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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
SUPPLEMENTAL BRIEF**

ROBERT W. FERGUSON
Attorney General

CALLIE A. CASTILLO, WSBA 38214
Deputy Solicitor General
1125 Washington Street SE
Olympia WA 98504
360-664-0869
OID No. 91087

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I. INTRODUCTION

There is no First Amendment right to conceal the true source of campaign contributions. Although Washington law prohibits such concealment, in 2013, Grocery Manufacturers Association (GMA) deliberately set out to shield its members' identities as the true source of campaign contributions aimed at defeating Initiative 522. GMA hid information about which companies stood to benefit from the measure's failure, violating voters' "right to receive information in an open society." *Fritz v. Gorton*, 83 Wn.2d 275, 297, 517 P.2d 911 (1974). GMA now offers a strained reading of the First Amendment and state law to escape the consequences of its actions. It cannot.

Demanding GMA's compliance with Washington's campaign finance laws satisfies exacting scrutiny under the First Amendment. Applying Washington's political committee definition and resulting disclosure requirements to national organizations—like GMA—that solicit and receive contributions to oppose a Washington ballot measure does not unconstitutionally burden any rights. Such organizations have no constitutional right to influence the State's elections through subterfuge. The State's compelling government interest in informing the public as to who financed the opposition to Initiative 522 significantly outweighs any purported burden GMA claims from disclosure.

GMA's intentional concealment also warrants reinstating the trebled portion of GMA's penalty. The trial court correctly applied the plain language of the Fair Campaign Practices Act to hold GMA accountable for

its intentional conduct. An entity like GMA that intentionally takes actions that violate state law cannot evade treble penalties simply by claiming they did not know the law. This Court should reverse the Court of Appeals on this issue and affirm the trial court’s judgment against GMA in all respects.

II. ISSUES ON REVIEW

1. GMA solicited and received over \$14 million in contributions from its members to oppose Initiative 522, thus requiring it to register a political committee in Washington and disclose its members’ contributions. Must the State prove that GMA has political advocacy as one of its primary purposes in order to hold the Association accountable for its violations of state law?

2. Does applying Washington’s campaign finance laws to GMA satisfy exacting scrutiny under the First Amendment when the laws serve a compelling government interest in informing the public as to who financed the opposition to Initiative 522 and GMA failed to show any credible threat from disclosure?

3. In addition to violating state law by failing to register a political committee, did GMA violate RCW 42.17A.435,¹ Washington’s prohibition on concealment, when it also deliberately shielded the identity of its members as the true source of the campaign contributions GMA used to oppose Initiative 522?

4. The Fair Campaign Practices Act permits courts to treble a judgment “[i]f the violation is found to have been intentional[.]” RCW 42.17A.765(5). Does this provision apply when a defendant intentionally engages in conduct that violates the Act or does it require proving that the defendant subjectively was aware that his conduct was illegal?

III. STATEMENT OF THE CASE

The State provided a comprehensive statement of this case in its Petition for Review at pages 2 through 13, and asks this Court to refer to

¹ As noted in the State’s previous briefs, the legislature significantly amended the Fair Campaign Practices Act in 2018, including recodifying many provisions relevant to this case. The State continues its practice of citing to the pre-2018 version of the law to remain consistent with the record and the Court of Appeals’ opinion. A copy of the relevant laws is attached to the State’s Petition for Review.

that brief. *See also* State’s COA Br. at 3-20.

IV. ARGUMENT

Washington has long required that political campaign contributions “be fully disclosed” so that the people know who seeks to influence elections. RCW 42.17A.001. GMA asks this Court to adopt a reading of the First Amendment and the Fair Campaign Practices Act (FCPA) that would eviscerate this policy, and allow GMA and others to sway a particular election without the public ever knowing. The Court should decline.

A. **GMA Was Required to Register a Political Committee When it Solicited Contributions to Oppose Washington Initiative 522**

The FCPA requires disclosure by “political committees,” which it defines as “any person . . . having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” RCW 42.17A.005(37). This definition includes two, independent prongs: “[A] person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals.” *Utter v. Bldg. Indus. Ass’n of Wash.*, 182 Wn.2d 398, 415, 341 P.3d 953 (2015) (quoting *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 598, 49 P.3d 894 (2002)). An organization like GMA has an “expectation of receiving contributions” when its members have “actual or constructive knowledge that the organization is setting aside [the members’] funds to support or oppose a candidate or ballot proposition.” *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1020

(9th Cir. 2010); *Utter*, 182 Wn.2d at 416-17. *See generally* State’s Answer at 2-5, 14-16; State’s COA Br. at 3-6, 28-32.

Here, GMA no longer disputes that it expected to receive contributions from its members to oppose Initiative 522 by February 28, 2013, and thus should have registered a political committee and complied with the State’s reporting requirements. *See* GMA’s Pet.; *State v. Grocery Mfrs. Assoc. (GMA)*, 5 Wn. App. 2d 169, 189-90, 425 P.3d 927 (2018); CP 4071. Rather, GMA contends the State cannot constitutionally apply the definition of “political committee” to it because GMA’s “primary purpose” is not electioneering. GMA’s Pet. at 12-14. The First Amendment imposes no such narrow restriction on the State’s campaign finance laws.

GMA relies on cases that have limited the expenditure prong of the State’s political committee definition to entities for whom attempting to influence elections is one of their “primary purposes.” *See Utter*, 182 Wn.2d at 423-27 (discussing cases). Courts have adopted this constitutional limitation to “ensure[] that the electorate has information about groups that make political advocacy a priority, without sweeping into its purview groups that only incidentally engage in such advocacy.” *Brumsickle*, 624 F.3d at 1011. No court, however, has held that this concern applies to organizations meeting the contributions prong of the political committee definition.

Unlike an organization making isolated campaign expenditures, an organization soliciting and receiving contributions from others to support or oppose a Washington candidate or ballot measure inherently has political

advocacy as one of its purposes. *Brumsickle*, 624 F.3d at 1020-21; *see also State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508, 546 P.2d 75 (1976); *Buckley v. Valeo*, 424 U.S. 1, 65-66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (pooling money through contributions is “essential” advocacy); *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley, Cal.*, 454 U.S. 290, 298, 102 S. Ct. 434, 70 L. Ed. 2d 492 (1981) (“Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression.”). Outside of pure fraud, the only purpose an organization would have to solicit and collect political contributions from others would be to use those funds to sway an election toward their collective view. *See Brumsickle*, 624 F.3d at 1021. Thus, there is no constitutional problem with applying the State’s campaign finance laws to those expecting to receive political contributions. Such entities do not incidentally engage in political advocacy, they have made it a priority—purposefully and deliberately.

GMA’s interpretation is not only unnecessary to satisfy the constitution, it undermines the purpose of campaign finance laws and would lead to absurd results. As discussed more in the next section, disclosure requirements provide voters important information about who is funding efforts to influence their votes, while also enabling contributors to follow how their contributions are being spent. *Brumsickle*, 624 F.3d at 1005; *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 370-71, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). When organizations contribute their

own money to campaigns, the public can follow those expenditures through the campaigns' required reporting and hold the organization accountable. *See Citizens United*, 558 U.S. at 370. Allowing organizations with an expectation of receiving political contributions from others to avoid this public scrutiny simply because their overall purpose might not be engaging in electoral activity would defeat these benefits of disclosure.

Under GMA's theory, entities could solicit significant war chests from others, enter the State to expend large amounts of money on a campaign, and then exit without the public ever knowing who truly was behind the effort to influence the state election. Large organizations collecting political contributions could escape disclosure requirements simply by being too big relative to the size of the contributions, or so long as their primary purpose is not electioneering. In contrast, individuals and small grassroots organizations engaging in the very same activity as these types of organizations would be subject to the laws. This variance makes no sense and is contrary to the State's policy of requiring "*complete disclosure of all [campaign] information respecting the financing of political campaign[s].*" RCW 42.17A.001 (emphases added). The Court should decline GMA's request to impose a "primary purpose" requirement for those collecting political contributions from others.

B. Requiring GMA to Comply with Washington's Campaign Finance Laws Satisfies Exacting Scrutiny under the First Amendment

Applying the State's campaign disclosure laws to GMA satisfies the First Amendment under the "exacting scrutiny" standard. *See, e.g., Citizens*

United, 558 U.S. at 366-67 (campaign disclosure requirements are subject to “exacting scrutiny”); *Voters Educ. Comm. v. Pub. Discl. Comm’n* (*VEC*), 161 Wn.2d 470, 482, 166 P.3d 1174 (2007) (same); *Family PAC v. McKenna*, 685 F.3d 800, 805-06 (9th Cir. 2011) (same, evaluating these laws); *Brumsickle*, 624 F.3d at 1005 (same). This test protects First Amendment rights by requiring a “‘substantial relation’ between the governmental interest [in disclosure] and the information required to be disclosed.” *VEC*, 161 Wn.2d at 482 (quoting *Buckley*, U.S. at 64). In an as-applied challenge like this one, the question is whether, based on the facts presented, requiring disclosure would result in an unconstitutionally onerous burden when compared to the State’s interest in providing the public with the required information. *Utter*, 182 Wn.2d at 430.

This Court should affirm the lower courts’ sound conclusion that the State’s compelling interest in informing voters about who is funding initiative campaigns outweighs any purported burden GMA claims from disclosing its members’ contributions. *See GMA*, 5 Wn. App. 2d at 192-99; CP 3192-94; CP 369-73. As the Court of Appeals noted, “[c]ampaign disclosure laws promote political speech, and parties who challenge those laws “‘never satisfactorily answer the question of how uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public.’”” *GMA*, 5 Wn. App. at 193 (quoting *VEC*, 161 Wn.2d at 483 (emphasis omitted) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003))).

1. Washington has an Important Governmental Interest in Requiring GMA to Disclose Its Contributors

GMA contends that requiring the disclosure of GMA’s contributors was “relatively insignificant” to the electoral process. GMA’s Pet. at 7-8; *see also* GMA’s COA Br. at 31-32 (claiming it would not “meaningfully enhance voters’ ability to evaluate campaign messages”). But federal and state courts universally hold that the State has a “sufficiently important, if not compelling, governmental interest” in informing the electorate about *who* is financing ballot measures. *Brumsickle*, 624 F.3d at 1005-06; *see also Family PAC*, 685 F.3d at 808 (finding same); *State ex rel. PDC v. Permanent Offense*, 136 Wn. App. 277, 284, 150 P.3d 568 (2006) (same); *cf. Citizens United*, 558 U.S. at 369 (the public’s “interest in knowing *who* is speaking about a candidate shortly before an election” was sufficient to mandate disclosing the funders of campaign advertisements (emphasis added)). The State interest in this case is no different.

GMA’s timely registration and reporting would have revealed to voters “the contributors to and participants in public discourse and debate” surrounding Initiative 522. *Brumsickle*, 624 F.3d at 1005. This is crucial information, because “[a]t least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation. In addition, mandating disclosure of the financiers of a ballot initiative may prevent the wolf from masquerading in sheep’s clothing.” *Family PAC*, 685 F.3d at 808 (emphases added) (citation omitted) (internal quotation marks omitted). GMA’s claim that it was sufficient that the No on 522 campaign disclosed GMA as a principal

contributor misses the point. GMA's Pet. at 8. Voters could not know—because GMA hid them—which companies financed GMA's political activities to defeat Initiative 522 and which, in fact, declined to participate. *See* State's Answer at 10.

GMA's subterfuge is especially concerning in this age, when it is critical that the public know who is behind efforts to influence elections. GMA solicited and received contributions from member companies to oppose Initiative 522 in order to hide those contributions from the public; indeed, GMA's stated goal was to "provide anonymity and eliminate state filing requirements for contributing members." CP 4054-56; *see also* Exs. 15, 17, 23, 29. Accordingly, GMA and its members distorted the message provided to voters by hiding the identities of the true speakers against Initiative 522. Under these facts, requiring GMA to disclose its contributors "bear[s] a substantial relationship to Washington State's sufficiently important interest in providing the electorate with source and financial information to inform their decisionmaking at the ballot box." *Brumsickle*, 624 F.3d at 1008; *see also* *GMA*, 5 Wn. App. 2d at 195-96, 199. This Court should therefore reject GMA's claim that disclosure of the true opposition to Initiative 522 would not have helped voters.

2. Washington's Reporting Requirements Impose Minimal Burdens on GMA

Attempting to rebut the State's interest in providing the required information, GMA claims that the State's disclosure requirements burden its and its members' associational rights. *See* GMA's Pet. at 9. The lower

courts correctly concluded otherwise. *GMA*, 5 Wn. App. 2d at 197-99.

GMA asserts that the State's campaign finance laws disproportionately burden national organizations like GMA that sometimes engage in state politics. GMA's Pet. 9. Nothing supports GMA's assertion. Requiring entities that satisfy the State's political committee definition to disclose all contributions received and expenditures made to oppose a Washington ballot measure imposes only "minimal, if any, organizational burdens." *Brumsickle*, 624 F.3d at 1014. Simply because GMA and its members engage in political speech does not mean that requiring them to disclose their activity to the public constitutes an unconstitutional burden. In fact, the courts have repeatedly upheld disclosure laws under similar claims. *See, e.g., Citizens United*, 558 U.S. at 366-71. "Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking[.]" *Id.* at 366 (internal quotation marks omitted) (citing *Buckley*, 424 U.S. at 64; *McConnell*, 540 U.S. at 201). Compliance with the State's campaign finance laws likewise would not have prevented GMA or its members from opposing Initiative 522. Instead, it would have ensured that the public received accurate information about who was doing the speaking. *VEC*, 161 Wn.2d at 498.

GMA also asserts a constitutional right to shield its members from public scrutiny. GMA's Pet. at 10-12; GMA's COA Br. at 35-37. It is true that the Supreme Court has narrowly permitted some groups to avoid compelled disclosure upon proof of "a reasonable probability that the

compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals[.]” See *John Doe 1 v. Reed*, 561 U.S. 186, 201, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (quoting *Buckley*, 424 U.S. at 74). Courts, however, have approved this exemption from disclosure for only a few select groups, such as minor political parties or the NAACP, and only upon an “uncontroverted showing” of specific incidents of significant governmental or private hostility. See *Buckley*, 424 U.S. at 69, 74; *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99-100, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982); *NAACP v. Alabama*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). Importantly, the potential for boycotts or other economic reprisals to companies has never been deemed sufficient to overcome the public's right to engage in those protected activities. Cf. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-12, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

The Court of Appeals rightly rejected GMA's claims as insufficient under these standards. See *GMA*, 5 Wn. App. 2d at 198-99 (finding GMA's claim of harm to be “minimal” and “generalized”). GMA's reason for seeking anonymity in Washington is, moreover, extraordinarily weak. GMA points to post-litigation testimony of a single staff member that certain members received threats and boycotts for opposing California's Prop 37. See *GMA's Pet.* at 10-11 (citing deposition testimony of Pamela Bailey). GMA's contemporaneous records show, however, that its members were concerned with harm to their brand images or boycotts of products. See, e.g., Ex. 13 (“There were efforts by the activists to boycott our brands

and harm the confidence consumers have in our products.”); Ex. 21 (“Criticism of the industry for its position on the GMO issue and our financial support for the campaign in California are the most recent attacks on our companies and the products we make.”). These economic-based, “generalized concerns do not establish a reasonable probability” that GMA’s members would suffer the type of harm described in *Buckley* and other cases. *GMA*, 5 Wn. App. 2d at 199. GMA’s experience simply cannot compare to that of the Socialist Party or the NAACP, groups notoriously subject to discrimination and abuse.

C. GMA Concealed the True Sources of Funding for Opposition to Initiative 522

GMA also challenges the lower courts’ conclusions that GMA violated the State’s prohibition against concealment, RCW 42.17A.435, which provides:

No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

GMA asserted below that the statute is vague such that it could not have known that it could not “shield” its members’ contributions. *See* GMA’s COA Br. at 27-34. GMA’s argument at this Court is that “an independent act intended to conceal or mislead is required” to trigger the concealment statute, and GMA claims the trial court found a violation “simply by failing to register and report as a political committee.” GMA’s Pet. at 19. The plain language of RCW 42.17A.435 reaches GMA’s subterfuge, and the record

shows that GMA's concealment involve independent actions.

RCW 42.17A.435 prohibits concealing the identity of anyone funneling money through another person or entity to support or oppose a ballot measure. *See Permanent Offense*, 136 Wn. App. at 283-84; *see also Webster's Third New International Dictionary* 469 (2002) (conceal: "to prevent disclosure or recognition of : avoid revelation of" or "to place out of sight"). It also prohibits acting in "any" manner "so as to effect concealment," which includes using a corporate structure to hide campaign finance information from the voting public. *Permanent Offense*, 136 Wn. App. at 289. As the Court of Appeals found, "[t]he fact that a statute is broad does not make it vague." *GMA*, 5 Wn. App. 2d at 206.

In *Permanent Offense*, the defendant created and used a for-profit corporation to hide her political committee's expenditures to an individual consultant. *Permanent Offense*, 136 Wn. App. at 280-81. The court of appeals affirmed RCW 42.17A.435's application notwithstanding that using a corporate structure to provide services was not itself a violation. *Id.* at 289. The court of appeals agreed that it was the defendant's intent to conceal the true recipient of the expenditures and the actions she took to implement the scheme that violated the statute, not the use of a corporate structure as the defendant claimed. *Id.*

Likewise, the concealment issue here was never about GMA's creation of its Defense of Brands Account or its failure "to register and report as a political committee," as GMA contends. *GMA's Pet.* at 19; *GMA's COA Br.* at 31. Rather, the issue was that GMA intentionally

concealed the true sources of the contributions it received and the expenditures it made to oppose Initiative 522. GMA intended to “shield” its members’ contributions from “public scrutiny,” action that is squarely within the statutory prohibition on concealment. CP 4059. It intended to “provide anonymity and eliminate state filing requirements for [its] contributing members.” *Id.*; *see also* Exs. 15, 17, 23, 29. GMA also took steps to divert the public’s attention away from the fact that its members were funding the opposition to Initiative 522. CP 4061; *see also* Exs. 67, 74. And, the superior court found “not credible” GMA’s belief that “shielding GMA’s members as the true source of contributions” was legal. CP 4068. GMA continued to pursue its plan after being warned that it raised legal issues under Washington’s campaign finance laws and without “fully, or accurately, disclos[ing] all material facts to its attorneys.” *See, e.g.*, CP 4061-65, 4068; Exs. 40, 72, 80.

In short, the record does not support GMA’s characterization of these as acts as merely failing to register and disclose. GMA’s Pet. at 20. Rather, the extensive record supports the trial court’s findings and its conclusion that GMA deliberately engaged in concealment in violation of RCW 42.17A.435. CP 4071.

D. The Superior Court Correctly Trebled GMA’s Penalty Because GMA Intentionally Concealed the True Source of its Contributions

The Court of Appeals erred when it rejected the superior court’s decision to treble GMA’s penalties under RCW 42.17A.765(5) (“If the violation is found to have been intentional, the amount of the judgment,

which shall for this purpose include the costs, may be trebled as punitive damages.”). As demonstrated in the State’s Petition for Review, the Court of Appeals’ conclusion that a defendant must subjectively know what the FCPA requires and choose to violate the law in order to face treble penalties is error and leads to absurd and harmful results. *See* State’s Pet. at 13-20. State law simply does not allow a defendant to escape the consequences of their actions by remaining ignorant of the law. *Id.* This Court should reject GMA’s attempt to read this subjective intent into the statute.

GMA first asks this Court to construe “violation” as if it were a transitive verb, rewriting the text to say, “if a party intended to violate the law.” GMA’s Answer at 7. The statute, however, uses the term as a noun: “[i]f the *violation* is found to have been intentional,” then the court “may” treble the judgment. RCW 42.17A.765(5); *see also Webster’s Third New International Dictionary* 2554 (2002) (violation: “the act or action of violating or the quality or state of being violated . . . an infringement or transgression < a ~ of law > < ~ of promises >”). In other words, before exercising discretion to treble the judgment, the trial court must find that the defendant committed an action that contravened the State’s campaign finance laws (i.e., the violation), and then determine that the violation (i.e., the illegal act) was intentional. That is exactly what the trial court did here in holding its trial, determining the appropriate penalty, and then trebling that amount “as punitive damages for GMA’s intentional violations of state law.” *See generally* CP 4046-72.

Next, GMA asks this Court to import a “knowledge of the law”

standard into the term “intentional” in RCW 42.17A.765. GMA’s Answer at 12. But “intentional” has a standard meaning that courts apply in many contexts, both criminal and civil. *See* State’s Pet. at 14-16 (citing cases). Just as the trial court did with GMA, courts look to whether the person acted with the purpose of accomplishing some act that was illegal in order to find whether the defendant committed an intentional violation. *Id.*

Attempting to evade the weight of authority, GMA points to instances where courts in some cases also discussed “willful” or “knowing” behavior when analyzing intent. *See* GMA’s Answer at 11-15. GMA asks this Court to make the illogical leap from those cases that RCW 42.17A.765(5) requires a mental state where the actor knows he or she is violating the FCPA before treble penalties can be imposed. GMA’s Answer at 11-12. That approach is not called for by the text of the statute, nor is it workable.

A finding that a defendant acted with “knowledge” does not necessarily mean that the defendant knew what the law required and deliberately chose to act anyway. *Cf.* RCW 9A.08.010(1)(b) (defining “knowledge” for purposes of criminal culpability); *State v. Minor*, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008) (“Ignorance of the law is generally not a defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime.”). The same too with a finding that a defendant acts with “intent” or “intentionally.” *Cf.* *Chicago Title Ins. Co. v. Office of Ins. Comm’r*, 178 Wn.2d 120, 143, 309 P.3d 372 (2013) (“Land Title did not wine and dine the real estate

middlemen by accident. Rather, whether out of overzealousness or ignorance of the law, Land Title engaged in intentional conduct that violated the law.”). The cases cited by the State in its Petition prove this point despite GMA’s attempt to suggest otherwise.

In *Vanderveen*, this Court affirmed that a lawyer’s guilty plea to a “willful” violation of two federal statutes established, in part, a finding that he acted “intentionally” for purposes of professional discipline. *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 605, 211 P.3d 1008 (2009). But this was because the United States Supreme Court had already defined “willful” for purposes of the federal laws as “acting with the knowledge that one’s conduct is unlawful.” *Id.* at 605-06. This Court held that, as used in those particular statutes, a finding of “willfulness” established “intentionality,” thus satisfying the state disciplinary code. *Id.* at 607; *see also Id.* at 607 n.19. This Court went on, however, to illustrate that “intentional” also describes GMA’s violation here. It deemed the lawyer’s other misconduct, such as receiving cash payments and failing to report or record them, to be “intentional” without any finding that the lawyer knew the conduct was unlawful. *See id.* at 611. Rather the Court found that the lawyer had “the conscious objective or purpose to accomplish a particular result,” in that case—as GMA did here—concealment. *Id.*

GMA also relies on *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985), another case that proves the State’s point. GMA’s Answer at 11-12. In that case, this Court affirmed that the

defendant committed “intentional trespass” after concluding that the company had “known for decades” that it was emitting particulate matters that could settle on nearby properties. *Bradley*, 104 Wn.2d at 682. The Court found the defendant acted intentionally not because it knew that one day it could be held liable for trespass and acted anyway, but because the defendant “had to appreciate with substantial certainty that the law of gravity would visit the effluence upon someone, somewhere.” *Id.* at 683. Same too here with GMA’s acts of concealment.

GMA suggests that this Court in *State v. Conte*, 159 Wn.2d 797, 154 P.3d 194 (2007), interpreted RCW 42.17A.765 to require a “‘knowingly’ mental state.” GMA’s Answer at 13 (citing *Conte*, 159 Wn.2d at 811 n.6). The case says no such thing. The Court’s point was simply that the criminal provision in RCW 40.16.030 did not overlap entirely with the FPCA because violations can occur that “would not involve a ‘knowingly’ mental state.” *Conte*, 159 Wn.2d at 811. And while the Court acknowledged in dicta that RCW 42.17A.765 contains a *mens rea* element, *id.* at 811 n.6, the Court never equated “intentional” in RCW 42.17A.765 with the Court of Appeal’s requirement in this case that an actor specifically know the law and know they are violating it.

GMA also points to other campaign finance decisions to support its conclusion that treble penalties are only appropriate if the defendant knows he is violating the law. *See* GMA’s Answer at 14-15 (citing trial court cases provided in CP 4230-31). GMA’s reliance on these trial court cases is misplaced for multiple reasons. Without having all the facts for each case,

this Court has no way of knowing what factors led to a particular penalty or whether the cases are even comparable. Moreover, nothing in those decisions supports GMA's argument that RCW 42.17A.765(5) requires subjective intent to violate the disclosure laws before a court may impose punitive damages. Instead, this Court should consider the cases for what they were: matters where the facts led the courts to conclude that the defendants knew Washington's campaign finance requirements and purposefully disregarded them. Nothing, however, suggests that this is the only factual pattern that satisfies RCW 42.17A.765(5).

Finally, GMA asserts that an award of punitive damages under RCW 42.17A.765 should be reserved for "special circumstances" and "to punish and deter blameworthy conduct." GMA's Answer at 7, 9. The State agrees, but GMA's conduct here was both egregious and blameworthy. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 85-86, 272 P.3d 827 (2012) (affirming a punitive award for egregious conduct and as a deterrent to other actors engaging in similar conduct).

RCW 42.17A.765(5) gives courts discretion to treble an entire judgment or a portion of the awarded penalties upon a finding that "the violation was intentional." Contrary to GMA's assertion, not every fact pattern is going to meet this standard. *See State's Pet.* at 16, n.5. And not every court is going to agree that trebling is necessary in each case. GMA's conduct here warranted it. Nothing in Washington's history of campaign finance regulation compares to GMA's intentional concealment of over \$14,000,000 in contributions. GMA's actions and statements show that it

knew and intended that its members' contributions to oppose Initiative 522 would go undisclosed to Washington voters. GMA also took steps to divert attention from the true source of the funds it was using to oppose Initiative 522. GMA continued in its course of action even as questions were raised by a Board member and outside counsel. It is hard to imagine clearer evidence of GMA's intent to conceal the true source of its contributions or the conclusion that GMA's violations of Washington law were intentional.

The State will never know the exact impact of GMA's concealment in the 2013 election. The superior court's treble penalty, however, reflects the severity of GMA's conduct and shows others that there is a real cost to hiding the true source of campaign contributions. This Court should reverse and reinstate the trebled portion of GMA's penalty.

V. CONCLUSION

For all of these reasons, the superior court's order and judgment should be affirmed. The State should be awarded its reasonable attorney fees and costs at trial and on appeal. RCW 42.17A.765(5); RAP 18.1.

RESPECTFULLY SUBMITTED this 17th day of June 2019.

ROBERT W. FERGUSON

Attorney General

s/ Callie A. Castillo

CALLIE A. CASTILLO, WSBA 38214

Deputy Solicitor General

1125 Washington Street SE

Olympia WA 98504

360-664-0869

Callie.Castillo@atg.wa.gov

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that I served the foregoing document, via electronic mail, upon the following:

Robert Mitchell
Aaron Millstein
K&L Gates
925 4th Avenue, Suite 2900
Seattle, WA 98104-1158
rob.mitchell@klgates.com
aaron.millstein@klgates.com

Bert Rein
Carol Laham
Matthew Gardner
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
brein@wileyrein.com
claham@wileyrein.com
mgardner@wileyrein.com

DATED this 17th day of June 2019, at Olympia, Washington.

s/ Kristin D. Jensen
KRISTIN D. JENSEN
Confidential Secretary

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