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.	PETITIONER META PLATFORMS, INC.'S ANSWER TO AMICUS CURIAE MEMORANDA

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I. INTRODUCTION

Several of the Nation's leading organizations on First Amendment issues filed memoranda calling for this Court's review in this case. These *amici*—the Institute for Free Speech, NetChoice, Chamber of Progress, and TechNet—underscore the significant and important legal issues relating to Washington's disclosure law that are presented for review in Meta's petition.

That disclosure law—comprised of both the Fair Campaign Practices Act and implementing regulations—imposes unjustified burdens on digital platforms that go well beyond what is necessary to help further the State's purported interest in an informed electorate. The result, as the State does not dispute, has been to shut down key channels for political speech in Washington—channels that the Washington electorate relied upon to receive information about relatively under-resourced political campaigns and ballot initiatives. Indeed, as *amici* document, Washington's law stands alone among the Nation's campaign-disclosure laws both in its over-intrusiveness

and resultant, speech-chilling effects. The Court of Appeals' decision cannot be allowed to stand.

II. ARGUMENT

A. *Amici* have demonstrated that the question of whether Washington's disclosure law violates the First Amendment is a significant question of law.

Amici have offered multiple reasons for why "[t]his Court should grant review on the significant and important question of whether this outlier law complies with the First Amendment." NetChoice, Chamber of Progress, and TechNet ("NetChoice") Br. 4. First, *amici* bolster Meta's argument that platform-based disclosure laws like Washington's are more likely to suppress political speech in violation of the First Amendment—a legal principle that the Court of Appeals rejected in contravention of federal caselaw. *See infra* § 1. Second, *amici* demonstrate that this outlier law cannot even survive exacting scrutiny, and that this Court must intervene to bring Washington's disclosure regime back into line with constitutional requirements. *See infra* § 2.

1. Washington's disclosure law suppresses political speech in ways that ordinary disclosure laws aimed at political actors generally do not.

Amici have shown that the State's characterization of Washington's disclosure law as imposing garden-variety, campaign-finance disclosure requirements has no basis in law or reality.[1]

Meta has already explained that campaign-finance disclosure laws targeting political actors are less likely to suppress speech in violation of the First Amendment than those targeting neutral platforms or other third parties. Pet. 13-14 (citing *Washington Post v. McManus*, 944 F.3d 506, 515-16 (4th Cir. 2019)). That is for a simple reason: Political actors (such as candidates and PACs) have strong incentives to comply with disclosure requirements to spread their message and prevail at the ballot box; digital platforms, by contrast, disseminate third

[1] *Cf. State v. Meta Platforms, Inc.*, 33 Wn. App. 2d 138, 153-55, 560 P.3d 217 (2024) (discussing campaign-finance cases targeting political actors and failing to cite a single case involving disclosure obligations imposed on digital platforms or neutral third parties); Answer to Pet. 9-12 (same).

party political speech primarily to raise revenue and thus have less reason to keep their forum open if it is no longer economically sensible. *Id.*

Both the Court of Appeals and the State have ignored the unique First Amendment considerations posed by imposing burdens on non-political actors for carrying political speech. That critical error tainted their First Amendment analysis in this case. As *amici* illustrate, the U.S. Supreme Court has long warned that "imposing liability on intermediaries stifles the speech of those who depend on them to disseminate their ideas." Institute for Free Speech ("IFS") Br. 3 (citing *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963); *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (1959)). Just like the booksellers in *Smith* and *Bantam Books* and the cable operators in *Denver Area*, Meta and similarly situated platforms in Washington can attest from firsthand experience to

the fact that "intermediary liability" is uniquely pernicious because it "silences *all* speakers downstream." *Id.* at 4.

Just this past term, the U.S. Supreme Court held that the First Amendment prohibits States from suppressing political speech through intermediaries—specifically, coercing a regulated party in order to suppress someone else's disfavored speech. *See Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 190, 197-98, 144 S. Ct. 1316, 218 L. Ed. 2d 642 (2024). And although this is not a First Amendment coercion case, that underlying principle applies with equal force here. Indeed, in her opinion for a unanimous Court, Justice Sotomayor underscored the "constitutional concerns with the kind of intermediary strategy" that is typical in cases like this one: Governmental action targeting neutral third parties is much more likely to suppress speech because these "intermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." *Id.* at 197-98.

Thus, time and again, the U.S. Supreme Court has

highlighted how a law's likelihood of suppression is closely tied to the incentives that the regulated parties face. As *amici* explain, "intermediaries face fundamentally different incentives than the speakers whose speech they host," which is why "intermediaries [could] rationally conclude that the marginal revenue from hosting regulated speech rarely justifies the legal risks and compliance costs." IFS Br. 6; *see also id.* at 5 (discussing how "intermediaries respond to the risk of intermediary liability by deleting speech or eliminating fora entirely" (citing *Reno v. ACLU*, 521 U.S. 844, 868-69, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997))); *accord* NetChoice Br. 8-9 (similar). That is the lesson and core logic of all these federal cases—which the Court of Appeals rejected.

The facts of this case bear all of this out: Washington's decision to hold neutral third parties liable for violating election-related disclosure requirements led Meta, Google, and Yahoo to ban Washington political ads in the State to avoid the risk of crippling penalties and the costs of compliance with the law's

burdensome obligations. Recall from Meta's petition for review that a single ad might bring in as little as a dollar of revenue, but force Meta to either incur massive compliance costs or face enormous liability. *See* Pet. 2, 28-29. That includes eight-figure monetary judgments like this one that "dwarf[] candidates' own expenditures" in state and local elections. NetChoice Br. 9-10. Unsurprisingly, then, "platforms have voted with their feet, concluding that the costs of carrying Washington political ads far outweigh the benefits." *Id.*

In sum, to properly analyze the law's constitutionality under the First Amendment, it is imperative that the courts understand how these incentives differ from those of the political speakers posting the ads, and how those differences explain the likelihood of speech suppression. The lower court's disregard for these differences presents a momentous constitutional question on which this Court's intervention is warranted.

2. Even under exacting scrutiny, the law cannot survive.

As *amici* demonstrate, Washington's disclosure law imposes burdens that go far beyond what any other State in the Nation requires of digital platforms. The law's extraordinary speech-suppressive effects cannot be reconciled with the First Amendment's free-speech guarantee, even under the "exacting scrutiny" standard that the Court of Appeals purported to apply. Review is necessary to ensure that the disclosure law complies with the First Amendment.[2]

a. When exacting scrutiny applies, the government must show that the law bears "a substantial relation" to "a sufficiently important government interest" and that it is "narrowly tailored" to accomplish that interest. *See Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611, 141 S. Ct. 2373, 210 L. Ed. 2d 716 (2021). If the law burdens more speech than is necessary,

[2] Because Washington's disclosure law is a content-based scheme that predictably suppresses political speech, strict scrutiny should apply. *See* Pet. 12-14; IFS Br. 11. But, as *amici* underscore, the law cannot survive even the "exacting scrutiny" that courts have applied to run-of-the-mill, campaign-finance disclosure laws. *See* IFS Br. 11-16; NetChoice Br. 4-10.

forgoing "less intrusive alternatives," it is unconstitutional. *Id.* at 613.

Meta already demonstrated that Washington's disclosure law fails that test. *See* Pet. 14-20. But *amici* further illustrate why that is so—in particular, the extent to which the law fails the First Amendment's narrow-tailoring requirement. They have demonstrated in exhaustive detail, for example, that there is no state disclosure law like Washington's. It is exceedingly rare for States to "single out political advertising run on digital platforms for any regulation beyond that imposed on other media." NetChoice Br. 4. And out of the eight States that do, only Washington requires the platforms themselves to determine in the first instance whether posted ads might be covered under the statute such that they need to be maintained and disclosed upon request. *See id.* at 4-7. Every other State requires the ad buyer to notify the platform and provides some sort of safe harbor (such as a "good faith" exception) where there is noncompliance. *See id.* at 6.

The fact that Washington "stands alone in imposing [these] burdensome requirements" suggests that they are not "'necessary'" to advance the State's stated interest of fostering an informed electorate. *Id.* at 8 (quoting *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214-15, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989)). Indeed, States across the Nation have found different ways to foster that same interest without requiring the platforms to (1) screen *all* ads posted on their digital platforms to determine which are covered; and (2) disclose granular information about these ads to requesters from anywhere in the world within 48 hours or else face massive monetary liability. It is no coincidence that Meta continues to run political ads in jurisdictions that, unlike Washington, have not made it financially irrational to host this kind of political speech.

Moreover, in words that could have been written for this case, the "[U.S.] 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.'" IFS Br. 13 (quoting *FEC v. Cruz*, 596 U.S. 289, 306, 142 S. Ct. 1638, 212 L. Ed. 2d 654 (2022); *McCutcheon v. FEC*, 572 U.S. 185, 221, 134 S. Ct. 1434, 188 L. Ed. 2d 468 (2014)). Political candidates and committees in Washington are already subject to comprehensive disclosure and reporting requirements about their advertisements, and these disclosures are easily accessible to the public online. *See* IFS Br. 13. To the extent Washington's disclosure law imposes greater recordkeeping and disclosure requirements on neutral platforms than on candidates and political committees, those burdens could and should be shifted to the political actors. They are, after all, the ones interested in prevailing at the ballot box and are thus more likely to bear the burdens of these requirements without sacrificing their speech. By contrast, requiring intermediaries to undertake substantially duplicative disclosure efforts adds little

benefit while imposing significant and unjustifiable burdens on speech. *See id.* at 13-14; *see also* NetChoice Br. 9.

But even if the current disclosure requirements imposed on the political actors themselves were not sufficient to achieve the State's interest, a basic survey of other state laws demonstrates that there were less intrusive alternatives that the State could—and thus should—have explored before "requiring such extensive disclosures of platforms and imposing such draconian penalties." NetChoice Br. 7.

Amici point to several such alternatives: The State could have modified the requirements on advertisers, who are currently required to disclose "most" but not all "of the information demanded of platforms," to require fuller disclosures and therefore obviate the need for platforms to disclose this information at all. IFS Br. 15; *see also* Pet. 17. Alternatively, the State could have required platform users "to notify the platforms when they post regulated ads and to provide the platforms with the information that must be disclosed to the

State." NetChoice Br. 1; *see also* Pet. 17-18. The State did not even provide for "'good faith' or similar exceptions that subject platforms to liability only when they have actual knowledge of the posted ad and fail to report on ads that they know are regulated." NetChoice Br. 6. These alternatives may have mitigated the law's burdens on digital platforms.

The State had all these options and many more. But it was "not free to enforce *any* disclosure regime that further[ed] its interests"—or that it mistakenly thought would further its interests—without regard to "less intrusive alternatives." *Ams. for Prosperity Found.*, 594 U.S. at 613. That lack of narrow tailoring is the critical failure that proves fatal under the First Amendment.

b. After so many rounds of briefing, the State has yet to acknowledge, much less justify, the speech-chilling effects of its disclosure law—a law that hinders rather than facilitates an informed electorate. For example, the State has no good response to the fact that the law effectively "eliminated an entire

category of political speech and with it, the very information about that speech that the [law] sought to share." IFS Br. 12; *see also* NetChoice Br. 13 ("The State supposedly wishes to promote transparency, but its law promotes only silence.").

Instead, the State has rested primarily on the Court of Appeals' conclusion that it was "technically feasible" for Meta to comply with the law's disclosure obligations, such that the law's burdens cannot be so significant to render it unconstitutional. *See* Pet. 11, 19-20. But that misses the point entirely. Whether Meta (or some other digital platform) technically could comply with a law that violates its constitutional rights is not the test, and "the court erred in treating a fundamental constitutional flaw as a mere challenge of software engineering." NetChoice Br. 16.

The key question here is whether the law is narrowly tailored. And because the State could have employed "alternatives that would promote transparency without driving political speech off major platforms," the law is not narrowly

tailored and fails exacting scrutiny. IFS Br. 16. And thus, just like the Maryland law that the Fourth Circuit found unconstitutional in *McManus*, Washington's law violates the First Amendment because it "burdens too much and furthers too little." *McManus*, 944 F.3d at 523; *see also* IFS Br. 12 (discussing *McManus*).

B. *Amici* have demonstrated that review is necessary to ensure continued grassroots participation in Washington politics.

As *amici* establish, Meta and other major digital platforms provide "vital channels" for political speech in Washington—particularly for non-institutional political actors and under-resourced campaigns. IFS Br. 9; *see* NetChoice Br. 12. By effectively "clos[ing]" down these channels, the disclosure law has chilled extraordinary amounts of political speech. IFS Br. 9.

These harms are neither theoretical nor abstract. IFS highlights the example of Chad Magendanz, who relied on Facebook advertising to secure a seat in the Washington House of Representatives. *See id.* at 9-10. After Meta banned political

advertising in Washington, however, Rep. Magendanz was left only with more expensive and less effective means of campaigning—"poor substitutes" across the board. *Id.* at 10-11. As a result, Rep. Magendanz simply decided not to seek reelection. *See id.* But the harms here go well beyond political actors who now lose a critical means of reaching voters. The entire Washingtonian electorate suffers when a State regulation "stifl[es]" rather than "protect[s]" political speech. NetChoice Br. 13 (citation omitted).

Given all this, the State does not and cannot dispute the law's downstream, speech-chilling impacts. Nor can it deny the importance of platform-based advertising to less-resourced and upstart political efforts—efforts that now lack a cost-effective means of reaching the Washington electorate. *See* Pet. 29-31.

Instead, the State has claimed that "[Meta's] own business decision to stop selling Washington political ads" presents no issue of substantial public importance warranting review. Answer to Pet. 29. But that cannot be correct. As *amici* explain

and former Rep. Magendanz's story confirms, digital platforms provide a "critical avenue for political communication." IFS Br. 9. And because Meta runs Facebook, a major channel for digital political advertising in the Nation, it is *absolutely* an issue of "substantial public importance" whether or not political actors in Washington may access it to post their ads. *See generally* Pet. 29-32; NetChoice Br. 12 (discussing usefulness of ads on digital platforms like Facebook).

Lastly, *amici* have shown that it *is* a matter of substantial public importance whether Washington needs this uniquely burdensome law to "ensur[e] that Washingtonians have timely access to information about efforts to influence their vote," Answer to Pet. 29, even though every other State has managed to advance this purpose without depriving voters of platform-based political advertising, *see* NetChoice Br. 4-6.

* * *

Washington's disclosure law stands on an island of its own. It suppresses massive amounts of the very speech that the

State claims to be valuable—even essential—to voters. That should set off constitutional alarm bells signaling that speech suppression is afoot. The unprecedented and exceptional features of Washington's law—in an area where the First Amendment protections are supposed to be at their zenith—serve as "the most telling indication of [a] severe constitutional problem" that this Court must redress. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012) (quoting *Free Enter. Fund v. Public Company Acct. Oversight Bd.*, 561 U.S. 477, 505, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010)). They are, as *amici* note, a "'danger sign' that the law 'falls outside tolerable First Amendment limits.'" NetChoice Br. 10 (quoting *Randall v. Sorrell*, 548 U.S. 230, 253, 126 S. Ct. 1479, 165 L. Ed. 2d 482 (2006) (plurality op.) (alterations omitted)). Given the momentous stakes of this case for both Meta and Washington's electorate, this Court should intervene and bring the State back into compliance with the First Amendment.

III. CONCLUSION

The Court should grant the petition for review.

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RESPECTFULLY SUBMITTED this 18th day of April, 2025.

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DECLARATION OF SERVICE

I hereby certify that I caused the foregoing Answer in Support of Amici Curiae NetChoice, Chamber of Progress, TechNet and Institute for Free Speech's Memoranda to be served on counsel for all other parties in this matter via this Court's e-filing platform.

Dated April 18, 2025.

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