

No. 96604-4

No. 49768-9-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Appellant.

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GROCERY MANUFACTURERS ASSOCIATION,

Appellant,

v.

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

Respondent.

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APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

The State's brief ("State Br.") offers hyperbole but no effective response to the arguments in GMA's opening brief ("Op. Br."). This reply makes three key points: (1) as applied to GMA, the Fair Campaign Practices Act ("FCPA") fails exacting scrutiny; (2) the trial court's summary judgment order violates CR 56(c); and (3) the court's massive, unprecedented judgment violates the Eighth Amendment and state law.

## II. ARGUMENT

### A. As applied to GMA, the FCPA is unconstitutional.

1. Because GMA had a First Amendment right to shield its members from death threats and boycotts, application of the FCPA to GMA cannot withstand exacting scrutiny.

The State claims that it may constitutionally force GMA to expose the identities of members who funded GMA's political speech. But because those members had suffered death threats and economic boycotts when, in 2012, they were identified as opponents of GMO-labeling requirements, the State's claimed interest must yield to First Amendment protections for freedom of speech and association. *See* Op. Br. 35-37.

The State asserts that GMA failed to present its argument for member anonymity to the trial court. State Br. 39. GMA's summary judgment briefs belie that assertion.<sup>1</sup> The State also suggests that only

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<sup>1</sup> *See* CP 409, 1334-36, 1340-42, and 1367-69. GMA pointed out that member "[p]rivacy

members of minor political parties and the NAACP may invoke First Amendment protection against state-compelled disclosure. State Br. 40. That claim is also wrong.

In *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813 (2001), *remanded on other grounds*, 146 Wn.2d 370 (2002), this Court recognized that members of community groups opposed to new residential subdivisions “share the same concerns of reprisal and harassment as the [Freedom Socialist Party].” *Id.* at 823. It held:

To assert the associational privilege under the First Amendment, a party resisting disclosure of information need only show some probability that the requested disclosure will infringe upon its First Amendment rights.

*Id.* at 822. This Court supported its reasoning with cases that recognized the potential chilling effect of compelled disclosure on contributors to a union PAC and the Arkansas Republican Party, *id.* at 823-24, concluding:

When advocacy groups are required to disclose the identity of their members or the details of all of their activities, the freedom of members to promote their views suffers. Privacy and anonymity are often essential to the free exercise of First Amendment rights.

*Id.* at 825; *accord Wash. Initiatives Now v. Rippie*, 213 F.3d 1132, 1138 (9th Cir. 2000) (requirement in FCPA that paid gatherers of initiative

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and anonymity are often essential to the free exercise of First Amendment rights,’ with anonymity serving as ‘a shield from the tyranny of the majority . . . to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.’” CP 1336 (citations omitted). *See also* RAP 2.5(a)(3).

signatures disclose their names and addresses failed exacting scrutiny, as “the risk that people will refrain from advocating controversial positions . . . makes a disclosure regime of this kind especially pernicious”).

The State admits that GMA’s members faced threats and boycotts but asserts that there must be an “uncontroverted showing” of significant hostility towards them. State Br. 40. Not true.<sup>2</sup> Regardless, a post-trial finding—now a verity—that GMA’s member companies “received negative responses from the public . . . including threats and boycotts,” CP 4053, surely qualifies as such a showing. *See also* CP 3188 (trial court cites “death threats”), 1540 (testimony about death threats), 2742 (new threat to GMA and its counsel); RP 180-81 (continuing boycotts of member companies), 207 (retaliation), 690-91 (threats and attacks). This record flatly contradicts the State’s claim that its interpretation of the FCPA imposes “minimal burdens” on GMA. State Br. 38.

The State has the burden of showing that its application of the FCPA to GMA withstands exacting scrutiny. Under this standard,

Washington must show that its interests . . . are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech.

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<sup>2</sup> “The evidence offered need show only a reasonable probability that the compelled disclosure” of names will lead to “threats, harassment, or reprisals from either Government officials or private parties.” *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

*Rippie*, 213 F.3d at 1138-39; accord *Voters Educ. Comm. v. Wash. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 481-82 (2007) (general presumption of constitutionality does not apply in First Amendment context). The State cannot meet this burden. Its reliance on how courts have addressed FCPA challenges in other cases, involving different facts, betrays its failure to confront GMA's as-applied challenge. See *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (per curiam) (decision upholding a statute against facial challenge does not "purport to resolve future as-applied challenges").

The State admits that it has no legitimate interest in the funds that GMA spent outside Washington but argues that GMA invited the State's inappropriate, compelled disclosure by creating a multi-purpose account. State Br. 39. This gets things backwards. GMA had no duty to structure the Account so as to anticipate and ameliorate constitutional problems raised by the State's actions. Rather, the State must interpret and apply the FCPA in a way that avoids impinging on GMA's First Amendment rights.

With respect to its application to GMA's speech in this state, the FCPA violates the First Amendment by burdening GMA's and its members' rights of speech and association without materially advancing voter education. The name "Grocery Manufacturers Association" fully disclosed GMA's economic interest, as well as its members' economic

interest, in opposing I-522. *See* Op. Br. 32-33, 45-46; *cf. Rippie*, 213 F.3d at 1139 (“there is no logical explanation of how a voter who signs an initiative petition would be educated in any meaningful way by learning the circulator’s name”). As applied, the statute fails exacting scrutiny.

2. The FCPA’s requirements are impermissibly vague.

Although other cases cannot dictate the outcome of GMA’s as-applied challenge to the FCPA, they do establish the legal framework for any would-be speaker wanting to understand how to comply with Washington law. Case law indicates that, to have an “expectation of receiving contributions,” one must have near-certainty about the funds’ intended use. *See* Op. Br. 20-23. Yet Judge Hirsch ruled that providing funds to a trade association for use at its discretion, both at the federal level and in state legislatures and initiative campaigns, suffices if Washington is one state where funds might be spent. *See* Op. Br. 24-25.

The State ignores this contradiction. It cites no case in which members were uncertain whether money given to a trade association to pursue broad policy goals would be spent on a particular election, yet the trade association was found to be a political committee. The State also ignores the mosaic of haphazard, inconsistent PDC decisions on the same subject. Op. Br. A-1–A-3. According to the State, this body of precedent is irrelevant to whether GMA should have known how the law applied to its

own conduct. State Br. 28.<sup>3</sup> Yet how can a speaker know how rules will be applied, other than by looking at how they have been applied in the past?

When GMA and its lawyers examined the issue, they determined that Washington law permitted contributions made by GMA to be reported as such. FCPA precedent and the State’s enforcement record failed to give GMA fair notice that a dues-funded trade association would be deemed a “political committee.” Indeed, that record “appears arbitrary and is rife with inconsistency,” such that “the public would have a hard time drawing much reliable guidance.” *See In re Tam*, 808 F.3d 1321, 1342 & 1342 n.7 (Fed. Cir. 2015), *aff’d*, 137 S. Ct. 1744 (2017). If application of a statute turns on an enforcer’s whim, it is impermissibly vague. *Cf. id.* at 1361 (O’Malley, J., concurring) (trademark restriction impermissibly vague where absence of clear standards gave government “virtually unlimited authority to pick and choose which marks to allow and which to deny”).

The State also cannot dodge GMA’s challenge to the anti-concealment statute. Despite conceding that the statute “creates an independent violation separate and apart from failing to timely register,” State Br. 32, the State identifies nothing GMA did to violate the statute

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<sup>3</sup> The State cites *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720 (1991), a case involving a physician who seduced a 16-year-old former patient and installed her at a beach house stocked with alcohol, which contributed to her becoming an alcoholic and a dropout. *See id.* at 743-44. That Dr. Haley should have understood such conduct suggested unfitness to practice medicine says nothing about how GMA should have understood the FCPA’s requirements.

“independent . . . from” failing to timely register. Nor does the State explain how the statute gives fair notice of what is the “source” of a contribution—i.e., how far back money must be traced before its “source” is identified.

3. Because electioneering is not a primary purpose for GMA, GMA may not be treated as a political committee.

As the State implicitly concedes, GMA—a nationwide trade association with many interests—does not have a “primary purpose” of electioneering. This should doom the State’s claim that GMA is a political committee. But the State argues that GMA is still liable, because the primary-purpose test applies only to the expenditure prong of the political-committee definition. State Br. 31-32. The State is wrong. The primary-purpose test is mandated by the First Amendment:

[T]he statutory definition of “political committee” contains no limitation regarding the purpose of such a committee. Reading some stringent purpose requirement, like the “a” primary purpose test, into our statute is necessary to satisfy First Amendment concerns.

*Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 427 (2015).

To be sure, this First Amendment requirement has been applied thus far only in cases arising under the expenditure prong. But the Washington Supreme Court has invited litigants to raise it in a case such as this, brought under the contribution prong. *See id.* at 416 (“[W]e deal with the controversy over the ‘purpose test’ under the expenditure prong—

the only prong under which [plaintiff] raises it.”). That court has also foreshadowed that the particular prong does not matter: To be a political committee, one must meet “*either* the ‘receiving contributions’ *or* ‘making expenditures’ portion of the statutory definition, *plus* whatever ‘purpose test’ might be added on to that statutory definition.” *Id.* (emphasis added).<sup>4</sup>

Applying the primary-purpose test to both prongs of the definition is required by logic as well as the First Amendment. Contributions to a group will later become expenditures by that group, just as expenditures were once contributions.<sup>5</sup> If the primary-purpose test applies only to the expenditure prong, its protection will be illusory. For if the State lacks proof that a group has a primary purpose of electioneering, it can simply proceed (as it did here) under the contribution prong. *See* CP 656.<sup>6</sup>

This Court should not reward the State’s effort to avoid constitutional constraints by artful pleading. No court has held that the “primary purpose” test applies as narrowly as the State urges. And no

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<sup>4</sup> The PDC agrees: An entity may be a political committee under either prong “when the evidence indicates that one of an organization’s primary purposes is electoral political activity during a specified period of time.” Report of Investigation, In re Compliance with RCW 42.17: In re ACLU, PDC Case No. 13-019 at ¶¶ 3.9-3.12 (Oct. 18, 2013), available at <https://perma.cc/33X6-JRKK>; see also “Primary Purpose Test” Guidelines, PDC Interpretation No. 07-02 (approved May 2, 2007).

<sup>5</sup> The statute exempts individuals spending their own money from the definition of “political committee.” RCW 42.17A.005(37). Entities may also spend their own money without registering as a political committee. *See* 1973 Op. Att’y Gen. No. 14.

<sup>6</sup> “Interrogatory No. 14: Do you contend that the . . . Account should have registered as a political committee under the ‘maker of expenditures’ prong . . . ? Answer: Yes, although this issue is not currently part of the State’s Amended Complaint.”

court has ever determined that a group lacking a primary purpose of electioneering was nonetheless a political committee.<sup>7</sup> This Court should not be the first. Rather, it must apply the interpretation that “is necessary to satisfy First Amendment concerns.” *Utter*, 182 Wn.2d at 427.

**B. Summary judgment was improper.**

The trial court found GMA liable as a matter of law for violating the FCPA despite genuine issues of material fact in the summary judgment record. This was reversible error:

A court grants summary judgment only when reasonable minds could not differ that the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact. CR 56(c).

*McAndrews Grp., Ltd. v. Ehmke*, 121 Wn. App. 759, 762-63 (2004).

Seeking support for the trial court’s ruling, the State quotes selectively from three exhibits while ignoring deposition testimony in the summary judgment record that contradicts the State’s version of what those exhibits say. Like the trial court, the State fails to heed the rule that, on summary judgment, all reasonable inferences must be drawn in favor of the non-moving party. *See Eugster v. State*, 171 Wn.2d 839, 843 (2011).

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<sup>7</sup> The State relies on *Human Life of Wash. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010), but that case did not address the issue GMA raises. Moreover, the outcome of the primary-purpose test in that case was clear. The plaintiff, “a nonprofit pro-life advocacy corporation,” sought to oppose an aided-dying initiative. It never denied having *a* primary purpose of electioneering, instead arguing that the political-committee statute must be limited to groups having *the* primary purpose of electioneering. *See id.* at 1008-12.

First, the State cites minutes from the GMA Board meeting on January 19, 2013, to prove that GMA then “expected to receive contributions to oppose I-522.” State Br. 23. As the minutes state, the Board “agreed that engaging in the State of Washington and reviewing long term strategies were necessary.” CP 963. But the minutes do not state that GMA had decided to expend funds to oppose I-522 or that its members expected GMA to do so. Rather, as GMA’s president explained in her deposition, “no decision is made to mount a campaign until we have the [polling] results from the consultants that demonstrate, if we’re going to do that, we’ll be able to be successful.” CP 1531; *accord* CP 1527. And she “would not begin to prejudge whether the board wanted to spend that amount of money” before the polling results came back. CP 1533. In January 2013 GMA had not made any final determination about whether to create the Defense of Brands Strategic Account, still less about whether to request funds from members or expend funds opposing I-522. CP 1527-29, CP 526.<sup>8</sup>

Second, the State relies on GMA’s draft budget and timeline to argue that GMA was committed to opposing I-522 and that it segregated funds primarily for campaign purposes. State Br. 23-24. But the budget

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<sup>8</sup> In early 2013 GMA was discussing I-522’s path through the Washington legislature, CP 1488-89, which would not trigger any reporting obligation under the FCPA.

GMA's members saw was merely a "straw man"; it did not tell them that GMA would expend any amount of funds in Washington. CP 1509 ("So we didn't have certainty on Washington State. We didn't have the scope of work fully developed. We had the broad topics on the other initiatives that we wanted to undertake. So we put together a straw man perspective budget to give the board a sense in January of what the scope of work would look like and what a total budget might look like.")<sup>9</sup>

Another witness confirmed that the draft budget was not a commitment from GMA to spend money on I-522. CP 528-29 ("[W]e don't expect to exceed the amount of the budget. . . . [i]f we were going to contribute. But still no decision whether or not we would spend, which ultimately we didn't make until the 8th of May when we made that first big contribution."); CP 1466-67 (when budgets were prepared, "I didn't know there was going to be a ballot measure in Washington State. I was planning in the event that there was a ballot measure anywhere."). In light of this testimony, the draft budget cannot establish as a matter of law that GMA expected to receive contributions to a Washington political campaign in February 2013.

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<sup>9</sup> Although the State tries to dismiss all this sworn testimony, State Br. 24 n.4, this Court may not disregard it or draw inferences in the State's favor. Rather, in reviewing the trial court's order on summary judgment, this Court must resolve all reasonable inferences in GMA's favor.

Money in the Account was separated from GMA's other funds to better track GMO-related spending. GMA's president called the Account "a sustainable funding mechanism, so we don't have to go to companies project by project . . . for all of the strategies outlined in the previous memo . . . ." CP 1529. Creating the Account "allow[ed] for greater planning for the funds required to combat current threats and better shield individual companies from attack." CP 995.<sup>10</sup> As the March 2013 invoice to GMA members stated, the Account was "a multipurpose account to help the Industry fund programs to address the threats from motivated and well financed activists." CP 1025.<sup>11</sup>

Third, the State cites minutes from the GMA Board meeting on February 28, 2013, which stated that success in Washington was critical to GMA's overall objective. *See* CP 1018-19. The deposition testimony

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<sup>10</sup> Shielding members from reprisals is not culpable but constitutionally protected. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the tyranny of the majority."); *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499-501 (D.C. Cir. 2016) (privacy interests justify limiting union and corporate disclosure obligations).

<sup>11</sup> GMA, not its members, controlled how the funds in the Account were expended. As the head of Government Affairs testified:

Q. Did GMA[']s members approve of this contribution prior to you making this [May 2013] contribution?

A. No.

Q. Did you have authority to make this contribution without GMA's members' approval?

A. I did.

CP 537-38.

quoted above shows that GMA was not committed to expending funds against I-522 by February 28, 2013, because (among other things) polling had not been completed. Given this testimony, no inference may be drawn in the State's favor that GMA or its members were already committed to opposing I-522 in February 2013. Furthermore, the minutes showed that GMA did not consider the funds in the Account as designated to fight I-522. The Account had five separate purposes, none of them specifically focused on Washington. *See* CP 1018; *see also* Op. Br. 17.

The State tries to brush aside, as superfluous, the trial court's findings of fact on summary judgment. The findings are "superfluous" in the sense that GMA need not assign error to challenge them, and this Court is not bound by them because its review is de novo. *See Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413 (1991); *Old City Hall LLC v. Pierce Cty. AIDS Found.*, 181 Wn. App. 1, 14-15 (2014). But such findings are also "inappropriate," *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 249 n.10 (2008), and "not proper," *Hemenway v. Miller*, 116 Wn.2d 725, 731 (1991). Often they betray error. *See United States ex rel. Austin v. W. Elec. Co.*, 337 F.2d 568, 572 (9th Cir. 1964). Such error is manifest when a trial court's summary judgment

findings resolve factual issues and do so erroneously.<sup>12</sup>

Because the summary judgment record reflects genuine issues of material fact as to whether and when GMA became a political committee, the trial court's order holding GMA liable as a matter of law cannot stand.

**C. The trial court's draconian penalty must be reversed.**

GMA challenges the trial court's unprecedented punitive-damage award because it violates both the U.S. Constitution and Washington law. Such challenges are reviewed de novo.

1. The judgment violates the Eighth Amendment.

The State concedes that the Eighth Amendment's prohibition of excessive fines governs the penalty imposed in this case. State Br. 46. *United States v. Bajakajian*, 524 U.S. 321 (1998), provides the proper framework for review. The trial court's judgment cannot be squared with either *Bajakajian* or cases applying it. *See* Op. Br. 43-49 and A-4-A-7.

*a. GMA's violation was solely a reporting offense.*

In *Bajakajian*, the Supreme Court held that "a reporting offense," i.e., one that involves withheld information about otherwise lawful

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<sup>12</sup> For example, the trial court found on summary judgment that GMA did not begin considering the Account until after the California initiative failed, yet the evidence showed GMA first considered the account in August 2012, months before the California election and long before GMA was aware of I-522. *See* Op. Br. 16-17; *see also* CP 3299-3305, 3374-87 (detailing other inaccuracies in the trial court's summary judgment order). *Cf. Hamilton v. Huggins*, 70 Wn. App. 842, 848-49 (1993) (function of summary judgment is *not* "to resolve issues of fact or arrive at conclusions based thereon"; trial court erred in relying on summary judgment findings) (emphasis in the original).

conduct, does not support a heavy penalty. 524 U.S. at 337. Here, GMA was engaged in lawful conduct: constitutionally protected political speech. GMA's only alleged violation of any statute was its failure to disclose information connected to that lawful conduct, the same as in *Bajakajian*.

In an attempt to draw a distinction, the State argues that GMA's failure to disclose "the millions of dollars that it received from its members to oppose I-522, as well as the identity of those members," constitutes a "fraud upon the public by deceiving them as to the identity of those who stood to benefit from I-522's defeat." State Br. 47. The State identifies no authority that nondisclosure of millions of dollars received by GMA is more blameworthy than nondisclosure of receiving (say) \$10,000. GMA was entitled to spend as little or as much money as it wanted in opposing I-522, so the amount involved does not impact the severity of GMA's conduct. *See Bajakajian*, 524 U.S. at 339 (rejecting idea of "inherent proportionality" between the undisclosed amount and severity of conduct). And GMA did not deceive the public. Rather, the public was informed that an association of grocery manufacturers opposed I-522.

*b. There was no other illegality.*

The State says that GMA's reporting offense "is inextricably tied to its illegal effort to conceal the true source of the funds." State Br. 47. But "concealment" as the State understands that term is just the flip side of

non-disclosure: every reporting-offense defendant “conceals” what is not disclosed. In this case, while GMA did not register and report as a political committee, it did nothing else to conceal anything from the public.

The State points out that Mr. Bajakajian was not trying “to hide whose money he was carrying,” State Br. 48, but *his* crime was failure to disclose how much money he carried. Here, the amount of money GMA spent opposing I-522 was always disclosed; GMA’s alleged offense was failing to disclose its funds’ source. In both cases, the nondisclosure gave rise to punishment.

To determine whether an offense involves other illegal acts, courts do not count the same violation twice. Instead, they consider other crimes charged and “the source and likely use of” the funds in question. *See United States v. Ely*, 468 F.3d 399, 403 (6th Cir. 2006). In this case, the source of GMA’s funds was indisputably lawful, and GMA used the funds for constitutionally protected speech. GMA did nothing alleged to be illegal other than fail to register and report as a political committee—the act for which the penalty challenged here was imposed.

*c. The State’s argument for statutory deference would defeat the purpose of the Excessive Fines Clause.*

The State asks this Court to affirm the trial court’s judgment based on the argument that any penalty within statutory bounds is “extremely

unlikely” to violate the Eighth Amendment. State Br. 48.<sup>13</sup> But the Excessive Fines Clause would be rendered pointless if the statutory fine amount resolved any inquiry into excessiveness. A fine that exceeds statutory limits is invalid under the statute; a fine within those limits is, on the State’s logic, unreviewable. Rather than asking whether RCW 42.17A.750(f) would permit an even larger fine, this Court must examine other possible fines for GMA’s conduct. Those fines totaled no more than \$622,820 under *both* RCW 42.17A.750(c) (\$10,000 per violation) *and* (d) (\$10 per day for each delayed report). CP 3453-54.

In *United States v. Beecroft*, 825 F.3d 991 (9th Cir. 2016), the trial court imposed a \$107 million fine, equal to the proceeds of the defendant’s mortgage fraud, under a statute requiring forfeiture of all such proceeds. *Id.* at 997-99. Rather than uphold the fine because it was within the statutory limit, the appellate court found it excessive compared to others that maxed out at \$1 million per violation. *Id.* at 1001. The court rejected the Government’s argument that total forfeiture was constitutional because it was statutorily required, explaining that “to hold otherwise would be tantamount to concluding that the Eighth Amendment simply

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<sup>13</sup> The State relies upon *Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000). *Newell*’s reasoning is suspect for its extremely cursory Eighth Amendment analysis. See *In re Wyly*, 552 B.R. 338, 615 (Bankr. N.D. Tex. 2016) (“Although *Newell Recycling* was decided after both [another case] and *Bajakajian*, it cites neither of these cases.”).

does not apply to statutorily mandated forfeitures.” *Id.* at 1002 n.9. Here, for the same reasons, this Court must compare the fine imposed on GMA to the other penalties that were possible under RCW 42.17A.750(c) and (d), rather than the maximum penalty that might be imposed under RCW 42.17A.750 (f)—the provision that GMA challenges.

The cases in which a fine has been found constitutional because it fell within a statutory limit involved statutes that set the maximum fine as a fixed per-incident amount, *see RGB Bush Planes, LLC v. Alaska Pub. Offices Comm’n*, 361 P.3d 886, 890 n.14 (Alaska 2015) (applying \$50-per-day statutory penalty), or that used a fixed mathematical formula to cap any possible fine amount.<sup>14</sup> Penalties based on mechanical formulae mitigate Eighth Amendment concerns because they eliminate caprice and increase the predictability of fines that one faces for particular conduct.

The trial court here eschewed fixed penalties. Instead, it considered a few mitigating and aggravating factors that it chose after trial and then plucked a \$6 million penalty from thin air. CP 4069-72. Such an arbitrary penalty raises grave Eighth Amendment concerns. *Cf. Yousoufian v. Office*

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<sup>14</sup> *Newell Recycling*, 231 F.3d at 210; *Combat Veterans for Congress PAC v. FEC*, 983 F. Supp. 2d 1, 18-19 (D.D.C. 2013) (penalty regulation set fine amount as a function of unreported amount, number of days late, and number of previous violations); *Cox for U.S. Senate Comm. v. FEC*, No. 03 C 3715, 2004 WL 783435, at \*14 (N.D. Ill. Jan. 22, 2004) (regulation set fine at \$100 plus 10% of undisclosed amount). *Cf. In re Wyly*, 552 B.R. at 614 (“There is also a strong argument that a **fixed-penalty provision** such as the \$10,000 fine assessed under § 6038 [of the tax code] should rarely be considered excessive.”) (emphasis added).

*of Ron Sims*, 168 Wn.2d 444, 465-68 (2010) (trial courts imposing penalties for violation of public-disclosure statutes must employ principled standards that serve a statute’s purpose, promote consistent trial-court decisions, and make them “susceptible to meaningful appellate review”).

The trial court also excluded evidence of GMA’s cooperation with the State. The State claims this was harmless error because the court still considered GMA’s cooperation as a mitigating factor in setting the penalty amount. State Br. 41 n.7. But the trial court’s “consideration” of GMA’s cooperation concedes both the relevance of the excluded evidence and the court’s error in excluding it. Evidence related to cooperation would have affected the penalty amount had it actually been admitted and evaluated.

*d. Full disclosure occurred before the election.*

As the State acknowledges, all of GMA’s contributions to No on I-522 were disclosed when made. State Br. 49. The State totally ignores that GMA *also* disclosed, before the election, the identities of its members and their payments to the Account. Thus, even if GMA’s initial failure to identify members that provided funds for its speech meant that voters lacked key information—something the State asks this Court to accept on faith, without supporting evidence and despite GMA’s fully descriptive name—GMA’s pre-election disclosures filled the gap. No voter went to

the ballot box harboring mistaken beliefs, because GMA by then had disclosed all the information the State demanded.

*e. GMA is not in the FCPA's "targeted class."*

The State asserts that the FCPA, though targeting everyone that contributes money to electoral campaigns, uniquely targets conduct like GMA's. This is so, says the State, because GMA's conduct involved "deceit"—specifically, telling members that they should, if asked, deny providing funds to No on I-522. State Br. 49. Such denials were both consistent with GMA's own messaging and entirely accurate: GMA's members did not fund No on I-522. Rather, they gave funds to GMA to engage in its own political speech, both in Washington and elsewhere. In any case, the constitutionality of the trial court's fine must be judged in relation to GMA's alleged violation of the FCPA, not member statements that are themselves protected by the First Amendment.

2. There is no basis for punitive damages.

GMA did not deliberately disobey Washington law. Yet the trial court trebled its already excessive penalty as punitive damages. The trial court accepted the State's assertion that any volitional act qualifies as a violation "found to have been intentional" under RCW 42.17A.765(5). This error demands correction. *See* Op. Br. 38-42.

The State fails to address GMA's arguments, which are based on the language of the statute, cases construing it, and cases construing similar statutes. Instead, the State cites cases that involve very different issues, such as tort liability for deposits of arsenic and cadmium from the smokestack at the ASARCO smelter. State Br. 43-45. The State claims that "intent" means the same thing at all times and in all places. Its own cases prove the opposite.<sup>15</sup>

In *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677 (1985), the court quoted the Restatement (Second) of Torts (1965) for the proposition that "intent" means that an actor desires certain consequences or knows those consequences are substantially certain to result from its conduct. *Id.* at 682. The defendant in *Bradley* had "known for decades" that it was emitting particulate metals from its smokestack and that gravity would cause those metals to settle on nearby properties. *Id.* The court held that the defendant acted intentionally because it had actual knowledge about the substantially certain consequences of its actions. *Id.* at 683-84.

In this case, the consequence that the State had to show GMA desired or knew was substantially certain to result was "the violation" that the trial court held GMA committed. But GMA neither desired to violate

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<sup>15</sup> That "intent" has a technical meaning just means that a trial court must instruct the jury on what the term means. *Hanson PLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 58 Wn. App. 561, 571 (1990).

the FCPA nor knew that being found in violation of the FCPA was a substantially certain consequence of being named as the source of its own contributions. On the contrary, GMA was told that its actions were lawful.

The State also cites *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594 (2009). There a lawyer pleaded guilty to violating a federal law that makes it a felony to willfully violate reporting requirements for cash transactions over \$10,000. *See id.* at 601. “Willful” in that statute means “acting with the knowledge that one’s conduct is unlawful.” *Id.* at 605-06. Rejecting the lawyer’s argument that he should not be found to have acted intentionally, the court held that when he “pleaded guilty to acting ‘willfully,’ he pleaded guilty to acting ‘intentionally,’ i.e., **with the knowledge that his conduct was unlawful.**” *Id.* at 607 (emphasis added).<sup>16</sup>

To determine whether “intentional” in the FCPA refers to consciousness of the act (as in *Bradley*) or to consciousness that the act is unlawful (as in *Vanderveen*), this Court must examine how “intentional” is used in the statute. *See State v. Wanrow*, 88 Wn.2d 221, 228 (1977) (“Words in a statute take their meaning from the context in which they are used.”); *In re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834,

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<sup>16</sup> The “word ‘willful’ is synonymous with ‘intentional.’” *Vanderveen*, 166 Wn.2d at 607 n.19.

838–39 (2009) (courts consider “the ordinary meaning of words, basic rules of grammar, and the statutory context.”).

RCW 42.17A.765(5) begins with a general rule (“In any action . . . the court may award” fees and costs) before addressing the circumstances in which punitive damages are permissible. For that purpose, the statute uses a conditional clause (“If . . . intentional”) to signal that harsher penalties are reserved for special circumstances. The drafters intended treble damages to apply to a specific subset of FCPA violations, not all or most violations. *See State v. Conte*, 159 Wn.2d 797, 811 n.6 (2007).

The drafters’ choice of “the violation” as the subject of this conditional clause, rather than “the conduct” or “the act or omission,” is highly significant. “Violate” is a transitive verb. Inherent in the concept of “violation” is that something—here, the law—was violated. Hence, use of “violation” together with “intentional” means that a party must have intended to violate the law. This reading is reinforced by the verb tense used to link “violation” with “intentional”—namely, the violation must be “found to have been intentional.” This phrasing denotes that a party must have appreciated that its act was a violation of the law when it acted.

The sentence concludes by specifying that the treble damages it authorizes are meant to be “punitive damages.” Trebling is “intended to punish and deter blameworthy conduct,” *Brown v. MHN Gov’t Servs.*,

*Inc.*, 178 Wn.2d 258, 271 (2013), and deterrence requires knowledge, *see State v. Brown*, 140 Wn.2d 456, 472 (2000) (Madsen, J., concurring) (“Without a knowledge requirement,” deterrence is unlikely to be advanced). Thus, the statute’s designation of treble damages as punitive damages, like its conditional construction, its use of the word “violation,” and its choice of syntax, indicates that treble damages may be imposed only if a party knew, when it acted, that it was committing a violation of the FCPA.

The State says nothing about these points. It also does not dispute that the rule of lenity requires construing any statutory ambiguity in GMA’s favor. Perhaps most tellingly, the State ignores the policy implications of its argument. The State seeks to punish constitutionally protected speech. Its construction of RCW 42.17A.765(5) would give trial courts unfettered discretion to treble monetary penalties on disfavored speakers. The court’s punitive damage award in this case cannot stand.

### **III. CONCLUSION**

Because the provisions of the FCPA as applied to GMA violate the First Amendment, the trial court’s judgment should be reversed and the case remanded with instructions to enter judgment for GMA.

If GMA is not granted such relief, this Court should vacate the trial court’s summary judgment on liability and remand the case for trial. The

Court should, at the same time, provide guidance to the trial court on its duty to admit evidence that is relevant to potential penalties as well as its duty to explain clearly, in terms susceptible to meaningful appellate review, the basis for any penalty. The trial court should be instructed that any penalty must satisfy the Excessive Fines Clause and that no penalty may be trebled absent proof of knowingly illegal conduct.

Even if summary judgment on liability is upheld, the trial court's \$18 million punitive-damages award should be vacated and the case remanded for determination of an appropriate, non-trebled penalty—one based on all relevant evidence and consistent with the Eighth Amendment.

DATED this 21<sup>st</sup> day of September 2017.

Respectfully submitted,

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**September 21, 2017 - 10:09 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49768-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Grocery Manufacturers Association, Appellant  
**Superior Court Case Number:** 13-2-02156-8

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