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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellee,

v.

META PLATFORMS, INC. formerly d/b/a/ FACEBOOK, INC.,

Appellant.

CORRECTED BRIEF OF LEAGUE OF WOMEN VOTERS OF WASHINGTON, FIX DEMOCRACY FIRST, THE BRENNAN CENTER FOR JUSTICE, AND CAMPAIGN LEGAL CENTER AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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INTERESTS OF *AMICI CURIAE*

Amici curiae are nonprofit, nonpartisan groups working to create a fair, transparent democracy accessible to all voters, including by supporting effective public disclosure laws. Measures like RCW 42.17A.345 (the "Disclosure Law") that Appellant Meta Platforms, Inc. challenges here are crucial to promoting *amici*'s interest in advancing citizens' right to know who is spending money to influence their voting decisions.

The **League of Women Voters of Washington (LWVWA)** is a nonpartisan, grassroots organization within Washington State committed to protecting voting rights, empowering voters, and defending democracy. LWVWA does this by registering and educating voters, including through candidate forums, election guides, information on voting mechanics, and civic education.

Fix Democracy First is a nonprofit, nonpartisan organization that works to strengthen democracy in Washington State and nationally, including efforts in campaign finance

reform and disclosure, public funding of elections, ranked choice voting and proportional representation, expanding voting access, and increasing civic participation.

The Brennan Center for Justice at NYU School of Law ("Brennan Center") is a nonprofit, nonpartisan law and public policy institute that seeks to strengthen, revitalize, and defend our systems of democracy and justice. The Brennan Center promotes reasonable campaign finance and disclosure policies that help perfect the ideal of self-government through fuller civic participation and a better-informed electorate.[1]

Campaign Legal Center (CLC) is a Washington D.C.-based nonprofit, nonpartisan organization that works to strengthen and defend campaign finance, political disclosure, and other election laws in litigation, administrative proceedings, and legislative policymaking.

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[1] This brief does not purport to convey the position of the New York University School of Law.

INTRODUCTION AND STATEMENT OF THE CASE

Meta's constitutional challenge to Washington's Disclosure Law lacks any legal basis and ignores a half-century of jurisprudence upholding a range of political disclosure measures, including many provisions of Washington's Fair Campaign Practices Act ("FCPA"). Meta also ignores that the public inspection requirements it now challenges have been on the books since 1976, and commercial advertisers far smaller and less sophisticated than Meta have been complying without incident for decades. 1976 Wash. Sess. Laws, Ch. 112, § 5.

Only by maintaining this blinkered and ahistorical view of Washington's Disclosure Law can Meta pretend that the law imposes unique burdens on its activities and disregard the widely recognized informational interests supporting such laws. *See*, *e.g.*, *Voters Educ. Comm. v. Washington State Pub. Disclosure Comm'n*, 161 Wash. 2d 470, 479, 166 P.3d 1174, 1179 (2007) (noting importance of informing voters about "the identity of and financing behind political speakers"). The public interest in

electoral transparency is well established and the burdens on Meta minimal, as confirmed by the finding below that Meta in the ordinary course of business already collects the information it is required to disclose by the challenged law. CP6633-47.

Amici submit this brief to address Meta's First Amendment arguments and to present the public interest in electoral transparency laws, particularly given the recent growth in digital communications and the threats to democratic discourse this trend poses. As spending on online political advertising surges nationwide, federal regulations—and self-regulation by tech platforms—have proven inadequate, leaving it to the states to ensure that digital ads are held to the same standards as other political advertising.

Amici also show that the Disclosure Law is supported by many decades of federal and Washington precedents recognizing the importance of "prompt disclosure of expenditures" to provide "citizens with the information needed to hold . . . elected officials accountable for their positions and supporters." *Citizens United*

v. FEC, 558 U.S. 310, 370-71 (2010). Because the Disclosure Law provides the public with critical information about the persons financing campaign spending, it does not burden but rather *promotes* the principles underlying the First Amendment.

Meta fails to engage with this well-established precedent and instead relies almost exclusively on a Fourth Circuit decision, *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), which invalidated, on an as-applied basis, a Maryland law that required online platforms to collect information about the political ads they ran and to "host" this information on their own websites. But the requirements and purposes of Maryland's law differ dramatically from those of the Disclosure Law; *McManus* is thus neither applicable nor persuasive here.

The Disclosure Law is consistent with the First Amendment and the Superior Court's judgment should be affirmed.

ARGUMENT

I. Voters Benefit from Knowing Who Finances Election Messaging.

The Supreme Court has repeatedly recognized that voters benefit from campaign finance transparency, and that democracy functions better when the interests funding and influencing campaign-related debate are disclosed. *See*, *e.g.*, *Citizens United*, 558 U.S. at 339. This need is even more acute in the context of online political advertising—where anonymity and technical innovations such as microtargeting and user data harvesting enable advertisers to subject voters to ever more finely-targeted campaign advertising with little disclosure of who is behind the messages. Against this backdrop, Washington's Disclosure Law provides voters with critical information about political advertising in the digital space, enabling Washington's election system to evolve with developing technologies while protecting

against false information, fraudulent actors, and the influence of dark money.

A. The Disclosure Law enables *amici* groups and Washington voters to obtain important campaign finance information.

Washington's FCPA was implemented over 50 years ago to "ferret out . . . those whose purpose is to influence the political process and subject them to the reporting and disclosure requirements of the act in the interest of public information." *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wash. 2d 503, 508, 546 P.2d 75, 79 (1976). The purpose of the FCPA is to ensure "that political campaign and lobbying contributions and expenditures be fully disclosed to the public." RCW 42.17A.001(1).

Under the Disclosure Law and its regulations, "commercial advertisers"—*i.e.*, most media entities—that run election-related advertising must maintain records about ads purchased on their platform. RCW 42.17A.345(1); WAC 390-18-050(3). Required information includes: the name of the candidate

or ballot measure supported or opposed, a copy of the advertisement, the name and address of the person who paid for the ad, the cost of the advertisement, and the dates the advertisement was shown to the public. WAC 390-18-050(6). The Disclosure Law also requires additional information from platforms like Meta specific to digital communications, including the demographics of the audiences targeted by the ad and the number of impressions the ad generated. WAC 390-18-050(7)(g).

The Disclosure Law serves *amici* and the voting public in multiple respects. First, as part of their missions, all *amici* groups have long advocated for transparency in the financing of federal and state election campaigns, including by working to design and enact disclosure legislation. In particular, the LWVWA worked to develop and support Washington State Initiative 276 in 1972. This initiative, passed with 72% approval, created the state's first comprehensive campaign finance law, including provisions of the Disclosure Law challenged here. Both Fix Democracy First

and the LWVWA also advocated for and helped pass two important disclosure bills in the State Legislature: the WA Disclose Act of 2018 and the PAC-to-PAC Disclosure of Campaign Donations Act.[2]

Second, *amici* groups in Washington rely on reporting by journalists like Eli Sanders for important information to aid their voter and civic education via social media and other voter outreach methods. When Meta refused to provide the required information to journalists such as Mr. Sanders, *amici* too were deprived of the information required by the Disclosure Law.

Third, the Washington *amici* groups' members include citizens who may request covered information in the future, and who benefit from information requests made and publicized by

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[2] Additionally, the LWVWA in a study of local news, *The Decline of Local News and Its Impact on Democracy (March 2023)*, arrived at member consensus in support of ensuring that everyone has access to information necessary for casting an informed ballot. https://lwvwa.org/resources/Documents/Studies/LocalNews/Decline%2036.pdf.

journalists and other voter education groups. Even when these members do not request information themselves, the Disclosure Law ensures there are mechanisms for public oversight over election-related advertising in Washington and provides reassurance that the money financing this advertising comes from legal sources.

B. The rise in political spending online underscores the critical need for transparency in internet-based electioneering.

Without measures to ensure transparency, the move to online political advertising has the potential to create voter confusion, facilitate the spread of misinformation and disinformation online, and exacerbate the political polarization and extremism that has increasingly come to define our elections.

1. The increase in digital political advertising presents a new threat to democracy.

Digital political advertising has surged in recent years both in national campaigns and here in Washington. *See* Tech for Campaigns, *2020 Political Digital Advertising Report*, http://bitly.ws/M8NR (noting political digital advertising

between 2018 and 2020 grew by 460%, nearly twice the rate of election spending overall). In 2008, U.S. presidential candidates collectively spent $22.25 million on online political ads. Those numbers have since ballooned to an estimated $1.4 billion in 2016[3] and $2.1 billion in 2020.[4] And Washington is no stranger to online political ad spending. In 2018—prior to clarification of the regulation at issue here—candidates and political committees in Washington reported spending more than $900,000 on Facebook advertising in state and local races, more than three times the previous midterm election.[5] Though Washington may

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[3] Lata Nott, *Political Advertising on Social Media Platforms*, ABA, Jun. 25, 2020, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/voting-in-2020/political-advertising-on-social-media-platforms/.

[4] The Center for Responsive Politics provides an online tool to filter through campaign spending, at *Online Political Ad Spending*, https://www.opensecrets.org/online-ads.

[5] The search engine at the Washington State Public Disclosure Commission will identify spending on Facebook by election year, *see* https://www.pdc.wa.gov/political-disclosure-reporting-data/browse-search-data/expenditures.

not see numbers like those in competitive federal races, even relatively modest advertising expenditures often have an outsized impact in state and local races because overall spending levels are typically lower than in federal elections. *See, e.g.*, Chisun Lee, et al., *Secret Spending in the States*, Brennan Ctr., 3 (June 2016), http://bitly.ws/Pe5i.

The rise in online political advertising impacts the public not only because of its exploding volume and cost, but also because digital communications are fundamentally different from traditional advertising delivery and carry unique risks. Platforms use "targeting" or "behavioral advertising," which involves tracking users' actions and preferences to deliver ads based on those characteristics. Federal Trade Commission Staff, *FTC Staff Report: Regulatory Principles for Online Behavioral Advertising* (February 2009), http://bitly.ws/M8NZ. This microtargeting is invisible to voters, leaving most recipients of these ads unaware of the process. *See* Michael Harker, *Political Advertising Revisited: Digital Campaigning and Protecting*

Democratic Discourse, 40 LEGAL STUDIES 151, 153–57 (2020). And as platforms have amassed exponentially larger amounts of user data, they have increasingly fine-tuned their ad targeting capacity. *See* Ira S. Rubinstein, *Voter Privacy in the Age of Big Data*, 2014 WISC. L. REV. 861, 863. But individual campaign databases are dwarfed by the scale of datasets maintained by the biggest advertising platform managers, like Google and Meta, which now dominate the digital advertising market, including for political ads. *Id.* at 864.[6]

These unique features of digital advertising pose new threats to democracy. The practice of micro-targeting means that online audiences have little understanding of the full range of advertising run by a candidate or advocacy group, including the different messages other voters are being shown. This new ability

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[6] *See* Victoria Smith Ekstrand & Ashley Fox, *Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising*, 47 NOTRE DAME J. LEGIS. 81, 83–84 (2021) ("[O]nline political advertising is dominated by two American platforms: Google (37.2%) and Facebook (19.6%)").

to secretively direct a range of specially tailored, and perhaps even conflicting, messages to different audiences is incompatible with the core legitimizing aspects of democratic society—such as "publicity and transparency for the deliberative process." *See* Jürgen Habermas, *Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research*, 16 COMMC'NS STUDIES 411, 413 (2006). And this hyper-targeting is part of an already-siloed social media ecosystem where algorithms filter content based on users' predetermined preferences. This results in a dangerous echo-chamber which "creates an antidemocratic space in which people are shown things with which they already associate and agree, leading to nondeliberative polarization." Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1666–67 (2018).

Requiring disclosure of who is paying for digital political ads as well as information about how particular ads are targeted

to specific audiences is key to countering this problem. Studies show that ads from anonymous groups are more effective than ads run by candidates. Travis Ridout, et al., *Sponsorship, Disclosure, and Donors: Limiting the Impact of Outside Group Ads*, 68 POL. RES. Q. 154 (2015). This is not because the ads were more persuasive. Instead, "it is largely differences in *backlash*, not persuasion" that provide this undeserved boost to anonymous groups' ads. Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM. POL. RSCH. 383, 403 (2012) (emphasis added). Otherwise put, unlike when viewing ads from recognized candidates or sponsors, voters have no means of critically assessing or holding accountable anonymous groups who finance negative ads. *See* Ridout, *supra* at 164.

Disclosure helps voters make reasoned decisions. *See* Jennifer A. Heerwig, Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102

GEO. L.J. 1443, 1471–72 (2014). Studies reflect that providing information about donors sponsoring an attack ad reduced the negative impact on the attacked candidate. Conor M. Dowling, Amber Wichowsky, *Does It Matter Who's Behind the Curtain? Anonymity in Political Advertising and the Effects of Campaign Finance Disclosure*, 41 Am. Pol. Res. 965, 982 (2013). And, "[a]lthough disclosure only weakens—and does not undermine—the impact of [anonymous] ads . . . disclosure does seem to ameliorate the structural imbalance that favors 'dark money' advertising." Ridout, *supra* at 163–64. Meaningful disclosure produces a voting base that can make more informed political decisions, in context and with a more critical eye.

2. Washington's Disclosure Law is a bulwark against dark money.

Despite the benefits of disclosure to democratic discourse, the federal government has been slow to respond to political campaigns' shift to digital advertising. Congress did not pass legislation updating disclosure requirements for digital political

ads, and the Federal Election Commission (FEC) has made little progress since it first regulated certain internet ad disclaimers in 2006. *See* 71 Fed. Reg. 18589 (Apr. 12, 2006), https://sers.fec.gov/fosers/showpdf.htm?docid=776. Although the FEC finally promulgated updated disclaimer regulations in 2022, it left many forms of digital political advertising unregulated. 87 Fed. Reg. 77467 (Dec. 19, 2022).

In light of this anemic federal effort, state legislatures have stepped in to curtail the dangers posed by unregulated digital electioneering. In addition to Washington state, California,[7] Colorado,[8] Maryland,[9] New Jersey,[10] New York,[11] Vermont,[12]

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[7] Cal. Bus. & Prof. Code §§ 17940–43; Cal. Gov. Code §§ 84503–10.

[8] Colo. Const. art. XXVIII, § 2.

[9] Online Electioneering Transparency and Accountability Act, MD SB875 (2018), enacted as Md. Const. art II, § 17(c).

[10] N.J. Stat. Ann. §§ 19:44A, 19:44B.

[11] *See, e.g.*, N.Y. Elec. Law § 14-107-B (including "online platform[s]" in expenditure disclosure requirements).

[12] Vt. Stat. Ann. tit. 17 ch. 6.

and Wyoming[13] have all taken steps to establish disclosure requirements for platforms hosting political ads. Five of the seven states also set standards for record-keeping. *See* Carolina Menezes Cwajg, *Transparency Rules in Online Political Advertising: Mapping Global Law and Policy,* Univ. of Amsterdam, 48–94 (Oct. 2020), http://bitly.ws/M8R7.

Without the guardrails provided by disclosure laws, the potential harms posed by digital electioneering will only multiply as technologies continue to advance. Artificial intelligence is already revolutionizing the creation and targeting of digital advertising materials. *See* Heejun Lee & Chang-Hoan Cho, *Digital Advertising: Present and Future Prospects*, 39 INT'L J. OF ADVERTISING 332, 336 (2020). Super PACs and other "dark money" groups can now computer-generate and easily micro-tailor ads to manipulate the most vulnerable audiences. *See* Cameron Joseph, *AI Political Ads Are Here, and No One Knows*

[13] Wyo. Stat. §§ 22-25-101, 22-25-110.

How to Handle Them, Vice News (Apr. 27, 2023), https://www.vice.com/en/article/epvxn7/ai-political-ads-republicans-biden. These technologies allow bad actors to increase the volume and credibility of misleading political ads—and without any disclosure requirements, voters are left in the dark and law enforcement obstructed. *See* Ekstrand & Fox, *supra* at 83. Washington's Disclosure Law provides important protection against these new threats.

II. Washington's Disclosure Law Is Consistent with the First Amendment.

A. The Disclosure Law meets exacting scrutiny.

Disclosure laws are constitutional if they meet "exacting scrutiny." *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Multiple provisions of the FCPA have been upheld by a range of courts under this standard, and Meta provides no reason why the sections it challenges now should not likewise be affirmed by this Court. *See, e.g., State v. Grocery Manufacturers Ass'n (GMA)*, 195 Wash. 2d 442, 461, 461 P.3d 334, 346 (2020); *State ex rel. Washington State Pub. Disclosure*

Comm'n v. Permanent Offense, 136 Wash. App. 277, 284, 150 P.3d 568, 571 (2006), *as modified on denial of reconsid.* (Dec. 20, 2006); *see also Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010).

1. Meta misapprehends the applicable standard of scrutiny.

Unable to counter this precedent, Meta simply ignores it, arguing that strict scrutiny should apply, based in part on the reasoning of an out-of-state Fourth Circuit case, *Washington Post v. McManus*. Meta Opening Br. 30-31.

As discussed *infra*, *McManus* is both distinguishable from this case and idiosyncratic in its reasoning. Moreover, the Fourth Circuit declined decide the level of scrutiny, cautioning that establishing strict scrutiny as the standard risked erecting undue barriers to enactment of future transparency measures for digital electoral advocacy: "To declare an invariable reviewing standard of strict scrutiny would be an attempt to script the future in the face of novel challenges to electoral integrity that we know not of and cannot foresee." 944 F.3d at 520.

Meta nonetheless insinuates that the proper approach is that of the *McManus* district court, Meta Opening Br. 28, 31, which had applied strict scrutiny on the theory that Maryland's disclosure law regulated newspapers and other third-party publishers of advertising, rather than the advertisers themselves. 944 F.3d at 512 (citing *Washington Post v. McManus*, 355 F. Supp. 3d 272, 297 (D. Md. 2019)).[14] But the district court's theory had no support in precedent, and since *McManus*, the Supreme Court in *Bonta* has more explicitly disavowed the idea of a variable standard of review. There, two 501(c)(3) groups challenged a California regulation that required "tens of thousands of charities each year" to file a non-public list of their large donors with the California Attorney General. 141 S. Ct. at 2387. Although the regulation covered charities whether they

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[14] Meta also complains that the Disclosure Law is content-based and "burdens political speech," Meta Opening Br. 28, 29, but does not explain how Washington's law differs in these respects from any other electoral transparency law, all of which target various types of "political speech."

engaged in electoral advocacy or not, the Court maintained that only exacting scrutiny applied. In so holding, the Court rejected the theory advanced by the *Bonta* plaintiffs—and Meta here—that the standard of review should vary depending on the activities of the reporting group. *Id*. at 2383 (rejecting contention that exacting scrutiny should be cabined to electoral context: "[r]egardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.").

More fundamentally, Meta's argument would countermand the basic principle of First Amendment jurisprudence that disclosure laws warrant only exacting scrutiny because they "impose no ceiling on campaign-related activities." *Citizens United*, 558 U.S. at 366 (quotation marks omitted). Like all disclosure laws, Washington's Disclosure Law "do[es] not prevent anyone from speaking," *id.* at 366; it requires only that platforms make available, on request, information about the political advertising they accept.
Its application to "third party" platforms does not change the

reality that the law itself does not restrict any speech and thus remains "the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976). Meta attempts to subvert this principle by claiming that the Disclosure Law nonetheless "ban[s] political speech," Meta Opening Br. 31, because Meta and other platforms may choose to respond by declining political ads in Washington. But even accepting this speculative prediction, it would result from Meta's choice, not by operation of Washington law.

2. Disclosure advances core First Amendment principles.

Meta also gives short shrift to the compelling governmental interests that disclosure laws promote. The Supreme Court has reiterated that laws like Washington's serve at least three important interests: (1) providing "citizens with the information needed to hold . . . elected officials accountable for their positions and supporters," *Citizens United*, 558 U.S. at 370-71; (2) deterring actual political corruption and the appearance

of corruption, *Buckley*, 424 U.S. at 66-68; and (3) gathering the data necessary to detect violations of the law, *id*. The first of these interests, the public's informational interest, is "alone . . . sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369.

Meta thus errs in arguing that the Disclosure Law fails exacting scrutiny because it does not focus on preventing quid pro quo corruption. *See* Meta Opening Br. 37. While preventing corruption is *one* constitutional justification accepted for disclosure measures, *Buckley*, 424 U.S. at 66-68, it is not the *only* one, as demonstrated by the many disclosure laws upheld solely based on the informational interest. *E.g.*, *Citizens United*, 558 U.S. at 369.

And Meta errs more fundamentally by urging that the Disclosure Law be reviewed only in terms of the putative *burdens* it imposes on speech. The Supreme Court has made clear that disclosure also *advances* First Amendment freedoms, criticizing, for instance, the plaintiffs challenging a federal

disclosure law for "ignor[ing] the *competing First Amendment interests* of individual citizens seeking to make informed choices in the political marketplace." *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (emphasis added) (quotation marks omitted). *See also Human Life*, 624 F.3d at 1005 ("[P]roviding information to the electorate is vital to the efficient functioning of the marketplace of ideas, and thus to advancing the democratic objectives underlying the First Amendment.").

As the Supreme Court has explained, "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). To fully participate in the political process, however, voters need enough information to determine which constituencies and interests are served by candidates and ballot referenda. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. *See also*

GMA, 195 Wash. 2d at 461 (reasoning that the "right to receive information is the fundamental counterpart of the right of free speech") (quotation omitted). Because the Disclosure Law provides the public with critical information about the persons funding political advertising, it promotes the values that animate the First Amendment.

B. This Court's review should not be guided by *Washington Post v. McManus*.

Turning its back to this broad judicial consensus, Meta argues that this Court should instead look outside this state to *McManus*. But the structure and purpose of the Maryland law reviewed there differs dramatically from the Disclosure Law here, and the decision has little relevance to this case.

1. *McManus* is distinguishable.

McManus concerned a fundamentally different type of disclosure law. Washington's Disclosure Law operates as an "open books" obligation, requiring covered media, including online platforms, to provide information about political

advertising upon request by a member of the public. Although the Maryland law included a somewhat analogous requirement that covered platforms allow the state Board of Elections to "inspect" their records upon request, *McManus,* 944 F.3d at 512,[15] its principal mandate was that platforms collect and *host* information on their own website about the sponsors and audience of political advertisements, and maintain this data for a year following the relevant election. The Fourth Circuit considered this "hosting" requirement a form of compelled speech, reasoning that it "intru[des] into the function of editors and forces news publishers to speak in a way they would not otherwise." *Id*. at 518 (quotation marks omitted).

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[15] The Fourth Circuit alluded to the possibility that Maryland's *inspection* requirement "implicate[d] the same set of concerns" as the hosting requirement but did not address how inspection alone "compelled" any speech. 944 F.3d at 518. Instead, its principal critique of this provision was that it failed to establish "discernable limits on the ability of government to supervise the operations of the newsroom." *Id*. at 518-19.

Because Washington law contains no analogous hosting requirement, the *McManus* opinion is inapt. Meta attempts to avoid this crucial distinction between the two state laws, describing them as equivalent simply because they both "required 'online Platforms' to make disclosures about political ads that appeared on their sites." Meta Opening Br. 18. But it was the perceived burden of compelling "publication" of the required information that the Fourth Circuit deemed a critical constitutional infirmity in Maryland's law—which is entirely absent here.

Meta also overlooks that the Fourth Circuit's compelled speech concerns were "compounded by [the law's] application to the class of plaintiffs" in that action, 944 F.3d at 517, *i.e.*, newspapers, which traditionally receive the broadest First Amendment protection, *see id*. ("[W]hen the government tries to interfere with the content of a newspaper or the message of a news outlet, the constitutional difficulties mount."). The Fourth Circuit considered the hosting requirement only "as applied to

these particular plaintiffs": namely, the Washington Post and other plaintiff newspapers. 944 F.3d at 513. It refrained from "expounding upon the wide world of social media and all the issues that may be pertinent thereto," *id*., thus explicitly declining to extend the reasoning of its ruling to social media companies like Meta.

McManus also differs from this case because, unlike here, where Washington is focused on providing information to the electorate, Maryland's "chief objective" was "combat[ting] foreign meddling in the state's elections." 944 F.3d at 521. While the court of appeals did not question that objective's importance, it faulted the Maryland law for doing "surprisingly little to further" this interest. *Id*. Indeed, the court emphasized that Maryland itself had admitted that foreign nationals "rarely, if ever" purchased the paid advertising covered by the challenged law. *Id*.

McManus thus does not cast any doubt on Washington's compelling interest in ensuring an informed electorate. This

informational interest was at most "secondary" in the *McManus* litigation, *id*. at 520, and was scarcely mentioned by the parties therein. As a result, the Fourth Circuit's opinion says virtually nothing about this interest and provides no guidance for the review of a disclosure measure justified on informational grounds.

2. *McManus* is in tension with Supreme Court precedents governing electoral disclosure.

McManus also conducts a "compelled speech" analysis that is inconsistent with the overwhelming majority of federal and state court decisions considering electoral disclosure laws.

First, the Supreme Court has never analyzed electoral reporting or disclaimer laws as "compelling speech," nor applied strict scrutiny on this ground. In *Citizens United*, 558 U.S. at 368, for instance, the Court did not adopt the plaintiff's argument that the federal "paid for by" disclaimer requirements for political ads were compelled speech, and declined to apply strict scrutiny. *See* Br. for Appellant at 43, *Citizens United*, 2009 WL 61467, No. 08-

205 (U.S. 2009) (arguing disclaimers "compel Citizens United to utter statements in its advertisements . . . that it would rather avoid") (quotation marks omitted)

But, even outside the electoral arena, the Supreme Court has typically reserved a finding of unconstitutional "compelled speech" to laws that discriminate on the basis of viewpoint, *see*, *e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 707 (1977) (invalidating a New Hampshire requirement that license plates bear the motto, "Live Free or Die" because it compelled appellees to adopt a message "repugnant to their moral, religious, and political beliefs"); or at the least, to laws that require the inclusion of speech that impedes the efficacy of the speaker's advocacy, *see Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795, 799 (1988) (requiring "professional fundraisers [to] disclose . . . the percentage of charitable contributions . . . that were actually turned over to charity," would "hamper the[ir] legitimate efforts" to raise such contributions).

In contrast, the campaign finance information that Maryland required platforms to host conveyed no ideological position and was purely factual in nature. The Washington Post did not claim to be philosophically opposed to the disclosure, and indeed it would be odd if a newspaper—or Meta here—were to assert that information about its own advertisers was somehow antithetical or "repugnant" to its beliefs.

Moreover, the Supreme Court has consistently reasoned that fears about compelling speech are assuaged where the required materials are distinct from, and unlikely to be associated with, the speaker in question. Thus, laws requiring factual or health advisories on advertising or consumer products are rarely viewed as unconstitutional compulsory speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Environmental Defense Center v. EPA*, 344 F.3d 832 (9th Cir. 2003). Similarly, the campaign finance information required by Maryland, much of which could be "hosted" separately from the political ad, was unlikely to be perceived as the newspaper's own

speech, as opposed to a state-mandated disclaimer. In short, few if any of the concerns animating the Supreme Court's compelled speech doctrine were relevant to Maryland's law, and certainly, none are present in this case.

CONCLUSION

The decision of the Superior Court should be affirmed.

Respectfully submitted,

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s/ *Jesse Wing*
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