FILED
SUPREME COURT
STATE OF WASHINGTON
3/26/2025 4:15 PM
BY SARAH R. PENDLETON
CLERK

No. 103748-1

In the Supreme Court of the State of Washington

STATE OF WASHINGTON, PLAINTIFF-RESPONDENT

v.

META PLATFORMS, INC., FORMERLY DOING BUSINESS AS FACEBOOK, INC., DEFENDANT-PETITIONER

AMICUS CURIAE MEMORANDUM FOR NETCHOICE, CHAMBER OF PROGRESS, AND TECHNET IN SUPPORT OF PETITIONER META PLATFORMS, INC.

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INTRODUCTION AND IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Washington is one of just three States that require online platforms to monitor and disclose political advertising by their users. Within two business days of a request—from anyone, anywhere—such platforms must make a litany of disclosures about any ad remotely pertaining to Washington politics.

Washington stands alone among all 50 States, however, in imposing these requirements on online platforms without requiring their users both to notify the platforms when they post regulated ads and to provide the platforms with the information that must be disclosed to the State. It also stands alone in imposing ruinous fines—here, $30,000 per ad—for achieving anything less than perfect compliance.

Every other State achieves its interests in transparent online political advertising without burdening political speech so heavily. As these widespread practices confirm, the asserted interest here—"the need to timely inform the electorate about who is expending money to influence an election in our state and how that

money is being spent"—can be satisfied through disclosures from the advertisers rather than the platforms. Op.18. Whether subject to strict or exacting scrutiny, the law cannot withstand the First Amendment's demand that a law burdening political speech be "narrowly tailored to the interest it promotes." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021).

The State's demand that platforms make complex factual and legal judgments perfectly and almost instantaneously across millions of ads, on pain of draconian fines, has chilled core political speech and shut down forums for participation in the democratic process. Faced with the impossible task of perfect compliance, leading platforms—including Meta, Google, and Yahoo—have endeavored to avoid violating the law by banning Washington state political ads. If the disclosure requirements and enforcement mechanisms were reasonable, these platforms would willingly carry this vitally important speech—as they do in other States and for Washington federal elections—and Washington citizens could use the platforms to place low-cost ads.

Amici NetChoice, Chamber of Progress, and TechNet—leading not-for-profit trade organizations that promote innovation, free enterprise, and free speech on the internet—file this brief to urge this Court to grant review. The Court of Appeals' decision presents significant questions of law and issues of substantial public importance because it breaks with binding and persuasive precedent and chills core political speech. Ultimately, it is Washington citizens who suffer, because the State's law effectively precludes platforms from providing a cost-effective means for candidates and citizens to share their political views. The First Amendment does not permit Washington to pursue its interest through an overbroad law that shuts down an entire channel for core political speech and diminishes the voice of its citizens in Washington elections.

ARGUMENT

I. The Constitutionality Of Washington's Platform Disclosure Law Presents A Significant Question Of Law Because It Burdens Speech More Severely Than Any Other Disclosure Law Nationwide (RAP 13.4(b)(3)).

Meta has persuasively shown (Pet. 15-17) that Washington's Platform Disclosure Law imposes greater burdens on political speech than the Maryland law struck down in *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019). But it is far worse than that: Washington's extreme law imposes much greater burdens on digital political advertising than the law of any other State. This Court should grant review on the significant and important question of whether this outlier law complies with the First Amendment.

The vast majority of States—42—do not single out political advertising run on digital platforms for any regulation beyond that imposed on other media. *See* Victoria Smith Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 J. OF LEGIS. 81, 86 (2021).

The remaining States (except Washington) uniformly require the political ad buyer to take steps that make it far more feasible for self-serve platforms—some of which receive millions of posted ads daily—to comply. Three States (Colorado, Vermont, and Wyoming) prescribe additional regulations for online political advertisements, but require only posting certain disclaimers on those advertisements, such that all required information is found in the ad itself and can easily be viewed—without any formal request from voters or placing burdensome recordkeeping obligations on platforms. Colo. Rev. Stat. §§ 1-45-108.5(5), 1-45-108.3 (2019); Vt. Stat. Ann. tit. 17, § 2972; Wyo. Stat. Ann. § 22-25-110. Three other States—Virginia, California, and New York—use a candidate-based record-keeping model that typically requires ad buyers to notify a platform that they are posting a covered political ad, while providing platforms with "good faith" (or similar) exemptions from liability when ad buyers fail to provide the required notification. Va. Code Ann. § 24.2-960 Cal. Gov't Code §§ 84504.3, 84504.6; N.Y. Elec. Law 14-107-b

Finally, two other States—Maryland pre-*McManus* and New Jersey—use a commercial-advertiser-based model to impose disclosure requirements on platforms that provide online commercial advertising. Md. Code Ann., Elec. Law § 13-405(b); N.J. Rev. Stat. § 19:44A-22.3(d). Even these States' laws are less burdensome than Washington's, as they seek disclosure of less information, have shorter retention periods, restrict who may request information, require political ad buyers to self-identify, and permit platforms to rely in good faith on the self-identification.

Most importantly, all these States uniformly require ad buyers to disclose to the platform whether the posted ad is regulated, and they uniformly provide "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.

Washington's law contains none of these protections. Worse, anyone, anywhere can make requests for disclosures of covered ads as broad and vague as "any political ads related to 2019

elections in Washington state." CP7870. And Washington's law, as blessed by the Court of Appeals, comes with heavy-handed penalties of up to $30,000 per undisclosed ad. *See* Op.58-73. That too is unprecedented—the Maryland law in *McManus*, for example, authorized only injunctive relief. 944 F.3d at 514.

Washington thus stands alone in requiring such extensive disclosures of platforms and imposing such draconian penalties—its law is "truly exceptional." *McCullen v. Coakley*, 573 U.S. 464, 490 (2014). And where, as here, core political speech is at stake, the State must explain "what makes [Washington] so peculiar that it is virtually the only State to determine that such [disclosures and penalties are] necessary." *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214-215 (1989).

That every other State satisfies its interests through less burdensome means underscores that Washington has "too readily forgone options that could serve its interests just as well, without substantially burdening" speech. *McCullen*, 573 U.S. at 490.

Indeed, when a State stands alone in imposing burdensome requirements, that indicates that its asserted interest is at best "dubious." *Ams. for Prosperity*, 594 U.S. at 614. And even assuming, *arguendo*, that Washington law serves some compelling interest, the fact that Washington "is virtually the only State to determine that [its broad disclosure requirements and penalties are] necessary" forecloses the conclusion that Washington law is narrowly tailored to that interest. *Eu*, 489 U.S. at 214-15.

To take only the most obvious examples, Washington can obtain the very same information by either (1) relying on existing disclosures from the candidates and speakers themselves or (2) requiring those candidates and speakers to notify the platform when they buy regulated political advertising and then requiring the platform to disclose only what it learns from those disclosures. As the State's own expert admitted, if existing disclosures are insufficient or untimely, Washington can require "more" and "faster disclosure of information by campaigns or candidates." CP8364-65. To ignore these alternative channels and instead

burden third parties with no stake in the outcome of the elections is an unconstitutional means of pursuing greater transparency.

Indeed, Washington law already requires just before elections each ad sponsor to file a special report within 24 hours of the ad's publication. RCW 42.17A.260. This report must include the sponsor's and platform's contact information, a description (and the amount) of the expenditure, publication dates, and the candidate being supported or opposed. RCW 42.17A.260(1)-(3). As in *McManus*, the State has not "show[n] why the marginal value of the small amount of *new* information … justif[ies] the weighty First Amendment burdens imposed." 944 F.3d at 523 n.5.

Washington's massive penalties on platforms magnify the burden and chilling effect on speech. As one state legislator explained, "[a] Facebook ad can cost less than five dollars." CP7418. Yet the court below imposed a penalty of $30,000 *per ad*—over $24 million in total. That disproportionate penalty dwarfs candidates' own expenditures in the State's costliest statewide elections, such as the $5.5 million spent on the 2020

Attorney General race, and is orders of magnitude greater than the amounts spent on local elections.[1] Not surprisingly, platforms have voted with their feet, concluding that the costs of carrying Washington political ads far outweigh the benefits. *See* Eric Goldman, *The Constitutionality of Mandating Editorial Transparency*, 73 Hastings L.J. 1204, 1219-20 (2022) (discussing *McManus*'s conclusion that "campaign finance disclosures" laws like Maryland's "economically distort[] publishers' editorial decisions" and calling it "a false equivalency" to treat this "as just another business compliance cost").

In short, Washington's law is "truly exceptional" (*McCullen*, 573 U.S. at 490)—a "danger sign[]" that the law "fall[s] outside tolerable First Amendment limits." *Randall v. Sorrell*, 548 U.S. 230, 253 (2006) (plurality op.).

[1] https://www.pdc.wa.gov/political-disclosure-reporting-data/record-setting-campaigns#other%20statewide%20offices.

II. This Case Presents Issues Of Substantial Public Importance Because The Platform Disclosure Law Chills Core Political Speech And Restricts Participation In The Democratic Process (RAP 13.4(b)(4)).

Laws like Washington's Platform Disclosure Law pose special dangers. Restrictions on political speech, the cornerstone of democracy, are "especially suspect." *McManus*, 944 F.3d at 513. The State pretends that the law does not prevent or interfere with speech, but it is an inexorable economic fact that as burdens accumulate and "additional rules are created for regulating political speech, any speech arguably within their reach is chilled." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 334 (2010). As the Fourth Circuit observed in *McManus*, "when election-related political speech brings in less cash or carries more obligations than all the other advertising options, there is much less reason for platforms to host such speech." 944 F.3d at 516. And it has long been clear that "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

Thus, the law's ultimate burden falls not just on platforms (who are unable to host political ads that they welcome in 49 other States), but on Washington candidates, campaigns, and voters—whose interests the Court of Appeals categorically refused to consider. *See* Op.42 (refusing to consider burdens on "the free speech rights of upstart, grassroots candidates" and "the privacy interests of the purchaser and viewers of ads"). As Washington state legislators on both sides of the aisle have testified, these online ads are "often the most effective way for candidates and campaigns to communicate with voters and constituents" and "to raise money from individual donors." CP7410; *see* CP7410-14 (Rep. Stokesbary); CP7416-19 (Sen. Mullet). Online ads are "especially useful for local candidates and campaigns," as they allow for local targeting that TV, radio, and newspaper ads do not, and for non-incumbent challengers relying on "grassroots organizing and small individual donations." CP7412-13, 7417. These candidates and campaigns would advertise online if they could, but Washington law—by imposing impossible burdens and

ruinous fines on platforms—effectively bars that speech. The State supposedly wishes to promote transparency, but its law promotes only silence.

This Court has recognized that laws like these, which "inevitably favor[] certain groups of candidates over others," are "particularly problematic." *Collier v. City of Tacoma*, 121 Wash. 2d 737, 752 (1993). *Collier* involved a comparatively minor restriction on political speech: a municipal ordinance banning yard signs more than 60 days before an election. *Id.* The law here is not so time-limited: it chills speech 365 days a year, regardless of when the relevant election takes place. And it targets an exponentially more speech—online ads across the entire State—rather than yard signs in one locale. In a world where the First Amendment requires giving "the benefit of any doubt to protecting rather than stifling speech," this law cannot possibly survive First Amendment scrutiny. *Citizens United*, 558 U.S. at 327.

III. Recent Decisions of The United States Supreme Court And Ninth Circuit Confirm That This Case Presents Significant Issues of Law (RAP 13.4(b)(3)).

Legal developments since this case was briefed and argued below confirm the need for this Court's review. Just last July, the U.S. Supreme Court again underscored what has long been clear: that the "expressive activity" of internet platforms, just like that of other speakers, is protected by the First Amendment. *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024). When platforms make decisions about what third-party speech to "include and exclude, organize and prioritize," they are engaged in expressive activity no less than "[t]raditional publishers and editors." *Id.* at 716-17. Simply put, "'[w]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles' of the First Amendment 'do not vary.'" *Id.* (quoting *Brown v. Ent. Merch. Assn.*, 564 U.S. 786, 790 (2011)). The decision below brushed this principle aside, minimizing the First Amendment rights of online platforms because, in the Court of Appeals' view, online platforms are not like "newspapers and

[therefore lack] their unique and complex constitutional rights." Op.47. This Court should grant review to ensure that Washington courts apply the First Amendment with the same force in the digital world as they do in the print world.

Similarly, the Ninth Circuit's recent decision in *X Corp. v. Bonta*, 116 F.4th 888 (9th Cir. 2024) highlights the burdens imposed by Washington's law. In that case, the Ninth Circuit granted a preliminary injunction against a California law requiring online platforms to categorize and disclose their content moderation policies as bearing on enumerated content categories. *Id.* at 894. Washington law here likewise compels platforms to make difficult and potentially controversial judgments about whether third-party speech is "used for the purpose of appealing, directly or indirectly" for any support—financial or otherwise—in a Washington state electoral campaign. RCW 42.17A.005(40); *see also* Op.56 (explaining that the law requires platforms "plac[e] ads into 'political' and 'non-political' categories to facilitate future inspection or disclosure"). The Court of

Appeals glossed over this obvious First Amendment burden, instead focusing on how difficult it would be for Meta to design an algorithm and construct a system of human review capable of identifying Washington state political ads. Op.31-36. Although even that colossal task is far more burdensome than the court gave Meta credit for, the court erred in treating a fundamental constitutional flaw as a mere challenge of software engineering.

CONCLUSION

Amici respectfully request that the Court grant review.

I certify that this memorandum contains 2,475 words, in compliance with RAP 18.17(c)(9).

Respectfully submitted,

s/ Steffen N. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Amicus Curiae Memorandum for NetChoice, Chamber of Progress, and Tech-Net in Support of Petitioner Meta Platforms, Inc. to be served on counsel for all other parties in this matter via this Court's e-filing platform. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of March 2025 at Seattle, Washington.

s/ Tyre L. Tindall
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Counsel for Amici Curiae NetChoice, Chamber of Progress, and TechNet

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March 26, 2025 - 4:15 PM

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