NO. 103748-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

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

Appellant.

---

# BRIEF OF AMICUS CURIAE INSTITUTE FOR FREE SPEECH

---

Ambika Kumar, WSBA #38237
Adam S. Sieff, WSBA #59792
Bianca G. Chamusco, WSBA #54103
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
(206) 622-3150 Phone
(206) 757-7700 Fax
*Attorneys for Amicus Curiae Institute for Free Speech*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes amd Regulations**



**Constitutional Provisions**



**Other Authorities**

Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197 (1993) ..... 8

Harry Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT (1965) ..... 7

Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006) ..... 6

Daniel Kreiss & Bridget Barrett, *Democratic Tradeoffs: Platforms and Political Advertising*, 16 OHIO ST. TECH. L.J. 493 (2020) ..... 9

Maria Petrova, Ananya Sen & Pinar Yildirim, *Social Media and Political Contributions: The Impact of New Technology on Political Competition*, 67 MGMT. SCI. 2997 (2021) ..... 9

Ithiel de Sola Pool, TECHNOLOGIES OF FREEDOM (1984) ..... 5

Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027 (2018) ..... 7

Wash. Pub. Disclosure Comm'n, Online Campaign Activities, PDC Interpretation No. 07-04, https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/online-campaign-activities (last amended June 27, 2013) ..... 1

# I. INTRODUCTION

The Washington Fair Campaign Practices Act makes hosting political ads so legally perilous that online platforms have banned them outright. This turns the First Amendment upside down. Under the guise of letting sunlight in, the State has shuttered the primary forum where grassroots candidates, political outsiders, and ordinary citizens engage in democratic discourse.

The Act piles recordkeeping and advertising disclosure mandates onto intermediaries, even though the advertisers themselves—candidates, campaigns, and political committees—must also retain and disclose similar information.[1] The State thus regulates political speech at two distinct chokepoints: at the level of both speaker and host. Confronted with Byzantine obligations and crushing penalties for noncompliance, platforms have taken

[1] Wash. Pub. Disclosure Comm'n, Online Campaign Activities, PDC Interpretation No. 07-04, https://www.pdc.wa.gov/rules-enforcement/guidelines-restrictions/online-campaign-activities (last amended June 27, 2013).

the only rational course: exit. Whether by design or effect, the State has eliminated an entire category of political speech from "the modern public square." *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017).

This Court should invalidate this disclosure regime, which chills far more speech than necessary to achieve its purported aims.

## II. IDENTITY AND INTEREST OF AMICUS

The Institute for Free Speech (IFS) is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, petition, and press. In addition to its scholarly and educational work, IFS represents individuals and organizations and regularly files amicus briefs in cases raising important First Amendment questions. IFS has an interest here because the decision of the Washington Court of Appeals undermines the core First Amendment rights of millions of Americans.

## III. STATEMENT OF THE CASE

IFS adopts Meta's Statement of the Case.

## IV. ARGUMENT

Focusing narrowly on the State's asserted interests, the Court of Appeals brushed aside a burden on speech so severe that multiple major platforms have banned political ads in Washington altogether. That was error, and reversal is warranted to forestall further chilling speech in an area where the "importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (internal quotation marks omitted).

### A. The First Amendment Protects Intermediaries to Prevent the Collateral Censorship of Speakers

The Supreme Court has long recognized that imposing liability on intermediaries stifles the speech of those who depend on them to disseminate their ideas.

In *Smith v. California*, 361 U.S. 147 (1959), the Court held unconstitutional a law imposing strict liability on booksellers for

selling "obscene" books because the law compelled self-censorship. As the Court observed, the "bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability," would "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Id.* at 153-54. For similar reasons, the Court rejected Rhode Island's bookseller liability laws in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), and federal regulations requiring cable operators to block certain content, *Denver Area Educ. Telecommc'ns Consortium v. FCC*, 518 U.S. 727 (1996).

The danger of intermediary liability is that it silences *all* speakers downstream. "Control any cog in the machine," Justice Scalia warned, "and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J.,

concurring in part and dissenting in part). Censors have thus long targeted intermediaries to preserve power and obstruct change. Pope Alexander VI banned unlicensed books to suppress early Protestants. *See* Ithiel de Sola Pool, TECHNOLOGIES OF FREEDOM 14 (1984). The British likewise sought to stifle American dissent by licensing printers, taxing newspapers, and weaponizing libel prosecutions. *Id.* at 14-16.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court identified the risk that intermediary liability "discourage[s]" publishers "from carrying" controversial content, "shut[ting] off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266. Such "self-censorship" is especially pernicious because it functions as "a censorship affecting the whole public." *Id.* at 279 (quoting *Smith*, 361 U.S. at 154).

Scholars call this phenomenon "collateral censorship"—censorship of speakers by punishing the messengers they rely on

to carry their speech. *See* Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999); *see also* Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 27-33 (2006). Often, intermediaries respond to the risk of intermediary liability by deleting speech or eliminating fora entirely, as perfectly vetting or documenting facts about every contributor's content poses too great a burden. *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

That these collateral censorship efforts "enlist the cooperation of private parties makes them more, rather than less, dangerous in comparison to direct regulation." Kreimer, *supra*, at 65. For one thing, collateral censorship is "less visible and less procedurally regular" than direct regulation. *Id.* For another, intermediaries face fundamentally different incentives than the speakers whose speech they host. Faced with potential liability for speech they have no organic desire to convey, intermediaries rationally conclude that the marginal revenue from hosting

regulated speech rarely justifies the legal risks and compliance costs. *See City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 466 (2002) (Souter, J., dissenting); *see also Wash. Post v. McManus*, 944 F.3d 506, 516 (2019) (noting third-party conduits of speech face greater chill from regulation than do original speakers).

Although the targets of intermediary regulation are generally large businesses, the typical victims are dissident and grassroots speakers. *See* Harry Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965). Experience shows that "marginalized communities" are "particularly vulnerable to the collateral censorship" resulting from regulating the intermediaries on which they rely to find an audience. *See* Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2047 (2018) (collecting examples).

Perhaps no case better illustrates this principle than *Sullivan*. Nominally a case about burdens of proof, the Court's decision "responded primarily to the core First Amendment

problem of the abuse of power to stifle expression on public issues[.]" Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 LAW & SOC. INQUIRY 197, 199 (1993). *Sullivan* involved an advertisement placed in the *New York Times* by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Sullivan*, 376 U.S. at 256-57. Titled "Heed Their Rising Voices," the ad ran on March 29, 1960, and described attempts by "Southern violators" of the Constitution to deny Black Americans their civil rights. *Id.* at 257-58, 305.

Mimicking earlier censors, the plaintiff sought to "curtail media coverage of the civil rights struggle"—the primary political issue of the day—through punishing litigation. Kagan, *supra*, at 200. It nearly worked. Saddled with a $500,000 jury award, the *Times* recalled its reporters from Alabama. *Id.* at 201. CBS News, perhaps the leading news outlet of the time, had planned to stop reporting on the civil rights movement altogether had the verdict been affirmed. *Id. Sullivan*'s lesson was clear:

When states impose ruinous liability on those who facilitate political speech, the speech itself disappears.

This chilling effect is amplified on the internet. Online platforms handle larger volumes of content and face correspondingly more catastrophic penalties. *See Reno*, 521 U.S. at 853. The Fourth Circuit acknowledged this in *McManus*, observing that when "political speech brings in less cash or carries more obligations than all the other advertising options," it becomes "financially irrational" for a platform to carry it. 944 F.3d at 516. The predictable result—demonstrated here, *infra* § IV.B—is that platforms scuttle political speech rather than risk crippling penalties.

This, too, especially harms outsiders and dissidents. Digital advertising offers an essential, cost-effective way for grassroots movements and resource-limited candidates to reach targeted audiences. *See* Daniel Kreiss & Bridget Barrett, *Democratic Tradeoffs: Platforms and Political Advertising*, 16 OHIO ST. TECH. L.J. 493, 497 (2020); *see also* Maria Petrova,

Ananya Sen & Pinar Yildirim, *Social Media and Political Contributions: The Impact of New Technology on Political Competition*, 67 MGMT. SCI. 2997, 2998, 3000-01, 3017 (2021) (social media access reduces barriers to entry and expands small-donor support for political newcomers). Research confirms that "the most financially constrained candidates rely on Facebook more" than their well-funded counterparts. Erika Franklin Fowler et al., *Political Advertising Online and Offline*, 115 AM. POL. SCI. REV. 130, 137 (2021). For these less-advantaged candidates, social media targeting means "the difference between advertising and not." *Id.* at 131. When regulatory pressure drives platforms to close these channels, smaller campaigns, grassroots organizations, and low-wealth candidates lacking access to traditional media suffer most. *See* J. Scott Babwah Brennen & Matt Perault, *"The Only People That Got Hurt Were the Small Guys": Assessing the Winners and Losers from the 2020 Platform Political Ad Bans*, Duke Ctr. on Sci. & Tech. Pol'y (July 21, 2021), https://perma.cc/AUT2-BFQ5, at 9,

20 (study finding that platform bans on digital political ads before the 2020 election disproportionately harmed "smaller campaigns" and "poorer and down-ballot races").

### B. The Act Has Demonstrably Chilled Speech—Especially by Grassroots Political Speakers

After Washington amended the Fair Campaign Practices Act's commercial advertiser rule in 2018, major platforms including Google, Facebook, and Yahoo stopped accepting political ads in Washington. CP390-91, 405. These platforms provided a critical avenue for political communication, particularly for non-incumbent and less-resourced candidates. *See* Fowler et al., *Political Advertising*, 115 AM. POL. SCI. REV. at 145 (noting that Facebook hosts "more … ads from challengers and down-ballot candidates relative to television," exposing voters to a "wider set of candidates"). By driving platforms to reject Washington state political advertising entirely, the Act has closed these vital channels to campaigns trying to reach Washingtonians.

These harms—to candidates and voters alike—are real and ongoing. During interviews with political candidates, IFS heard time and again how their speech has been chilled by Meta's forced exit. For example, former State Representative Chad Magendanz began investing heavily in Facebook advertising in 2014 after discovering that over 70 percent of his district checked the platform daily. He considered the platform a great campaign equalizer and elected to withdraw from politics rather than campaign for reelection without this essential tool.

Magendanz credited the platform's speed, reach, and cost-effectiveness for enabling him to successfully compete with better-funded candidates. He could place ads on the platform within 24 hours of breaking news, which allowed him to address hot-button issues before they faded from public view. His ad buys generated thousands of impressions for minimal cost, averaging 70 to 80 impressions per dollar spent. His $30,000 investment generated over 10 million impressions—a scale and efficiency he could not replicate elsewhere.

Alternatives to Facebook advertising proved unsatisfactory. Not only were traditional forms of advertising, like cable television, much more expensive, but they also lacked the two-way engagement and real-time performance metrics that allow for rapid strategic refinement to campaign messaging. Magendanz found these other options wasteful by comparison.

Meta's exit from Washington politics contributed to Magendanz's own decision not to seek reelection in 2020. He told the Public Disclosure Commission that the embargo on Facebook and Google advertising was one of the main reasons he chose not to run. Without social media advertising, he felt he would be running at a severe disadvantage. And though Magendanz eventually returned to politics in subsequent legislative election cycles, he continues to lament the loss of his ability to engage voters through targeted Facebook advertising. With his four losses since leaving the House decided by narrow margins, he believes an effective online advertising campaign might have proved decisive in any of those races.

Magendanz's experience is not unique. Javier Figueroa, a native of Monterrey, Mexico, is one of the first naturalized citizens elected to a city council in Washington. Figueroa found Facebook advertising indispensable to his voter outreach efforts in multiple campaigns at the state and local level.

Figueroa turned to Facebook because television advertising was financially impossible for him, as it is for approximately 90% of political candidates. In his 2016 lieutenant governor race, Figueroa directed $50,000 of his $70,000 campaign budget to Facebook advertising. Without Facebook, statewide outreach would have required purchasing expensive advertisements in multiple newspapers and in multiple broadcast markets—and even those expenditures would not reach the many rural voters who lack cable access. Facebook allowed him to reach voters across the entire state through a single platform at a fraction of those combined costs. The platform's targeting capabilities also maximized the impact of his limited resources. He could tailor distinct messages to different constituencies—

urban versus rural voters, for example—while avoiding expenditures on those ineligible to vote. For Figueroa, losing access to Facebook political advertising meant losing access to a critical forum for political speech and the one channel that made statewide political speech economically feasible for candidates without wealthy donor networks.

And City of Kirkland Councilmember Toby Nixon—who previously served for five years as a State Representative and has run in nine Washington elections—maintains that Facebook was uniquely effective for local campaigns because it allowed him to reach large, Kirkland-specific audiences at low cost through precise geographic and demographic targeting. He especially appreciated that voters could click through to his website or message him directly on the platform. Television, radio, print, mailers, and generic web ads are not adequate substitutes: TV and radio buys reach many non-constituents and are easily skipped; mailers cost upwards of $0.70 per voter versus roughly one cent per Facebook impression; and widely available ad

blockers have eroded the efficacy of generic web ads. Nixon, too, has found himself shut out from his most effective campaign tool.

Multiply these stories across hundreds of Washington campaigns over many elections, and the chill on political discourse becomes undeniable. With Meta's forced exit, the Act has achieved through regulatory coercion what the State could never accomplish directly: the systematic exclusion of grassroots and resource-constrained speakers from the digital public square. This is collateral censorship in its purest and most pernicious form.

### C. The Act Fails Exacting Scrutiny

Strict scrutiny applies. But the Court need not decide that issue, as the Act's requirements fail even exacting scrutiny.

That standard requires the government to show a compelled disclosure requirement (1) bears "a substantial relation" to "a sufficiently important government interest," and is (2) "narrowly tailored" to accomplish that interest. *Ams. for*

*Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021). Narrow tailoring requires "an understanding of the extent to which the burdens" imposed by disclosure "are unnecessary" to the government's goals. *Id*. A law that burdens more speech than necessary despite "less intrusive alternatives" is unconstitutional. *Id.* at 613.

Focusing on the second element, the Act is not narrowly tailored because the obligations it imposes on intermediaries unnecessarily burden political speech.

**1. Requiring intermediaries to keep and disclose records of others' political speech significantly burdens that speech.**

The State's claim that the Act promotes public access to information collapses on contact with reality. The Act in fact achieved the opposite—eliminating an entire category of political speech, and with it, the very information about that speech that the Act sought to illuminate. This constructive speech prohibition disproportionately harms grassroots campaigns, lower-budget candidates, and outsider groups. *See supra* § IV.A.

That is exactly why *McManus* held a materially identical Maryland law unconstitutional: "While ordinary campaign finance disclosure requirements do not 'necessarily reduce[] the quantity of expression,' the same cannot be said for platform-based laws." *McManus*, 944 F.3d at 517 (internal citation omitted).

**2. The Act's redundancies are strong indicia that it is not narrowly tailored.**

The Supreme Court has cautioned against regulatory schemes that layer redundant burdens on political speech, recognizing that a "prophylaxis-upon-prophylaxis approach" signals that a regulation is not "necessary for the interest it seeks to protect." *FEC v. Cruz*, 596 U.S. 289, 306 (2022); *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014).

Here, Washington *already* requires political candidates to disclose comprehensive information about their advertisements. For example, under RCW 42.17A.320, candidates must disclose this information on the face of their ads. They are also subject to reporting requirements about their donors, expenditures, and

online advertising. *See, e.g.*, RCW 42.17A.260; RCW 42.17A.305; RCW 42.17A.235. These disclosures are publicly accessible through the Public Disclosure Commission's website and available upon request.

Washington's duplicative disclosure regime places extraordinary burdens on intermediaries while doing nothing more to advance "the prevention of '*quid pro quo*' corruption or its appearance," which remains the "only" "permissible ground for restricting political speech." *Cruz*, 596 U.S. at 305 (citations omitted). In fact, the information intermediaries must collect, store, and disclose is often *more difficult to access* than the State's candidate reporting website because an intermediary's information, especially if it is available only by visiting the intermediary's office during normal business hours.

Thus, while a belt-and-suspenders approach to transparency *might* provide some "ancillary benefits," the existence of a "detailed and specific" parallel disclosure regime means such benefits cannot justify the Act's burdens. *McIntyre*

*v. Ohio Elections Comm'n*, 514 U.S. 334, 350-51 (1995) (duplicative disclosure law invalid).

### 3. The State can advance its objectives through less-intrusive means.

Washington could have achieved its transparency goals through numerous less-restrictive options. It instead chose the *most* restrictive one, burdening intermediaries in ways that have compelled them to close their forums to political speech altogether. Because these "burdens are unnecessary," the Act is invalid. *Ams. for Prosperity*, 594 U.S. at 611.

First, as discussed above, the law already imposes disclosure obligations at the speaker level, requiring political committees to disclose information about their ads. To the extent the State wants more transparency, it should modify *those* requirements—not shift the burden to intermediaries that neither create nor fund the speech, and on whom additional burdens operate primarily to stifle all political expression downstream. *See supra* § IV.A.

Second, the State has not identified an interest supported by the Act. The State "must do more than 'simply posit the existence of the disease sought to be cured.'" *Cruz*, 596 U.S. at 307 (citation omitted). It must point to concrete evidence "demonstrating the need to address a special problem" by restricting speech. *Id.* (citation omitted); *see also McManus*, 944 F.3d at 521-22 (same standard). "[M]ere conjecture" is not enough. *Cruz*, 596 U.S. at 307 (internal quotation marks and citation omitted).

Here, the State has offered no evidence why the requirements imposed on commercial advertisers are necessary to prevent corruption, let alone any reason to believe that imposing recordkeeping duties on platforms would combat that problem. The Act's requirements—for instance, tracking an ad buyer's method of payment, WAC 390-18-050(6)(d)—bear no rational relation to any legitimate state interest. If anything, these rules are misdirected: Prohibited entities seeking to influence elections would likely do so through illicit, unreported

expenditures, not by purchasing Facebook ads with debit cards using their real names.

* * *

Because Washington has alternatives that would promote transparency without driving political speech off major platforms, the Act fails exacting scrutiny. The platform disclosure rules are unconstitutional, and the Court should hold them invalid.

## V. CONCLUSION

The judgment of the Court of Appeals should be reversed.

This document contains 3,213 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of September, 2025.

By */s/ Ambika Kumar*
Ambika Kumar, WSBA # 38237
Adam S. Sieff, WSBA # 59792
Bianca Chamusco, WSBA # 54103
DAVIS WRIGHT TREMAINE LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
ambikakumar@dwt.com
adamsieff@dwt.com
biancachamusco@dwt.com

*Attorneys for Amicus Curiae Institute for Free Speech*

## DAVIS WRIGHT TREMAINE LLP

## September 12, 2025 - 2:38 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 103,748-1 |
| **Appellate Court Case Title:** | State of Washington v. Meta Platforms, Inc. |

**The following documents have been uploaded:**

- 1037481_Motion_20250912142952SC606847_6994.pdf
  This File Contains:
  Motion 1 - Amicus Curiae Brief
  *The Original File Name was IFS Amicus Motion Merits Stage.pdf*
- 1037481_Other_20250912142952SC606847_8546.pdf
  This File Contains:
  Other - proposed Amicus Curiae Brief
  *The Original File Name was IFS Amicus Brief Merits Stage - PROPOSED.pdf*

**A copy of the uploaded files will be sent to:**

- Jessica.Buswell@atg.wa.gov
- LucasW@mhb.com
- SGOOlyEF@atg.wa.gov
- Todd.Sipe@atg.wa.gov
- abrecher@orrick.com
- adamsieff@dwt.com
- biancachamusco@dwt.com
- clopez-morales@orrick.com
- comcec@atg.wa.gov
- cristina.sepe@atg.wa.gov
- ebaranouski@orrick.com
- echlopak@campaignlegalcenter.org
- evillano@orrick.com
- jessew@mhb.com
- lisamerritt@dwt.com
- mparris@orrick.com
- pharold@wsgr.com
- rmckenna@orrick.com
- sea_wa_appellatefilings@orrick.com
- sjohnson@wsgr.com
- tmalloy@campaignlegalcenter.org
- tracie.bryant@kirkland.com
- ttindall@wsgr.com
- winn.allen@kirkland.com
- ysheard@wsgr.com

**Comments:**

---

Sender Name: Fred Burnside - Email: fredburnside@dwt.com

**Filing on Behalf of:** Ambika Kumar - Email: ambikakumar@dwt.com (Alternate Email: )

Address:
920 5TH AVE STE 3300
SEATTLE, WA, 98104-1610
Phone: 206-757-8016

**Note: The Filing Id is 20250912142952SC606847**