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NO. 96604-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent/Cross Petitioner.

**STATE OF WASHINGTON'S ANSWER TO AMICUS CURIAE
THE INSTITUTE FOR FREE SPEECH**

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TABLE OF CONTENTS

I. INTRODUCTION1

II. ARGUMENT2

 A. This Court Should Reject the Institute’s Request to
 Review GMA’s Penalty under the Eighth Amendment.....3

 B. This Court Should Reject the Institute’s Invitation to
 Adopt a New Test for Exacting Scrutiny6

III. CONCLUSION9

TABLE OF AUTHORITIES

Cases

<i>Buckley v. Valeo</i> , 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).....	2
<i>Citizens United v. Fed. Election Comm’n</i> , 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).....	2, 7
<i>City of Seattle v. Evans</i> , 184 Wn.2d 856, 366 P.3d 906 (2015).....	2
<i>Clausen v. Icicle Seafoods, Inc.</i> , 174 Wn.2d 70, 272 P.3d 827 (2012).....	7
<i>Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.</i> , 532 U.S. 424, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001).....	4
<i>Doe v. Reed</i> , 561 U.S. 186, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010).....	6
<i>Fields v. Dep’t of Early Learning</i> , 193 Wn.2d 36, 434 P.3d 999 (2019).....	2
<i>Fritz v. Gorton</i> , 83 Wn.2d 275, 517 P.2d 911 (1974).....	5, 9
<i>Havens v. C & D Plastics, Inc.</i> , 124 Wn.2d 158, 876 P.2d 435 (1994).....	3
<i>Human Life of Wash. Inc. v. Brumsickle</i> , 624 F.3d 990 (9th Cir. 2010)	5, 7
<i>State ex rel. Pub. Disclosure Comm’n v. Permanent Offense</i> , 136 Wn. App. 277, 150 P.3d 568 (2006).....	2
<i>State v. Grocery Mfrs. Ass’n</i> , 5 Wn. App. 2d 169, 425 P.3d 927 (2018).....	8, 9

<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999).....	1, 4
<i>Timbs v. Indiana</i> , __ U.S.__, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019).....	3
<i>United States v. Bajakajian</i> , 524 U.S. 321, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998).....	3
<i>Utter v. Bldg. Indus. Ass'n of Wash.</i> , 182 Wn.2d 398, 341 P.3d 953 (2015).....	6

Constitutional Provisions

U.S. Const. amend. I.....	1
U.S. Const. amend. VIII.....	1, 3

Rules

RAP 10.3(6).....	3
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I. INTRODUCTION

The Institute For Free Speech raises issues not presented on review, and, in the process, ignores the actual facts and issues raised in this case. This Court should decline to address the Institute's novel arguments about issues not raised by the parties.

The Institute first asks this Court to analyze Grocery Manufacturers Association's (GMA) penalty under the Eighth Amendment of the U.S. Constitution. Not only is the constitutionality of GMA's penalty not before the Court, the Institute asks this Court to employ the wrong analysis. A penalty violates the Eighth Amendment only if it is "grossly disproportional" to the gravity of the offense. *State v. WWJ Corp.*, 138 Wn.2d 595, 604, 980 P.2d 1257 (1999) (citing *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998)). While the Institute suggests this inquiry is inadequate and the Court should apply "exacting scrutiny" to the size of GMA's penalty, the Eighth Amendment does not require such additional analysis. In any event, GMA concealed the true source of over \$14 million in campaign contributions, warranting a very substantial fine.

The Institute also claims that GMA's penalty violates the First Amendment because it purportedly does not serve the State's interests and chills speech. The Institute openly questions the value of disclosure of

campaign finance information. But it is well established that the State has a significant interest “in promoting [election] integrity and preventing concealment that could harm the public and mislead voters.” *State ex rel. Pub. Disclosure Comm’n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006). GMA intentionally deprived Washington voters of the true “sources of election-related spending” and their ability to “make informed choices in the political marketplace.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 367, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (citation and internal quotation marks omitted). Penalizing actors like GMA for misconduct does not chill any protected speech; rather it deters concealment and ensures that political contributions remain in the light. *C.f. Buckley v. Valeo*, 424 U.S. 1, 67, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

This Court should affirm GMA’s penalty in its entirety.

II. ARGUMENT

It is well settled that this Court generally will not address arguments raised only by amici, even constitutional ones. *See, e.g., Fields v. Dep’t of Early Learning*, 193 Wn.2d 36, 41 n.1, 434 P.3d 999 (2019); *City of Seattle v. Evans*, 184 Wn.2d 856, 861 n.5, 366 P.3d 906 (2015). Nevertheless, the

Institute asks this Court to consider issues that were not asserted by GMA in its petition for review or argued in its supplemental brief. Moreover, the Institute’s arguments do not present an accurate depiction of the law or the facts. This Court should decline to address the Institute’s arguments.

A. This Court Should Reject the Institute’s Request to Review GMA’s Penalty under the Eighth Amendment

The Institute first invites this Court to review GMA’s penalty under the Excessive Fines clause of the Eighth Amendment of the U.S. Constitution. GMA’s petition does not present this issue, and so there is no basis for this Court to accept the Institute’s invitation.¹ But even if that were not so, the Institute asks this Court to employ the wrong test.

“The touchstone of the constitutional inquiry under the [Eighth Amendment’s] Excessive Fines Clause is the principle of proportionality[.]” *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). Accordingly, a penalty violates the constitution only if it is “grossly disproportional” to the gravity of the

¹ GMA does contend that if this Court upholds GMA’s treble penalty on statutory grounds, then it should remand the matter back to the Court of Appeals to consider the constitutionality of its penalty. *See* GMA Suppl. Br. at 20 n.16. As a preliminary matter, GMA wrongly contends that the United States Supreme Court’s decision in *Timbs v. Indiana*, ___ U.S. ___, 139 S. Ct. 682, 687, 203 L. Ed. 2d 11 (2019) mandates that the penalty be evaluated under the Excessive Fines clause. The case says no such thing; instead it merely holds that the clause is incorporated against the states. In any event, GMA’s footnote is not sufficient to raise the constitutional claims now. *Cf. Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994) (court will not address constitutional arguments not supported by adequate briefing); RAP 10.3(6).

offense. *WWJ Corp.*, 138 Wn.2d at 604 (quoting *Bajakajian*, 524 U.S. at 334). Courts look to a number of criteria, including the defendant's culpability, to determine whether a penalty in a particular case satisfies this standard. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435-36, 121 S. Ct. 1678, 149 L. Ed. 2d 674 (2001). Here, applying the relevant criteria to the facts prove that GMA's civil penalty is not "grossly disproportionate" to its multiple, intentional violations of Washington law. *See State's Pet.* at 2-13 (Statement of the Case). GMA was able to solicit, receive, and conceal over \$14 million in contributions from its members. GMA's \$18 million penalty for this and its other campaign finance violations correlates with its egregious behavior. No further inquiry is necessary to satisfy the Constitution.

The Institute also contends that GMA's penalty targets speech and therefore should be subjected to "exacting scrutiny," and is out of proportion to the "'minimal' harm of a reporting offense." Institute Br. at 6-7. There are three fatal flaws to this contention: (1) it misstates the constitutional test; (2) it significantly understates the magnitude of GMA's violation; and (3) the penalty for GMA's violation does not target speech.

The Institute claims that this Court should apply exacting scrutiny to the size of the penalty here, rather than the "grossly disproportional" test the United States Supreme Court has applied, but the Institute admits that

no court has ever done so. Institute Br. at 6 n.3. There is no reason for this Court to adopt a never before accepted theory on an issue not properly before the Court.

In any event, GMA did not engage in a mere technical or minor violation of Washington's campaign finance laws. Rather it deliberately concealed information that the public had a right to know. *See Fritz v. Gorton*, 83 Wn.2d 275, 296, 517 P.2d 911 (1974) (“[T]he right to receive information is the fundamental counterpart of the right of free speech.”). While the Institute discounts the public's right to this information, Institute Br. at 15-16, that is not a judgment call for the Institute to make. The point of the people's right to information is to create a free marketplace for political speech and allow the people to decide for themselves what weight to give the information presented. *Fritz*, 83 Wn.2d at 296-99. “Campaign finance disclosure requirements thus advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.” *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010). There is no constitutional right to conceal the true source of campaign contributions from the public view.

Finally, GMA's substantial penalty had nothing to do with its "speech." Nothing in Washington law prohibited GMA from collecting contributions from its members or contributing those funds to the No on 522 committee. Rather GMA's penalty reflects its intentional concealment of the source of GMA's \$14 million in campaign contributions to the No on 522 committee and its purposeful evasion of Washington's campaign finance disclosure laws. *See* State's Suppl. Br. at 19-20. The Institute's suggestion that penalizing GMA for its misconduct somehow chills "protected activity," Institute Br. at 8, is simply wrong.

B. This Court Should Reject the Institute's Invitation to Adopt a New Test for Exacting Scrutiny

Exacting scrutiny applies to disclosure requirements. *See, e.g., Doe v. Reed*, 561 U.S. 186, 196, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). To apply this test, courts ask whether the applicable disclosure requirements result in an unconstitutionally onerous burden in comparison to the government's interest in providing the public with campaign finance information. *Utter v. Bldg. Indus. Ass'n of Wash.*, 182 Wn.2d 398, 430, 341 P.3d 953 (2015). The Institute, however, asks this Court to apply a form of exacting scrutiny that would require examining the government's interests compared to what the Institute calls the "weight of fines for non-

compliance.” Institute Br. at 7, 12. The Court should reject the Institute’s request for this Court to design a new constitutional test.

The Institute faults the Court of Appeals for examining GMA’s claimed burdens, as opposed to what the Institute calls “the actual burdens of disclosure,” which purportedly include whether large fines will chill speech. *See* Institute Br. at 11-14. But, as previously discussed, penalizing actors like GMA who deliberately conceal campaign finance information does not chill speech. Rather, it serves the State’s significant interests in punishing particularly egregious conduct and deterring future wrongdoing. *Cf. Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 85-86, 272 P.3d 827 (2012) (affirming a punitive award for egregious conduct and that also served as a deterrent to other actors engaging in similar conduct). Contrary to the Institute’s suggestion, there is a substantial relationship between the State’s interests in prohibiting concealment and GMA’s penalty here.

Washington’s disclosure laws, including the prohibition against concealment, provide voters important information about who is funding efforts to sway their vote. *Brumsickle*, 624 F.3d at 1005. They ensure that the “governmental interest in ‘provid[ing] the electorate with information’ about the sources of election-related spending” is met without imposing a “ceiling on campaign-related activities” or “prevent[ing] anyone from speaking.” *See Citizens United*, 558 U.S. at 366-67 (second alteration ours)

(quoting *Buckley*, 424 U.S. at 64, 66; *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)).

The Institute nevertheless contends that the State's informational interests are overstated in this case, because GMA did not "ma[k]e up an anodyne name concealing their identities and economic interests" and voters allegedly "knew the constituencies opposing [Initiative 522]." Institute Br. at 15-16. The Institute also faults the State for not limiting the disclosure requirements to GMA's "earmarked funds" or "substantial donors," information that in the Institute's view "actually educates voters about those in fact supporting or opposing the ballot measure." Institute Br. at 17-19. The Institute's analysis is flawed when the actual facts of this case are considered.

Contrary to the Institute's suggestion, it was not "grocery manufacturers as a whole," but only select GMA members that had an interest in seeing Initiative 522's defeat. *Compare* Institute Br. at 16, n.19, with CP 4060 (FF 52) and Ex. 122 (GMA's list of contributors). Those select GMA members undisputedly knew that they were being asked to contribute to GMA's efforts to defeat Initiative 522. *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 190-91, 425 P.3d 927 (2018); *see also* State's Answer at 2-6. Disclosing the members' contributions would have actually educated voters about which companies financed GMA's opposition to

Initiative 522 and which companies declined to participate in the effort. *Grocery Mfrs. Ass'n*, 5 Wn. App. 2d at 196. But, “GMA deliberately concealed the actual source of the contributions—certain GMA members.” *Id.* at 205. In doing so, GMA violated “the public’s right to know *the identity of those contributing* to campaigns for or against ballot title measures on issues of concern to the public.” CP 4069 (FF 108) (emphasis added); *see also Fritz*, 83 Wn.2d at 296. Contrary to the Institute’s assertion, holding GMA accountable for violating this fundamental tenet serves the public interest.

III. CONCLUSION

The Institute asks this Court to consider constitutional issues that were not raised by the parties and which do not comport with the law. This Court should reject their arguments entirely.

RESPECTFULLY SUBMITTED this 9th day of October, 2019.

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