus memoranda supporting the petition for review filed by Grocery Manufacturers Association ("GMA"). All four argue that this case satisfies the criteria for review in RAP 13.4(b). Although each amicus memorandum offers a different perspective on the constitutional issue that GMA's petition raises, all of them presume that GMA properly preserved its challenge under the Eighth Amendment's Excessive Fines Clause. That presumption is correct.

For example, *amici* Building Industry Association of Washington, Enterprise Washington, and Washington Farm Bureau urge the Court to accept review because there is substantial public interest in how the Excessive Fines Clause applies to campaign disclosure violations and because the application of the Excessive Fines Clause to campaign disclosure violations presents a significant question of law. These amici point out that over 1,200 organizations filed as Washington political committees in 2020 and that all of them have an interest in the sanctions they might incur for missteps—especially the kind of ruinous penalties imposed here.

The State, in its answer to GMA's petition for review, states: "GMA set forth its Excessive Fines Clause argument only in an untimely post-trial motion to reduce the penalty." Ans. to Pet. for Rev. at 16. The State did not

make this assertion in its brief to the Court of Appeals, when GMA could have refuted it in reply. The State might now ask this Court to discount the amicus memoranda based on the same false insinuation—namely, that the Excessive Fines issue was not properly preserved. *Cf. City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015) (court will not address arguments raised only by amicus). GMA submits this short answer to set the record straight on preservation of the trial court's errors.

II. ARGUMENT

A. GMA raised the Eighth Amendment's prohibition on excessive fines before trial.

In its trial brief, filed in the superior court on August 8, 2016, GMA cited the Eighth Amendment and its bar on excessive fines as a limitation on any penalty that the court might impose. After discussing the penalties imposed in other FCPA cases, GMA stated:

> Any penalty here of more than a modest amount violates this principle [of treating like cases alike], as well as the Eighth Amendment's requirement that a penalty not be "grossly disproportional to the gravity of the defendant's offense." State v. WWJ Corp., 88 Wn. App. 167, 175 (1997), modified and affirmed on other grounds, 138 Wn.2d 595, 603–604 (1999).

CP 3704. In *WWJ*, this Court identified *United States v. Bajakajian*, 524 U.S. 321 (1998), as the source of the "grossly disproportional" standard for excessive fines under the Eighth Amendment. *WWJ*, 138 Wn.2d at 603–04, 980 P.2d 1257. A footnote in GMA's trial brief, dropping from the end of

the passage just quoted, directed the court's attention to article I, § 14 of the Washington constitution and cited cases addressing state constitutional limits on grossly disproportionate penalties. CP 3704.

Well before the superior court entered its initial judgment, therefore, it was apprised of the constitutional limitations on excessive fines and given case citations that would have enabled the court, had it been so inclined, to test its damage award against the strictures of the Eighth Amendment and article I, § 14. Any assertions or insinuations otherwise are false.

B. GMA raised the Eighth Amendment's prohibition on excessive fines before the superior court entered its amended judgment.

On January 12, 2017, after the trial court had ruled that GMA was liable for a $6 million fine, trebled to $18 million, but before the court adjudicated the parties' post-trial claims for fees and costs, GMA filed a motion to conform the penalty amount to the Eighth Amendment and article I, § 14. CP 4324–30. It is this motion that the State calls "untimely." Ans. to Pet. for Review at 4, 5, 16.

The State argued that GMA's intervening notice of appeal deprived the trial court of jurisdiction to decide the motion to conform. CP 4338–39. But RAP 7.2(e) contradicts the State's argument. The State also argued that the motion was outside the time limits permitted for reconsideration under CR 59 and for relief from a judgment under CR 60. But CR 60(b) and RCW

4.72.020 permit such a motion to be filed within a reasonable time, the outside limit of which is one year after entry of judgment. *See* Reply in Support of GMA's Motion to Conform the Penalty Amount to the Eighth Amendment and the Washington Constitution, CP 4346–48.

The superior court adopted the State's argument and denied GMA's motion on procedural grounds. CP 4358–60. After it refused to entertain the merits of GMA's constitutional argument, the court entered an amended judgment for over $19 million, which included a net award of over $1 million to the State for its fees and costs on top of the same $18 million penalty that GMA had pointed out was unconstitutional. CP 4354–57.

Giving the superior court an opportunity to correct an error of constitutional magnitude before the court enters an amended judgment reflecting the same error would ordinarily be thought salutary, but the State sought to avoid the issue then and seeks to do so now.

C. GMA appealed the amended judgment as well as the original judgment and assigned error to the superior court's Eighth Amendment violations.

The current appeal runs both from the trial court's original judgment and from the amended judgment entered after the trial court had twice been apprised of the Eighth Amendment issue raised by its penalty. Two days after the superior court entered its amended judgment on April 5, 2017, GMA filed a notice of appeal with respect to that judgment. CP 4361–67.

On April 13, 2017, the court of appeals issued a perfection notice that consolidated GMA's second appeal with the first one under Cause No. 49768-9-II.

On June 21, 2017, GMA filed its opening brief. Assignment of Error No. 6 reads: "The trial court imposed an unconstitutionally excessive fine." The corresponding issue statement reads: "Does the trial court's massive and unprecedented penalty violate the Eighth Amendment? (A/E 6)." GMA's opening and reply briefs devote substantial attention to that issue. *See* Op. Br. at 42–49 and A-4–A-7; Reply Br. at 14–20. The State's brief does, too. Nowhere does the State's brief suggest that the issue is not properly before the court of appeals, because any such suggestion would be baseless.

D. This Court should hear GMA's Eighth Amendment argument.

In its opinion remanding the case to the court of appeals, this Court recognized the importance of GMA's Eighth Amendment challenge to the parties in this case. The four amicus memoranda attest to the importance of the issue to everyone else who is subject to the Fair Campaign Practices Act. GMA properly preserved the Eighth Amendment issue. The excessive fine imposed in this case deserves this Court's attention, and it requires correction.

III. CONCLUSION

The Court should disregard counsel's misstatements and grant the petition for review.

DATED this 6th day of April 2021.

Respectfully submitted,

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