No. 84661-2

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellee,

vs.

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

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This case concerns a novel and burdensome disclosure requirement that has suppressed political speech in this state, stifled the emergence of small campaigns, and failed to serve the State's purported interests. RCW 42.17A.345 and its implementing regulation, WAC 390-18-050 (collectively, the "Platform Disclosure Law"), require "digital communication platforms" to disclose massive amounts of information about state and local political advertisements on an expedited timeframe under threat of millions of dollars in penalties for non-compliance. Unlike every other disclosure law that the Supreme Court has endorsed, this law imposes those burdens not on political speakers or candidates, but on digital platforms that display and disseminate political speech. The only other appellate court to have considered a similar law struck it down as violating the First Amendment, recognizing the severe impacts such a law can have in shutting off entire platforms for political speech. *See Washington Post v. McManus*, 944 F.3d

506 (4th Cir. 2019). This Court should reach the same conclusion: The Platform Disclosure Law violates the First Amendment, and therefore the State's claims against Appellant Meta Platforms, Inc. ("Meta") should have been rejected.

At its core, the Platform Disclosure Law requires digital platforms (such as Facebook, Twitter, YouTube, TikTok, *etc.*) to provide any member of the public who demands it a litany of (often private and sensitive) information about political advertisements that appear on their services, including the name and address of the payor, the payment method used, the amount paid, detailed demographic information about the audiences the advertiser targeted and reached, and the number of "impressions" generated—in no more than two business days of receiving the request. Platforms must make those rapid disclosures 365 days a year, while the actual speakers—political advertisers—are subject to similar requirements only during the few weeks before an election. Under the State's interpretation of the law, a requester does not have to be a Washington citizen (even Russian

or Chinese government operatives could invoke its provisions); does not have to identify herself (anonymous requests must be complied with); does not have to identify specific ads (a requester can ask for every political ad shown to anyone in Washington in the last five years without more specificity); and can seek the information for any purpose (including targeting or harassment of the speakers). Platforms must turn over the requested information no questions asked. And if they fail to do so within two business days, they face potential fines of $10,000 (and sometimes $30,000) *per advertisement* at issue, meaning that potential penalties can easily run into the millions or tens of millions of dollars.

Given the breadth of the State's law, it is no wonder that major platforms for digital advertising services have been unable to comply and have closed their platforms for political speech in Washington. Appellant Meta was among those impacted directly. Although Meta (which operates Facebook) already voluntarily provided much of the information the law requires 24

hours a day in its online Ad Library, the remaining disclosures required by the Platform Disclosure Law were so impractical and burdensome that Meta ultimately chose to ban all state and local political advertising in Washington from its services. Other digital platforms, including Google and Yahoo, have enacted similar bans, closing off entire channels of communication for core political speech. The record shows that the loss of digital political advertising in Washington has tilted the playing field in favor of certain political speakers—including big-money campaigns and incumbents. Small, upstart challengers who rely on inexpensive digital advertising to efficiently and effectively spread their messages have been left with no other avenue.

Instead of narrowing its law, the State sued Meta for failing to timely provide all the required disclosures for advertisements posted on Meta's services in violation of Meta's policies. Holding that Meta had intentionally violated the Platform Disclosure Law 822 times for failing to respond to 12 requests covering 411 ads (which the Court counted twice across

the 12 requests), the Superior Court granted summary judgment for the State and levied a $24-million-plus penalty.

For two independent reasons, the Superior Court's grant of summary judgment cannot stand.

First, the Platform Disclosure Law violates the First Amendment. The only comparable disclosure law—a Maryland law that imposed *fewer* burdens than Washington's—was struck down under the First Amendment. *McManus*, 944 F.3d 506. Washington's Platform Disclosure Law similarly imposes impermissible burdens on core political speech and should be invalidated. The law does not serve the State's claimed interests in exposing corruption and foreign election interference. Indeed, it is difficult to see how knowing some of the required disclosures—*e.g.*, whether a payment was made by debit or credit—could do so. Nor are the law's heavy burdens justified; much of the information it requires is already available through other means, such as disclosures by the speakers themselves. There are numerous ways in which the Platform Disclosure Law

could be made meaningfully less burdensome for platforms without compromising the State's claimed interests—and without the associated collateral damage to political speech in Washington State. Under binding First Amendment doctrine, the availability of those less-burdensome alternatives—combined with the heavy burdens the law imposes on core political speech—requires that the law be struck down.

Second, the Platform Disclosure Law is preempted by Section 230 of the federal Communications Decency Act ("CDA"). Section 230 expressly preempts any laws that treat platforms as publishers of content on their services—and the Platform Disclosure Law expressly applies *only* to platforms that publish content. The Platform Disclosure Law also requires Meta to review third-party content posted on its services or face liability, because a platform cannot make the required disclosures about Washington political ads unless it monitors its site for those ads. Such a mandatory review requirement triggers the CDA's preemption provisions.

Even if the Platform Disclosure Law could stand (it cannot), the Superior Court's penalty was wildly off-base. Skating past the plain text, the Superior Court held that Meta had violated the Platform Disclosure Law every time it failed to produce information about an *individual advertisement*, even though the statute and regulation speak only of the requirement to respond to *requests*, and even though the staff of the Public Disclosure Commission ("PDC") itself—the agency charged with interpreting and administering the law—had previously opined that violations should be imposed *per request* and not *per ad*. The Superior Court held that Meta had failed to produce data about 411 ads twice over. The Superior Court's flawed penalty determination thus inflated the violations at issue from 12 violations to 822 violations, penalizing Meta twice over for each ad at issue. The Superior Court then imposed the $30,000 statutory maximum for each violation ($10,000, trebled), despite many mitigating factors pushing the penalty to the bottom of the statutory range, including Meta's undisputed timely production

of many of the required categories of information, cooperation with the PDC's investigation, and demonstrated commitment to election transparency in Washington State.

The Court should reverse the Superior Court's grant of summary judgment and direct the court to enter summary judgment for Meta. In the alternative, the Court should reverse the Superior Court's judgment and order it to reduce the penalty.

II. STATEMENT OF THE CASE

This case concerns a statute, RCW 42.17A.345, and a regulation, WAC 390-18-050, that require "digital communication platforms" like Meta to make a host of disclosures about Washington "political advertising" and "electioneering communications" that third parties place on the platforms' services. Platforms must disclose roughly 10 pieces of information about a given ad, including: "[t]he name of the candidate" supported; a copy of the ad; the name and address of the payor, "including the federal employer identification number, or other verifiable identification, if any, of an entity"; the "total

cost"; the amount paid; the date of payment; the method of payment; dates that the advertiser "rendered service," including dates the ad was shown to the public; "demographic information … of the audiences targeted and reached"; and "the total number of impressions" the ad generated. WAC 390-18-050(6)-(7). Platforms must make those disclosures 365 days a year, within two business days of receiving any request. WAC 390-18-050(4)(b)(i). And platforms must respond to requests from anyone, anywhere in the world, regardless of the purpose for which the request was made and regardless of whether the requester identifies themselves.

Washington's Platform Disclosure Law is an outlier. Only one other state (Maryland) has attempted to subject platforms to disclosure requirements anywhere near as burdensome as Washington's. And Maryland's law was struck down as inconsistent with the "most basic First Amendment principles." *McManus*, 944 F.3d at 523.

The Platform Disclosure Law has also effectively closed

off a crucial avenue for political advertising in Washington. Because the burdens imposed by the Platform Disclosure Law are so onerous and unrealistic, some of the most popular digital platforms in the country—including those operated by Meta, Google, and Yahoo—have taken the extraordinary step of banning all Washington political ads from their platforms. CP7449-50; https://adspecs.yahooinc.com/pages/policies-guidelines/yahoo-ad-policy. The direct result of the Platform Disclosure Law, therefore, has been to reduce the amount and vitality of political discourse in Washington. Political actors in the state—particularly small-dollar and upstart campaigns who rely on cheaper digital advertising to spread their message—have been deprived of a critical means for reaching voters. And for no good reason: The State's interests in promoting transparency and preventing corruption are more than adequately served by other disclosure laws that apply to political candidates and ad sponsors.

Although Meta has banned Washington political ads,

some users chose to ignore the ban and ran those ads anyway. (Meta's advertising technology—like that of almost every other modern digital platform—is self-service, meaning that users can place ads without interacting with anyone before the ad is placed and run. CP7452.) Meta has processes and procedures in place to prevent unauthorized ads, but because of the self-service nature of digital advertising and the number of candidates and causes participating in any given Washington election cycle (almost 7,000 in 2020, CP7076), some ads slipped through the ban and made it onto Meta's services. Even though Meta received no notice when users posted those prohibited ads, Meta's technology made certain information about those ads immediately available in Meta's Ad Library, a publicly accessible ad repository. *See* CP7452-53. And Meta provided more information about Washington political ads in response to individual requests under the Platform Disclosure Law. *E.g.*, CP7593; CP8117; CP8155. That said, Meta could not practicably provide all the information required by the Platform

Disclosure Law in the required timeframe on request.

Despite perfect compliance with the Platform Disclosure Law being impossible, Washington sued Meta for failing to completely and timely comply with 12 alleged requests. CP247-318. Those requests were made by just three individuals (Tallman Trask, Eli Sanders, and Zach Wurtz), none of whom sought information to inform their vote—which is the core purpose the Platform Disclosure Law aims to serve. *See* CP8060-72 (request from Mr. Trask made to test Meta's compliance); CP7580-82 (request from Mr. Sanders made to report on Meta's compliance); CP38-50 (repeated requests from Mr. Wurtz made to secure data for political-consulting business). Cumulatively, the 12 requests sought information about 411 separate Washington political ads, each of which was the subject of multiple requests. *See* CP5573-74.

In defense, Meta raised two arguments relevant here. *First*, Meta argued that the Platform Disclosure Law violated the First Amendment. Meta's position was that the Platform

Disclosure Law was a content-based regulation that compelled political speech and thus warranted strict scrutiny several times over. In the alternative, Meta contended that the Platform Disclosure Law could not survive even exacting scrutiny because it was not narrowly tailored to a sufficient governmental interest. *Second*, Meta argued that the Platform Disclosure Law was preempted by Section 230 of the CDA. 47 U.S.C. § 230.

The Superior Court rejected both arguments. In an oral ruling, the court held that the Platform Disclosure Law was subject to, and survived, exacting First Amendment scrutiny. Verbatim Report of Proceedings ("Rep. Procs.") 30:5-8. That holding was based on the court's understanding—supported not by any undisputed facts in the record, but only by the State's purported expert's ipse dixit—that "Meta is already collecting" all the information it must disclose under the Platform Disclosure Law and thus compliance would be as easy as "essentially press[ing] a button." *Id.* at 31:16-32:8. The court also held that the Platform Disclosure Law was not preempted by Section 230

because this case is not about "defamation" but rather about "disclosure," *id.* at 42:23-43:6, a curious distinction with no basis in law or fact. As to the number of violations at issue, the court ordered the State to "submit a new order that's restricted to it being based on requests." *Id.* at 62:21-63:8.

Nonetheless, the court's written order held that the 12 requests at issue generated 822 violations, even though many of the supposed violations duplicated across each of the requests; that each of the 822 violations should be penalized at the maximum of the $0-$10,000 statutory range; and that each of those violations were intentional (despite Meta's political ad ban in Washington State) and should therefore be trebled. CP5574, CP5576, CP5784. It ultimately fined Meta $24,660,000 and awarded the State costs and fees of $10,522,159.59 ($3,507,386.53 trebled) for a total of $35,182,159.59. CP5783; CP5816. Without any statutory basis to do so, the court also entered an injunction requiring Meta to "come into full compliance" with the Platform Disclosure Law—and certify

such compliance to the court—within 30 days of final judgment. CP5785-86. Meta filed a notice of appeal on October 28, 2022. CP5788-813.

Meta subsequently moved to stay the Superior Court's injunction pending appeal. Commissioner Koh granted Meta's motion, finding that the First Amendment and Section 230 arguments at issue were "debatable" and that the balance of the equities favored a stay, including because the Superior Court's injunction "explicitly impose[d] duties beyond the statute." Commissioner's Ruling Granting Emergency Mot. for Stay 6-7. The State moved to modify that ruling, asking this Court to reimpose the Superior Court's injunction. This Court affirmed the stay.

III. STANDARD OF REVIEW

This Court reviews the trial court's conclusions of law on summary judgment de novo. *O'Dea v. City of Tacoma*, 19 Wn.App. 2d 67, 79, 493 P.3d 1245 (2021). Summary judgment is proper where no genuine issue of material fact exists and the

moving party is entitled to judgment as a matter of law. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009); CR 56(c). The Court reviews penalty assessments for abuse of discretion. *See O'Dea*, 19 Wn.App. 2d at 79.

IV. ARGUMENT

For two separate reasons, this Court should reverse. To start, the Platform Disclosure Law violates the First Amendment. As the Fourth Circuit put it in *McManus*, disclosure requirements imposed on platforms for speech (in contrast to disclosure requirements imposed on political candidates or speakers) simply "burden[] too much and further[] too little, and this one-sided tradeoff falls short of what the First Amendment requires." 944 F.3d at 523. The Platform Disclosure Law also is preempted by Section 230 because—by letter and by practice—it seeks to hold Meta liable for content that third parties post on Meta's services. Either way, the law fails.

Even if the Platform Disclosure Law could survive, the Superior Court's penalty cannot. The statute and regulation

impose liability based on failure to respond to *requests*, not failure to produce information about any given *ad*. And, if anything, the record supports only a penalty at the very bottom of the statutory range, rather than the statutory-maximum penalty imposed by the Superior Court.

A. The Platform Disclosure Law Violates the First Amendment.

The First Amendment strongly disfavors laws that reduce "the quantity and diversity of political speech." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam). That is precisely what the Platform Disclosure Law does. The Platform Disclosure Law places heavy burdens on online platforms if and only if they carry Washington political ads. Given the heavy penalties imposed by the Platform Disclosure Law and the near-impossibility of compliance, the natural response to the law is for digital platforms to stop carrying political ads in this state. Indeed, that is exactly what several operators of the platform—including Meta, Google, and Yahoo—have done. CP7449-50; https://

adspecs.yahooinc.com/pages/policies-guidelines/yahoo-ad-policy. There can be no dispute that a law directly prohibiting platforms from carrying Washington political ads would violate the First Amendment. It makes no difference that the Platform Disclosure Law produces that same unconstitutional result by different means.

1. *McManus* invalidated a similar law, even though that law placed substantially lighter burdens on platforms.

The Fourth Circuit's decision in *Washington Post v. McManus*, 944 F.3d 506 (2019), explains why the Platform Disclosure Law is unconstitutional. Just like the Platform Disclosure Law, the Maryland law in *McManus* required "online platforms" to make disclosures about political ads that appeared on their sites. *Id.* at 511-12, 514. A group of news outlets subject to the law challenged it under the First Amendment. *Id.* at 512. In striking down the law, the Fourth Circuit acknowledged that some disclosure laws are constitutional. *Id.* at 516. But the court saw the challenged law as "different in kind" because it

"burden[ed] *platforms* rather than political actors." *Id.* at 515. The court reasoned that, where disclosure laws burden political candidates or speakers, the "burdens … posed by [the] disclosure obligations" are "generally offset[], at least in part" by the political actors' "organic desire to succeed at the ballot box." *Id.* at 516. But platforms, the court found, have no comparable interest offsetting the burdens posed by disclosure laws. *Id.* at 516-17. Thus, platforms are likely to respond to disclosure laws by banning political speech from their sites entirely—a "foreclos[ure of] channels for political speech" that "'necessarily reduce[s] the quantity of expression.'" *Id.* at 517 (quoting *Buckley*, 424 U.S. at 19). Because the Maryland law would reduce political speech—a cardinal First Amendment sin—the Fourth Circuit invalidated the law as inconsistent with the "most basic First Amendment principles." *Id.* at 523.

McManus's logic applies with even greater force here because the Platform Disclosure Law places heavier burdens on platforms and thus is more likely to result in closing off avenues

for political speech in the form of political ads. Most significantly, the Platform Disclosure Law requires a platform to review every ad posted on its site to identify the ones that meet the Platform Disclosure Law's definitions of "political advertising" or "electioneering communication[]." WAC 390-18-050(3)-(4). Those definitions are nuanced. "Political advertising" covers any ad "used for the purpose of appealing, directly *or indirectly*, for votes or for financial *or other* support or opposition in any election campaign." RCW 42.17A.005(40) (emphases added). And "[e]lectioneering communication" covers any ad that "[c]learly identifies a candidate," with or "without using the candidate's name," subject to a laundry list of exceptions. RCW 42.17A.005(21). Given this nuance, determining whether an ad meets those definitions often requires not just initial screening by an algorithm, but also subsequent human review. Before the Superior Court, Meta presented evidence that it uses both automated and human review to identify Washington political ads on its sites. CP7567-69. Meta

also presented evidence about just how burdensome those multiple layers of review are for Meta given the *millions* of ads that appear on Meta's sites at any given time. CP7073-93; CP7875. And that is with Meta's ad ban in place: Without the ban, there would undoubtedly be many more Washington political ads on Meta's services, and thus the burdens of reviewing those ads would be even greater.

The massive burden of reviewing every ad on a website to determine which ones are covered political ads was entirely absent in *McManus*. Under the Maryland law, ad sponsors were required to provide notice when they posted a covered political ad, Md. Code Ann., Elec. Law § 13-405(a)(1) (effective July 1, 2018), and platforms were required to make disclosures only if they received such notice, *id.* § 13-405(b)(1). Thus, platforms did not need to review the ads posted on their sites to identify the ones covered by the Maryland law. Ad sponsors did that heavy lifting for them.

There are several other ways in which the Platform Disclosure Law is substantially more burdensome than the Maryland law in *McManus*. For one thing, the Platform Disclosure Law requires disclosures for five years after an election, as compared to only one year under the Maryland law. *Compare* WAC 390-18-050(3), *with* Md. Code Ann., Elec. Law § 13-405(b)(3)(ii) (effective July 1, 2018). The Platform Disclosure Law also requires that more categories of information be disclosed than did the Maryland law. *Compare* WAC 390-18-050(6), (7)(g) (requiring disclosure of roughly ten pieces of information), *with* Md. Code Ann., Elec. Law § 13-405(b)(6) (effective July 1, 2018) (requiring disclosure of, at most, four pieces of information).

Moreover, some of the additional information required by the Platform Disclosure Law has privacy implications for both purchasers and viewers of ads. The Platform Disclosure Law requires platforms to reveal ad sponsors' addresses, regardless of whether the addresses lead to a business or a personal home.

WAC 390-18-050(6)(c). It also requires platforms to reveal "location" information for "the audiences targeted and reached" by an ad in whatever form the platform collects that information "as part of its regular course of business." WAC 390-18-050(7)(g). The location information Meta collects pursuant to its terms and policies can sometimes place users who viewed an ad within "a mile or two" of a given address. CP7994-95. Thus, for example, if a Meta user views an ad, the location information Meta is required to disclose could pinpoint the mile-or-two radius within which that user lives. Meta has a strong First Amendment interest against being compelled to utter speech that could have such significant effects on user privacy. *Cf. Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2387-88 (2021) (striking down a law that raised "privacy concerns" by requiring charities to disclose "sensitive donor information").

Below, the Superior Court disregarded the burdens associated with the required disclosures, reasoning, again, on no undisputed facts on the record and only a supposed expert's say-

so, that "Meta is already collecting" the necessary information and thus Meta could comply by "essentially press[ing] a button." Rep. Procs. 31:16-32:8. As an initial matter, that discounts substantial record evidence of how burdensome it is for Meta to compile, review, and disseminate information in response to a request. CP7073-93; CP7447-53. More importantly, the Superior Court seemed to assume that Meta's economic costs of compliance were the only burdens relevant to the First Amendment analysis. That is incorrect: Users of Meta's services have a First Amendment interest in not having their private information disclosed, and Meta has a corollary First Amendment interest in not disclosing that information. *See Bonta*, 141 S.Ct. at 2388-89.

Finally, the potential penalties under the Platform Disclosure Law are much more severe than under the Maryland law. A platform can be fined up to $10,000 for each violation of the Platform Disclosure Law. RCW 42.17A.750(1)(c). A platform can also be forced to pay the State's costs, including

attorney's fees. RCW 42.17A.780. And if a court determines that a platform intentionally violated the Platform Disclosure Law, then both the fine and the costs-and-fees award can be trebled. *Id.* That means that very substantial penalties can be imposed in Washington, particularly if the Court were to conclude (incorrectly, in our review), that each *political ad* constitutes a separate violation, rather than each responded-to request. By contrast, the Maryland law did not provide for *any* monetary liability *at all* for platforms, at least until after a platform had violated an injunction requiring removal of an ad. Md. Code Ann., Elec. Law §§ 13-405.1(b), 13.605(b) (effective July 1, 2018).

Beyond the difference in the burdens placed on platforms, there is another reason why *McManus*'s logic applies with even greater force here: The Platform Disclosure Law not only reduces political speech but *disproportionately* reduces the political speech of certain speakers. A regulation of speech "is particularly problematic" if it "favors certain groups of

candidates over others." *Collier v. City of Tacoma*, 121 Wn.2d 737, 752, 854 P.2d 1046 (1993). Just like the regulation at issue in *Collier*, the Platform Disclosure Law favors well-funded candidates (often incumbents) over less well-funded candidates (often challengers). *Id.* Advertising on digital platforms like those offered by Meta is cheaper than other forms of advertising. CP7412; CP7418. It also allows candidates to use advertising funds more efficiently because Meta can better direct ads to the voters that candidates most want to reach. CP7417-18. Both of those concerns—cost and efficiency—are more important to candidates who are less well-funded and lack name recognition (such as non-incumbents). CP7432-33; CP7683. Thus, the Platform Disclosure Law does not just reduce political speech; it disproportionately reduces the political speech of challengers, thereby contributing to political stagnation.

In its stay briefing before this Court, the State tried—and failed—to distinguish *McManus* on two grounds. The State first argued that Meta lacked evidence that it was as burdened by the

Platform Disclosure Law as the *McManus* plaintiffs had been by the Maryland law. State's Mot. to Modify Commissioner's Ruling 33-34. Nonsense. As just explained, Meta presented evidence that it was far *more* burdened than the *McManus* plaintiffs. The more-severe burdens imposed by the Washington law are also apparent from comparing the text of the two statutes, in particularly the severe monetary penalties that apply in this state and are nowhere to be found in the Maryland law. The State simply has it backward: The Maryland law was demonstrably significantly *less* burdensome for platforms, and the Fourth Circuit still stuck the law down.

The State also sought to distinguish *McManus* on the ground that it expressly limited its holding to platforms run by "newspaper[s]" as opposed to those run by "social media compan[ies]." State's Mot. to Modify Commissioner's Ruling 32. That is a distinction without a difference. The core logic of *McManus* is that disclosure laws that burden platforms are very likely to result in platforms banning political ads from their

sites—a "foreclos[ure of] channels for political speech" that the First Amendment cannot tolerate. 944 F.3d at 517. That logic applies equally to all platforms—those run by newspapers and those run by digital platforms alike. *McManus* itself recognized as much, pointing out that the Maryland law had caused Google to ban political ads. *Id.* at 516-17. Thus, *McManus*'s reasoning plainly extends to platforms like Meta.

2. The Platform Disclosure Law is subject to—and cannot survive—strict scrutiny.

The First Amendment principles that drove the decision in *McManus* compel the same result here. To start, the Platform Disclosure Law triggers strict scrutiny several times over. *First*, the Platform Disclosure Law is a content-based regulation of speech since it "applies to particular speech because of the topic discussed"—namely, Washington politics. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Content-based regulations are subject to strict scrutiny. *Id.* at 163-64.

Second, the Platform Disclosure Law "[m]andat[es] speech that a speaker would not otherwise make"—namely, the many disclosures required by the law. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). Regulations that compel speech are also subject to strict scrutiny. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S.Ct. 2361, 2371 (2018).

Third, the Platform Disclosure Law regulates political speech. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley*, 424 U.S. at 14. For that reason, "the importance of First Amendment protections is 'at its zenith'" where political speech is concerned. *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (citation omitted). That is why "[l]aws that burden political speech are 'subject to strict scrutiny,'" whether they do so "by design or inadvertence." *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citation omitted).

Below, the State did not contest that the Platform Disclosure Law targets speech based on its content, compels speech, and burdens political speech. *See* CP5273. Nor did the State contest that any one of those three features generally subjects a law to strict scrutiny. *See id.* Instead, the State tried to situate the Platform Disclosure Law within an exception to strict scrutiny that both the U.S. and Washington Supreme Courts have drawn around certain campaign disclosure laws. CP5272-73. Laws that fit within the exception are subject to the lesser (but still demanding) standard known as exacting scrutiny. *See, e.g.*, *Citizens United*, 558 U.S. at 366-67; *State v. Evergreen Freedom Found.*, 192 Wn.2d 782, 798-99, 432 P.3d 805 (2019).

The Platform Disclosure Law does not fit within that exception. The logic behind the exception is that, as compared to other laws regulating political speech, disclosure laws are less likely to reduce the quantity and diversity of such speech. *See, e.g.*, *Citizens United*, 558 U.S. at 366-67 (explaining that disclosure laws are subject to exacting scrutiny because "they

'impose no ceiling on campaign-related activities' and 'do not prevent anyone from speaking'" (citations omitted)); *Evergreen Freedom Found.*, 192 Wn.2d at 798-99 (same). That logic holds where a disclosure law burdens political actors because their "organic desire to succeed at the ballot box" will "generally offset[], at least in part, whatever burdens are posed by disclosure obligations." *McManus*, 944 F.3d at 516. But the logic does *not* hold where a disclosure law burdens third-party platforms because they have no comparable interest offsetting the burdens imposed by the law. *Id.* at 516-17. Third-party platforms will therefore likely respond to disclosure laws by banning political speech from their sites—which not only silences *select* speakers (the worst effect a normal disclosure law might have) but silences *all* speakers who might otherwise use the sites. In short, the rationale for excepting certain disclosure laws from strict scrutiny—that those laws are unlikely to keep many, if any, from speaking—does not extend to disclosure laws that burden third-party platforms.

Below, the State argued that the U.S. Supreme Court has already decided the question by applying exacting scrutiny to disclosure laws that burden third parties. CP5273-74. But the State cited just two cases, both of which are easily distinguishable. The State's first case—*McConnell v. FEC*, 540 U.S. 93 (2003)—does not even involve true disclosure requirements, only recordkeeping requirements. *Id.* at 233-34. More importantly, those requirements were imposed against broadcasters, *id.*, which have for decades been subject to unique and less-stringent First Amendment requirements given the scarcity of available broadcast spectrum. There is virtually no risk that a broadcaster will respond to disclosure requirements by banning political speech from its airwaves. That is because a broadcaster is a government licensee who, consistent with the First Amendment, can be required to carry political speech or else have its broadcast license revoked and assigned to another broadcaster who will perform that public service. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 393-94 (1969). Disclosure

laws that burden broadcasters are much less likely to close off channels for political speech than are disclosure laws that burden platforms like Meta. So while the former are subject to exacting scrutiny, the latter must be subject to strict scrutiny.

The State's other case—*John Doe No. 1 v. Reed*, 561 U.S. 186 (2010)—is even further afield. There, the supposed "third party" burdened by the disclosure requirements was the State of Washington itself. *Id.* at 192-93. A state will not seek to evade disclosure requirements—requirements that, by definition, the state has imposed against itself—by banning political speech. *Reed* proves the point: There, the state *defended* the disclosure requirements against a challenge brought by Washingtonians whose information would be disclosed. *Id.* at 193. The risk of the state banning political speech was especially remote on the facts of *Reed*. The question there was whether the state could be required to disclose the names and addresses of Washingtonians who had signed referendum petitions. *Id.* at 191. There was no risk whatsoever that the state would eliminate the referendum

process to avoid that disclosure requirement because the referendum process was guaranteed by the Washington Constitution. Wash. Const. art. II, § 1(b). In short, states (and particularly the State of Washington in *Reed*) are much less likely than private platforms to close off channels for political speech in response to disclosure laws. Thus, while disclosure laws that burden states are subject to exacting scrutiny, disclosure laws that burden private platforms must be subject to strict scrutiny.

The Platform Disclosure Law does not come close to surviving strict scrutiny. Strict scrutiny requires a law to be "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). As explained immediately below, the Platform Disclosure Law is not sufficiently tailored to sufficiently important governmental interests to survive even exacting scrutiny. *See infra* pp. 35-49. *A fortiori*, then, the Platform Disclosure Law cannot survive strict scrutiny.

3. The Platform Disclosure Law cannot survive even exacting scrutiny.

Even if this Court were to subject the Platform Disclosure Law to a lower level of scrutiny, the result would be the same because the law fails even exacting scrutiny. *See McManus*, 944 F.3d at 520 (declining to decide whether the Maryland law at issue was subject to strict or exacting scrutiny because the law was unconstitutional under either standard).

As the name suggests, exacting scrutiny is a demanding standard. Exacting scrutiny requires first, "that there be 'a substantial relation between the disclosure requirement and a sufficiently important governmental interest,'" and, second, "that the disclosure requirement be narrowly tailored to the interest it promotes." *Bonta*, 141 S.Ct. at 2385 (citations omitted). As the Washington Supreme Court recently reiterated, the State bears the burden to show that a law regulating speech survives First Amendment scrutiny. *See State v. TVI, Inc.*, 524 P.3d 622, 629-30 (Wash. 2023); *see also McCutcheon v. FEC*, 572 U.S. 185,

210 (2014) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." (citation omitted)).

Here, the State failed to carry its burden for at least four reasons: (i) several of the State's claimed interests are speculative; (ii) much of the required information does not advance the State's claimed interests; (iii) the required information that *does* advance the State's claimed interests is already available through other means; and (iv) there are numerous ways in which the Platform Disclosure Law could be made meaningfully less burdensome for platforms without compromising the State's claimed interests.

First, several of the State's claimed interests are speculative and thus cannot be used to support the Platform Disclosure Law. When a State seeks to regulate speech, it cannot "simply posit the existence of the disease sought to be cured." *FEC v. Cruz*, 142 S.Ct. 1638, 1653 (2022) (citation omitted). Instead, it must supply "'record evidence or legislative findings'

demonstrating" that the putative problem is a real one. *Id.* (citation omitted).

The State's claimed interest in preventing corruption is impermissibly speculative. It is black-letter law that only "*quid pro quo* corruption" (distinct from "'mere influence or access'") may be "legitimately regulated under the First Amendment." *Id.* at 1653-54 (quoting *McCutcheon*, 572 U.S. at 208). But the State did not "identify a single case of *quid pro quo* corruption in this context," *id.* at 1653—that is, a single instance in which a person purchased a political ad in exchange for a political favor (or even was believed to have done so). The State is simply guessing that such corruption exists, which is the exact "conjecture" that courts have always deemed "[in]adequate to carry a First Amendment burden." *Id.* (quoting *McCutcheon*, 572 U.S. at 210).

The State's claimed interest in enforcing campaign-finance laws fares no better. The State's apparent theory—never clearly articulated below—is that donors are covertly evading Washington's campaign-finance limits by purchasing political

ads. *See* CP5277. But the State presented no evidence of any donor actually doing so (or even being suspected of doing so). And, in any event, a plethora of other Washington election laws impose disclosure and reporting requirements on candidates, campaigns, and political speakers, *e.g.*, RCW 42.17A.260; RCW 42.17A.305; RCW 42.17A.235, so there are a multitude of other ways to police such alleged activity.

The State's claimed interest in combatting foreign election interference fails for the same reason. The Platform Disclosure Law covers only *state and local* elections. But the State presented no evidence of actual or attempted foreign interference in *those* elections—in Washington or anywhere else. *See, e.g.*, CP5277. So with respect to three of the State's claimed interests, the State has put the cart before the horse by holding out the Platform Disclosure Law as a solution without first proving that a problem even exists.

Second, even if all the State's claimed interests were valid (they are not), many of the required disclosures do not advance

those interests. To prevent *quid pro quo* corruption, the information that matters is who paid for an ad (was it someone who later received a political favor from the candidate?) and how much that person paid (was it an amount that could realistically buy the favor?). The same is true to enforce campaign-finance laws: What matters is who paid (was it someone who made other contributions?) and how much (did the ad purchase push that person over the limit?). And for purposes of combatting foreign election interference, the only information truly relevant is the identity of the buyer (was it a foreign operative?).

But the Platform Disclosure Law goes miles beyond that information. The Law requires disclosure of an ad sponsor's address. WAC 390-18-050(6)(c). It requires disclosure of the method of payment used to purchase the ad. WAC 390-18-050(6)(d). And it requires numerous disclosures about the ad's actual and intended audience, including "demographic information … (e.g., age, gender, race, location, etc.), of the audiences targeted and reached" and "the total number of

impressions" the ad generated. WAC 390-18-050(7)(g). The State may be able to dream up *some* connection between those pieces of information and the State's claimed interests in preventing corruption, enforcing campaign-finance laws, and combatting foreign election interference. But the State never did so below and should not be permitted to do so now. *See* CP5275-77. And *some* connection is otherwise not good enough. *Cruz*, 142 S.Ct. at 1653. The State needed—but failed—to prove a "substantial relation." *Bonta*, 141 S.Ct. at 2385 (citation omitted).

The State will likely respond that, even if information like audience demographics and the method of payment does not advance the three interests set forth above, it does advance the State's final claimed interest: helping voters educate themselves about candidates and causes. CP5275-76. But Washington voters do not seem to share the State's assessment. The record shows that, since 2019, only three people—Mr. Sanders, Mr. Trask, and Mr. Wurtz—have requested information from Meta

under the Platform Disclosure Law. CP5573. Not one of them sought information to help inform his vote. *See* CP7580-82; CP8060-72; CP38-50. If the State were right that information like audience demographics and the method of payment were even remotely useful in deciding how to cast a ballot, one would expect there to be *some* requests made for that purpose. But the State did not and cannot point to a *single one*.

Third, the required information that *does* advance the State's interests is already available through other means. As noted, an ad sponsor's identity is information that is substantially related to the State's claimed interests. So too is the cost of an ad. But voters and the State do not need the Platform Disclosure Law to get that information. Washington law already requires ad sponsors to disclose it. RCW 42.17A.260(3)(a), (e). In fact, Washington has enacted numerous laws and regulations that collectively require political actors to disclose information about their political advertising, including descriptions of the expenditures, cost, contributors, payment date, sponsor name and

address, payment recipient name and address, publication date, and statements of foreign non-involvement. *See* RCW 42.17A.320; RCW 42.17.260; RCW 42.17A.305; RCW 42.17A.235; RCW 42.17A.240; RCW 42.17A.250; *see also* WAC 390-18-010; WAC 390-18-020; WAC 390-18-025. That is a problem for the State because this Court must assess the "marginal" benefit of the Platform Disclosure Law on the State's claimed interests, and it must do so by showing how the Platform Disclosure Law meaningfully contributes to the plethora of other disclosure laws that already exist in this state and apply to candidates, campaign, and political speakers. *See, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 752 (2011). Here that marginal benefit is zero—which is easily outweighed by the severe burdens the Platform Disclosure Law places on platforms.

Moreover, whereas other Washington laws require ad sponsors to disclose the information that advances the State's interests only in the 21 days before an election, the Platform

Disclosure Law requires platforms to disclose that information year-round. *Compare* RCW 42.17A.260(1)(a), *with* WAC 390-18-050(3)-(4). That strongly suggests that requiring disclosures only in the 21 days before an election is sufficient to serve the State's interests. It was the State's burden to prove otherwise, *see McCutcheon*, 572 U.S. at 210, and it presented no evidence whatsoever that year-round disclosures were necessary, *see* CP5277-81.

Even if year-round disclosures are necessary, it is ad sponsors—not platforms—who should bear the duty to make them. For one thing, the burdens on ad sponsors would be lighter; they would need to make disclosures only about their own ads, and would not need to review the content of millions of ads posted by others. Plus, ad sponsors' "organic desire to succeed at the ballot box" would offset the burdens of the disclosure requirements. *McManus*, 944 F.3d at 516. As explained, platforms have no comparable countervailing interest, *id.* at 516-17, so imposing the disclosure requirements against

platforms is much more likely to reduce the quantity and diversity of political speech, *id.*

Fourth, even assuming that all the required disclosures are necessary to serve the State's interests and that platforms must be the ones to make those disclosures, there are still numerous ways in which the Platform Disclosure Law could be made less burdensome without sacrificing the State's interests. Most significantly, ad sponsors could be required to notify platforms when they post a covered political ad, as was the case under the Maryland law at issue in *McManus*. *See* Md. Code Ann., Elec. Law § 13-405(a)(1) (effective July 1, 2018). If such notice were required, platforms would be spared the massive burden of reviewing the content of every ad on their sites to identify the ones that meet the Platform Disclosure Law's nuanced definitions of "[p]olitical advertising" and "[e]lectioneering communication." *See* RCW 42.17A.005(21), (40). In its stay briefing before this Court, the State responded that ad sponsors might withhold the required notice, thereby ensuring that no

information about their ads was disclosed. State's Reply in Supp. of Mot. to Modify Commissioner's Ruling 13. But penalizing such withholding would surely help prevent it.

Similarly, the burdens of reviewing the content of all ads to determine which ones are subject to the Platform Disclosure Law would be dramatically reduced if requesters needed to specifically identify the ads they sought information for (as opposed to generally requesting information about all ads that ran on a platform in a given timeframe). Consider, for example, a version of the Platform Disclosure Law that required requesters to supply the URL for any ad they wanted information on. In responding to a request, a platform would need to visit each URL, review the ad to determine whether it was subject to the Platform Disclosure Law, and make (or not make) disclosures accordingly. Depending on how many ads the request referenced, that could still be quite burdensome. But it would not be *anywhere near* as burdensome as what the Platform Disclosure Law currently requires: that platforms preemptively

review the content of each ad posted on their sites just in case the ad happens to be covered and someone happens to request it.

Beyond reducing the burdens of reviewing and identifying covered ads, there are several other ways in which the Platform Disclosure Law could be made less burdensome for platforms. For one thing, platforms could be required to make disclosures only within the 21 days before an election, which is what Washington law requires of ad sponsors. *See* RCW 42.17A.260(1)(a). It was the State's burden to show a substantial relation between disclosures made outside that 21-day window and a governmental interest that is both important and non-speculative. *See Cruz*, 142 S.Ct. at 1653; *Bonta*, 141 S.Ct. at 2385. The only non-speculative interest the State has advanced is informing voters' electoral choices. *See supra* pp. 40-42. And the State has no evidence whatsoever that voters see any need for the required information outside the 21-day window before an election (or any need for the required information, full stop). *See* CP5277-81.

Another way the Platform Disclosure Law could be made less burdensome is if platforms were given longer than two business days to respond to requests, especially ones that may cover hundreds of ads, culled from potentially millions that must be reviewed, without specifically identifying any of them. In its stay briefing before this Court, the State argued—without citation or evidence—that there was no need to allow more response time because "Meta already records the information [it must disclose] in its usual course of business." State's Reply in Supp. of Mot. to Modify Commissioner's Ruling 14. The Superior Court said the same, finding (again, without any evidence) that "Meta is already collecting" the information it must disclose so "all they have to do in order to [provide the information] is essentially press a button." Rep. Procs. 31:16-32:8. That entirely ignores that, to respond to requests, Meta must identify *which ads* it must disclose information about. Only after Meta does so—through multiple layers of automated and human review—can Meta provide the required information.

Even after Meta has identified the relevant ads, it cannot produce the data with the "press [of] a button": Meta must also gather numerous pieces of data associated with those ads, often going back years at a time. *See supra* pp. 8-9. That burdensome review and production process is why a two-business-day response deadline is unreasonable. On the other side of the scale, the State has no evidence that its claimed interests would be affected if platforms had longer than two business days to respond—even if that extended response deadline applied only to requests made outside the 21-day window before an election. *E.g.*, CP5281.

Finally, the Platform Disclosure Law could limit those who may make requests to Washington voters. Again, the only non-speculative interest the State has advanced is informing Washington voters' electoral choices. *See supra* pp. 40-42. Permitting requests from people other than Washington voters bears no relation, much less a substantial relation, to that interest. In its stay briefing before this Court, the State hypothesized that national or regional media might make requests under the

Platform Disclosure Law and that their reporting might help educate Washington voters. State's Reply in Supp. of Mot. to Modify Commissioner's Ruling 13. But if Washington voters do not see the required information as relevant to their electoral choices—and they do not, as evidenced by the fact that not one of the requesters in this case has ever made a request for that purpose, *see supra* pp. 12—then it is tough to see why voters would see a news report about the required information any differently. In any event, the State presented no evidence that such media made any such requests for those reasons. For all those reasons, the State cannot carry its burden and the Platform Disclosure Law comes nowhere close to surviving exacting scrutiny.

B. Section 230 of the Communications Decency Act Preempts the Platform Disclosure Law.

The Platform Disclosure Law is not only unconstitutional but also preempted by federal statute. Section 230 of the CDA provides that "[n]o provider or user of an interactive computer

service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Section 230 expressly preempts "any State or local law that is inconsistent with this section." *Id.* § 230(e)(3). There can be no doubt that Meta's Facebook service qualifies as an "interactive computer service." *See, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (Facebook is an "interactive computer service"). Nor can there be doubt that the political ads covered by the Platform Disclosure Law qualify as "information provided by another information content provider." *See, e.g.*, *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669, 671 (7th Cir. 2008) (third-party ads are "information provided by another information content provider"). The sole question, then, is whether the Platform Disclosure Law "treat[s]" Meta as the publisher of those ads. The answer is yes—and thus the Platform Disclosure Law would be invalid even if it were constitutional.

Although it can sometimes be difficult to determine whether a claim impermissibly "treat[s]" a defendant as a publisher, there are easy cases, including those in which the defendant's being a publisher or engaging in publication is an express element of the claim. *See Force v. Facebook, Inc.*, 934 F.3d 53, 64 n.18 (2d Cir. 2019); *see also Chi. Lawyers' Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 697 (N.D. Ill. 2006) (Section 230 preempts "claims that require 'publishing' as an essential element"), *aff'd*, 519 F.3d 666 (7th Cir. 2008). If the defendant's being a publisher or engaging in publication is an element, then the claim clearly "treat[s]" the defendant as a publisher—and the claim is accordingly preempted.

The Platform Disclosure Law is preempted twice over because a defendant's being a publisher and engaging in publication are both elements of a claim under the law. The Platform Disclosure Law applies only to "commercial advertiser[s]," RCW 42.17A.345(1)—which the Law defines as

"any person that sells the service of *communicating messages or producing material for broadcast or distribution to the general public or segments of the general public*," RCW 42.17A.005(10) (emphasis added). Thus, to be liable under the Platform Disclosure Law, a defendant must be a publisher. And a defendant's duties under the Platform Disclosure Law are triggered only when an ad is "*publicly distributed or broadcast*." WAC 390-18-050(3) (emphasis added). Thus, to be liable under the Platform Disclosure Law, a defendant must also have engaged in publication. In sum, to determine that the Platform Disclosure Law is preempted, this Court need look no further than the express elements of a claim under the law.

Looking past the express elements and conducting a functional analysis of whether the Platform Disclosure Law "treat[s]" a defendant as a publisher only confirms that the Platform Disclosure Law is preempted. This Court has held that a statute "treats" a defendant as a publisher if it bases liability on the defendant's "'exercise of a publisher's traditional editorial

functions.'" *Schneider v. Amazon.com, Inc.*, 108 Wn.App. 454, 463-64, 31 P.3d 37 (2001) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). One such function is "review[ing] material submitted for publication," *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)—as the State acknowledged in its stay briefing before this Court, Reply in Supp. of Mot. to Modify Commissioner's Ruling 15 (listing "reviewing … third-party content" as a "traditional editorial function[]" (citation omitted)). Thus, a statute impermissibly "treat[s]" a platform as a publisher if it requires the platform to review third-party content posted on its site. *See, e.g.*, *Klayman*, 753 F.3d at 1358-59; *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008); *Green v. Am. Online (AOL*), 318 F.3d 465, 471 (3d Cir. 2003).

Congress's decision to preempt statutes that require review of third-party content makes perfect sense. Platforms display and disseminate a "staggering" amount of third-party content. *Zeran*, 129 F.3d at 331; CP7875 ("[I]n January 2020,

there were over 8 million active advertisers across Meta (then Facebook) platforms."). Reviewing that content would be "expensive" at best and "impossible" at worst. *Chicago Lawyers' Comm.*, 519 F.3d at 668-69 (first quotation); *Zeran*, 129 F.3d at 331 (second quotation). So if platforms were required to review third-party content, they would likely respond by "severely restrict[ing] the number and type[s] of messages" permitted on their sites. *Zeran*, 129 F.3d at 331. That would transform the internet's marketplace of ideas from a sprawling bazaar into a cramped bodega—which is the exact result Section 230 was meant to avoid. *See Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) ("The intent of [Section 230] is … to promote rather than chill internet speech."); 47 U.S.C. § 230(a)(3) (factual finding that the internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity").

The Platform Disclosure Law is preempted because it requires a platform to review third-party content posted on its site. As discussed, a platform must make disclosures about an ad only if the ad fits within the Platform Disclosure Law's nuanced definitions of "political advertising" or "electioneering communication." *See* WAC 390-18-050(3); RCW 42.17A.005(21), (40). And a platform can determine whether an ad fits within those definitions only by reviewing the ad. The State did not—because it could not—dispute this below. As explained, that duty to review is incredibly burdensome for a platform like Meta, which can have *millions* of active advertisers at a given time. *See supra* pp. 54.

The State has cited *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), to argue that the Platform Disclosure Law evades preemption even though it requires platforms to review third-party content. State's Answer to Mot. for Stay Pending Appeal 27-28. But *HomeAway* hurts, rather than helps, the State. *HomeAway* confirms that a statute is

preempted if it "would necessarily require an internet company to monitor third-party content" posted on its site. 918 F.3d at 682. That describes the Platform Disclosure Law exactly: A platform cannot make the required disclosures about Washington political ads unless it monitors the content of ads third-party advertisers post on its services.

The facts of *HomeAway* further illustrate why the preemption analysis comes out differently here. The city ordinance at issue in *HomeAway* prohibited platforms like Airbnb and HomeAway from processing transactions for certain rental properties not registered with the city. *Id.* at 680. The plaintiff platforms argued that the ordinance was preempted because it required them to review listings posted on their sites to determine whether the listings were for such unregistered properties. *Id.* at 682. The Ninth Circuit rejected that argument. The court found that the platforms did not need to conduct *any* "review [of] the content … of listings on their websites." *Id.* Instead, the platforms could simply review "incoming requests

to complete a booking transaction." *Id.* That latter sort of review was consistent with Section 230, the court reasoned, because the content being reviewed was not posted publicly on the sites but rather was "distinct, internal, and nonpublic." *Id.*

The facts are completely different here. The non-public booking requests in *HomeAway* supplied the only information that platforms needed to comply with the ordinance (namely, the address of the property the requester sought to rent). That is not true of requests under the Platform Disclosure Law. To determine whether an ad meets the law's broad and nuanced definition of "political advertising," *supra* pp. 20-21, a platform cannot simply review *a request* for the ad but must review *the ad itself*. Thus, unlike the *HomeAway* ordinance, the Platform Disclosure Law *does* "necessarily require an internet company to monitor third-party content" posted on its site. 918 F.3d at 682.

Moreover, the burdens imposed by the *HomeAway* ordinance are far lighter than the burdens imposed by the Platform Disclosure Law. By definition, each of the booking

requests at issue in *HomeAway* related to a single, specified property. So each request required the platform to take one specified property; compare it to a published list of registered properties; and then process (or not process) the request accordingly. By contrast, a request under the Platform Disclosure Law can cover countless ads, none of which are specifically identified. Take, for example, Mr. Sanders's request for "[a]ll of the information that Facebook is legally required to disclose about all of the political ads Facebook has sold to local and state-level candidates, campaigns, and ballot measure advocates in Washington State between January 1, 2021 and today (July 12, 2021)." CP7587. A request like that requires Meta to review the content of all ads run in Washington over a nearly 7-month period; conduct the textured analysis necessary to determine whether each one qualifies as "political advertising" or "electioneering communication"; and for the ads that do qualify, pull together and produce the roughly 10 pieces of information that Meta is required to disclose, all within a mere

two days. And that is not even the most onerous request that Meta could face—the law permits requesters to demand information going back five years. WAC 390-18-050(3). At bottom, the review-related burdens are significantly greater here than they were in *HomeAway*, which is yet another reason *HomeAway*'s preemption analysis does not control.

C. The Penalty Award Must Be Reduced.

On top of the fact that the Platform Disclosure Law is unconstitutional and preempted by federal law, the Superior Court also awarded the wrong penalty. At most, Meta was liable for 12 violations of the law assessed at the bottom of the statutory range. Meta should have been assessed a penalty far, far lower than that awarded by the Superior Court.

1. Meta committed, at most, 12 violations (one per request), not 822 violations (one per ad subject to a request).

The Superior Court erred by holding that Meta violated the Platform Disclosure Law 822 times for failing to produce data about 411 ads, rather than 12 times for failing to respond to 12

requests.[1]

The statute imposes liability on a per-request basis. To start, RCW 42.17A.345 is titled "Commercial advertisers—*Public inspection of documents*—Copies to commission." RCW 42.17A.345 (emphasis added). And the statute requires commercial advertisers to "maintain current books of account and related materials … that shall be *open for public inspection*." *Id.* (emphasis added). Without a request for public inspection, there can be no violation, and the relevant "violation" is a failure to respond to a *request* for "public inspection."

The regulation takes the same approach. WAC 390-18-050(4)(b)(i) provides that commercial advertisers may comply with the law by providing information "[b]y digital transmission, such as email, promptly upon *request*," strongly indicating that a violation occurs only after a request is made. WAC 390-18-050(4)(b)(i) (emphasis added). Nothing in the statute or the

[1] What constitutes a "violation" under the Disclosure Law is a legal question subject to *de novo* review.

regulation says that each ad contained within a single request constitutes a distinct and separate violation of the law.

The Attorney General's Office previously conceded *in the investigation phase of this same matter* that violations of the Platform Disclosure Law accrue by request, not by ad. Although the PDC charged Meta with having failed to respond to two requests for information, those requests covered seventeen discrete ads. When asked to opine on whether violations should be counted by request or by ad, an Assistant Attorney General was clear that violations accrued *only on a per-request basis* and that Meta therefore should be charged with two violations of the law, not 17. *See* CP8010 ("This Matter Involves *Two* Violations of RCW 42.17A.345" (emphasis modified)); CP8011 ("Facebook failed to respond to *two* requests for information, violating RCW 42.17A.345 on *two* separate occasions." (second emphasis added)). The Attorney General and PDC Staff expressly considered charging Meta with separate violations for each ad but declined to do so because "[b]asing the number of

violations solely upon the number of ads referenced in a request could quickly lead to a penalty amount grossly disproportionate to other violations of RCW 42.17A reviewed by the Commission." CP8010-11. This filing was made under the name of the Attorney General and was signed by an attorney in his office. CP8014. Still, in Superior Court, the State advocated (and the court adopted) the exact opposite approach.

A recent decision from the Supreme Court of the United States underscores the untenability of the State's position. In *Bittner v. United States*, 143 S.Ct. 713 (2023), the Court considered the scope of liability under the Bank Secrecy Act ("BSA") for certain individuals' failure to file annual reports with the federal government about their foreign bank accounts. *Id.* at 717. The federal government maintained that liability accrued for each *unreported account*, meaning that because the petitioner had failed to disclose 272 accounts, he was liable 272 times over. *Id.* at 718-19. The petitioner argued that liability accrued for each *inaccurate report*, meaning he was five times

liable for five inaccurate reports. *Id.* at 719. The Supreme Court agreed with the petitioner, emphasizing that the statutory text spoke only of reports and was devoid of references to "accounts or their number." *Id.* at 719. Another key "contextual clue[]" was "what the government itself … told the public about the BSA." *Id.* at 721. The government's prior representations that liability accrued per report and not per account weighed for the petitioner. *Id.* at 721-22 & n.5 ("[W]hen the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one.").

Determining violations by ad instead of by request also makes little sense as a practical matter. Doing so can quickly cause the number of violations to balloon and disproportionately penalize the conduct at issue. At bottom, this case concerns Meta's failure to respond to a discrete number of requests for information made by three individuals over two years. The Superior Court held that Meta had failed to respond to 12 requests. CP5573. Yet the Superior Court concluded that Meta

committed ***822 separate violations of the law*** and that those 12 requests covered data about 411 ads. CP5575. There was no basis in law or logic for doing so. Indeed, the Court only reached 822 violations by double-counting ads the State claimed were subject to multiple requests. CP5574-75.

To the extent there may be ambiguity concerning how to count violations, that ambiguity must be resolved in Meta's favor under the rule of lenity. RCW 42.17A.750, which provides the standards for imposing the penalties at issue, is penal in nature. It provides for "sanctions," "penalties," and the circumstances under which violating the statute is criminal. *E.g.*, RCW 42.17A.750. In construing a "penal statute, although civil in form," Washington courts adopt the interpretation most favorable to the regulated party if the statute is reasonably susceptible to different meanings. *Kahler v. Kernes*, 42 Wn.App. 303, 308, 711 P.2d 1043 (1985); *accord Bittner*, 143 S.Ct. at 724-25 (plurality op.). The presumption that any ambiguity should be resolved in Meta's favor carries added force here: Grave Due

Process concerns would arise if Meta were held responsible for orders of magnitude more violations (and millions in additional fines) under an interpretation that is not clearly specified in the statutory and regulatory text. *See Bittner*, 143 S.Ct. at 725 (plurality op.) (stating "the government's current theory poses a serious fair-notice problem"); *see also State v. Padilla*, 190 Wn.2d 672, 681-82, 416 P.3d 712 (2018). Meta is therefore liable for, at most, 12 violations associated with the 12 requests at issue.

2. Meta should not have been assessed the maximum per-violation penalty of $10,000.

Each of the violations at issue warranted a penalty at the bottom of the statutory range, not the statutory maximum of $10,000 awarded by the Superior Court. *See* RCW 42.17A.750(1)(c). In setting a penalty, courts "may consider the nature of the violation and any relevant circumstances," including mitigating factors. *See* RCW 42.17A.750(d). At least eight significant mitigating factors in this case push the

appropriate penalty toward the bottom of the $0-$10,000 statutory range. The Superior Court did not credit a single one of those factors. CP5784-85. That was plainly error.

First, Meta has promoted political transparency in Washington, sometimes exceeding Washington's requirements. It is undisputed that Meta voluntarily established an Ad Library that provides a wealth of information about political advertisements. *See* CP7448. It is similarly undisputed that the Ad Library makes information available 24 hours a day, seven days a week, 365 days a year. *Id.* The Ad Library is publicly available, searchable, and user-friendly, *see id.*, providing information about a given ad for seven years—meaningfully longer than the five years the Platform Disclosure Law requires, *compare* CP7460-61, *with* RCW 42.17A.345(1). For these reasons, PDC Staff concluded that the Ad Library was a mitigating factor in a proposed judgment concerning Mr. Sanders's and Mr. Trask's 2019 requests. CP8333-34; *see* CP7398.

Second, Meta undisputedly disclosed much of the required information immediately on request. Meta's Ad Library provides many of the data points that the Platform Disclosure Law requires to be disclosed, including (i) the name of the candidate or ballot measure; (ii) a copy of the ad; (iii) the sponsor's name; and (iv) the dates on which the ad ran. CP7448. Meta's Ad Library also contains the approximate cost of the ad (expressed as a range); the approximate number of impressions the ad generated (also expressed as a range); certain demographic information for the audience targeted; certain demographic information for the audience reached; the amount paid (by advertiser); and the sponsor's address (if voluntarily provided by the sponsor). *Id.*; CP7393-94; CP8032-33.

Third, there is no dispute that for some of the requests at issue, Meta produced two and sometimes three additional categories of required information. In response to one of Mr. Sanders's requests and one of Mr. Trask's requests, Meta produced the exact cost of the ads and the exact number of

impressions the ads generated. *See* CP8089-90; CP7513-14; *see also* CP7395 (PDC stating 2019 productions "contained most" of the required disclosures). And in response to another of Mr. Sanders's requests and one of Mr. Wurtz's requests, it is undisputed that Meta produced those two pieces of information plus the sponsors' methods of payment. *E.g.*, CP7593; CP8117; CP8155.

Fourth, Meta established a formal process to efficiently respond to requests under the Platform Disclosure Law. Despite Meta's best efforts, some users were able to evade Meta's ad ban. So Meta set up a formal process for handling requests related to Washington political ads that ended up on Meta's services. *See* CP7921-22.

This process did not (and was not intended to) erect artificial barriers to responding to requests under Washington's Platform Disclosure Law. True, Meta asked requesters to provide certain identifying information. CP7621. But Meta did not *require* anyone to provide that information before Meta

would act on their request. *See* CP7620 (incomplete request form); CP7593-613 (Meta's production).[2] Instead, Meta used whatever information the requester provided to expedite Meta's response. CP7990.

Fifth, it is undisputed that none of the requests at issue in this case were made for the core purposes that animate Washington's disclosure law—informing voters and ensuring election integrity. *Supra* pp. 12. There was thus no "significant or material impact on the public," which the relevant penalty provision recognizes as a mitigating factor. *See* RCW 42.17A.750(d)(ii).

Sixth, during the PDC's investigation of Mr. Sanders's and Mr. Trask's 2019 complaints, it is undisputed that Meta extensively consulted and cooperated with PDC Staff. *See* RCW

[2] The sole exception is that Meta required requesters to identify themselves. Because requests involve "sensitive and private information," Meta reasonably insisted on "know[ing] who we're providing information to before we give that information out." CP7574.

42.17A.750(d)(xii). That cooperation included numerous communications and an in-person meeting discussing Meta's technical capabilities, information, and privacy concerns. *See* CP7510-14; CP8081-88. The result was a proposed stipulated judgment drafted by PDC Staff, which included as a mitigating factor that Meta "worked with PDC staff in a collaborative manner to resolve this matter." CP7398.

Seventh, Meta never intentionally or knowingly skewed Washington's political process by favoring one candidate or cause over another. Quite the opposite: Meta is deeply concerned with *preventing* election interference and *enhancing* election transparency, in Washington and nationwide. *See* https://www.facebook.com/help/259468828226154; CP7448. Meta voluntarily enhances election integrity, including by requiring advertisers to verify their identities through an "extensive authorization process" before they can run ads on Meta's services. CP7393. Meta also requires advertisers to place "[p]aid for by" disclaimers on all political ads. *Id.*

Eighth, negotiated penalties in similar cases are significantly lower than the Superior Court's penalty. *See* RCW 42.17A.750(d)(xiii). The parties negotiated a stipulated judgment in 2018 concerning a similar lawsuit. Though that case covered what the State claimed were "continuous[]" failures to comply from 2013 through 2018, the stipulated judgment was for just $200,000. CP7915. Similarly, in 2018, the State settled a lawsuit accusing Google of violating the Platform Disclosure Law for approximately $200,000. *See* https://www.atg.wa.gov/news/news-releases/ag-ferguson-google-will-pay-more-423000-over-repeated-violations-washington. In 2021, the State settled a second suit against Google for approximately $400,000. *Id.* Even adjusting for the difference in the number of ads at issue, the penalty in this case is orders of magnitude higher.

Assessing the maximum penalty of $10,000 for every ad sought by a request also raises grave Due Process concerns. "[L]aws which regulate persons or entities must give fair notice

of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The Platform Disclosure Law does not provide fair notice that digital platforms may be assessed multiple penalties if multiple ads are referenced by a single request. Instead, the relevant regulation states that a single violation occurs when a platform fails to respond "promptly upon request," WAC 390-18-050(4)(b)(i), which, to reiterate, was the interpretation PDC Staff took in this very case. *Supra* pp. 61-62.

Even assuming that violations may arise on a per-ad basis, Meta was never on notice that it could be assessed multiple violations for a single ad that was referenced in multiple requests. Dozens of ads were the subject of such duplicative requests here. *Compare* CP243 (July 2021 request for information on "every political ad shown in Washington State since 2016"), *with* CP7587 (July 2021 request for information on "all of the political ads … in Washington State between January 1, 2021 and today (July 12, 2021)"). For that reason, too, the Superior Court's

penalty violates Due Process.

The penalty awarded here also constitutes an "excessive fine[]" in violation of the U.S. Constitution's Eighth Amendment and article I, section 14 of the Washington Constitution. A fine is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Given Meta's substantial compliance with the Platform Disclosure Law, as well as the lack of any adverse effect on Washington's political process, the Superior Court's $24-million-plus penalty was grossly disproportionate.

3. Because Meta did not intentionally violate the Platform Disclosure Law, trebling was unwarranted.

For all the same reasons, there was no basis for the Superior Court to treble any judgment entered against Meta. Trebling is permitted only if a violation is "intentional." *See* RCW 42.17A.780. Below, the State claimed that Meta's violations were intentional because "[d]espite announcing a ban on Washington Political Advertisements in December 2018,

Meta was aware then and has been since that such advertisements would continue to be provided on its platform." CP441. As PDC Staff has acknowledged, "[t]he acceptance of political advertisements by Facebook might violate Facebook's *policy*, but such acceptance did not violate RCW 42.17A." CP8010.

V. CONCLUSION

This Court should reverse the Superior Court's grant of summary judgment and direct the court to enter summary judgment for Meta. In the alternative, the Court should reverse the Superior Court's judgment and order it to reduce the penalty.

This document contains 11,996 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Appellant's Opening Brief to be served on counsel for all other parties in this matter via this Court's e-filing platform.

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