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.

RESPONDENT STATE OF WASHINGTON'S ANSWER TO AMICI CURIAE MEMORANDA BY INSTITUTE FOR FREE SPEECH AND NETCHOICE, CHAMBER OF PROGRESS, AND TECHNET

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I. INTRODUCTION

Newspapers, TV stations, and others have long complied with Washington's Fair Campaign Practices Act, which requires advertisers to maintain certain records on political ads they accept and make those records available when requested by the public. The law treats digital communications platforms no differently. The parity in the State's law aligns with the position of Meta's CEO, Mark Zuckerberg, on disclosures for internet political ads: "If you look at how much regulation there is around advertising on TV and print, it's just not clear why there should be less on the internet."[1]

NetChoice, Chamber of Progress, and TechNet (Tech Amici) and the Institute for Free Speech (IFS) (collectively, Amici) criticize the FCPA as extreme, contending the law "single[s] out political advertising run on digital platforms" by

[1] Charles Riley, *This is the regulation Mark Zuckerberg wants for Facebook*, CNN BUSINESS (Mar. 22, 2018), https://money.cnn.com/2018/03/22/technology/regulation-political-ads-facebook-zuckerberg/index.html.

imposing regulation beyond what is imposed on other media and imposing requirements for intermediaries at all. Tech Amici Mem. 4; *see also* IFS Mem. 4. Amici are wrong. The FCPA holds digital communications platforms to a consistent standard as other mediums by requiring *all* commercial advertisers who have accepted political advertising to maintain records of those ads, including the exact nature and extent of the services rendered, and to make those records available upon request. *See* RCW 42.17A.345. And the FCPA appropriately distinguishes between information ad purchasers may have and information commercial advertisers themselves hold.

Amici's mischaracterizations of Washington's disclosure law and the record do not make this case worthy of review. Amici's contentions about the burdens of disclosure are untethered to the actual record in this case, in which Meta submitted no evidence about its purported burden and pointed only to the downstream effects of its own business decision to ban political ads in Washington. All judges who have looked at

the issue have correctly treated Meta's assertion as unsupported by the record, which instead amply showed Meta simply chose not to accept Washington political ads and comply with the FCPA based on its own business priorities.

Further, federal and state laws routinely require intermediaries to disclose information. And Amici do not acknowledge Meta has advocated for laws like the FCPA, collects information in its regular course of business but does not disclose it though required by the FCPA, and publicly shares much of the same information required by the FCPA in other jurisdictions.

The Court should deny review.

II. ARGUMENT

A. Washington Is Within Its Authority to Enact and Enforce the FCPA

Washingtonians engaged in the democratic process when they proposed and passed the FCPA to promote and ensure transparency in the funding and expenditures of Washington elections. Over 50 years ago, the State's citizens made clear that

the "public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." RCW 42.17A.001(10). The people explained, "full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17A.001(11).

The FCPA has imposed duties on all commercial advertisers from the law's beginning. *See* Laws of 1973, ch. 1, § 11 (reporting requirements). And in 1976, the Legislature adopted the recordkeeping and public inspection requirements at issue in this case for commercial advertisers. *See* Laws of 1976, ch. 112, § 5. So for decades, all commercial advertisers who accept political advertising have been expected to maintain documents and books of account for those advertisements open for public inspection during normal business hours. RCW 42.17A.345(1). The information includes "(a) [t]he names

and addresses of persons from whom it accepted political advertising or electioneering communications; (b) [t]he exact nature and extent of the services rendered; and (c) [t]he total cost and the manner of payment for the services." *Id.* Commercial advertisers must maintain these records open for public inspection "for a period of no less than five years after the date of the applicable election." *Id.*

The Public Disclosure Commission (PDC) has further adopted rules about the information that commercial advertisers must maintain and disclose as part of the "exact nature and extent of the services rendered," RCW 42.17A.345(1)(b), and how that information must be made available to the public. In 2018, the PDC clarified the information that commercial advertisers, including internet platforms, must maintain and disclose and provided flexibility in how that information may be provided to the public. WAC 390-18-050.[2] The rule permits disclosure by

[2] Citations to WAC 390-18-050 are to the 2018 version in effect when Meta received the requests at issue in this case.

digital transmission, such as email, by online publication, or on the PDC's platform if available. *Id.*

Commercial advertisers must make information regarding political advertising or electioneering communications available for inspection within 24 hours of the ad's initial distribution or broadcast, and within 24 hours of any update or change to such information. WAC 390-18-050(4). The information that advertisers must maintain for open inspection includes: the name of the candidate or ballot measure supported or opposed, whether the ad supports or opposes the candidate or ballot measure, the name and address of the sponsor actually paying for the ad, the ad's total cost or total cost and amount paid, and the dates the commercial advertiser rendered service. WAC 390-18-050(5)(a)-(d). For digital communications platforms, the exact nature and extent of the services rendered includes: a description of the demographic information of the audiences targeted and

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https://lawfilesext.leg.wa.gov/law/WACArchive/2018a/WAC%20390%20-%2018%20%20CHAPTER.pdf.

reached, but only to the extent this information is collected as part of the commercial advertiser's regular course of business, and the total number of impressions generated by the ad or communication. WAC 390-18-050(6)(g).[3]

Thanks in part to the FCPA, Washington's disclosure laws and enforcement are ranked the best in the nation. *See The State Campaign Finance Index 2022*, COALITION FOR INTEGRITY at 13 (June 21, 2022), https://www.coalitionforintegrity.org/wp-content/uploads/2022/06/The-State-Campaign-Finance-Index-2022-Full-Report.pdf.

Oher states have started to fill regulatory gaps by requiring disclaimers and disclosures for internet political ads following revelations that Russia attempted to influence the 2016

[3] The rule sets out the exact nature and extent of the services rendered by other advertisers too. For example, broadcast media must retain records of, and provide for inspection upon request, information like "[a]ir time and number of spot advertisements" and notations evidencing services provided like "copy writing, talent, production, and tape reproduction[.]" WAC 390-18-050(6)(c).

presidential election by buying and placing political ads on platforms like Facebook. States have enacted legislation to create or amend their existing laws to clarify disclosure and/or recordkeeping requirements for online political advertising related to state elections. *See* League of Women Voters COA Amici Br. 17-18. Some states, like Alaska, California, Colorado, Maryland, Nevada, New York, Vermont, Virginia, and Washington, have required sponsorship disclaimers for political ads placed online. *Digital Political Advertising: Disclosure and Recordkeeping Requirements*, CENTER FOR INFORMATION, TECHNOLOGY, AND PUBLIC LIFE, https://citapdigitalpolitics.com/?page_id=44 (Jan. 27, 2022). States have also established recordkeeping requirements, including California, Nevada, New Jersey, New York, and Washington. *See id.* For example, California requires online platforms to keep records about the ads they accept, including advertisements relating to candidates, which must include "[a] digital copy of the advertisement," the number of times the ad was viewed, "the date and time that the

[ad] was first displayed and last displayed," the candidate or ballot measure referenced in the ad, and the "name and identification number of the committee that paid for the advertisement[.]" Cal. Gov't Code § 84504.6(d). This information must be made available "as soon as practicable," and should be kept by the platform for at least four years. *Id.*

States are applying different disclosure models to address a modern but serious threat involving technology that can be and is used to target specific groups of people with specific, and often different, messages. Our federalist system of government contemplates differences between states' laws. That difference does not make Washington's law "dubious." Tech Amici Mem. 8 (quotation omitted). That Washington does it differently does not make this case worthy of review.

B. The FCPA Importantly Promotes Participation in the Democratic Process and Is Narrowly Tailored

Amici contend the FCPA's disclosure requirements chill speech but do not address how disclosure *promotes* voter

participation in the democratic process because they allow the public to get key information about who finances political messaging and who the messages are targeted towards. The FCPA firmly recognizes the importance for the public to know, through disclosures, the source of communications about politics—whether the source of information is the ad sponsor or the commercial advertiser.

The importance of the information covered by the FCPA, which the Court of Appeals recognized, is amply supported by the record. *See* Op. 18; CP6344-59, 6366-67, 6369-71, 6421-29. Information about sponsorship, targeting, and reach inform voters about a political ad's intent, meaning, and impact, including if the ad intends to mobilize or demobilize voters. *Id.* Digital advertising plays a particularly unique role because it can be tailored precisely and ephemerally to users based on private information platforms have collected on their users.[4] *Id.*;

[4] *See, e.g.*, David Gutman, *As capital gains tax goes to WA Supreme Court, a push to 'microtarget' justices*, SEATTLE TIMES

see Answer 14-15. Thus, targeting and reach, as well as other information required by the FCPA, allow the public to understand ads and contextualize that content in the marketplace of ideas.

1. The FCPA does not chill speech

Amici draw false comparisons between the FCPA's disclosure requirements and other laws that by their terms actually restricted speech. Amici's argument ignores that election-related disclosure requirements are treated differently from speech prohibitions precisely because they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. *Gaspee Project v. Mederos*, 13 F.4th 79, 85 (1st Cir. 2021); *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

Tech Amici invoke *Collier v. City of Tacoma*, 121 Wn.2d 737 (1993), to argue the FCPA is particularly problematic. But

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(Jan. 26, 2023), https://www.seattletimes.com/seattle-news/politics/as-capital-gains-tax-goes-to-wa-supreme-court-a-push-to-microtarget-justices/ (describing efforts by advocates to target online ads to this Court by location and interests).

the municipal ordinance at issue in *Collier* expressly limited political speech by restricting political signs in residential yards and public fora, like parking strips, to a 60-day campaign window before an election. *Id.* at 743. This Court thus held the ordinance was an invalid time, place, and manner restriction as-applied and observed that the sign restriction ordinance could benefit incumbents with name recognition over an underfunded challenger. *Id.* at 760. But here, the FCPA's recordkeeping and inspection requirements are not time, place, and manner speech restrictions; they are disclosure requirements considered "a less restrictive alternative" and subject to lesser standards of constitutional review. *Citizens United*, 558 U.S. at 369. To the extent an underfunded challenger is disadvantaged by Meta's decision to prohibit political ads in Washington, that is the downstream effect of Meta's own business decision to half-heartedly prohibit political ads—not the requirements or operation of the law.

Same too with Tech Amici's reliance on *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), which examined a California law that prohibited the official governing bodies of political parties from endorsing candidates in party primaries, thus burdening the right to free speech and association. *Id.* at 216. By contrast, the FCPA's record-keeping requirements for commercial advertisers do not prohibit any speech.

Likewise, the U.S. Supreme Court held that federal prohibition on corporate independent expenditures was an "outright ban" on speech that violated the First Amendment. *Citizens United*, 558 U.S. at 337. But in that same decision, the Court upheld disclaimer and disclosure requirements that, inter alia, required television electioneering ads to identify who was responsible for the content of advertising and display the name and address of the group that funded the ads. *Id.* at 366. The

Court explained, "disclosure is a less restrictive alternative to more comprehensive regulations of speech." *Id.* at 369.[5]

This is true even when disclosure requirements rest on a third-party intermediary, including one that hosts political advertising. *See McConnell v. FEC*, 540 U.S. 93, 234-37 (2003), *overruled in part on other grounds by Citizens United*, 558 U.S. 310 (upholding recordkeeping and public inspection obligation imposed on third party broadcasters under exacting scrutiny); *John Doe No. 1 v. Reed*, 561 U.S. 186, 191 (2010) (upholding requirement that compelled the state (a neutral third party) to produce referendum petition forms).

The FCPA's disclosure requirements gives Washington voters contextual information about the election-related

[5] Moreover, the FCPA's disclosure requirements are simply not comparable to the strict criminal liability statute against booksellers in *Smith v. California*, 361 U.S. 147 (1959), a statute allowing a state commission to compel book distributors from selling certain books in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and a regulation requiring cable operators to block content. *Contra* IFS Mem. 3.

messages they receive, like how they were targeted to see a political ad and who paid for that ad. This information, as well as other information required by the law, allow the public to understand the advertisements and engage with that content in the marketplace of ideas. The law acknowledges the importance of precisely this type of information, which provides the public "with the information with which to assess the various messages vying for their attention in the marketplace of ideas." *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 800 (2019).

Amici argue that Meta's business decision to ban Washington political ads shows the FCPA is overly burdensome. It bears emphasizing, however, that the record shows that Meta chose not to comply with the FCPA because it was inconsistent with its own stated priorities and preference for uniformity of laws. *See* CP663-64. For example, one way (though not the only way) Meta could comply with the FCPA is through its Ad Library by creating additional fields to display information it collects in the regular course of business (and thus required by the FCPA) not

currently in the Ad Library. Meta's reason for omitting this information is that it would conflict with Meta's goal to provide uniform information about political ads at a country—rather than state—level. *See* CP6654-55 (Meta 30(b)(6) witness explaining the Ad Library was set up "at the country level" and Meta's policies "were also initially intended to be at a country level").

2. The FCPA's requirements are not burdensome

IFS's arguments that the FCPA fails exacting scrutiny because its requirements for commercial advertisers are redundant with requirements for political candidates are simply not true. *Contra* IFS Mem. 13-14.

As the record below makes clear, political advertising sponsors (including the politicians Meta relied on at summary judgment below) often purchase advertising, particularly digital advertising, through intermediaries, brokers, and automated exchanges and may not have ready access to detailed information about particular advertisements. CP6723, 7115-16, 7212-20. And so while sponsors of Washington political ads have to

generally disclose political advertising expenditures to the PDC at regular intervals, those disclosures do not contain the same information required of digital commercial advertisers. CP6438-40, 6723-24, 7116, 7142-54, 7212-20, 5330-34. Nor do they keep pace with the instantaneous nature of digital advertising (particularly an issue spanning the weeks of Washington's vote by mail period). CP5289-90.

Amici point to the downstream effects of Meta's business decision to ban political ads in Washington to argue the FCPA is overly burdensome. But Meta's choice to not comply with the law is not the same as not being able to do so. Meta's own internal documents and testimony (its CR 30(b)(6) designee and other employees) confirmed that Meta chose not to comply with the FCPA because it was inconsistent with company priorities and because Meta would have to divert resources from other projects. CP6748-78, 6784, 6949-51, 6658-60, 6985, 6987, 6654-55, 6662-64. Meta never seriously evaluated or considered complying with Washington's laws, despite that doing so was

well within Meta's expertise and relatively inexpensive to implement. CP6990, 6929-51, 6954-57. No evidence supports the fundamental premise on which Meta's and Amici's arguments rest—by contrast, the State's experts provided unrebutted testimony explaining various ways in which Meta could easily comply with the law.

Amici argue that the disclosure law hurts small campaigns. Tech Amici Mem. 12; IFS Mem. 9. But none of the politician witnesses Meta presented below actually knew why Meta banned political ads in the State, whether there were alternatives, and if so, how Meta evaluated them. *See, e.g.*, CP6725-38 (admitting no personal knowledge why Meta announced the ban or other options Meta considered), 7138-41 (same), 7117-34 (same), 7021-22, 7025 (admitting no direct knowledge of why Meta announced ban and relying on Meta's own statements). Instead, the witnesses all relied on what Meta's lawyers told them, the demonstrably false narrative that Meta could not comply.

3. Meta is capable of complying with the FCPA

Amici fail to acknowledge that Meta's own ad policies and use of political advertisement categories in its Ad Library demonstrate that Meta already knows how to—and in fact does—identify political ads. Answer 18. Meta uses algorithms to identify the subject of the ads that run on their platform that then inform whether it will be included in the Ad Library, and under which category (*e.g.*, political, housing, employment, credit). CP5945, 5910-17, 606-07. For ads Meta identifies under the "issues, elections, or politics" category, the Ad Library digitally stores for seven years the ads and certain information about those ads. *Id.*

Because Meta's policies differ depending on the ad's subject matter and the ad's location, Meta's systems must first determine the type of ad and the geographic location that applies before adding the ad to the Ad Library. CP7317-25. The Ad Library displays different types of information for different types of ads in different locations. CP6995-97, 7327-28, 7339-48,

7366. Meta "proactively detect[s] or reactively review[s] possible social issues, electoral or political ads in 220+ countries" for compliance. CP7321-25. Meta's "ad review system is designed to review all ads before they go live." CP7334-37. And there is no dispute here that Meta has not disclosed information it retains as part of its ordinary course of business. *See, e.g.*, CP6633 (targeting), 6635 (cost and payment data), 6637, 6640 (reach), 6647 (impressions), 6642-45 (other categories not in Ad Library). But the fact that Meta's Ad Library already contains some information required by the FCPA—and Meta collects the remaining information in the ordinary course of business—shows that Meta could comply with the FCPA with ease. Instead, in open defiance of Washington law, Meta chooses to affirmatively redact and omit some of the required targeting information and sponsor information required under the law.

4. *McManus* is distinguishable

Finally, there are key differences between the law in *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), and

the FCPA that the Court of Appeals recognized but Amici's arguments elide. *See* Op. 44-47. The *McManus* court was particularly troubled by the Maryland law requirement mandating newspapers to publish information about political ads on their own websites. 944 F.3d at 518 ("Maryland's law intrudes into the function of editors and forces news publishers to speak in a way they would not otherwise.") (cleaned up). By contrast, Washington's law does not contain a publication requirement; advertisers may host that information if they choose to do so. *See* WAC 390-18-050(3) (setting out other methods to comply, including public inspection of records during regular business hours and electronic transmission).

When compared to a newspaper, especially a small one, any burdens of compliance differ significantly, particularly when nearly all of Meta's business is premised on collecting, analyzing, and selling huge amounts of the very information at issue here. Instead, newspapers in Washington favorably support the FCPA. *See* Editorial Board, *Don't let Facebook off the hook*

for political ad transparency, SEATTLE TIMES (Aug. 23, 2022), https://www.seattletimes.com/opinion/editorials/dont-let-facebook-off-the-hook-for-political-ad-transparency/ ("If the state's local newspapers, television stations and radio broadcasters — often operating with small staff on shoestring budgets — can faithfully carry out their responsibilities under the law, surely a company that employs more than 83,500 people and counts revenues by the billions can do the same.").

C. The Industry's Own Calls for Comparable Regulations and Compliance with Other Laws Belie Any Complaints About the FCPA's Purported Burdens

Tech Amici's complaints about the FCPA are particularly weak because some of their members, including Meta, have advocated for and applied laws like Washington's FCPA.[6] For example, Meta's founder has called for more regulation of

[6] Mark Zuckerberg, *Four Ideas to Regulate the Internet*, META (Mar. 30, 2019), https://about.fb.com/news/2019/03/four-ideas-regulate-internet/; Mark Zuckerberg, Facebook (Apr. 6, 2018), https://www.facebook.com/zuck/posts/10104784125525891.

political advertising, calling for the same kinds of transparency regulations applied to TV and print to also apply to the internet.[7] Meta has gone further to endorse the federal Honest Ads Act, *see* CP7269, which contains many of the same recordkeeping and inspection requirements set forth in Washington's laws.[8]

Tech Amici's burden arguments are further undermined by their partner companies coming into compliance with other jurisdictions' disclosure laws for digital ads. Meta has changed or tailored its Ad Library in other countries to comply with specific legal requirements (*e.g.*, Canada and India). CP5931, 5933-36, 6289-91.

And in 2023, companies like Meta and Google announced their compliance with the European Union's recent law—the

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[7] *Supra* n.1.

[8] Honest Ads Act, S. 1356, 116th Cong. § 8 (1st Sess. 2019), https://www.congress.gov/bill/116th-congress/senate-bill/1356/text (requiring online platforms make available for public inspection a copy of the advertisement, description of audience targeted, number of views, date first and last displayed, name of candidate or legislative issue, name of the purchaser, and average rate charged).

Digital Services Act—which regulates online platforms' policies on advertising, transparency, and content moderation. Specific to disclosure, online platforms that display advertising on their interfaces must ensure that the recipients of the service can identify, for each specific advertisement displayed to each individual recipient, in a clear and unambiguous manner and in real time:

> (a) that the information is an advertisement, including through prominent markings[;]
> (b) the natural or legal person on whose behalf the advertisement is presented;
> (c) the natural or legal person who paid for the advertisement if that person is different from the natural or legal person referred to in point (b);
> (d) meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.

Digital Services Act, art. 26 L 277/59 (2022), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32022R2065. The Act is not limited to political ads.

Instead of withdrawing from the digital advertising market in the EU, Meta announced its efforts to provide ad transparency to comply with the Digital Services Act. Meta has expanded its Ad Library "to display and archive *all* ads that target people in the EU, along with dates the ad ran, the parameters used for targeting (e.g., age, gender, location), who was served the ad, and more." Nick Clegg, President, Global Affairs, *New Features and Additional Transparency Measures as the Digital Services Act Comes Into Effect*, META (Aug. 22, 2023), https://about.fb.com/news/2023/08/new-features-and-additional-transparency-measures-as-the-digital-services-act-comes-into-effect/.[9]

[9] Google likewise expanded its Ad Transparency Center to meet the Act's requirements. Laurie Richardson & Jennifer Flannery O'Connor, *Complying with the Digital Services Act*, GOOGLE (Aug. 24, 2023), https://blog.google/around-the-globe/google-europe/complying-with-the-digital-services-act/.

Meta's willingness and ability to conform to the ad transparency laws of other jurisdictions undercuts its and Tech Amici's arguments that the FCPA is unduly burdensome.

D. The Penalty Is Amply Supported by the Record and Does Not Merit This Court's Review

Finally, Tech Amici paint the penalty imposed against Meta as extreme and unjustified, but this is untethered from the law and the record. Tech Amici gloss over Meta's culpability and sophistication and ignores that the FCPA gives courts discretion to impose penalties and fashion relief that account for the nature and context of the violation. *See* Answer 24-29. The trial court's penalty is firmly rooted in Meta's misconduct as a flagrant, repeat, and intentional violator of the law and supported by this Court's precedent.

III. CONCLUSION

The Court should deny Meta's petition for review.

This document contains 4,000 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 18th day of April 2025.

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 18th day of April 2025, at Tacoma, Washington.

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