No. 103748-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

META PLATFORMS, INC., formerly doing business as FACEBOOK, INC.,

Petitioner.

MEMORANDUM OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH

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I. INTRODUCTION

The Washington Fair Campaign Practices Act imposes redundant recordkeeping and disclosure requirements on intermediaries that host political advertising. The advertisers themselves—candidates, campaigns, and other political committees—are already required to keep and disclose information about their political ads.[1] Yet the Act imposes crushing penalties on intermediaries that fail to satisfy its Byzantine obligations. Platforms have responded by shuttering their forums to political ads, disproportionately burdening outsider campaigns that lose access to a medium the Supreme Court has called "the modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

This Court should grant review and hold invalid the State's double-disclosure regime, which chills far more speech than needed to achieve its putative goals.

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[1] Wash. Pub. Disclosure Comm'n, Online Campaign Activities, PDC Interpretation No. 07-04, https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/online-campaign-activities (Am. June 27, 2013).

II. IDENTITY AND INTEREST OF AMICUS

The Institute for Free Speech (IFS) is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, petition, and press. Along with performing scholarly and educational work, IFS represents individuals and organizations and files amicus briefs in cases raising important First Amendment questions. IFS has an interest here because the decision of the Washington Court of Appeals undermines the core First Amendment rights of millions of Americans.

III. STATEMENT OF THE CASE

IFS adopts Meta's Statement of the Case.

IV. ARGUMENT

Focusing narrowly on the State's asserted interests, the Court of Appeals brushed aside a burden on speech so severe that multiple major platforms have already banned political ads in Washington. That was error, and review is warranted to forestall further chilling speech in an area where the "importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

A. The First Amendment Protects Intermediaries to Prevent the Collateral Censorship of Speakers

The U.S. Supreme Court has long recognized that imposing liability on intermediaries stifles the speech of those who depend on them to disseminate their ideas.

In *Smith v. California*, 361 U.S. 147 (1959), the Court held unconstitutional a law imposing strict liability on booksellers for selling "obscene" books because the law compelled self-censorship. As the Court observed, the "bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability," would "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Id.* at 153-54. For similar reasons, the Court rejected Rhode Island's bookseller liability laws in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and federal regulations requiring cable operators to block certain content, *Denver Area Educ. Telecommc'ns Consortium v. FCC*, 518 U.S. 727 (1996).

The danger of intermediary liability is that it silences *all* speakers downstream. "Control any cog in the machine," Justice Scalia observed, "and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part). Censors have thus long targeted intermediaries to preserve power and prevent change. Pope Alexander VI banned unlicensed books to stanch early Protestants. *See* Ithiel de Sola Pool, TECHNOLOGIES OF FREEDOM 14 (1984). The British likewise sought to stifle American dissent by licensing printers, taxing newspapers, and weaponizing libel prosecutions. *Id.* at 14-16.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court identified the risk that intermediary liability "discourage[s]" publishers "from carrying" controversial content, "shut[ting] off an important outlet for the promulgation of information and ideas by persons who do

not themselves have access to publishing facilities." *Id.* at 266. Such "self-censorship" is especially pernicious because it functions as "a censorship affecting the whole public." *Id.* at 279 (quoting *Smith*, 361 U.S. at 154).

Scholars call this phenomenon "collateral censorship"—censorship of a speaker by punishing the messenger they rely on to carry their speech. *See* Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999); *see also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27-33 (2006). Often, intermediaries respond to the risk of intermediary liability by deleting speech or eliminating fora entirely, as perfectly vetting or documenting facts about every contributor's content poses too great a burden. *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

That these collateral censorship efforts "enlist the cooperation of private parties makes them more, rather than less, dangerous in comparison to direct regulation." Kreimer, *supra*, at 65. For one thing, collateral censorship is

"less visible and less procedurally regular" than direct regulation. *Id.* For another, intermediaries face fundamentally different incentives than the speakers whose speech they host. Faced with potential liability for speech they have no organic desire to convey, intermediaries rationally conclude that the marginal revenue from hosting regulated speech rarely justifies the legal risks and compliance costs. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 466 (2002) (Souter, J., dissenting); *see also Wash. Post v. McManus*, 944 F.3d 506, 516 (2019) (noting third-party conduits of speech face greater chill from regulation than do original speakers).

Although the targets of intermediary regulation are generally large businesses, the typical victims are dissident and grassroots speakers. *See* Harry Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965). Experience shows that "marginalized communities" are "particularly vulnerable to the collateral censorship" resulting from regulating the intermediaries on which they rely to find an

audience. *See* Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2047 (2018) (collecting examples).

Perhaps no case better illustrates this principle than *Sullivan*. Nominally a case about burdens of proof, the Court's decision "responded primarily to the core First Amendment problem of the abuse of power to stifle expression on public issues[.]" Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197, 199 (1993). *Sullivan* involved an advertisement placed in the *New York Times* by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Sullivan*, 376 U.S. at 256-57. Titled "Heed Their Rising Voices," the ad ran on March 29, 1960, and described attempts by "Southern violators" of the Constitution to deny Black Americans their civil rights. *Id.* at 257-58, 305. Mimicking earlier censors, the plaintiff sought to "curtail media coverage of the civil rights struggle" through punishing litigation. Kagan, *supra*, at 200. It nearly worked: saddled with a $500,000 jury award, the *Times* recalled its reporters from Alabama. *Id.* at 201. CBS News, perhaps the leading

news outlet of the time, had planned to stop reporting on the civil rights movement altogether had the verdict been affirmed. *Id.*

This chilling effect is amplified on the internet. Online platforms handle larger volumes of content and face correspondingly more catastrophic penalties. *See Reno*, 521 U.S. at 853. The Fourth Circuit acknowledged this in *McManus*, observing that when "political speech brings in less cash or carries more obligations than all the other advertising options," it becomes "financially irrational" for a platform to carry it. 944 F.3d at 516. The predictable result—demonstrated here, *infra* § IV.B—is that platforms scuttle political speech rather than risk crippling penalties.

This, too, especially harms outsiders and dissidents. Digital advertising offers an essential, cost-effective way for grassroots movements and candidates with limited resources to reach targeted audiences. *See* Daniel Kreiss & Bridget Barrett, *Democratic Tradeoffs: Platforms and Political Advertising*, 16 OHIO ST. TECH. L.J. 493, 497 (2020).

Regulation pressuring these channels to close their doors thus disproportionately harms smaller campaigns, grassroots organizations, and low-wealth candidates lacking traditional media access.

B. The Act Has Demonstrably Chilled Speech—Especially by Grassroots Political Speakers

The record here confirms this outcome. After amendment of the Fair Campaign Practices Act commercial advertiser regulation in 2018, major platforms including Google, Facebook, and Yahoo stopped accepting political ads in Washington. CP390-91, 405. These platforms provided a critical avenue for political communication, particularly for non-incumbent and less-resourced candidates. By driving platforms to reject Washington state political advertising entirely, the Act has closed these vital channels to campaigns trying to reach Washingtonians.

These harms are real. Political candidates' speech has already been chilled by Meta's forced exit. Chad Magendanz, for example, is a former Navy nuclear submarine officer who served in the Washington House of

Representatives. He testified that Facebook advertising changed the way he campaigned in a positive way, allowing him to engage very effectively with younger generations of voters that prefer to engage online. Javier Figueroa, a native of Monterrey, Mexico, is the first naturalized citizen elected to a city council in Washington. Political advertising on Facebook allowed him to direct his campaign messages to a targeted audience. And Toby Nixon holds multiple positions, balancing a full-time job at Microsoft with a seat on the Kirkland City Council and leadership positions in local groups. He credits Facebook with helping him run targeted, cost-efficient campaigns that were much more effective than other advertising media in spreading his message.

Meta's forced exit disadvantaged these and other candidates. Other channels are poor substitutes for Facebook advertising. Television ads are less targeted, much more expensive, and easily avoided. Direct mailers are often discarded and also very expensive. Ad blockers have made regular online ads less effective. Meta's exit

was a main reason Magendanz decided not to seek reelection in 2020.

C. The Act Fails Exacting Scrutiny

Strict scrutiny applies. But the Court need not decide that issue, as the Act's requirements fail even exacting scrutiny.

That standard requires the government to show a compelled disclosure requirement (1) bears "a substantial relation" to "a sufficiently important government interest," and is (2) "narrowly tailored" to accomplish that interest. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). Narrow tailoring requires "an understanding of the extent to which the burdens" imposed by disclosure "are unnecessary" to the government's goals. *Id*. A law that burdens more speech than necessary despite "less intrusive alternatives" is unconstitutional. *Id.* at 613.

Focusing on the second element, the Act is not narrowly tailored because its redundant obligations unnecessarily burden political speech.

1. Requiring intermediaries to keep and disclose records of others' political speech significantly burdens that speech.

The State's claim that the Act promotes public access to information would ordinarily be dubious, considering that the State already mandates more effective and accessible disclosure means. But the argument fails completely, as the Act has in fact eliminated an entire category of political speech and with it, the very information about that speech that the Act sought to share. This constructive speech prohibition disproportionately harms grassroots campaigns, lower-budget candidates, and outsider groups. *See supra* § IV.A.

That is exactly why *McManus* held a materially identical Maryland law unconstitutional: "While ordinary campaign finance disclosure requirements do not 'necessarily reduce[] the quantity of expression,' the same cannot be said for platform-based laws." *McManus*, 944 F.3d at 517 (internal citation omitted).

2. The Act's redundancies are strong indicia that it is not narrowly tailored.

The Supreme Court has cautioned against regulatory schemes that layer redundant burdens on political speech, recognizing that a "prophylaxis-upon-prophylaxis approach" signals that a regulation is not "necessary for the interest it seeks to protect." *FEC v. Cruz*, 596 U.S. 289, 306 (2022); *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

Here, Washington *already* requires political candidates to disclose comprehensive information about their advertisements. For example, under RCW 42.17A.320, candidates must disclose this information on the face of their ads. They are also subject to reporting requirements about their donors, expenditures, and online advertising. *See, e.g.*, RCW 42.17A.260; RCW 42.17A.305; RCW 42.17A.235. These disclosures are publicly accessible through the Public Disclosure Commission's website and available upon request.

Washington's duplicative disclosure regime imposes far-reaching nuclear burdens on speech intermediaries, while doing nothing more to advance "the prevention of

'*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 306 (affirming this is the "only" "permissible ground for restricting political speech"). In fact, the information intermediaries must collect, store, and disclose is often *more difficult to access* than the State's candidate reporting website because an intermediary's information, especially if it is available only by visiting the intermediary's office during normal business hours.

Thus, while a belt-and-suspenders approach to transparency *might* provide some "ancillary benefits," the existence of a "detailed and specific" parallel disclosure regime means such benefits cannot justify the Act's burdens. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350-51 (1995) (duplicative disclosure law invalid).

3. The State can advance its objectives through less-intrusive means.

Washington could have pursued numerous less-restrictive options. It instead chose the *most* restrictive one, burdening intermediaries in ways that have compelled them to close their forums to political speech altogether.

Because these "burdens are unnecessary," the Act is invalid. *Ams. for Prosperity*, 594 U.S. at 611.

First, as discussed above, the law already requires political advertisers to disclose most of the information demanded of platforms. To the extent the State wants more transparency, it should modify *those* requirements—not shift the burden to intermediaries that neither create nor fund the speech, and on whom redundant burdens operate primarily to stifle all political expression downstream. *See supra* § IV.A.

Second, the State has not identified an interest supported by the Act. The State "must do more than 'simply posit the existence of the disease sought to be cured.'" *Cruz*, 596 U.S. at 307 (citation omitted). It must point to concrete evidence "demonstrating the need to address a special problem" by restricting speech. *Id.* (citation omitted); *see also McManus*, 944 F.3d at 521-22 (same standard). "[M]ere conjecture" is not enough. *Cruz*, 596 U.S. at 307 (internal quotation marks and citation omitted). The State has offered no evidence why this law

is necessary to prevent corruption, let alone any reason to believe that imposing recordkeeping duties on platforms would combat that problem. The Act's requirements—for instance, tracking an ad buyer's method of payment, WAC 390-18-050(6)(d)—bear no rational connection to any legitimate state interest. If anything, these rules are misdirected: prohibited entities that seek to influence elections would likely do so through illicit, unreported expenditures, not by buying ads with a debit card using their true identities.

* * *

Because Washington has alternatives that would promote transparency without driving political speech off major platforms, the Act fails exacting scrutiny. The platform disclosure rules are unconstitutional, and the Court should grant review to hold them invalid.

V. CONCLUSION

The Court should grant review and reverse.

I certify that this document contains 2435 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of March 2025.

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DECLARATION OF SERVICE

I hereby certify that I caused the foregoing to be served on counsel of record for the parties in this matter via the Court's e-filing platform.

Dated: March 26, 2025

s/ Ambika Kumar
Ambika Kumar

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