

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

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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. 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

