No. 99407-2

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GROCERY MANUFACTURERS ASSOCIATION,
Petitioner.

SUPPLEMENTAL *AMICI CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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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. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Amici filed at the petition stage in this appeal to emphasize that First Amendment liberties must be part of any Eighth Amendment excessive-fines analysis when the State punishes a defendant's exercise of its associational rights. *Amici* write again now to emphasize the sea change in the First Amendment law regarding compelled donor disclosures brought about by *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021) and to encourage the Court to consider GMA's constitutionally protected conduct when assessing the penalty's constitutional legitimacy.[1]

INTRODUCTION

In their petition-stage brief, *amici* stressed two points. First, the Eighth Amendment's Excessive Fines Clause limits the statutorily authorized penalties that the State may impose. *See Amici Curiae* Memorandum of The National Association of Manufacturers *et al.* 5-7. Second, the State's history of FCPA enforcement and its pursuit of the Grocery Manufacturers Association (GMA) suggested that it was motivated by animus towards GMA's message. *Id.* at 7-10.

Those arguments remain significant reasons to reverse the Court of Appeals' judgment. But *Americans for Prosperity Foundation*—issued

[1] Both NAM and the Chamber filed briefs as *amici curiae* in *Americans for Prosperity Foundation*, explaining—as they do here—that a too-lenient standard for allowing compelled disclosures from membership organizations would chill protected speech and associational rights.

since this Court granted review—gives this Court even more reason to step back and reassess. *Americans for Prosperity Foundation* undermines the standard this Court used to uphold the constitutionality of the State's Fair Campaign Practices Act (FCPA) as applied to GMA in *State v. Grocery Manufacturers Association*, 195 Wn.2d 442 (2020) (*GMA II*). In light of the Supreme Court's decision, this Court can and should revisit *GMA II*. But even if the Court adheres to *GMA II*, it should nonetheless incorporate the lessons of *Americans for Prosperity Foundation* into its Eighth Amendment analysis. GMA's conduct, even if ultimately unlawful, was motivated by values that *Americans for Prosperity Foundation* held are legitimate and laudable. That calls into question the gravity of the alleged harm suffered by Washington voters and shines a deeply unflattering light on the harshness of the penalty imposed.

This Court should reverse.

ISSUE ADDRESSED BY *AMICI CURIAE*

Whether *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), shows that the penalty levied against GMA was constitutionally excessive and warrants reconsideration of *GMA II*.

ARGUMENT

Americans for Prosperity Foundation warrants reconsideration of *GMA II*, or, at the very least, shows that the penalty levied against GMA is constitutionally excessive.

Since this Court granted review in this case, the U.S. Supreme Court decided *Americans for Prosperity Foundation*, which struck down a California requirement that state-registered charities disclose to the State donors who gave more than $5,000 in a given tax year. 141 S. Ct. at 2379-80, 2389. The Court explained that forced-donor-disclosure regimes are, at minimum, subject to "exacting scrutiny," and that a State's disclosure requirement must be "narrowly tailored to [its] asserted interest." *Id.* at 2384. These holdings undermine *GMA II*'s foundation and should inform this Court's Excessive Fines Clause analysis.

1. In *GMA II*, this Court examined the FCPA, which it held required GMA to disclose which of its members contributed to GMA's "Defense of Brands" account. 195 Wn.2d at 455-461. The Court recognized that "compelled disclosure may encroach on First Amendment rights by infringing on the privacy of association and belief," but nonetheless held that the FCPA as applied to GMA was constitutional. *Id.* at 461 (quoting *Voters Educ. Comm. v. Public Disclosure Comm.*, 161 Wn.2d 470, 482 (2007)).

The Court's analysis, however, proceeded from what the Supreme Court has since made clear was a mistaken premise. The Court stated that the FCPA as applied to GMA was constitutional if it satisfied "exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important government interest." *Id.* at 461 (internal quotation marks and citation omitted). The Supreme Court in *Americans for Prosperity Foundation* rejected that conception of exacting scrutiny and expressly disagreed with the argument that "exacting scrutiny requires no additional tailoring beyond the 'substantial relation' requirement." 141 S. Ct. at 2383. The Court further held that although "exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government's asserted interest." *Id.* In short, the Supreme Court has clarified that *GMA II* applied the wrong tailoring test, and this Court should take this opportunity to correct its precedent. *See Roberson v. Perez*, 156 Wn.2d 33, 42-43 (2005) ("An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.").

If this Court applies the correct tailoring standard, it would hold that the FCPA as applied to GMA violates the First Amendment. As *GMA II* acknowledged, "all of [GMA's] contributions to the No on 522 political

committee were publicly attributed to GMA and the name 'Grocery Manufacturers Association' is not inherently misleading." 195 Wn.2d at 464. As a result, requiring that GMA report that *it* contributed the funds to No on 522 is a more narrowly tailored way to achieve the State's goal of ensuring that the "public, acting as legislators on ballot propositions such as I-522, . . . know[s] who is lobbying for their votes." *Id.* at 463.

In addition, even this Court's balancing analysis has been undermined by the Supreme Court's decision in *Americans for Prosperity Foundation*. In *GMA II*, this Court held that GMA and its member companies had not produced evidence that they would be harmed as a result of disclosure of their contributions sufficient to offset what the Court saw as the public-information benefits of that disclosure. 195 Wn.2d at 464-469. But *Americans for Prosperity Foundation* has since explained the risk that state action " '*may* have the effect of curtailing the freedom to associate,' and . . . the '*possible* deterrent effect' of disclosure" are relevant and important aspects of the First Amendment analysis. 141 S. Ct. at 2388 (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-461 (1958)).

Indeed, in many cases it is the *risk* of harm—not proof of harm—that renders a law invalid. That is in part why *Americans for Prosperity Foundation* was able to reject California's disclosure law on its face despite

lack of record evidence about the effect on the companies who were not involved in the case. The risks of harm, combined with the lack of tailoring, made the disclosure law constitutionally invalid. In focusing on what this Court saw as an insufficient record on risk of harm, the Court's analysis was contrary to *Americans for Prosperity Foundation*'s admonition that disclosure requirements can " 'create[ ] an unnecessary risk of chilling' in violation of the First Amendment." *Id.* (quoting *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984)). Put simply, the FCPA as understood through *GMA II* carries an impermissible and unconstitutional chilling effect on speech, especially so with the penalty imposed upon GMA.

2. Apparently worried about what *Americans for Prosperity Foundation* means for its case, the State has moved to strike a similar argument in GMA's brief as supposedly waived. State Mot. to Strike or Leave to Respond to New Argument 4-7. But this Court should not wait for the next case to confirm that *GMA II* has been abrogated. This appeal is from the same judgment as at issue in *GMA II*, and this Court should not affirm the imposition of a penalty that the Supreme Court has now made clear is constitutionally improper. Moreover, "[s]o long as [*GMA II*] remains available to the State, the threat of prosecutions of protected expression is a real and substantial one. Even the prospect of ultimate

failure of such prosecutions by no means dispels [its] chilling effect on protected expression." *Dombrowski v. Pfister*, 380 U.S. 479, 494 (1965). Unless overturned by this Court here, *GMA II* will remain a cudgel that the State can wield to threaten millions in fines against the next trade association that seeks to participate in matters of public importance through spending on ballot-initiative advocacy. *See Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects [groups'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.").

There is also no doctrinal reason for the Court to stay its hand. This Court "recognize[s] an exception to waiver where 'a new issue arises while the appeal is pending because of a change in the law.' " *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441 (2008) (citation omitted). Now that *Americans for Prosperity Foundation* has clarified the relevant First Amendment test, GMA should be allowed to challenge the Court's prior application of the incorrect standard in *GMA II*.

On the merits, the State contends that the FCPA is narrowly tailored because requiring disclosure of the GMA member companies that donated to GMA's Defense of Brands account is the narrowest way to satisfy the State's interest of the public knowing which GMA member companies donated to GMA's Defense of Brands fund. *See* State Mot. to Strike or

Leave to Respond to New Argument 8-12. But that argument is hopelessly circular. If the State defines its interest by the regulation to be imposed, then the regulation will always be narrowly tailored to further the interest; the two will always map onto each other.

Properly framed, the question is whether forcing GMA to reveal which member companies donated to its Defense of Brands account is a narrowly tailored way to let the public know "know who is lobbying for their votes." 195 Wn.2d at 463. The answer is no. The public's interest is served just as well by letting them know that *GMA* is lobbying for their votes. GMA is now, was in 2013, and has been since 1908 an established, known industry association that serves as a voice for packaged-consumer-good manufacturers. There is no risk that GMA was a front created solely to fool the public or launder members' ballot-initiative expenditures.

The State's tailoring argument also proves too much. Under it, a State could justify disclosure of *any* organization's donors on the theory that it allows the public to know who is behind the organization's public advocacy. But time and again, the Supreme Court has held that a core function of the First Amendment is to allow individuals to join together and publicly advocate *without* their identities becoming public. *See, e.g.*, *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *NAACP*

v. Alabama ex rel. Patterson, 357 U.S. at 462-463. The State's narrow-tailoring analysis guts that purpose and it should be rejected.

3. Even if the Court adheres to *GMA II*, it should consider *Americans for Prosperity Foundation* when assessing the excessiveness of the penalty here. The Eighth Amendment requires the Court, "*de novo*," to "compare the amount of the [penalty] to the gravity of [GMA's] offense." *United States v. Bajakajian*, 524 U.S. 321, 336-337 (1998). *Americans for Prosperity Foundation* affects the Court's consideration of the gravity of GMA's offense in at least two ways.

First, *GMA II* viewed GMA's First Amendment challenge as unmeritorious because GMA did not have hard proof that its members would be harmed if their contributions to the Defense of Brands account were disclosed. *See GMA II*, 195 Wn.2d at 465-469. But *GMA II*'s analysis put the burden on the wrong party. *Americans for Prosperity Foundation* makes clear that a group acts legitimately when it seeks to protect its members not just from particular threatened harms, but also the risk of or potential for harm. 141 S. Ct. at 2388. *Americans for Prosperity Foundation* therefore teaches that GMA's nondisclosure of the donors to its Defense of Brands account because it feared the potential harm to those donors if their identities were disclosed was rooted in more-legitimate

concerns than the State, the Court of Appeals, and this Court may have thought.

Second, *Americans for Prosperity Foundation* reaffirmed and heartily endorsed the Supreme Court's prior holdings that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association" and that there is a "vital relationship between freedom to associate and privacy in one's associations." *Id.* (quoting *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 460, 462). That GMA's FCPA violations, however imperfectly, were made in furtherance of these two vital First Amendment freedoms further reduces the gravity of GMA's offenses.

The State contends that GMA's conduct was more serious because it concealed who was lobbying the public for their votes. State Supp. Br. 8-9. But lobbying disclosures address the danger not of the public being misled, but the fear that unknown parties may be attempting to bribe legislators or buy legislators' favor. *See McCutcheon v. Federal Elections Com'n*, 572 U.S. 185, 192 (2014). For a ballot initiative, those concerns are nonexistent. Although the Court may speak metaphorically of "the public, acting as legislators," with respect to ballot measures, *GMA II*, 195 Wn.2d at 463, advocacy expenditures for ballot measures seek to persuade, not bribe. Public debate is enhanced—not harmed—when all viewpoints are

included, even controversial ones. *Americans for Prosperity Foundation*, 141 S. Ct. at 2388. If the State chills some speakers from participating in the debate, and punishes them harshly when they run afoul of disclosure laws—as it did here—it deprives the public from making a well-informed decision. GMA's failure to disclose is accordingly less grave and the trebled penalty more harsh—and unconstitutional.

CONCLUSION

The Court should reverse the Court of Appeals' judgment.

August 13, 2021

Respectfully submitted,

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