

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
6/17/2019 10:43 AM  
BY SUSAN L. CARLSON  
CLERK

No. 96604-4

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner and Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Respondent and Petitioner.

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GROCERY MANUFACTURERS ASSOCIATION,

Respondent and Petitioner,

v.

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

Petitioner and Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT/PETITIONER GMA

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## **I. INTRODUCTION**

Grocery Manufacturers Association (“GMA”) has served as a voice for American food manufacturers on a host of public policy issues since 1908. About ten years ago, GMA became embroiled in battles over mandatory labeling of genetically modified organisms, or GMOs. Its members suffered death threats and economic boycotts when they were disclosed as supporting GMA’s position on this highly charged issue.

In 2013 GMA contributed \$11 million to defeat I-522. GMA’s contributions were fully disclosed as its own. No voter was fooled about the interests of those opposing I-522 or was better advised when, a month before the election, the State forced GMA to register a political committee under the Fair Campaign Practices Act (“FCPA”) and to disclose all the members that had put money into GMA’s Defense of Brands Strategic Account (the “Account”). Nevertheless, the trial court assessed an \$18 million penalty, by far the largest campaign-finance fine in U.S. history.

The Court of Appeals upheld the trial court’s liability findings, while overturning its award of punitive damages. Both parties sought review. GMA seeks reversal on liability because the Court of Appeals failed to properly apply First Amendment protections and this Court’s precedents. GMA seeks affirmance of the Court of Appeals’ punitive-damages holding, which the FCPA and the First Amendment require.

## **II. ISSUES PRESENTED FOR REVIEW**

A. There was no evidence that GMA misled any voter or hampered voters' ability to understand the biases of I-522 opponents. At the same time, undisputed evidence showed that disclosing individual member contributions exposed GMA's members to death threats and economic reprisals. In these highly unusual circumstances, does applying the FCPA to GMA fail exacting First Amendment scrutiny?

B. The Court of Appeals held that GMA could meet the definition of "political committee" under the "contributions" prong without having a primary purpose of electioneering, even though such a purpose must be established under the "expenditures" prong. Does *Utter v. Building Industry Association of Washington*, 182 Wn.2d 398 (2015), require applying the primary-purpose test to both prongs?

C. The Court of Appeals held that, by failing to register as a political committee, GMA violated a statute prohibiting "concealment" of the source of contributions. Did the court misapply the FCPA by double-counting GMA's non-registration as two separate violations?

D. The FCPA authorizes punitive damages only where "the violation is found to have been intentional." Was the Court of Appeals correct in holding that this language requires a showing that GMA intended to violate the law?

### **III. STATEMENT OF THE CASE**

GMA is a 111-year-old trade association of American food, beverage, and consumer-product makers. *See* CP 4052; RP 641–42. From 2010 to 2016 debate raged over whether such companies should have to disclose GMOs on their food labels. Trial Exhibit (“Ex.”) 2, 139. GMA recognized that complying with a patchwork of inconsistent state GMO-labeling rules would be burdensome, complex, and costly for its members. *Id.* GMA thus favored uniform federal legislation and opposed piecemeal state-level efforts to address GMO labeling. RP 433, 654.

In 2012, GMA opposed a California GMO-labeling ballot measure. *See* Ex. 139; CP 4053. GMA found out that its own financial resources were too limited to enable meaningful political participation. *See* RP 433–34; Ex. 2. GMA asked its members to contribute to the California effort directly or by providing earmarked funds to GMA, all of which were disclosed as member contributions. *See* Ex. 139; RP 277–78, 440–41. But because member companies had not planned for such expenses, they could not respond promptly to GMA’s pleas for help. *See* Ex. 13. And when their contributions were disclosed, many members received death threats and suffered economic reprisals. *See* CP 1540, 3188; RP 180–81.

Given this experience, GMA looked for a way to fund its own participation in the political process without subjecting members to danger

and harassment. In August 2012, GMA staff discussed creating the Account. Ex. 131; *see also* CP 4053–54. The Account had a four-year goal: equipping GMA to counter state-level labeling efforts while pursuing a uniform federal solution. Ex. 21, 139; RP 441–43.<sup>1</sup>

When GMA explored creating the Account in August 2012, it knew virtually nothing about I-522. RP 436; CP 4054. Only in November did GMA begin discussing I-522, which would not appear on the ballot for a year, if at all. *See* CP 4054. In January 2013, GMA commissioned a poll to determine the feasibility of challenging I-522 if placed on the ballot. Ex. 9, 137; CP 2337–38; RP 296–97, 329. GMA planned to decide whether to oppose I-522 based on the poll results. CP 2337–38; RP 296–97, 329.

On February 28, 2013, GMA’s board approved creating the Account.<sup>2</sup> Ex. 32. Both GMA’s in-house counsel and outside lawyers told GMA that creating the Account and treating funds received from members as GMA’s own money was lawful. *See* Ex. 16, 17, 23, 59, 80, 148; RP 155–56, 222; CP 4063.<sup>3</sup> On March 15, GMA told members the initial

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<sup>1</sup> Federal legislation on GMO labeling was enacted in July 2016. *See* Pub. L. 114-216.

<sup>2</sup> According to the Court of Appeals, this was the moment—two months before I-522 qualified for the ballot—when GMA became a Washington political committee. As such, it had to register with the PDC within 14 days and report a host of internal information, much of it unrelated to any Washington electoral activities. *See* pages 11–12 below.

<sup>3</sup> The trial court held that GMA could not establish an advice-of-counsel defense because the court thought GMA failed to ask enough questions or provide sufficient information for outside counsel to give an opinion. CP 4062–65, 4068, 4071. It is undisputed, however, that GMA believed it was following the law.

polling results and first invoiced them for Account funds. Ex. 32 at 2; CP 4060. Money paid into the Account came under GMA's discretionary control. CP 918, 1473–76; RP 297, 303, 338, 654; *see also* Ex. 148. On April 28, I-522 qualified for the ballot. CP 605. On May 8, GMA made its first contribution to the No on I-522 Committee (“No on I-522”). *See* Ex. 76. No on I-522 disclosed all GMA contributions as coming from “Grocery Manufacturers.” *E.g.*, Ex. 119, 120. News coverage of those contributions identified many of GMA's larger members.<sup>4</sup>

In October 2013, the State sued GMA, alleging that GMA had failed to properly register and report as a political committee and that it had thereby concealed the sources of the funds it contributed to No on I-522. CP 18–24. Under threat of injunction, GMA registered a political committee, “Grocery Manufacturers Association Against I-522,”<sup>5</sup> and disclosed member contributions to the Account. CP 1690–92, 3858–60.<sup>6</sup>

The trial court found on summary judgment that GMA had violated the FCPA and held against it after a trial on penalties. The court

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<sup>4</sup> For example, a reporter wrote on August 17, 2013: “With its big donation on Monday, the Grocery Manufacturers Association has now given \$2.222 million to the campaign against I-522. It represents major corporations such as ConAgra, General Mills, Kellogg, Hillshire Farms, Pepsico and Coca-Cola.” CP 487.

<sup>5</sup> No such entity existed, but the PDC told GMA to act as if one did and to treat funds in the Account as member contributions to “GMA Against I-522.” CP 546. The Account included funds spent on non-Washington activities. *See* CP 592–93, 601–10.

<sup>6</sup> The disclosure did not change campaign advertisements or affect media accounts of the issues raised by I-522. CP 487–88. Activists simply used the disclosed information to target identified members with consumer boycotts. CP 488–89.

trebled its \$6,000,000 fine as punitive damages and entered an amended judgment for \$19,026,090. SCP 4354–57. The Court of Appeals affirmed the trial court’s liability finding but reversed its treble-damage award.

#### IV. ARGUMENT

##### **A. As applied to GMA, the FCPA’s disclosure requirements for political committees fail exacting First Amendment scrutiny.**

The “First Amendment applies to the fullest extent during a political campaign.” *Sequist v. Caldier*, — Wn. App. 2d —, 438 P.3d 606, 612 (2019). Because compelled disclosure “can seriously infringe on privacy of association and belief,” the “significant encroachments on First Amendment rights of the sort that compelled disclosure imposes . . . must survive exacting scrutiny.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

To survive exacting scrutiny, the State must show that applying the FCPA to GMA (1) promotes a governmental interest sufficiently important to outweigh the burden on GMA’s rights of association and speech and (2) bears a substantial relationship to that interest. *See State v. Grocery Mfrs. Ass’n*, 5 Wn. App. 2d 169, 192 (2018) (“GMA”). In an initiative campaign, where contributions pose no risk of quid-pro-quo corruption, the State’s only constitutionally cognizable interest is ensuring that voters understand the interests of those funding messages for or against the ballot measure. *See Buckley*, 424 U.S. at 203; *Human Life of*

*Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). Here, No on I-522 disclosed its principal contributors as Monsanto, DuPont Pioneer, and GMA,<sup>7</sup> leaving no doubt about the interests of initiative opponents. GMA’s fully descriptive name made its own interests in the measure obvious, as did news coverage at the time. *See* note 4 above.

To treat “disclosure” or “transparency” as ends in themselves (as the Court of Appeals did) is circular. To pass exacting scrutiny, the State must show that requiring a particular disclosure actually promotes fair elections. Instead, the Court of Appeals excused the State from proving that labeling GMA a political committee (1) promoted a fairer election and (2) did not disproportionately burden GMA’s political expression.

First, the Court of Appeals *assumed* that treating GMA as a political committee made the election fairer because voters might want to know which GMA members were funding the Account. But the First Amendment requires *proof* that such information would have enhanced electoral fairness. *Compare GMA*, 5 Wn. App. 2d at 195, *with Wash. Initiatives Now v. Rippie*, 213 F.3d 1132 (9th Cir. 2000) (State failed to prove that required disclosure of names and addresses of initiative gatherers was justified by interest in voter education and fraud detection).

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<sup>7</sup> *See* No on 522, WASH. PDC (2013), [https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer\\_id=NO522%20%20507&election\\_year=2013](https://www.pdc.wa.gov/browse/campaign-explorer/committee?filer_id=NO522%20%20507&election_year=2013) (navigate to the “Contributions” tab). *See also* CP 1250.

The Court of Appeals also ignored that disclosures posed the greatest risk of deterring participation by GMA’s smaller, less well-known members, who were uniquely vulnerable to reprisals. CP 2360 (“[T]he list was . . . used . . . to go after smaller companies that couldn’t defend themselves.”).

By excusing the State’s utter failure to show that GMA misled voters or that voters would have benefitted from more information, the court denied First Amendment protection to GMA’s speech on an issue of public concern—an activity at the heart of our political system. Protecting GMA’s expressive freedom outweighs the State’s relatively insignificant interest in requiring disclosure of GMA members, since no evidence suggested that disclosure would have actually helped voters. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 348–49 (1995) (compelled disclosure of political flyers’ author did not promote transparency where author’s identity would “add little, if anything, to the reader’s ability to evaluate the . . . message” that they received from a stranger).

Second, the Court of Appeals improperly discounted the interests of GMA’s members in avoiding economic reprisals and death threats.

[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .

*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). As the Court of Appeals noted, GMA’s members suffered death threats, cyber harassment, and boycotts for opposing state GMO-labeling requirements, including efforts to attack their associational freedom directly by forcing them to withdraw from GMA membership. *GMA*, 5 Wn. App. 2d at 198–99. GMA, its staff, and its members also received online threats “[e]very single day” and were the targets of vandalism. *See* CP 1543–44, 1775.

The Court of Appeals dismissed all this as “similar to evidence not deemed sufficient to prevent disclosure in *Buckley* and *Reed*.” *Id.* On the contrary, the minor-party officials in *Buckley* could not avoid disclosure because “[a]t best they offer . . . testimony . . . that one or two persons refused to make contributions because of the possibility of disclosure.” 424 U.S. at 71–72. And the plaintiffs in *Doe v. Reed* *facially* challenged disclosure laws but failed to show that those laws created a risk of reprisals in cases other than their own. 561 U.S. 186, 200–01 (2010).

This case presents exactly the type of evidence *Buckley* recognized as striking at the heart of associational freedom: “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself,” or a “pattern of threats or specific manifestations of public hostility.” *Buckley*, 424 U.S. at 74. An organization need not wait for someone to be killed before having its

associational freedoms protected; death threats are enough. The Court of Appeals misapplied exacting scrutiny in failing to protect GMA’s right to free speech and association. *See Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 825 (2001) (“When advocacy groups are required to disclose the identity of their members and . . . all of their activities, the freedom of members to promote their views suffers.”).

**B. The Court of Appeals’ decision conflicts with *Utter*.**

As this Court has held, the First Amendment requires imposing a “purpose” limitation on the political committee statute. *Utter*, 182 Wn.2d at 416 (applying the political committee statute only to organizations with a “primary purpose” of electioneering satisfies this requirement).<sup>8</sup> The Court of Appeals failed to follow *Utter* when it refused to apply the “purpose” limitation to the entire political committee statute.

There are two ways to qualify as a “political committee” under the FCPA: by “receiving contributions” or by “making expenditures.”<sup>9</sup> “Clearly,” this Court explained in *Utter*, one can be a political committee “under *either* the ‘receiving contributions’ *or* ‘making expenditures’

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<sup>8</sup> To “electioneer” means “to take an active part in an election campaign . . . .” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY. *See, e.g.*, RCW 29A.84.520 (forbidding election officers from electioneering at a voting center or ballot drop location during voting period); RCW 42.17A.005(22) (defining “electioneering communication”).

<sup>9</sup> “‘Political committee’ means any person (except a candidate or an individual dealing with his or her own funds or property) having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition.” Former RCW 42.17A.005(37) (now subsection (40)).

portion of the statutory definition, *plus* whatever ‘purpose’ test might also be added on to that statutory definition.” *Id.* at 416 (emphasis added). This test “is necessary to satisfy First Amendment concerns.” *Id.* at 427. *Utter* recognizes a constitutional threshold for political-committee status, the burdens of which are equally onerous regardless of which statutory prong the State invokes. The State may not avoid its required threshold showing by electing to bring a claim under the contributions prong rather than the expenditures prong.

Applying a purpose limitation to only half of the political committee statute unconstitutionally burdens the activities of nationwide trade associations such as GMA.<sup>10</sup> If the FCPA applies to associations that lack a primary purpose of electioneering, their receipt of any funds that could potentially be spent in elections forces them to disclose a massive amount of internal information unrelated to electioneering<sup>11</sup> as well as the

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<sup>10</sup> The State never argued that GMA has a primary purpose of electioneering, *see* Resp.’s Br. (8/22/17) at 31–32, and thereby implicitly conceded that GMA lacks such a purpose. The Court of Appeals wrongly focused on the primary purpose of the Account. *Compare GMA*, 5 Wn. App. 2d at 196, with *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass’n*, 111 Wn. App. 586, 599–600 (2002) (factors for determining primary purpose include “(1) . . . the stated goals and mission *of the organization*; (2) whether *the organization’s* actions further its . . . goals and mission; (3) whether the stated goals and mission *of the organization* would be substantially achieved by a favorable outcome in an upcoming election; and (4) whether *the organization* uses means other than electoral political activity to achieve its stated goals and mission.” (emphasis added)).

<sup>11</sup> For instance, RCW 42.17A.205 requires a political committee to reveal its internal corporate structure, *id.* (2)(b), to make certain financial information available for public inspection, *id.* (2)(i) (*see also* RCW 42.17A.235), and to disclose detailed information about its debts, whether or not election related, *see* RCW 42.17A.240(3), (8).

names and addresses of member-contributors. *See* RCW 42.17A.240(2). Compelled disclosure will chill members' willingness not just to contribute to a cause, but to associate together at all.<sup>12</sup> It will also expose proprietary information about internal operations that implicates no state interest. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 598 (2002) (“*EFF*”) (“All funds would have to be reported, even those used for traditional labor union activities not connected with electoral campaign activity . . .”).

Treating contributions and expenditures differently makes little sense. Contributions *to* an entity will become expenditures *by* it unless the entity simply hoards the funds, making disclosure pointless.<sup>13</sup> All “expenditures” begin as “contributions” under the definition of “political committee,” which exempts from its scope persons spending their own funds. *See* former RCW 42.17A.005(37); 1973 Op. Att’y Gen. No. 14 (“Opinion No. 14”). Yet the Court of Appeals saw a “fundamental difference between spending money on . . . and receiving contributions from others to spend on an election.” *GMA*, 5 Wn. App. 2d at 189. Not so.

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<sup>12</sup> *See Buckley*, 424 U.S. at 15 (“[E]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”); *Right-Price*, 105 Wn. App. at 825.

<sup>13</sup> The definitions of “contribution” and “expenditure” are reciprocal: each includes the other. *See* RCW 42.17A.005(16)(a) (“‘Contribution’ includes . . . [a]n expenditure made . . . in cooperation [or] consultation . . . with, or at the request or suggestion of . . . a political committee . . .”); *id.* .005(23) (“‘Expenditure’ includes a . . . contribution”).

As Attorney General Gregoire opined, having a primary purpose of electioneering is indispensable for political-committee status:

An organization is only a political committee if a primary purpose of the organization is to affect, directly or indirectly, government decisionmaking by supporting or opposing candidates or ballot propositions. ***If this is not a primary purpose of the organization, it is not a political committee.***

1993 Op. Att’y Gen. No. 3 (emphasis added). Nevertheless, the Court of Appeals refused to apply the primary-purpose test, reasoning as follows:

[T]he language of former RCW 42.17A.005(37) contains no primary purpose requirement for the contributions prong. And courts have not imposed one, even though they have had the opportunity. Immediately after the statement GMA quotes, the court in *Utter* proceeded to discuss the contributions prong without any suggestion that a primary purpose requirement applied to that prong.

*GMA*, 5 Wn. App. 2d at 188.

This reasoning does not withstand scrutiny. The statutory text contains no primary-purpose requirement for *either* prong. This Court has read the primary-purpose test *into the statute* to address First Amendment concerns. *Utter*, 182 Wn.2d at 427. And the sole reason this Court in *Utter* did not address the primary-purpose test under the contributions prong is that the expenditures prong was “the only prong under which [Appellant] raises it.” *Id.* at 416.

The “primary purpose” language comes from Opinion No. 14, which states that the “over-all statutory scheme . . . clearly was only meant to affect those organizations whose primary purpose is to attempt to influence elections.” Opinion No. 14. Later, *State v. Evans Campaign Committee* cited Opinion No. 14 in holding that the defendant lacked such a purpose and consequently did not become a political committee by giving money to another political committee. 86 Wn.2d 503, 508–09 (1976). *EFF* followed *Evans* in applying the primary-purpose test to the challenged expenditure without addressing whether it applied further. *EFF*, 111 Wn. App. at 598–99.<sup>14</sup>

Although the courts in these cases were not called upon to address the contributions prong, they recognized that the primary-purpose test covers the whole statute. *EFF*, 111 Wn. App. at 600 (“If . . . one of the organization's primary purposes was electoral political activity during the period in question, and the organization received political contributions . . . , then the organization was a political committee . . .”). “Reading some stringent purpose requirement . . . into our statute is necessary to satisfy First Amendment concerns.” *Utter*, 182 Wn.2d at 427. Doing so with just half the statute does nothing to satisfy those concerns. The Court of

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<sup>14</sup> Similarly, “the prong at issue here” in *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997 (9th Cir. 2010), was “the ‘expenditures’ prong.”

Appeals' holding should be reversed, and the lack of any showing that GMA had a primary purpose of electioneering should result in dismissal.

**C. The Court of Appeals misinterpreted the concealment statute.**

Violating the FCPA's anti-concealment statute, RCW 42.17A.435, requires more than failing to register and report as a political committee. It requires an independent act intended to conceal. *See Wash. State Pub. Disclosure Comm'n v. Permanent Offense*, 136 Wn. App. 277, 284 (2006) (concealment statute violated where defendant not only failed to disclose funds but also used corporate entity to hide payment for what "otherwise appeared to be grass-roots effort").

The Court of Appeals said that "even under GMA's independent act standard," GMA should be liable because "GMA deliberately concealed the identity of its members who contributed to the DOB account." *GMA*, 5 Wn. App. 2d at 205. But GMA's motivation for not registering is not an "independent act." In holding that it was, the Court of Appeals made the same mistake as the trial court. By ignoring that an act of nondisclosure is not unlawful "concealment" unless accompanied by an overt act meant to conceal or mislead, the Court of Appeals wrongly double-counted GMA's alleged violation of the FCPA's register-and-report provisions as an independent statutory violation, thereby increasing GMA's exposure to penalties. This was error.

**D. There is no basis to impose punitive damages on GMA.**

A court may treble the amount of a judgment under the FCPA as punitive damages, but only if “the violation is found to have been intentional.” Former RCW 42.17A.765(5). As the Court of Appeals held:

The plain language of RCW 42.17A.765(5) states that the *violation* must be intentional, not that the conduct giving rise to the violation must be intentional. This language makes it clear that a party must have knowledge that it was violating the law to be subject to treble damages. The fact that GMA deliberately engaged in conduct that the trial court *later* determined was a violation of the FCPA does not mean that GMA intended to violate the FCPA.

*GMA*, 5 Wn. App. 2d at 209 (emphasis in the original). This holding fully accords with the text of the statute and cases applying that language.

If a statute’s meaning is plain, courts “give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9–10 (2002). Here, former RCW 42.17A.765(5) starts with a general rule (“In any action . . . the court may award” fees and costs) and then sets forth the specific circumstances in which punitive damages are permissible. The statute’s use of a conditional clause (“If . . . intentional”) signals that treble damages are reserved for a limited subset of FCPA violations, not all or most violations.

As the Court of Appeals recognized, it is highly significant that the subject of this conditional clause is “the violation,” not “the conduct” or

“the act or omission.” “Violation” denotes that something—here, the law—was violated, not just that something was done. The statute’s combination of “violation and “intentional” permits an award of treble damages only if there was a specific intent to violate the law.

The verb phrase that links “violation” with “intentional”—namely, the violation must be “found to have been intentional”—further reinforces the Court of Appeals’ reading of the statute. This wording requires the defendant to have appreciated that it was violating the law *when it committed the violation*. See, e.g., *State v. Bunker*, 169 Wn.2d 571, 578 (2010) (“[W]e employ traditional rules of grammar in discerning the plain language of the statute.”).

The same phrase appears in only one other Washington statute, RCW 39.30.020, which establishes civil penalties for contracts made in willful violation of the law. It provides: “If, as a result of a criminal action, the violation is found to have been intentional, the municipal officer shall immediately forfeit his or her office.” *Id.* This statute, too, attaches punitive consequences to only a subset of civil violations—namely, acts committed with the *mens rea* needed to secure a criminal conviction. Cf. *Still v. Comm’r of Dep’t of Emp’t & Training*, 39 Mass. App. Ct. 502, 503–04 (1995), *aff’d*, 423 Mass. 805 (1996) (a knowing violation of a rule or policy is one that is “found to have been intentional, i.e., the employee

not only must be aware of the existence of the rule or policy but must also be aware at the time she acted that she was violating it.”).

The rest of former RCW 42.17A.765(5) also validates the Court of Appeals’ reading, because it specifies that treble damages are meant to serve as “punitive damages.” Trebling is “intended to punish and deter blameworthy conduct.” *Brown v. MHN Gov’t Servs., Inc.*, 178 Wn.2d 258, 271 (2013). Deterrence requires knowledge. *See State v. Brown*, 140 Wn.2d 456, 472 (2000) (Madsen, J., concurring) (“Without a knowledge requirement,” deterrence is unlikely); *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 538 (1999) (punitive damages require “a positive element of conscious wrongdoing”). Thus, the statute’s designation of treble damages as punitive, like its conditional construction, use of the word “violation,” and choice of syntax, indicates that treble damages are authorized only if a party knew, when it acted, that it was violating the FCPA.<sup>15</sup>

The State argues that treble damages are authorized upon a showing of general intent to perform an act that is later found to violate the FCPA, whether or not one understood and intended that result. This would permit trebling in all cases where the underlying conduct was voluntary rather than coerced or inadvertent. This Court has already

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<sup>15</sup> *Cf. In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 607 (2009) (by pleading guilty to violating a federal law that criminalizes willful violations of reporting requirements for large cash transactions, lawyer “pleaded guilty to acting ‘intentionally,’ i.e., **with the knowledge that his conduct was unlawful.**”) (emphasis added).

implicitly rejected the State’s reading of the statute, observing: “Violations of chapter 42.17[A] RCW can occur that . . . would not involve a ‘knowingly’ mental state.” *State v. Conte*, 159 Wn.2d 797, 811 (2007). The Court noted that violations found to have been intentional **do** require a showing of specific intent to break the law:

The defendants point out that if a violation . . . is intentional, penalties may be trebled. . . . Therefore, they contend, the act includes a mens rea requirement. However, this does not mean that **all** violations of chapter 42.17[A] RCW would necessarily occur with a “knowingly” mental element . . . .

*Id.* at 811 n.6 (emphasis in the original). The Court of Appeals’ holding on punitive damages is entirely consistent with *Conte* and with how the FCPA has been interpreted and applied in every previous case.

If an “intentional violation” of the FCPA means only that a person participating in a campaign decided to do something that is later found to be contrary to the FCPA, then punitive damages will be available in nearly every case. This heightens the risk that the State will use punitive damages arbitrarily to attack disfavored viewpoints. That risk is not just theoretical. If the Court compares this case with *State ex rel. Wash. St. Pub. Discl. Comm’n v. Food Democracy Action!*, 5 Wn. App. 2d 542, 544 (2018), it will see that the State sought punitive damages from a party on one side of the I-522 debate but not from a similarly situated party on the other side.

See GMA's Answer to State's Petition for Review (Feb. 15, 2019) at 15–20. Such a result is intolerable under the First Amendment. *See, e.g., Rosenberg v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–29 (1995).<sup>16</sup>

## V. CONCLUSION

This Court should apply exacting scrutiny and conclude that the State's application of the FCPA to GMA in the unique circumstances of this case violates the First Amendment. The Court should also hold that, because GMA lacks a primary purpose of electioneering, it is not a political committee under Washington law. The Court should hold that GMA's failure to register as a political committee does not by itself constitute prohibited concealment. Finally, the Court should affirm the Court of Appeals' ruling that punitive damages may not be awarded under the FCPA absent an intentional violation of the law.

DATED this 17th day of June 2019.

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<sup>16</sup> If, despite the arguments above, this Court agrees with the State's interpretation of the punitive-damage provision while rejecting GMA's challenge to the lower courts' liability determinations, the Court should remand the case to the Court of Appeals to consider GMA's Eighth Amendment challenge to the trial court's judgment. *See GMA*, 5 Wn. App. 2d at 177 n.2. Indeed, any penalty finally assessed in this case must be evaluated under the Excessive Fines Clause. *See Timbs v. Indiana*, — U.S. —, 139 S. Ct. 682, 687 (2019). No appellate court has yet done this.

Respectfully submitted,

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June 17, 2019 - 10:43 AM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 96604-4  
**Appellate Court Case Title:** State of Washington v. Grocery Manufacturers Association  
**Superior Court Case Number:** 13-2-02156-8

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