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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 NATIONAL ASSOCIATION OF MANUFACTURERS**

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I. INTRODUCTION

There is no blanket constitutional right to conceal the identity of those funding ballot measure campaigns. Rather, Washington has a well-established interest in disclosing to the public who is actually funding ballot measure campaigns in the state. Requiring Grocery Manufacturers Association (GMA) to disclose the true source of its contributions to the No on 522 campaign substantially serves this important governmental interest by providing the public with vital information about who stood to benefit from Initiative 522's defeat.

The National Association of Manufacturers (NAM) nevertheless repeats two of GMA's arguments already refuted by the State: (1) the public did not have an interest in knowing which businesses contributed extensive resources towards GMA's efforts to defeat Initiative 522; and (2) GMA had a constitutional right to shield its members' contributions from public scrutiny. *See* State's Suppl. Br. at 6-11. NAM also invites this Court to take judicial notice of unverified facts asserted in various online articles as a means to justify GMA's misconduct in hiding information that the public had a right to know. These arguments are not helpful to the Court and do not serve the purpose of RAP 9.12 or RAP 10.3.

This Court should reject NAM's arguments. GMA cannot escape the consequences of its subterfuge by inappropriately invoking the First

Amendment as a sword and shield for its misconduct. This Court should affirm the trial court’s judgment.

II. ARGUMENT

Washington has an important—even compelling—governmental interest in informing the electorate about exactly who is financing ballot measure campaigns in the state. *See, e.g., Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005-07 (9th Cir. 2010) (informing voters about “who is lobbying for their vote” for ballot measures is “critical”); *State ex rel. Pub. Disclosure Comm’n v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006) (“Washington State has a substantial interest in providing the electorate with valuable information about who is promoting ballot measures and why they are doing so.”). As the Ninth Circuit noted when affirming the State’s disclosure laws:

Campaign finance disclosure requirements [] 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. *An appeal to cast one’s vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.* The increased “transparency” engendered by disclosure laws “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”

Brumsickle, 624 F.3d at 1008 (emphasis added) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).

Notwithstanding the courts' recognition of this "critical" governmental interest, NAM takes up GMA's contention that Washington voters had no need to know "*which specific* grocery manufacturers" gave money to GMA to oppose Initiative 522. NAM Br. at 12. NAM does not explain why disclosing the actual source of \$14 million in contributions provides "marginal additional informational benefit," nor do they provide any evidence or support that their proposition is true. NAM Br. at 11. And, in fact, the record in this case shows that it is not. Even GMA recognized the importance of distinguishing between GMA's members generally and the members that actually gave money to oppose Initiative 522. *See, e.g.*, RP Vol. I at 132:21-134:2 (GMA CEO Bailey admitting GMA removed its membership list from its website two days after No on 522 reported GMA's contribution because it would appear that all of GMA's membership were "contributing to the GMO issue" when in fact it was only certain board members).

Contrary to NAM's contention, there is no blanket First Amendment right to conceal campaign contributions. *See Buckley v. Valeo*, 424 U.S. 1, 73-74, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). NAM contends that

Washington's informational interest does not justify requiring GMA to disclose its individual members' contributions because of their purported First Amendment interests in associational anonymity. *See, e.g.,* NAM. Br. at 1-2, 7-8, 12-20. But NAM's contention improperly conflates two issues. The Supreme Court has long drawn a distinction between mandatory disclosures of campaign-related contributions and expenditures and other forms of mandatory disclosures, such as disclosing the author of anonymous campaign literature. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-55, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995). Applying First Amendment principles protecting speech, the Court has found the former mandatory disclosures acceptable and the latter not. *Id.* Indeed, the Court has specifically noted that states can outright prohibit anonymous political contributions in order to preserve the integrity of the political system. *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299-300, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981).

The courts have recognized a narrow exception to disclosure requirements if an entity makes an "uncontroverted showing" of threats or reprisal. *See Buckley*, 424 U.S. at 69. But when determining whether an exception should be allowed in a particular case, courts apply the same exacting scrutiny as for all state disclosure laws. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 369-71, 130 S. Ct. 876, 175 L. Ed. 2d 753

(2010); *Doe v. Reed*, 561 U.S. 186, 200-01, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010). The State has already shown that GMA meets none of the criteria that courts have considered when determining whether certain, exceptional associational groups—like the NAACP—should be exempt from state disclosure requirements. *See* State’s Suppl. Br. at 10-12. Further, even if GMA had provided sufficient evidence to show “a reasonable probability” that its members’ First Amendment associational rights were in fact burdened—which GMA did not—the State’s compelling interests in disclosure and preventing concealment would outweigh GMA’s interest in anonymity here. *See id.*

Ultimately, GMA and NAM desire to sway the public discourse through their financial contributions while avoiding public criticism for their endeavors. Their attempt, however, to invoke the First Amendment as both a sword and shield for their activities is absurd. Just as GMA and NAM have a right to speak, the public likewise has a right to do so, including through boycotts and their wallets. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (boycotts and other economic speech protected even if it embarrasses others or coerces them into action); *Thornhill v. Alabama*, 310 U.S. 88, 103-105, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (peaceful picketing is a protected right even if it has the effect of dissuading others from

entering into business relations with the establishment). Justice Brandeis once said in lamenting the suppression of political speech, “the remedy to be applied is more speech, not enforced silence.” *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J., concurring), *overruled in part by*, *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969). The same principle applies in this case. The remedy for public speech is more speech—not less, as GMA and NAM ask for here.

Ultimately, the public has a right to receive information about who is financing efforts to influence their vote. *See, e.g., Voters Educ. Comm. v. Pub. Disclosure Comm’n*, 161 Wn.2d 470, 483, 166 P.3d 1174 (2007) (quoting *Fritz v. Gorton*, 83 Wn.2d 275, 297, 517 P.2d 911 (1974)) (“The constitutional safeguards which shield and protect the communicator, perhaps more importantly also assure the public the right to receive information in an open society.”). “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Citizens United*, 558 U.S. at 371. Neither GMA nor NAM have shown a valid reason to shut out the public discourse in this regard.

III. CONCLUSION

Washington has a compelling interest in informing its electorate about who is financing, and thus stands to benefit from, a ballot measure's defeat. Holding GMA accountable for its subterfuge in hiding that information from the public substantially fulfills the State's interests and does not infringe on any First Amendment right. This Court should affirm.

RESPECTFULLY SUBMITTED this 9th day of October, 2019.

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