No. 96604-4

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.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

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INTRODUCTION

Trade associations have a constitutionally protected right to speak on behalf of their members, and their members have a constitutionally protected right to associate with each other and with the association. An important corollary to these rights to speak and associate is the right to do so anonymously. The right to associate privately is especially important for those who may take unpopular political positions. Without anonymity, speakers face boycotts, harassment, and even threats of violence, all for engaging in activity "at the heart of the First Amendment's protection." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

The Supreme Court has accordingly insisted that when the government attempts to force disclosure—either of the identity of an individual speaking anonymously or of an organization or association's members—it must have a good reason, and then some. The State must survive "exacting scrutiny," which requires the State to show a "substantial relation" between a "sufficiently important government interest" and the information that must be disclosed. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 366, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010) (internal quotation marks omitted).

The Court of Appeals below did not hold the State to this high standard. The record showed that the Grocery Manufacturers Association (GMA)'s members had previously endured boycotts, death threats, and harassment after their opposition to others genetically modified organism (GMO)-labeling initiatives was disclosed. *See State v. Grocery Manufacturers Ass'n*, 5 Wn. App. 2d 169, 178-179, 425 P.3d 927, 932-933 (2018). But even in the face of that record evidence, the Court of Appeals refused to find "a reasonable probability that the compelled disclosure of [GMA's] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 198, 124 S. Ct. 619, 175 L. Ed. 2d 753 (2003), *overruled on other grounds by Citizens United*, 558 U.S. 310 (internal quotation marks omitted).

That was error. In fact, the threats and harassment heaped upon GMA were typical of what faces businesses that take political stands. And the specter of that harassment forces businesses—particularly small businesses—to choose between advocating for their own interests and enduring backlash, or staying silent and saving face. This has the effect of stifling core political speech—a consequence that is at odds with the First Amendment's preference for more, not less, viewpoints in the

"marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119, 123 S. Ct. 2191, 156 L. Ed. 2d 148 (2003).

The Court should reverse as to GMA's First Amendment defense.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) is a trade association of American manufacturers made up of 14,000 member companies in every industrial sector. Since its founding in 1895, the NAM has advocated for American makers and the values that make American industry strong, including free enterprise, competitiveness, and individual liberty. The NAM represents manufacturers big and small. Although the NAM's members include 79 percent of Fortune 100 manufacturers and 54 percent of Fortune 500 manufacturers, small- and medium-sized manufacturers make up 90 percent of the NAM's membership.

The disclosure requirements at issue in this case threaten to stifle robust political debate and to subject the NAM's members to threats and harassment for engaging in protected political activism. The NAM can thus offer the Court a unique perspective on the burden that disclosure laws such as those here place on trade associations and the small businesses they speak for.

ISSUE ADDRESSED BY *AMICUS CURIAE*

Whether the Court of Appeals properly weighed the potential for harassment and threats as a result of the disclosures required by chapter 42.17A RCW, particularly where there was record evidence that GMA's members had previously experienced threats and harassment as a result of mandated disclosures.

STATEMENT OF THE CASE

In 2013, GMA decided to donate money to oppose I-522, a Washington State ballot initiative that would have required packaged-food producers to disclose on their labels whether a product contained GMOs. *See Grocery Manufacturers Ass'n*, 5 Wn. App. 2d at 178-179. GMA had opposed a similar measure in California the year before. *Id.* at 178. It encouraged its members to contribute to that effort both in their own names and by providing funds to GMA. *See* GMA Pet. 3. When GMA's members' opposition to the California initiative was disclosed, some of its members were harassed and boycotted. *Grocery Manufacturers Ass'n*, 5 Wn. App. 2d at 178-179

After that experience, GMA wanted to ensure that GMA itself—and not its member companies—would be the source of any political contributions opposing the Washington initiative. *See id.* at 178. GMA therefore created an account to oppose similar ballot initiatives and engage

in other GMO-labeling-related advocacy, and it sought funds from its member companies. *See id.* at 178-179. Thirty-four members contributed, and GMA made multiple contributions to the opposition effort, each time disclosing itself as the contributor. *See id.* at 179, 195.

The State sued GMA, alleging that GMA's contributions violated the State's Fair Campaign Practices Act (FCPA). *See id.* at 176, 179-180. The trial court granted the State summary judgment, holding that GMA had become a "political committee" within the meaning of the then-existing RCW 42.17A.005(37)[1] and that GMA had thus failed to follow the FCPA's disclosure requirements. *Id.* at 180. After a bench trial on penalties, the trial court concluded that GMA's violation was intentional and imposed a trebeled civil penalty totaling $18 million. *Id.* at 181-182.

The Second Appellate Division affirmed the trial court's order granting summary judgment in favor of the State, reversed the trial court's imposition of treble damages, and remanded for further proceedings to determine whether GMA's conduct qualified for treble damages under the appropriate standard. *See id.* at 177. The Court of Appeals rejected GMA's argument that the FCPA's disclosure requirements violated the First Amendment as applied to GMA, concluding that the requirements

[1] In 2018, the Legislature amended RCW 42.17A.005 and recodified .005(37) as .005(40). *See id.* at 176 n.1.

substantially related to an important government interest in providing information to voters. *See id.* In the court's view, disclosing the information that "a nationwide association of 'grocery manufacturers' " opposed the initiative was "not particularly informative because 'grocery manufacturers' is such a broad category." *Id.* at 195. Had voters *also* known the names of the companies actually funding GMA's efforts and the types of products they sell, "[v]oters may have been able to discern from this information that beverage manufacturers were particularly concerned about GMO labeling." *Id.* Even though the record indicated that GMA members received "death threats," "were picketed," and were pressured "to withdraw from GMA membership" following their opposition to the similar California ballot initiative, the court nevertheless concluded that GMA did not "establish a reasonable probability that GMA member companies would suffer the type of adverse impacts that would have had a chilling effect on freedom of association or political speech." *Id.* at 198-199.

This Court granted GMA's petition to review the Court of Appeals' First Amendment holding.

ARGUMENT

I. The Court of Appeals did not hold the State to its exacting burden of proving that its disclosure requirements were justified.

In 2016, there were 63,866 trade and professional associations in the United States that employ roughly 1.3 million people. *See* Power of A, *Associations by the Numbers: An Overview*, https://tinyurl.com/y6dksjb4; Power of A, *The Power of Associations: An Objective Snapshot of the U.S. Association Community* 5 (2015), https://tinyurl.com/y6laknqr. These associations, like other membership groups, help their members to advocate more "effective[ly]" for their own interests. *Buckley v. Valeo*, 424 U.S. 1, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (internal quotation marks and alteration omitted). A trade association allows member companies to pool their resources and speak with a collective voice in political affairs that is greater than any company's voice speaking alone. *See, e.g.*, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1017 (3d Cir. 1994) (Stapleton, J., concurring in part and dissenting in part) (noting that trade associations provide members "joint representation before legislative and administrative agencies"). The association can meet with elected officials to explain members' interests and concerns, advocate for the adoption of new legislation, and support or oppose ballot measures that affect members' interests—all things that individual companies may

not have the clout or resources to do on their own. *See id.*; *Sanitation & Recycling Indus., Inc. v. City of New York*, 107 F.3d 985, 998 (2d Cir. 1997) (describing how trade associations serve "a lobbying function at the city and state level").

The First Amendment protects companies' rights to band together to advocate for themselves two times over. First, the First Amendment protects companies' associational right "to engage in association for the advancement of beliefs and ideas." *National Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 430, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (internal quotation marks omitted). Second, the First Amendment protects the association's right to speak on its own behalf, especially when the association engages in "core political speech," including advocacy regarding "issue-based elections." *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995).

As the Court of Appeals has recognized, "[p]rivacy and anonymity are often essential to the free exercise" of those rights. *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 105 Wn. App. 813, 825, 21 P.3d 1157, 1164 (2001). Indeed, the Supreme Court has explained that privacy in one's associations is "indispensable to preservation of freedom of association, particularly where a group espouses dissident

beliefs." *National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958) (hereinafter "*NAACP v. Alabama*").

This principle was born out of the experience of civil-rights organizations in the Jim Crow south. In *NAACP v. Alabama*, the NAACP challenged on First Amendment grounds an Alabama law requiring it to give the state its membership list. *See id.* at 451. The NAACP had shown "that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. The Supreme Court concluded that the compelled disclosure of the organization's members placed a "substantial restraint" on the members' freedom of association because disclosure was "likely to affect adversely" the ability of the organization and its members "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462-463. The Court explained that disclosure "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.* at 463.

Disclosure requirements thus "seriously infringe on privacy of association and belief guaranteed by the First Amendment" and courts accordingly give them "exacting scrutiny." *Buckley*, 424 U.S. at 64. "To survive this scrutiny, significant encroachments cannot be justified by a mere showing of *some* legitimate governmental interest." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 744, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008) (internal quotation marks and citations omitted and emphasis added). "Instead, there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed," *id.* (internal quotation marks omitted), and the government's proffered interest must be "sufficiently important." *Citizens United*, 558 U.S. at 366 (internal quotation marks omitted). When the government's asserted interest is in informing voters, it must "*show* that its interest[] . . . [is] furthered by the disclosure requirement," which includes providing a "logical explanation of how a voter . . . would be educated in any meaningful way" by receiving the extra information. *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1138-39 (9th Cir. 2000) (emphasis added). A mandated disclosure requirement fails this test outright if the party facing disclosure can "show a reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties." *John*

Doe No. 1 v. Reed, 561 U.S. 186, 200, 130 S. Ct. 2811, 177 L. Ed. 2d 493 (2010) (quoting *Buckley*, 424 U.S. at 74). And even when the group itself has not experienced threats and harassment directly, it can in some instances "offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Reed*, 561 U.S. at 204 (internal quotation marks and alterations omitted).

As GMA explains, the Court of Appeals in this case misapplied this standard. *See* GMA Pet. 10-11; GMA Supp. Br. 8-10. Most importantly, the Court of Appeals did not appreciate the risk that the compelled disclosure of a GMA's contributors' names would have "subject[ed] them to threats, harassment, or reprisals from either Government officials or private parties." *McConnell*, 540 U.S. at 198 (internal quotation marks omitted). And that risk was real: When GMA opposed a similar ballot initiative on the same issue in another west coast State, its members were subjected to the threats, harassment, and boycotts that lie at the heart of why the First Amendment protects anonymous speech and association. *Cf. Citizens United*, 558 U.S. at 370 (noting that challenger "offered no evidence that its members may face . . . threats or reprisals"). The Court of Appeals thus erred in concluding that burden of disclosure was outweighed by the marginal additional informational benefit Washington voters stood to receive from knowing not just that

grocery manufacturers contributed to an account GMA used to make a contribution to oppose I-522, but *which specific* grocery manufacturers contributed to an account GMA used to make a contribution to oppose I-522. *See Grocery Manufacturers Ass'n*, 5 Wn. App. 2d at 195. As the Supreme Court has recognized, "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit." *McIntyre*, 514 U.S. at 348.

II. Upholding the State's required disclosures will chill businesses', especially small businesses', ability to advocate for themselves and their political interests.

The Court of Appeals' holding will have impacts well beyond this case. Upholding the State's required disclosures for political committees threatens to subject businesses—especially small businesses—that participate in public debate through their trade associations to harassment and threats. And the predictable consequence of that harassment and those threats is that businesses will choose to remain silent, leaving the policy conversation poorer for their absence.

1. Anonymous and pseudonymous political speech is an important part of the American political tradition. Alexander Hamilton, James Madison, and John Jay wrote the *Federalist Papers* under the pseudonym "Publius" to advocate for the constitution's ratification. *See* Bradley A.

Smith, *In Defense of Political Anonymity*, City (2010), https://tinyurl.com/yyafwotm. John Marshall wrote as "a Friend of the Union" and "a Friend of the Constitution" to elaborate on his opinion in *McCulloch v. Maryland*. *See id.* And both Thomas Jefferson and Abraham Lincoln published political writings anonymously throughout their careers. *See id.*

Anonymous political speech allows an argument's substance to matter more than its speaker's identity. *See American Civil Liberties Union of Nevada v. Heller*, 378 F.3d 979, 990 (9th Cir. 2004) ("Anonymity may allow speakers to communicate their message when preconceived prejudices concerning the message-bearer, if identified, would alter the reader's receptiveness to the substance of the message."); Smith, *supra* ("[D]isclosure fosters . . . the . . . idea[] that the identity of the speaker matters more than the force of his argument."). Keeping a speaker's identity private also allows her to avoid harassment, reprisal, and violence based on her views. *See, e.g.*, Sidney Blumenthal, *A Self-Made Man: The Political Life of Abraham Lincoln 1809-1849*, at 264-266 (2016) (explaining how a political foe challenged a young Abraham Lincoln to a duel after Lincoln was revealed to be the writer of a pseudonymous column mocking him).

The harms from disclosure are felt most keenly by those taking unpopular political positions. For instance, as *NAACP v. Alabama* illustrates, several States attempted to obtain local NAACP chapters' member and donor rolls of in an effort to intimidate members and donors. *See* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 Ind. L. Rev. 255, 272 (2010). And during the Cold War, donors to the Communist and Socialist parties were retaliated against when their political affiliations were made public. *See Brown v. Socialist Workers '74 Campaign Comm'n (Ohio)*, 459 U.S. 87, 99, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982) (noting that members of the Socialist Workers Party (SWP) endured "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office").

The forced revelation of political positions today can also impose serious personal, professional, and financial consequences. Nominees can be grilled about their donations. *See* Mayer, 44 Ind. L. Rev. at 273 & n.93 (discussing how Senator Kerry questioned an ambassadorial nominee regarding donations to Swift Boat Veterans for Truth). Reporters' and investigators' objectivity can be challenged. *See id.* at 267 & n.61 (detailing how one media outlet used disclosure databases to publish the political affiliations of journalists who made federal political

contributions); Marshall Cohen, *Special Counsel Team Members Donated to Dems, FEC Records Show*, CNN, June 13, 2017, https://tinyurl.com/y4vylbu3 (objectivity of the Mueller investigation challenged based on disclosures showing team members contributed to Democrats). And businesses can come to fear that if they support particular candidates or positions they will be a target for regulators. *See Citizens United*, 558 U.S. at 483 (Thomas, J., concurring in part and dissenting in part) (businesses feared opposing former New York Attorney General Elliot Spitzer); *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., dubitante) ("Disclosure also makes it easier to see who has not done his bit for the incumbents . . . .").

The Internet has only magnified the potential for harassment. Websites that aggregate donors' names make locating and identifying donors easier. *See* Mayer, 44 Ind. L. Rev. at 276 (discussing the publication of donor lists on eightmaps.com and Accountable America); *see also* Kenzie Bryant, *Equinox, Trump, and the Embarrassment of Being a Consumer in 2019*, Vanity Fair, Aug. 9, 2019, https://tinyurl.com/yyv9sesa (discussing the #GrabYourWallet movement, which catalogues companies that have profited from or support the Trump administration). Social media sites allow boycotts to spring up overnight and go viral. *See, e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 185, 130 S.

Ct. 705, 175 L. Ed. 2d 657 (2010) (per curiam) (noting how opponents of a California ballot initiative allegedly "compiled Internet blacklists" of supporter businesses and "urged others to boycott those businesses in retaliation for supporting the ballot measure") (internal quotation marks omitted); Boycott and Defeat Koch Industries, *Koch Industries/Georgia Pacific products to avoid. List of alternatives attached*, May 11, 2011 3:15pm, https://tinyurl.com/y4p4hkeh (Facebook post listing Angel Soft toilet paper and Brawny paper towels among products to avoid using because of their connection to Koch Industries). It is precisely *because of* digital campaigns' effectiveness that websites have sprung up to weaponize disclosed donor information and to pressure donors to stop giving to particular causes. *See Van Hollen, Jr. v. Federal Election Comm'n*, 811 F.3d 486, 500 (D.C. Cir. 2016) ("The advent of the Internet enables prompt disclosure of expenditures, which provides political opponents with the information needed to intimidate and retaliate against their foes.") (internal quotation marks and alterations omitted); *see also* Bryant, *supra* (#GrabYourWallet encourages consumers to demand brands "make a statement that company executive(s) will neither endorse nor contribute to Trump's 2020 re-election").

2. Manufacturing companies and their employees—the NAM's constituency—have been the targets of these political-harassment

campaigns, and from both sides of the political spectrum. Koch Industries has been the frequent boycott target because of its founders' political stances. *See, e.g., Pledge to Boycott Koch Products*, Nation of Change, Oct. 24, 2016, https://tinyurl.com/y2rmxsbb. PepsiCo faced boycotts after its CEO criticized President Trump. *See* Zach Ford, *Trump Supporters Launch Boycotts of Pepsi, Oreos, and Netflix*, Think Progress, Nov. 16, 2016, https://tinyurl.com/yxt66tp6. And so did Nike after it launched an ad campaign featuring Colin Kaepernick, the NFL quarterback who famously knelt during the National Anthem to protest what he saw as police mistreatment of African Americans. *See* Dan Adler, *Our Never-Ending Culture Wars: Colin Kaepernick and Nike's Betsy Ross Air Maxes Edition*, Vanity Fair, July 2, 2019, https://tinyurl.com/yycqdc5w.

Some harassment has even been the result of mandated political disclosures. For example, Bristol Myers Squibb employees were targeted by an activist animal-rights group infamous for firebombing those it perceived to be connected to animal testing. John R. Lott, Jr. & Bradley Smith, *Donor Disclosure Has Its Downsides*, The Wall St. J., Dec. 26, 2008, https://tinyurl.com/y3efgczn; Sandra Laville & Duncan Campbell, *Animal Rights Extremists in Arson Spree*, The Guardian, June 24, 2005, https://tinyurl.com/jthm9ml. The organization used information acquired from political disclosures to publish the employees' home addresses on the

organization's website under the heading "Now you know where to find them." *See* Lott & Smith*, supra*. And the activists were able to obtain the employees' addresses only because of the contributions that the employees made to political campaigns, with the resulting disclosures. *See id.* When harassment and boycotts are the result of not public positions, but rather compelled disclosures, the resulting harassment is an "indirect[ ]" but "inevitable result of the government's conduct in requiring disclosure," *Buckley*, 424 U.S. at 65; *Shelton v. Tucker*, 364 U.S. 479, 486, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960) (explaining that mandated disclosure necessarily "bring[s] with it the possibility of public pressures").

In short, the harassment GMA's members experienced in California and that GMA feared they would experience again in Washington is typical of the kinds of threats individuals and businesses frequently endure when their political views are disclosed. *See Grocery Manufacturers Ass'n*, 5 Wn. App. 2d at 198-199. Indeed, disclosure requirements commonly "enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Van Hollen,* 811 F.3d at 500 (internal quotation marks omitted).

3. Part of the benefit of joining an association is to be able to speak with a collective voice on important matters of public policy. *See Heller*, 378 F.3d at 989 ("[I]ndividuals working in cooperation with groups may be concerned about readers prejudging the substance of a message by associating their names with the message."). Membership in an organization allows members to avoid being singled out for their views, while still advancing those views. As courts have repeatedly recognized, "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159 (9th Cir. 2010) (quoting *NAACP v. Alabama*, 357 U.S. at 460). If businesses' contributions to trade associations' political efforts are disclosed, they will be subjected to more harassment, which will have a chilling effect on trade associations' ability to advocate for themselves and their members—especially when their views are unpopular. Faced with the choice to disclose and face harassment or to not speak at all, many businesses will choose silence.

This will be especially devastating for the 90 percent of the NAM's members that are small- and medium-sized businesses. *See About the NAM*, Nat'l Ass'n Mfrs., https://www.nam.org/about/. Those businesses, unlike larger manufacturers with corporate-security and

public-relations departments, often do not have the resources to withstand threats and boycotts. They will have no choice but not to speak at all—causing "[s]peech [to] be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election." *Citizens United*, 558 U.S. at 372. That suppression will, in turn, harm the public interest by depriving the public debate of these companies' views. *See Hicks*, 539 U.S. at 119 (when speech is discouraged, "society as a whole . . . is deprived of an uninhibited marketplace of ideas."). The Court should avoid that unconstitutional result by reversing the Court of Appeals' First Amendment holding.

CONCLUSION

For these reasons and those in GMA's supplemental brief, the Court should reverse the Court of Appeals' judgment as to the First Amendment.

September 6, 2019

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