No. 96604-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Petitioner and Respondent*,

v.

GROCERY MANUFACTURERS ASSOCIATION, *Respondent and Petitioner*.

GROCERY MANUFACTURERS ASSOCIATION, *Respondent and Petitioner*,

v.

ROBERT W. FERGUSON, Attorney General of the State of Washington, in his official capacity, *Petitioner and Respondent*.

BRIEF OF *AMICUS CURIAE* THE INSTITUTE FOR FREE SPEECH

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INTEREST OF AMICUS CURIAE

The Institute for Free Speech ("Institute") is a nonpartisan, nonprofit organization that defends the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations, *pro bono*, in cases raising First Amendment objections to the regulation of core political activity. The Institute has an interest in this case because the severe governmental sanctions at issue will chill the exercise of fundamental First Amendment rights. The Institute served as *amicus curiae* to the Court of Appeals in this case and at the petition stage before this Court.

INTRODUCTION

Washington's Attorney General hailed as "historic" the Superior Court's imposition of an $18 million fine for reporting errors related to ballot-issue advocacy.[1] Those reporting errors did not involve bribery or anything related to *quid pro quo* corruption: There were no candidates or office holders to be corrupted. The Grocery Manufacturers Association's ("GMA") error did not conceal the interests of those funding the opposition to the ballot measure: The full amounts contributed were reported, voters

[1] Washington State Attorney General, *Grocery Manufacturers Assoc. To Pay $18M, Largest Campaign Finance Penalty In US History* (Nov. 2, 2016), http://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us.

knew GMA's and its members' interests, and the contributions were themselves legal.

The Court of Appeals reduced the fine to $6 million to cure the Superior Court's errors in statutory interpretation, but the Court of Appeals erred in not subjecting the base and punitive fines to constitutional scrutiny. Whether $6 million or $18 million, the fines here are massive—a death sentence for most groups. And groups will silence themselves, knowing that complaints by ideological opponents may result in terminal penalties. Such fines therefore suppress "speech about public issues," which speech "commands the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015).

Neither the trebled fine nor the base fine pass such constitutional scrutiny. Because the fines target protected political speech, they must meet the scrutiny required under both the First and Eighth Amendments to the United States Constitution. The Eighth Amendment's gross disproportionality analysis, properly accounting for the First Amendment burdens at issue here, requires that the actual burdens imposed for noncompliance with a disclosure law be substantially related to the government's informational interest. The trebled fine is not substantially related to the State's interest in punishing reprehensible conduct. And given the tenuous relationship between the additional disclosure demanded by the

State and the informational interest, the burdensome base fine also cannot survive constitutional scrutiny. Accordingly, while the decision by the Court of Appeals to reverse the trebled fine should be affirmed—on both statutory and constitutional grounds–the First and Eighth Amendments require that the base fine be reversed as well.

STATEMENT OF THE CASE

The Superior Court held that GMA failed to meet its deadline to register as a political committee. Letter Opinion at 5, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Mar. 9, 2016). It further held that, although GMA's contributions had been reported, GMA violated state law by failing to disclose individual contributors and to submit reports as a political committee. *Id*.

The Superior Court later held that treble damages for reporting violations do not require "subjective intent to violate the law," and that violators need merely "act[] with the purpose of accomplishing an" act that is illegal. Order Confirming the Meaning of an Intentional Violation ("Intent Order") at 2, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. July 15, 2016). The Superior Court then held that GMA intentionally violated state law and ordered a civil penalty of $6,000,000 and treble punitive damages. Findings of Fact, Conclusions of

Law and Order on Trial at 23-24, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Super. Ct. Nov. 2, 2016).

On review, the Court of Appeals held that GMA was a political committee under RCW § 42.17A.005(37). *State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 176-77 (2018). Applying exacting scrutiny, the Court of Appeals articulated the State's interest in campaign finance disclosure. Yet it did not undertake a thorough analysis of the disclosure regime's tailoring to that interest—in particular, of the burdens such enormous fines impose on the ability to speak about public issues. *See id*. at 194-95. While the court thus affirmed the $6 million base fine, it nonetheless reversed the trebled fine as not justified by the statutory definition of intent. *Id*. at 207-09.

ARGUMENT

The Court of Appeals reversed the Superior Court's trebled fine on statutory grounds, but it erred in letting stand a still massive fine without requiring that its imposition meet exacting scrutiny. Because both the trebled and base fines chill protected political speech, this Court's Eighth Amendment excessive-fines analysis must incorporate the exacting scrutiny standard applicable in cases regulating political association and expression.

Our Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "[P]rotection against excessive fines has been a

constant shield throughout" our nation's history. *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019). We have protected against excessive fines in part because, as history taught, "[e]xcessive fines can be used . . . to retaliate against or chill the speech of political enemies." *Id*. After the Stuart kings were "overthrown in the Glorious Revolution," *id*. at 688, the jurisprudence surrounding the English Bill of Rights and its American successors moved into other areas, *id.* at 688-89, but it is still rooted in bedrock protections against the zeal for controlling political speech.

Fines are constitutionally excessive when they are "grossly disproportional to the gravity of . . . [a] defendant[s'] offenses." *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001) (first and third alterations in original) (internal quotation marks omitted). Because this standard is "inherently imprecise," *id*. (internal quotation marks omitted), courts carefully scrutinize anything relevant to the relationship between a fine's burdens and the reprehensibility of a defendant's actions.

In every case courts must examine "the degree of the defendant's reprehensibility or culpability, the relationship between the penalty and the harm to the victim . . . , and the sanctions imposed in other cases for comparable misconduct." *Id*. at 435 (citations omitted). But because concepts like "gross excessiveness" are inherently contextual, because "they are fluid concepts that take their substantive content from the[ir]

particular contexts," *id*. at 436 (internal quotation marks omitted), courts also look at factors relevant to the particular case, such as "[l]egislative intent," *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014), "the defendant's ability to pay," *id*., whether a defendant is in "the class of persons for whom the statute was principally designed," *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003), "the nature of the harm caused," *id*., and the maximum fine allowed by statute, *id*.; *see also United States v. Heldeman*, 402 F.3d 220, 223 (1st Cir. 2005).

The fines here target speech, and not even the speech that may support large fines, i.e., speech that is associated with reprehensible activity. Rather, it targets political speech—"expression at the core of our electoral process and of the First Amendment freedoms." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (internal quotation marks omitted). And because burdens on protected speech must meet at least exacting scrutiny,[2] whether a fine for political speech meets exacting scrutiny is one of the relevant factors that courts should consider as part of the Eighth Amendment disproportionality analysis.[3] That is, the disproportionality analysis should

[2] Strict scrutiny applies to burdens substantially restricting speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010).

[3] The standard of review for whether a fine is constitutionally permissible when it intrudes upon First Amendment activity appears to be a matter of first impression. But, in line with other disclosure requirements, the standard would be at the very least exacting scrutiny. *See, e.g., Citizens United*, 558 U.S. at 366-67.

"require[] a 'substantial relation' between" Washington's penalties for violating its "disclosure requirement and a 'sufficiently important' governmental interest." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted).[4] "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the *actual burden* on First Amendment rights.'" *Id*. (emphasis added).

The actual burden on First Amendment rights that must be included in the disproportionality analysis includes the weight of fines for non-compliance—especially devastating penalties like those imposed here. *See, e.g., Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (balancing Montana's zero-dollar disclosure threshold with compliance burdens). Accordingly, courts must weigh the State's interest in disclosure against the actual burdens, including the weight of potential fines. *Cf. Sampson v. Buescher*, 625 F.3d 1247, 1259-62 (10th Cir. 2010) (balancing against all the burdens imposed).

Here, the Superior Court imposed a $6,000,000 base fine and an additional $12,000,000 punitive fine for the "minimal" harm of a reporting offense. *United States v. Bajakajian*, 524 U.S. 321, 339 (1998), *superseded*

[4] *Buckley*'s requirement that disclosure laws meet exacting scrutiny applies as much to ballot measures as much as it does to candidates. *See Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298 (1981)); *Sampson v. Buescher*, 625 F.3d, 1247, 1255 (10th Cir. 2010).

by statute on other grounds, as stated in State v. Jose, 499 F.3d 105, 110-11 (1st Cir. 2007).[5] GMA neither hid nor underreported its contributions to the anti-initiative committee, and its name is fully descriptive of its economic interest in the anti-initiative campaign. Moreover, the conduct to be reported involved no criminal activity. But the State succeeded in burdening GMA with an exorbitant fine—one triggered by reporting errors in a complex and counterintuitive disclosure regime—that is sure to chill GMA's and others' protected activity.[6] *See Citizens United*, 558 U.S. at 324 (noting that "[p]rolix laws chill speech," and that "[t]he First Amendment

[5] In *Bajakajian*, the United States Supreme Court held that a fine of $357,144—for a "*crime* [that] was solely a reporting offense"—was too burdensome to withstand constitutional scrutiny. 524 U.S. at 336-40 (emphasis added). Congress later expressed its intent that failure to report currency be punished severely, but only because such reporting offenses were attached to "serious criminal activity." *Jose*, 499 F.3d at 112. "[T]he confiscation of . . . smuggled bulk cash" was necessary to "break the cycle of criminal activity of which the laundering of the bulk cash is a critical part," namely "drug trafficking, terrorism, money laundering, racketeering, tax evasion and similar crimes." UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT ACT) ACT OF 2001, 107 Pub. L. No. 56, § 371, 115 Stat. 272, 337 (2001). There is neither a criminal offense here nor a relationship to one, much less to serious criminal activity. As this case involves a ballot measure, the risk of *quid pro quo* corruption is not even present. *See Sampson*, 625 F.3d at 1256 (noting that there cannot be an anti-corruption or anti-circumvention interests in the ballot context because there is no candidate who might exchange a vote for campaign contributions); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 352 n.15 (1995) (noting that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (internal quotation marks omitted) (citations omitted)).

[6] Furthermore, the exacting scrutiny criteria will benefit the Eighth Amendment excessive fines analysis. As noted, the analysis of gross disproportionality is "inherently imprecise." *Cooper Indus.*, 532 U.S. at 434 (internal quotation marks omitted). The exacting scrutiny criteria are better developed and can add precision to the inherently *ad hoc* gross disproportionality analysis.

does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day").[7]

As noted above, the exacting scrutiny that should be incorporated in the disproportionality analysis requires that the State show a "'substantial relation' between the government['s] interest[s] and the" burdens the government imposes. *Buckley*, 424 U.S. at 64-65. The fines imposed by the Superior Court cannot survive scrutiny, in at least two ways. First, the trebled fine is not substantially related to the State's interest in condemning and punishing reprehensible conduct. Second, neither the Superior Court nor the Court of Appeals verified that the base fine met exacting scrutiny.

A. The Superior Court's trebled fine was not substantially related to condemning and punishing reprehensible conduct.

The Court of Appeals correctly held that the Superior Court erred in interpreting and applying the requirement that a violation be intentional to impose treble damages. But even if this Court were to conclude that the Superior Court properly interpreted the statutory requirement, as the State requests in its petition for review, the trebled fine would fail exacting scrutiny's requirement that fines be tailored to the government's interest in

[7] This fear is particularly acute where, as here, the initiation of enforcement is not left to government regulators with a duty to fairly, impartially, and evenly enforce the law, but rather to political or ideological opponents with an incentive to advance marginal or hyper-technical claims. *See* RCW § 42.17A.775 (granting private right to bring action).

punitive damages. A court may only impose punitive damages—such as the treble damages here—to express "moral condemnation" and "'to punish reprehensible conduct.'" *Cooper Indus.*, 532 U.S. at 432 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

Exacting scrutiny requires "a 'substantial relation' between [the law at issue] and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). Washington's law recognizes that the treble damages provision is a form of punitive damages, and it requires a mental state sufficient to justify such punitive damages: "If the violation is found to have been *intentional*, the amount of the judgment . . . may be trebled as *punitive damages*." RCW § 42.17A.780 (emphasis added) (formerly RCW § 42.17A.765(5)). The Superior Court, however, held that the required mental state "is not limited to instances where the person acted with subjective intent to violate the law," i.e., "to only those instances where the person subjectively knew their actions were illegal and acted anyway." Intent Order at 2.

Because the Superior Court did not require a subjective intent to violate the law, or some other "misconduct [that] was especially reprehensible,"[8] its interpretation of the trebling provision is not restricted

[8] *See, e.g., RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2097 (2016) (permitting treble damages for harm to business or property for RICO violations); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928, 1932 (2016) (permitting treble

"to punish[ing] reprehensible conduct." *Cooper Indus.*, 532 U.S. at 432 (internal quotation marks omitted). Rather, it diminishes any true "expression of . . . moral condemnation" for such misconduct, *id*., by punishing any violation where a defendant merely intended to take a prohibited action, even if he did not intend to violate the law. Thus, even assuming that expressing moral condemnation and punishing egregious behavior is "a 'sufficiently important' governmental interest" in the First Amendment context, there is no "'substantial relation' between the [law at issue] and" that interest. *Citizens United*, 558 U.S. at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). Therefore, as applied by the Superior Court, the trebling provision for a reporting violation has no place in the context of core First Amendment activity, where "it is our law and our tradition that more speech, not less, is the governing rule." *Id.* at 361.

B. The Superior Court and the Court of Appeals failed to require that the massive base fine meet exacting scrutiny.

a. The courts erred in not applying exacting scrutiny

Furthermore, both the Superior Court and the Court of Appeals erred in failing to require as part of their disproportionality analyses that the

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damages for patent infringement for conduct comparable to that of a "wanton and malicious pirate," "not to be meted out in a typical infringement case," but only for conduct that is "willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, [and] flagrant").

massive $6 million base fine meet exacting scrutiny. As noted above, exacting scrutiny demands that the strength of any governmental interest be balanced against "the seriousness of the *actual burden* on First Amendment rights," and that includes the devastating weight of fines for non-compliance permitted under this law. *Doe*, 561 U.S. at 196 (emphasis added) (internal quotation marks omitted).

Rather than examining whether the massive base fine could meet exacting scrutiny, the Court of Appeals examined only whether the FCPA's disclosure requirements were constitutional. And even then it looked only at the State's interest in not misleading voters, whether the law was overinclusive, and whether GMA or its members faced threats due to the disclosure. *Grocery Mfrs. Ass'n*, 5 Wn. App. 2d at 195-97. There was no analysis of whether the actual burdens of disclosure were outweighed by the State's interest—including whether large fines will chill speech.

b. The base fine is burdensome and not in line with fines for comparable conduct

The $6,000,000 base fine imposed by the Superior Court is unconstitutionally burdensome. The "rough remedial justice" permitted to the government under the Eighth Amendment is not too burdensome when it is proportional, for example, to the costs of prosecution and investigation. *State v. Clark*, 124 Wn. 2d 90, 102 (1994), *overruled on other grounds by*

State v. Catlett, 133 Wn. 2d 355 (1997); *see id*. at 103-04 (holding forfeiture of $30,921 not "excessive" when the costs of investigation and prosecution were at least $26,000).[9] But there is no allegation here that the State incurred $6,000,000 in investigation and prosecution costs.[10] Nor is this a case where the State has confiscated $6,000,000 in drugs, illegal weapons, or even contraband goods.

Indeed, this case does not even involve illegal or impermissible contributions. In praising the Superior Court's decision to grant its request for the "largest campaign finance penalty in US history," the State boasts that the largest federal fine ever granted was $3.8 million, almost a sixth the trebled fine and half the base fine here.[11] But that case did not involve mere reporting errors. MUR 5390 involved a corporation's illegal contributions and illegal fundraising, solicitation, and collection of contributions.[12]

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[9] The *Catlett* Court overruled *Clark*'s holding that civil forfeiture triggered the Fifth Amendment's double jeopardy clause. But, as repeatedly recognized by this and the United States Supreme Court, forfeitures and other fines are subject to the Eighth Amendment "when they are at least partially punitive." *Timbs*, 139 S. Ct. at 689; *see Clark*, 124 Wn.2d at 103-04 (subjecting to excessiveness analysis).

[10] Indeed, the Superior Court ordered that the State was separately entitled to its prosecution costs. Findings of Fact, Conclusions of Law and Order on Trial at 24, ¶ 3.

[11] Washington State Attorney General, *Grocery Manufacturers Assoc. To Pay $18M, Largest Campaign Finance Penalty In US History* (Nov. 2, 2016), https://www.atg.wa.gov/news/news-releases/ag-grocery-manufacturers-assoc-pay-18m-largest-campaign-finance-penalty-us.

[12] *See* Federal Election Commission, *MUR 5390: Chartered corporation pays record $3.8M civil penalty* (June 1, 2006), https://www.fec.gov/updates/mur-5390-

This case is more akin to what some have touted as the largest FEC administrative fine.[13] Under AF 2512, the Commission concluded that Obama for America had violated reporting requirements by failing to file 48-hour reports for large contributions totaling $1,895,956.[14] The FEC charged $110 each for 14 unfiled notices and 10% of the overall contributions not reported in those notices, for a total fine of $191,135.[15] *But see Clark*, 124 Wn. 2d at 104 (collecting cases) (noting that even fines in the hundreds of thousands of dollars were too burdensome). In other words, the largest fine the FEC has given for *comparable* conduct was less than 5% of the fine imposed here.[16]

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chartered-corporation-pays-record-38m-civil-penalty/; Conciliation Agreement, MUR 5390 (April 17, 2006), https://eqs.fec.gov/eqsdocsMUR/000051B2.pdf.

[13] Brad Sylvester, *Fact Check: Did Obama's 2008 Campaign Pay the Largest FEC Fine Ever* (Dec. 24, 2018), https://checkyourfact.com/2018/12/24/fact-check-obama-2008-largest-campaign-fec-fine/.

[14] *See* Commission Letter at 1, Federal Election Commission, AF 2512 (May 24, 2012), https://eqs.fec.gov/eqsdocsAF/13092681857.pdf.

[15] *See* Attachment 1 at 31, AF 2512 (May 24, 2012), https://eqs.fec.gov/eqsdocsAF/13092681857.pdf.

[16] Even accounting for the different amounts at issue, the fines here are still disproportional: At issue here were reporting errors amounting to "approximately $11 million," *Grocery Mfrs. Ass'n*, 5 Wn. App. 2d at 176, while unfiled reports for $1,895,956 in contributions were at issue in the Obama for America matter, Commission Letter at 1. The fine levied in the Obama for America matter, at $191,135, was only 10% of the amounts at issue. Commission Letter at 1. The fine imposed here, however, was over 50% of the amounts at issue. Whether 30 times larger than the Obama for America fine or 5 times larger—whether in absolute or percentage comparisons—the fine at issue here is grossly disproportional to fines for similar conduct.

c. The interest in disclosure is minimal here

The Court of Appeals thus affirmed a starkly burdensome base fine—one far surpassing fines for more serious conduct and outstripping fines for comparable conduct—that will chill protected political speech. While that alone makes it difficult for the fine to meet exacting scrutiny—to show a "substantial relation" between the disclosure interest and the heavy base fine—the Court of Appeals also overstated the government's interest in disclosure. *Citizens United*, 558 U.S. at 366 (internal quotation marks omitted).

The informational interest required to sustain disclosure demands that the reporting "increase[] the fund of information concerning those who support" a candidate or ballot measure—that is, the disclosure must "define more of the candidates' constituencies." *Buckley*, 424 U.S. at 81.[17] A

[17] It is questionable whether such an informational interest furthers democratic deliberation and decision-making. Rather, when it helps citizens reject an argument based on who made it rather than the strength of its reasoning, the informational interest promotes political polarization and diminishes discourse. Indeed, while an argument published under a non-descript name like Publius or Brutus may prompt citizens to examine an idea further, often using sources they know and trust, such disclosure allows them to accept or reject an idea without any further thought or examination whatsoever. Nonetheless, the United States Supreme Court has held that the informational interest may satisfy exacting scrutiny—as long as a law's regulations are adequately tailored to giving additional, needed information to voters. *See Buckley*, 424 U.S. at 64-65 (requiring "substantial relation between" required disclosure and the informational interest (internal quotation marks omitted)); *id* at 66-67, 80-81 (defining interest as providing information about those who have provided "contributions earmarked for political purposes" to "increase[] the fund of information concerning those who support the candidates [or ballot measures]"). But, as discussed below, GMA has already provided the information needed to satisfy the informational interest, and the additional information demanded in fact subverts it.

reviewing court "must therefore analyze the public interest in knowing who is spending and receiving money to support or oppose a ballot issue." *Sampson*, 625 F.3d at 1256.[18]

This is not a case where a measure's opponents made up an anodyne name concealing their identities and economic interests. Rather, the information that was disclosed fulfilled the purposes of the informational interest: the voters knew the constituencies opposing the measure.[19] But because the FCPA allows for a type of generalized donor disclosure, the State demanded more, beyond the scope of exacting scrutiny.

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[18] Moreover, shortened references to *Buckley* in *Citizens United*—such as the statement that the informational interest is one "in 'provid[ing] the electorate with information' about the sources of election-related spending"—did not expand *Buckley*, either explicitly or implicitly. *Citizens United*, 558 U.S. at 367 (alteration in original). The *Citizens United* Court dealt with a law whose application was explicitly limited to the disclosure of donations that were earmarked for a communication, and thus were explicitly intended to financially support advocacy for or against a candidate. *See Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 280 (D.D.C. 2008), *affirmed in part by* 558 U.S. 310 (2010) (noting requirement that a contribution be "for the purpose of furthering" the communication at issue); *cf. Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016) (noting application limited to "provide[] the public with information about those persons *who actually support* the message conveyed . . . without imposing . . . significant burden[s]" on speakers (emphasis added) (internal quotation marks omitted)).

[19] The Court of Appeals hypothesized that knowing individual company names and their products might further the informational interest, but this was pure supposition on the court's part. To start, the court ignored that Nestle is a food *and* beverage company when it grouped it with Pepsi and Coca-Cola and asserted that voters might benefit from knowing "that beverage manufacturers were particularly concerned about GMO labeling." *Grocery Mfrs. Ass'n*, 5 Wn. App. 2d at 195. But the court also did not address why other beverage companies were not among the top contributors. Or why some cereal companies but not others were among top contributors. Or why some dairy and soup companies were but not others. Thus, beyond pure supposition, such detailed disclosure does little to further the informational interest. Rather, like a work by Monet or Van Gogh, it is only with distance that the picture becomes clear—that grocery manufacturers as a whole, represented by their trade organization, opposed GMO labeling.

The Court of Appeals relied on an Attorney General Letter Opinion stating that member organizations meet the contributions prong only "if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonably should know, of this political use." *Grocery Mfrs. Ass'n*, 5 Wn. App. 2d at 187 (internal quotation marks omitted). But even so limited, the FCPA does not require that donations be made for political purposes in Washington, much less that they be made for the ballot measure at issue. Thus, contributions reported as supporting advocacy in Washington may have supported something else entirely. And in misleading voters that the contributions were so intended, the FCPA subverts the informational interest.

As the Federal Election Commission and the D.C. Circuit have explained, an earmarking requirement is needed for disclosure to educate voters about the financial constituencies of candidates and ballot measures. That is, when a law compels disclosure of donors who have not given specifically to fund a communication, that law "mislead[s] voters as to who really supports the communications." *Van Hollen*, 811 F.3d at 497. This is because the general treasury funds of corporations and unions—and even the segregated funds of multi-state organizations—are comprised of "donations from persons who support the [organization's] mission," but who "do not necessarily support" individual communications. *Id*. (quoting

72 Fed. Reg. 72899, 72911 (Dec. 26, 2007)); *see also id*. (noting that it is "hard to escape the intuitive logic behind this rationale," and that it was "based firmly in common sense and economic reality").

Furthermore, both the FEC and the D.C. Circuit have explained that earmarking maintains a constitutional balance between disclosure and the right to anonymity, by limiting the reach of disclosure "requirements [that] have their real bite [by] flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence." *Id*. at 501 (internal quotation marks omitted).

Thus, in analyzing whether a Colorado disclosure law met exacting scrutiny, the Tenth Circuit held that it was "important" that the law required "only disclos[ure of] those donors who have specifically earmarked their contributions for electioneering purposes." *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016). Similarly, a specially convened three-judge district court in *Independence Institute v. Federal Election Commission* held that the Bipartisan Campaign Reform Act was sufficiently tailored to withstand constitutional scrutiny because "disclosure is limited to only those substantial donors who contribute . . . for the specific purpose of supporting the advertisement." 216 F. Supp. 3d 176, 191 (D.D.C. 2016), *summarily affirmed*, 137 S. Ct. 1204 (2017).

Moreover, the three-judge court in *Independence Institute* upheld a law that, it emphasized, was tailored to the informational interest through "disclosure . . . limited to . . . *substantial donors*." *Id*. (emphasis added). Tailoring disclosure to substantial donors who actually support a communication protects voters from succumbing to an informational deluge, from being buried "in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking." *See TSC Indus. v. Northway,* 426 U.S. 438, 448-49 (1976) (Marshall, J.).

The State, however, refuses to limit the disclosure demanded to information that actually educates voters about those in fact supporting or opposing the ballot measure triggering disclosure. For example, the State failed to acknowledge that it had "no governmental interest in GMA's other financial transactions unrelated to the Washington ballot measure," arguing that "[t]he point of disclosure is to provide the public information about money coming into a political committee and money available to that political committee at any point during a campaign." *See* State Motion for Summary Judgment at 16, *State v. Grocery Mfrs. Ass'n*, No. 13-2-02156-8 (Thurston Cty. Superior Ct. Jan. 22, 2016). But if that money was meant for a different ballot measure—say product safety or date labeling—or for a ballot measure in a different state, or for other purposes altogether, then voters are being misled as to who supported the ballot measure here.

Thus, the Court of Appeals incorrectly affirmed an overly burdensome base fine, one far exceeding those other courts have found acceptable for similar, and even more egregious, conduct. At the same time, there is no relation, much less a substantial one, between the informational interest and the additional information GMA has been punished for not providing. Accordingly, even the base fine cannot meet the exacting scrutiny demanded by the First and Eighth Amendments.

CONCLUSION

For the reasons above, this Court should hold affirm the decision by the Court of Appeals that the Superior Court improperly trebled the fine on GMA and reverse the Court of Appeals and remand that it properly apply exacting scrutiny to the base fine.

Submitted September 6, 2019

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CERTIFICATE OF SERVICE

I, Ryan McBride, hereby certify under penalty of perjury of the laws of the State of Washington that on September 6, 2019, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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☒ by CM/ECF (JIS)
☐ by Electronic Mail
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Signed September 6, 2019

/s/ Ryan P. McBride
Ryan P. McBride

Attorney for Amicus Curiae