

No. 99407-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,

Petitioner.

***AMICI CURIAE* MEMORANDUM OF THE NATIONAL
ASSOCIATION OF MANUFACTURERS, THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA, THE
FORGING INDUSTRY ASSOCIATION, AND THE TREATED
WOOD COUNCIL IN SUPPORT OF REVIEW**

Patrick Hedren
Erica Klenicki
NATIONAL ASSOCIATION OF
MANUFACTURERS
733 10th Street N.W., Ste. 700
Washington, D.C. 20001

*Counsel for the National
Association of Manufacturers*

Tara S. Morrissey
Stephanie A. Maloney
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, N.W.
Washington, DC 20062

*Counsel for the Chamber of
Commerce of the United States of
America*

Elizabeth Och WSBA #54341
HOGAN LOVELLS US LLP
1601 Wewatta St., Ste. 900
Denver, CO 80202
(303) 454-2469

Sean Marotta
Benjamin A. Field
Patrick C. Valencia
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
IDENTITY AND INTEREST OF <i>AMICI CURIAE</i>	1
INTRODUCTION	2
STATEMENT OF THE CASE.....	4
ISSUE ADDRESSED BY <i>AMICI CURIAE</i>	5
ARGUMENT	5
I. Penalties do not satisfy the Excessive Fines Clause just because they are within a prescribed statutory range.....	5
II. The State’s enforcement history and justification for this penalty together suggest an excessive penalty motivated by animus towards the speech and corporate speakers.....	7
CONCLUSION.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
Cases:	
<i>Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.</i> , 492 U.S. 257 (1989).....	3, 6
<i>Citizens United v. FEC</i> , 558 U.S. 310 (2010).....	9
<i>Louisiana ex rel. Gremillion v. NAACP</i> , 366 U.S. 293 (1961).....	8
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958).....	8
<i>Rosenberger v. Rector & Visitors of Univ. of Virginia</i> , 515 U.S. 819 (1995).....	9
<i>State ex rel. Washington State Pub. Disclosure Comm’n v. Food Democracy Action!</i> , 5 Wn. App. 2d 542 (2018)	9
<i>State v. Grocery Mfrs. Ass’n</i> , 5 Wn. App. 2d 169 (2018)	4
<i>State v. Grocery Mfrs. Ass’n</i> , 195 Wn.2d 442 (2020)	2, 3, 4, 8
<i>State v. Grocery Mfrs. Ass’n</i> , 15 Wn. App. 2d 290 (2020)	3, 4, 5
<i>Timbs v. Indiana</i> , 139 S. Ct. 682 (2019).....	6
<i>United States v. Bajakajian</i> , 524 U.S. 321 (1998).....	7, 9

<i>United States v. Stevens</i> , 559 U.S. 460 (2010).....	10
<i>Voters Educ. Comm. v. Washington State Pub. Disclosure Comm’n</i> , 161 Wn.2d 470 (2007)	3
Statutes:	
RCW 42.17A.750 (2012).....	7
RCW 42.17A.765 (2012).....	7
Other Authority:	
2 Joseph Story, Commentaries on the Constitution of the United States (Thomas McIntyre Cooley ed., 4th ed. 1873)	6

IDENTITY AND INTEREST OF *AMICI CURIAE*

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly \$2.33 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States. The NAM supports policies that protect the First Amendment rights of manufacturers.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

For over 100 years, the Forging Industry Association (FIA) has helped forging companies in North America increase their global competitiveness. FIA's producer members manufacture approximately 75% of North

American custom forgings volume. Its supplier members manufacture materials and provide services used by the forging industry. FIA brings awareness to lawmakers on key issues impacting the industry's future.

Since 2003, the Treated Wood Council's (TWC) mission has been to serve all segments of the treated wood industry in the field of government affairs. It serves companies that harvest and saw wood, manufacture wood preservatives, produce pressure-treated wood product, or serve the industry.

The penalty imposed here signals to Washington businesses that they may face especially severe repercussions if they make a mistake in complying with complex campaign-finance laws and if they speak a message the State particularly disagrees with. *Amici* can offer the Court a unique perspective on the threat such penalties pose to trade associations and their member businesses in the State of Washington and nationwide.

INTRODUCTION

Under the Eighth Amendment, even when a defendant has broken the law, the State cannot wield its prosecutorial power to pursue improper ends through outsized penalties. The decision below undermines that principle and ignores this Court's direction to scrutinize the \$18 million penalty imposed on the Grocery Manufacturers Association (GMA) to ensure it was "based on constitutionally permissible considerations." *State v. Grocery Mfrs. Ass'n*, 195 Wn.2d. 442, 476-477 (2020) (*GMA II*).

Trade associations have a First Amendment right to speak on their members' behalf, and their members have a right to associate with each other and with the association. The First Amendment also protects anonymous speech as a corollary to those rights, especially for those who take contentious political positions. *See, e.g., Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 482 (2007). And even where the State satisfies the exacting scrutiny necessary to impinge on those First Amendment liberties—as this Court held the State did here, *GMA II*, 195 Wn.2d at 461-462—the Eighth Amendment separately ensures that the State does not excessively fine those that have broken the law as retaliation for unpopular views.

Here, the State's justifications for its massive fine, and the Court of Appeals' rationale for accepting them, would make the Excessive Fines Clause toothless by blessing any penalty within the statutorily prescribed range, regardless of the State's motivation. And the State's reasons for socking GMA with such a large fine here betray animus toward GMA's speech and corporate identity. The Eighth Amendment is meant to protect against such "abuse of . . . prosecutorial power." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) (internal quotation marks omitted). This Court should grant review, confirm that the Eighth Amendment requires careful examination of whether an outsized

fine was motivated by hostility to corporate speech, and reverse GMA's trebled fine.

STATEMENT OF THE CASE

GMA donated money in 2013 to oppose I-522, a ballot initiative to require labeling packaged food that contained genetically modified organisms. *See State v. Grocery Mfrs. Ass'n*, 5 Wn. App. 2d 169, 178-179 (2018) (*GMA I*). Because GMA's members had been harassed and boycotted for prior opposition to a similar referendum, GMA exercised its own constitutional right to speak for them against the Washington initiative. *See id.* GMA received contributions from 34 members, then made multiple donations to the No on I-522 effort, each time disclosing itself as the donor. *See id.* at 178-179, 195.

The State successfully sued GMA for violating Washington's Fair Campaign Practices Act (FCPA), imposing a trebled civil penalty totaling \$18 million. *Id.* at 176, 179-182. This Court subsequently held that the "penalty must be scrutinized carefully" and "based on constitutionally permissible considerations." *GMA II*, 195 Wn.2d at 477.

On remand, the Court of Appeals held that because GMA's nondisclosure of its contributors was what the FCPA was meant to prevent and the \$18 million penalty was within the permissible statutory range, the fine was not excessive. *See State v. Grocery Mfrs. Ass'n*, 15 Wn. App. 2d

290, 302-306 (2020) (*GMA III*). The court rejected GMA’s argument that the Eighth Amendment analysis should consider whether political animus motivated the penalty and disregarded evidence that the State singled out GMA for especially harsh treatment. *See id.* at 306-307.

ISSUE ADDRESSED BY *AMICI CURIAE*

Whether the \$18 million penalty imposed against GMA was constitutionally excessive where the State’s enforcement history reveals that the penalty was far out of proportion to previous fines for the same conduct and where GMA was treated more harshly than violators on the other side of the issue because of GMA members’ corporate identities.

ARGUMENT

I. Penalties do not satisfy the Excessive Fines Clause just because they are within a prescribed statutory range.

The crux of the Court of Appeals’ opinion and the State’s opposition to review is that so long as a defendant violated a statute, the government may constitutionally impose any statutorily authorized penalty because the statute provides advance notice and warning of the potential fine. The Court of Appeals reasoned that because the FCPA allows a penalty to be based on the amount of unreported contributions, and allows for trebling, the penalty here is permissible because it meets those parameters. *See GMA III*, 15 Wn. App. 2d at 304. The State doubles down on this justification, arguing GMA

violated the FCPA when it concealed donors' identities and the FCPA was meant to combat such concealment, so therefore any penalty within the FCPA's statutory range is constitutional. *See* Answer 6-8.

The Eighth Amendment is made of sterner stuff. The Framers understood it was needed to curb "governmental abuse of its 'prosecutorial' power," *Browning-Ferris*, 492 U.S. at 266, in part because free-speech guarantees could be circumvented with excessive punishments. Indeed, "Stuart kings . . . us[ed] large fines to . . . harass their political foes," *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019), and that abuse led to adoption of the English Bill of Rights' excessive-fines prohibition that inspired the Eighth Amendment, *Browning-Ferris*, 492 U.S. at 266-267; *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 624 (Thomas McIntyre Cooley ed., 4th ed. 1873) (Eighth Amendment "adopted as an admonition" against "the arbitrary reigns of some of the Stuarts"). The Eighth Amendment is thus a rights-protecting backstop for those who have broken the law, recognizing that "[e]xorbitant tolls undermine other constitutional liberties" and "[e]xcessive fines can be used . . . to retaliate against or chill the speech of political enemies." *Timbs*, 139 S. Ct. at 689.

The Court of Appeals' opinion and the State's answer ignore this purpose behind the Excessive Fines Clause, rendering it meaningless. But Supreme Court precedent makes clear that a statutory range is not an Eighth

Amendment safe harbor. For example, in *United States v. Bajakajian*, a statute authorized forfeiture of currency up to the amount that a defendant failed to report. 524 U.S. 321, 337, 340 (1998). The Supreme Court’s Eighth Amendment inquiry did not end there. The Court instead considered various factors, including that the forfeiture claimant had obtained the unreported money legally and was using it for legal purposes. *See id.* at 337-338. The same must be true here. To be sure, the FCPA says that a penalty *can* be based on the amount of concealment and *can* be trebled. RCW 42.17A.750, 42.17A.765 (2012). That does not mean a FCPA-compliant penalty cannot be constitutionally excessive; a court *still* must consider the relevant factors, including improper enforcement motive. Any other interpretation allows governments to publish penalty schedules with astronomical upper bounds, and then selectively seek the outsized penalties for disfavored parties. The Court should grant review to correct the Court of Appeals’ contrary—and toothless—view of the Eighth Amendment.

II. The State’s enforcement history and justification for this penalty together suggest an excessive penalty motivated by animus towards the speech and corporate speakers.

Setting aside the State’s argument that anything goes within a statutory range, the penalty here becomes constitutionally suspect. As GMA has pointed out, excluding GMA’s penalty, the average FCPA penalty imposed from 2005 to 2018 was only approximately \$80,000, and

GMA's penalty is 24 times larger than the next largest penalty and six times the sum of all other FCPA penalties. *See* Pet. 7-8. The State further acknowledges it did not even bother to seek trebling for a disclosure violation relating to the very same referendum by a group that supported I-522. Answer 18. And its explanation for these disparities belies unconstitutional hostility to GMA's speech and to corporate speakers generally, making the ultimate \$18 million fine imposed unconstitutional.

First, the State finds nefarious certain GMA conduct that is often constitutionally protected. The State notes that GMA told its members they could emphasize their support for GMA rather than their opposition to I-522, and that GMA chose not to list all its members on its website. Answer 2-3, 18. But the First Amendment protects collective speech generally, and nondisclosure of membership lists specifically. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-463 (1958); *Louisiana ex rel. Gremlion v. NAACP*, 366 U.S. 293, 296 (1961). True, this Court held that GMA violated the FCPA and that the FCPA was constitutional as applied to GMA's circumstances. *GMA II*, 195 Wn.2d at 461. But that does not mean that GMA's conduct warrants unchecked penalties. To the contrary: that the State is justifying the penalty by citing constitutionally protected conduct undermines the penalty's constitutional legitimacy. At the very least, that GMA's conduct was consistent with an

assertion of First Amendment freedoms shows that it violated—at most—a “reporting offense.” *Bajakajian*, 524 U.S. at 337.

Second, the State’s attempt to explain away its enforcement disparities indicates a special hostility to corporate speech. Food Democracy Action! (FDA!), which supported I-522, also knowingly violated the FCPA, and it did not defend itself at trial. *See State ex rel. Washington State Pub. Disclosure Comm’n v. Food Democracy Action!*, 5 Wn. App. 2d 542, 545-547 (2018). Yet the State did not even *seek* a trebled penalty against FDA!. *Id.* The State says the differential treatment is warranted because “GMA is a large, sophisticated organization with large, sophisticated members,” whereas FDA! was “a two-person operation gathering small donations from individuals.” Answer 18. But it is impermissible to apply political-speech regulations differently based on “the speaker’s corporate identity.” *Citizens United v. FEC*, 558 U.S. 310, 365 (2010). Those who violate the FCPA should be treated equally. And the State’s alternative argument that GMA’s trebling was because of its *concealment* rather than its *speech*, *see* Answer 19, fails because FDA!, too, concealed its donors’ identities. What separates GMA and FDA! is not their conduct, but their points of view and organizational forms. *See Rosenberg v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (“[v]iewpoint discrimination” is particularly “egregious”).

Allowing the State's justifications to stand will have impacts beyond this case. Organizations like *amici* speak on behalf of corporate members on controversial topics across the country and seek to protect members' privacy consistent with law. The State's arguments open the door to disproportionate penalties if such groups make a mistake in complying with campaign-finance laws and happen to speak for a business organized in the corporate form. It allows the State, under guise of a statutory penalty, to silence disfavored speech. This result betrays the Constitution's guarantee that individuals and organizations of any viewpoint can speak without fear of excessive government retaliation. The constitutional problem is acute for ballot initiatives like I-522, which have mostly corporate speakers on one side and mostly non-corporate speakers on the other. If the State can discriminate based on a speaker's corporate identity, it will have the unconstitutional effect of "restrict[ing] expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted). This Court's review is necessary to prevent such unconstitutional discrimination.

CONCLUSION

For these reasons and those in GMA's Petition, the Court should grant review and reverse the Court of Appeals' judgment.

March 12, 2021

Patrick Hedren
Erica Klenicki
NATIONAL ASSOCIATION OF
MANUFACTURERS
733 10th Street N.W., Ste. 700
Washington, D.C. 20001

*Counsel for the National
Association of Manufacturers*

Tara S. Morrissey
Stephanie A. Maloney
U.S. CHAMBER LITIGATION
CENTER
1615 H Street, N.W.
Washington, DC 20062

*Counsel for the Chamber of
Commerce of the United States
of America*

Respectfully submitted,

/s/ Elizabeth Och
Elizabeth Och WSBA #54341
HOGAN LOVELLS US LLP
1601 Wewatta St., Ste. 900
Denver, CO 80202
(303) 454-2469

Sean Marotta
Benjamin A. Field
Patrick C. Valencia
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2021, I served the foregoing memorandum upon the following counsel of record electronically via the court portal:

Robert B. Mitchell
Aaron E. Millstein
Daniel-Charles Wolf
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Attorneys for Petitioner, Grocery Manufacturers Association

Robert W. Ferguson
Noah G. Purcell
Karl D. Smith
Cristina Sepe
Office of the Attorney General of Washington
1125 Washington Street SE
Olympia, WA 98501
(360) 664-0869

Attorneys for Respondent, State of Washington

/s/ Elizabeth Och
Elizabeth Och