No. 103748-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. META PLATFORMS, INC., formerly doing business as FACEBOOK, INC., Petitioner.	SUPPLEMENTAL BRIEF OF PETITIONER META PLATFORMS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

I. INTRODUCTION

The campaign finance law at issue here has made it irrational and unworkable for digital platforms to carry political ads targeting Washington state and local elections. Major platforms have banned these ads as a result. The law tips the scales against disempowered political actors who need low-cost but effective digital advertising to communicate with voters. And the State has failed to justify that result under the First Amendment.

In 2018, the State expanded the Fair Campaign Practices Act (FCPA) to impose burdensome disclosure obligations on "digital communication platforms." The State now requires such platforms to maintain extensive information about any advertisement in the last five years that constitutes "political advertising," and disclose this information upon request to any person or entity—anywhere in the world and at any time—within two business days. Candidates and campaigns, meanwhile, have *less* demanding disclosure obligations. And even minor

noncompliance carries significant penalties for platforms: Based on its failure to timely satisfy 12 requests for information from just three individuals, Meta faces a $35 million judgment. There is no reason for Meta—or any other platform operator—to incur the threat of massive penalties (and high compliance costs), by continuing to carry ads that provide very little revenue. It is no surprise, then, that Meta and others banned Washington political ads from their platforms.

The State largely shrugs off the speech-suppressive effects of the disclosure law. According to the State, the fact that the law has effectively closed down a key channel for political speech in Washington is just a "downstream effect" for which the State bears no blame. State.Answer.Amici.12. If an "underfunded" campaign finds itself "disadvantaged" as a result, it is due to companies' "business decision[s]"—not the disclosure law. State.Answer.Amici.12. Yet the State cannot show how it makes financial sense for platform operators like Meta to continue disseminating political ads in Washington. Nor

does the State explain how causing platforms to ban digital political advertising in Washington aligns with the FCPA's ostensible purpose: "providing voters access to information that educates them about their votes." Answer.2. Far from being narrowly tailored, the law counterproductively *reduces* voter access to information. No other State has nearly so burdensome a disclosure regime—and in no other State has Meta banned political ads. What the State brushes off as a reflection of our "federalist system," State.Answer.Amici.9, is clear evidence that the law fails the means-end fit that the First Amendment requires.

Equally indefensible is the State's interpretation of the law's penalties provision—and the $35 million judgment levied against Meta. The plain language of the law triggers disclosure obligations only upon requests for information. Yet the trial court improperly transformed Meta's failure to timely satisfy 12 requests into *822* per-ad violations—double-counting ads covered by overlapping requests. Nothing in the text, scheme, or purpose of the law supports that reading. Moreover, a $35

million judgment is unconstitutionally excessive. That grossly disproportionate fine bears no reasonable relationship to Meta's misconduct or any harm it might have caused to the electorate.

This Court should reverse.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the FCPA and implementing regulations violate the First Amendment because they impose unjustifiable burdens on digital communication platforms and fail to further the State's purported interest in educating its electorate about political ad purchasers and their expenditures through narrowly tailored means. *See* RCW 42.17A.345(1); WAC 390-18-050 (together, "disclosure law").

2. Whether a penalty imposed for violating the disclosure law's obligation to provide responsive information "promptly upon request" should be calculated based on the number of requests or the number of ads subject to each request.

3. Whether a $35 million judgment against Meta for failing to respond to 12 requests with every piece of required

information within two business days is an unconstitutionally excessive fine under the Eighth Amendment.

III. STATEMENT OF THE CASE

Purchasing an ad on Facebook is relatively inexpensive; it can cost as little as a dollar. CP2420, 2485, 5012. Although Facebook ads are relatively inexpensive, they are effective at reaching voters. Advertising on Facebook has therefore been particularly important in Washington for non-establishment candidates and grassroots campaigns. CP7410-13; CP7416-19.

In 2018, Meta (which operates Facebook) and other major platform operators banned Washington political ads. Pet.8-9. The bans responded to new regulations extending certain disclosure requirements to "digital communication platforms" and adding platform-specific obligations. WAC 390-18-050.

The FCPA now requires platforms to (1) collect and maintain information on "political advertising" in Washington; and (2) make it available "for public inspection." RCW 42.17A.345(1). "Political advertising" is anything "used for the

purpose of appealing, directly or indirectly" for support in an electoral campaign. RCW 42.17A.005(40). Platforms must maintain a copy of each ad; name of the candidate or ballot measure; name and address of the ad's sponsor; total cost; manner and date of payment; dates on which the ad was shown; demographics and statistical characteristics of targeted and reached audiences; and number of impressions generated. WAC 390-18-050(6)-(7). "[U]pon request" by anyone, platforms must provide any or all of this information within two business days. WAC 390-18-050(4). These requirements constitute the "disclosure law" challenged here.

The FCPA does not require ad buyers to notify platforms when they post ads covered by the disclosure law. Thus, unauthorized ads sometimes slip through Facebook's screening processes. CP7452-53. Once posted, key information about those ads becomes accessible in Meta's Ad Library. CP6639-40. The Ad Library displays a copy of the ad; name of the candidate or ballot measure; sponsor's name (and address if provided);

approximate cost; dates on which the ad ran; demographic information for reached audiences; and approximate number of impressions generated. CP7393-94.

Between 2018 and 2021, Meta received requests for more granular information about Washington political ads from only three individuals: Eli Sanders, Tallman Trask, and Zach Wurtz. Pet.9-10. None of these requests was made to inform the requester's vote. CP5241; 8060-61; 7580-82 (Sanders and Trask testing Meta's compliance); CP38-40 (Wurtz seeking information for business purposes). Yet the requests were broad—one sought information on "every political ad shown in Washington State since 2016." CP243.

The State sued Meta for its alleged failure to satisfy these 12 requests. Following cross-motions for summary judgment, the trial court ruled for the State on every question—disregarding numerous disputes of material fact. The court rejected Meta's argument that the disclosure law violates the First Amendment and assessed 822 "per-ad" violations against Meta—double-

counting 411 ads subject to multiple requests. CP5574-76. The court imposed the $10,000 statutory maximum for each violation, awarded the State fees and costs, and trebled the judgment as punitive damages—reaching a $35 million penalty. CP5576, 5816.

The Court of Appeals affirmed. Rejecting Meta's argument that strict scrutiny should apply, the court held that the disclosure law survives exacting scrutiny, largely based on its determination that compliance is "technically feasible" for Meta. Op.25-26, 34-35. The Court of Appeals also affirmed the per-ad calculation of penalties and the $35 million sum. Op.66, 73.

IV. ARGUMENT

A. The disclosure law violates the First Amendment.

1. The disclosure law cannot survive strict scrutiny.

The default rule is that strict scrutiny applies to content-based regulations of speech. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). The disclosure law is plainly content-based, as liability hinges on the political *content* of the ads posted

on Facebook. *See id.* at 168-69; Pet.12-13. *Contra* Op.15 (wrongly conflating viewpoint neutrality and content neutrality). The State does not even attempt to argue that the law survives strict scrutiny. For good reason: Even if educating the electorate is a "compelling state interest," the disclosure law is not "the least restrictive means" of furthering that interest. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *cf. infra* 12-22.

The only question is whether the disclosure law is subject to a lesser, exacting-scrutiny standard, solely because it concerns disclosures about campaign finances—as the Court of Appeals held. Op.12-17. The answer is no.

The U.S. Supreme Court has applied exacting scrutiny to laws imposing campaign-finance disclosure requirements on political actors—but never to disclosure requirements on neutral platforms disseminating political speech. *See* Op.13-16 (collecting cases). The rationale for applying exacting scrutiny to such laws is that they "burden the ability to speak, but … do not prevent anyone from speaking." *Citizens United v. FEC*, 558

U.S. 310, 366 (2010) (citation modified). Disclosure obligations will not stop political speakers from communicating with voters because they must share their message to "succeed at the ballot box." *Washington Post v. McManus*, 944 F.3d 506, 516 (4th Cir. 2019).

This rationale does not apply to disclosure laws targeting platforms that have "markedly different incentives." *Id.* at 517. This case proves the point. The ads here sometimes earned Meta as little as a dollar, while exposing Meta to massive liability. The Court of Appeals' reasoning—that platforms will be "strongly motivated to comply" to "continue receiving advertising revenue," Op.16—has no basis in the record or reality. The disclosure law "make[s] it financially irrational … for platforms to carry political speech." *McManus*, 944 F.3d at 516.

The predictable result of that incentive structure is that platform-oriented disclosure laws have much greater speech-suppressive effects than disclosure laws targeting political actors. *See* Meta.Answer.Amici.4-6; *cf. Nat'l Rifle Ass'n of Am.*

v. Vullo, 602 U.S. 175, 198 (2024) ("[I]ntermediaries will often be less invested in the speaker's message and thus less likely to risk the regulator's ire[.]" (citation modified)). That requires a higher level of scrutiny. *See Davenport v. Washington Ed. Ass'n*, 551 U.S. 177, 188-89 (2007) (explaining that "strict scrutiny is unwarranted" only for the subset of content-based regulations that do not risk suppressing speech); *cf. Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672-73, 680 (1998) (declining to "mechanical[ly]" extend public-forum doctrine to public broadcasting because it might cause broadcasters "not to air candidates' views at all," resulting in "less speech, not more").

In support of its view that exacting scrutiny applies, the State points to inapposite caselaw. The State cites *McConnell v. FEC*, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United*, 558 U.S. at 310. Answer.11-12. But *McConnell* was applying a distinct line of cases concerning broadcasters, *see* 540 U.S. at 237 (citing, e.g., *Red Lion Broad. Co. v. FCC*, 395 U.S.

367 (1969))—which, as government licensees, receive reduced First-Amendment protection and can be *required* to carry political speech, *see Red Lion*, 395 U.S. at 389-90. The State is also wrong to suggest that *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), is like this case. Answer.12. The supposedly "neutral third party," Answer.12, was the State itself, which *defended* the law in court and was constitutionally required to host the underlying political speech. *See John Doe No. 1*, 561 U.S. at 192-93.

Because strict scrutiny applies and the State does not argue it is satisfied here, the decision below must be reversed.

2. The disclosure law fails even exacting scrutiny.

Even under exacting scrutiny, the State must show that the disclosure law bears "a substantial relation … [to] a sufficiently important governmental interest" and is "narrowly tailored to th[at] interest." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021) (citation modified); *see State v. TVI, Inc.*, 1 Wn.3d 118, 128 (2023). If the State foregoes "less intrusive

alternatives" and suppresses more speech than is necessary, the law fails to "satisfy[] the means-end fit that exacting scrutiny requires." *Bonta*, 594 U.S. at 613.

The disclosure law cannot pass muster under even this less-demanding standard. It does very little to advance the State's interest in fostering an informed electorate. And whatever little it does comes at an unjustifiable cost to political expression, employing means that are far from narrowly tailored.

a. The disclosure law suffers from a "dramatic mismatch … between the interest that the [State] seeks to promote and the disclosure regime that [it] has implemented." *Id.* at 612. Thus, its application to Meta violates the First Amendment.[1]

The State's asserted interest in educating voters may be "important" in the "abstract." *McManus*, 944 F.3d at 520. But, against the backdrop of Washington's disclosure regime for

[1] Despite the Court of Appeals' statement to the contrary, Op.12 n.9, the State has correctly acknowledged that "Meta raises an as applied challenge," State Ct. App. Br. 34; Pet.20 n.3.

political actors, the platform-oriented disclosure obligations do little to advance that interest. *See Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 752 (2011) (isolating the "marginal" benefit of Arizona campaign finance law). Political actors already maintain and must publicly disclose information about electioneering communications: 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 42.17A.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.

The State does not explain why additional information—such as ad targeting and reach information and the method of payment used to purchase an ad, *see* WAC 390-18-050(6)(d), (7)(g)—should be required from platforms instead of political actors. Nor does the State explain why platforms must bear the burden to disclose this information within two business days of

any request they receive. All the State says is that many campaigns purchase advertising through consulting firms or other third parties. Answer.15-16. But campaigns also hire third-party "compliance firm[s]" to satisfy their disclosure obligations; that a third party is involved says nothing about whether the requisite information can be made accessible to the public. CP6724. The State does not argue—and did not adduce any evidence—that any information platforms are required to disclose cannot be obtained from the ad sponsors directly.

In any event, shifting the disclosure burden to platforms has not enhanced the State's goal of fostering an informed electorate. Because the State made it "financially irrational" for platforms to disseminate political advertising, *McManus*, 944 F.3d at 516, platforms have chosen to ban Washington political ads. That means *less* information for voters. Specifically, it means less information from the non-incumbent, grassroots candidates and hyperlocal initiatives that rely on low-cost digital advertising to spread their messages. *See* Pet.29-32;

State.Answer.Amici.12 (recognizing that "underfunded challenger[s]" may be most "disadvantaged"); *see also Collier v. City of Tacoma*, 121 Wn.2d 737, 752 (1993) (finding speech restriction "particularly problematic because it inevitably favor[ed] certain groups of candidates over others"). The disclosure law therefore "depriv[es] citizens of valuable opinions and information." *Wash. State Republican Party v. Wash. State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 265 (2000).

Extraordinarily, the State welcomes this speech-suppressive effect: The State faults Meta for only "half-heartedly implement[ing]" its ban and "allow[ing] … lapse[s]" where Washington political ads were inadvertently disseminated on Facebook. Answer.7-8. Otherwise, the State suggests that these speech-suppressive effects may be disregarded from the First Amendment calculus because Meta made a "business decision" not to permit ads, Answer.29, reflecting Meta's "'corporate priorities,'" Answer.17 (quoting Op.35). But Meta's ban is the rational response to the financial "incentives" under

which Facebook and other platforms "operate." *McManus*, 944 F.3d at 517. The State cannot skirt the perverse incentives that the disclosure law creates by wrongly asserting that Meta's ban amounts to a "choice not to comply with the law." State.Answer.Amici.17 (citation modified). Meta has no obligation to disseminate speech that subjects it to the law's burdensome requirements. *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (explaining that regulations themselves "dampen[] the vigor and limit[] the variety of public debate" when regulatory burdens lead to "self-censorship").

The Court of Appeals scarcely addressed the law's means-end fit, instead focusing on whether it is "technically feasible" for Meta to comply with the disclosure law. Op.34-35. The court insisted that the law is constitutional because Meta "'*can* comply,'" and merely "refuse[d]" to do so. Op.30, 35 (emphasis added). This reasoning—which the State repeats, State.Answer.Amici.2-3, 15-20—is flawed several times over.

To start, whether it is "technically feasible" to comply with a law is beside the point. In *Bonta*, for example, no one disputed that charitable organizations could file Schedule B forms disclosing information about their top donors. *See* 594 U.S. at 611-15. It was perfectly feasible. But the law "cast[] a dragnet for sensitive donor information from tens of thousands of charities each year, … even though that information [would] become relevant in only a small number of cases involving filed complaints." *Id.* at 614. These disclosures were not "'in proportion to the interest served.'" *Id.* The same means-end disproportion is equally fatal here.

The Court of Appeals also understated the burdens associated with the disclosure law, relying on the trial court's one-sided view of the summary judgment record. While the trial court determined that providing disclosures promptly upon request would be easy as "press[ing] a button," RP31:16-32:8, the record disproves that notion, *see, e.g.*, CP7859 (expert opinion that compliance would require "substantial changes to

[Meta's] carefully designed transparency tools"); CP7887 & n.127 (testimony that "the privacy of users" and "the realtime and dynamic nature of [Meta's] advertising auction" constrain Meta's ability to comply); CP8370-71 (testimony that altering Ad Library to include required disclosures would be too "burdensome and difficult").

The State downplays the law's burdens by wrongly asserting that the law treats all commercial advertisers alike. State.Answer.Amici.1-2, 4-7. But no other commercial advertiser must disclose such detailed information: Television stations need not disclose the number of viewers that tune in while an ad is broadcasted; newspapers need not disclose the demographics of their delivery routes. WAC 390-18-050(7)(g). And even if the State were imposing the same obligations on all advertisers, the burden on, say, print media (which publicizes a limited number of political ads) would vastly differ from the burden on digital platforms (which disseminate millions of inexpensive ads independently posted by users).

In *McManus*, the Fourth Circuit struck down the closest analog to Washington's disclosure law—a significantly *less* burdensome one. *See* Pet.15-16. The Maryland law there covered ads going back only one year and required ad purchasers to notify platforms that they had posted a covered ad (rather than forcing platforms to monitor all ads to ensure compliance). *See* Md. Code Ann., Elec. Law § 13-405(a)(1), (b)(3), (c)(2) (2018). While the State tries to distinguish *McManus* as a newspaper case involving a distinct publication requirement, State.Answer.Amici.20-21, *McManus* also struck down a similar inspection requirement for digital platforms, *see* Pet.16-17. The Fourth Circuit held that that law's burdens on speech—which had led Google to stop disseminating political advertisements in Maryland—could not be justified under even exacting scrutiny. *See McManus*, 944 F.3d at 517, 520.

b. The State has failed to establish that less speech-suppressive alternatives would not work to advance its stated interest. *See Bonta*, 594 U.S. at 613. The State could require ad

sponsors to maintain and disclose all the requisite information about purchased digital ads—an approach that better protects speech by allowing the "organic desire to succeed at the ballot box" to "offset[] … whatever burdens are posed by disclosure obligations." *McManus*, 944 F.3d at 516. The law could at least mirror the disclosure regime for political actors by limiting disclosure obligations to ads disseminated 21 days before the election or requiring platforms to respond to requests from the public only in the 10 days before the election. *See* RCW 42.17A.260(1)(a); RCW 42.17A.235(6)(a). The State could also mitigate the law's burdens by requiring ad purchasers to notify platforms when they post ads subject to the disclosure law. The State has not demonstrated the need for its chosen platform-oriented disclosure regime given these less intrusive alternatives.

The handful of other States that have platform-oriented disclosure laws uniformly require ad buyers to flag covered ads for platforms and provide certain safe harbors for imperfect compliance. *See* NetChoice Br. 4-7. "The State has not

adequately explained … what makes [Washington] so peculiar" that these less burdensome measures, assuming they are constitutional, would not work here. *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 214-15 (1989).

B. The $35 million judgment cannot be reconciled with the plain text of the penalties provision or the U.S. Constitution.

The Court of Appeals compounded the disclosure law's burdens by adopting an atextual "per-ad" interpretation of what constitutes a violation. A plain reading of the law establishes that Meta committed just 12 violations—one for each request that Meta failed to fully satisfy.

Notwithstanding the minor nature of Meta's offense, the court also affirmed "the largest campaign finance penalty anywhere in the country—ever."[2] That outlier $35 million penalty is unconstitutionally excessive.

[2] Press Release, Washington State Office of the Attorney General (Oct. 26, 2022), https://tinyurl.com/sthjsbfx.

1. Base penalties for violations of the disclosure law must be assessed on a per-request basis.

a. "Where statutory language is plain and unambiguous," this Court "ascertain[s] the meaning of the statute solely from its language." *Dot Foods, Inc. v. Wash. Dep't of Rev.*, 166 Wn.2d 912, 919 (2009). The relevant language, here, requires a per-request calculation of penalties. A platform satisfies its obligations under the disclosure law by making information available "promptly *upon request*." WAC 390-18-050(4)(b)(i) (emphasis added); *see also* WAC 390-18-050(2) (obligation to "make information available for public inspection"); RCW 42.17A.345(1). It follows, then, that Meta committed 12 violations—one for each of the 12 times Meta failed to timely satisfy a "request" for information.

The Court of Appeals, however, affirmed the trial court's unexplained decision to "increase the number of violations from 12 to 822" and base penalties "from $120,000 to $8,220,000." Op.59. The Court of Appeals recognized that the disclosure law

only ever requires Meta "to disclose" information about ads "when requested." Op.1. Yet the court improperly "delete[d]" the request requirement from the law—replacing it with a per-ad metric for assessing violations that appears nowhere in the text. *State v. J.P.*, 149 Wn.2d 444, 450 (2003). This Court cannot embrace a construction that depends on "import[ing] additional language … the legislature did not use." *Dot Foods*, 166 Wn.2d at 920.

Equally troubling, the Court of Appeals reached its per-ad construction by interpreting language from an FCPA provision that is *not even* at issue here: the provision requiring platforms to "maintain current books of account and related materials." RCW 42.17A.345(1); *see* Op.61. Based on this language, the court divined a legislative "intent" to impose a "discrete serial obligation" on platforms to "preserve" information about "each individual ad"—*regardless* of whether anyone ever "step[s] in[]" to request information. Op.62. In short, the court's per-ad interpretation is based on this "distinct" record-maintenance

obligation. Op.62.

Yet Meta indisputably satisfies its obligation to "maintain" all requisite information about Washington political ads posted on Facebook. Answer.6-7 ("[Meta] collects and retains th[is] information in its regular course of business."). The violations at issue here are premised on Meta's failure to "make [this information] available for inspection" following each of 12 requests. CP5575; *see* Op.3-4. The court's per-ad interpretation rests on a reading of the wrong statutory provision. It is also internally incoherent: If violations are based on a "distinct" FCPA obligation that does not "requir[e] someone … to request" information, Op.62, why did the trial court impose penalties based on the number of ads covered by the 12 requests—and double-count ads covered by overlapping requests? The Court of Appeals cannot escape the nature of Meta's violations, as dictated by the disclosure law's language itself: failures to timely provide covered information "upon request."

b. Unable to find textual support for a per-ad

interpretation, both the Court of Appeals and the State argue that the law must be "liberally construed" to further its purposes. Op.62 (quoting RCW 42.17A.001(11)); Answer.20-21. But this Court "glean[s] the legislative intent from the words of the statute itself"; supposed purpose cannot overcome plain language. *HomeStreet, Inc. v. State*, 166 Wn.2d 444, 451-52 (2009).

Regardless, neither the Court of Appeals nor the State explains how a per-ad construction better serves legislative intent. *See Better Bus. Bureau of D.C. v. United States*, 326 U.S. 279, 283 (1945) (liberal construction cannot give "statutory words … tortured meanings unjustified by legislative intent"). The court repeatedly cites an introductory provision explaining that the FCPA seeks to ensure "full disclosure" of campaign expenditures. Op.61-62 (quoting RCW 42.17A.001(1)). But this language equally supports Meta's reading: A violation occurs whenever platforms fail to "fully disclose" information in response to a request.

The Court of Appeals reasoned that a per-request

construction permits requesters to "circumvent … legislative intent" by filing "separate request[s] for each individual ad[]." Op.64; *see* Answer.21-22. If the court just meant that requesters could weaponize a per-request method of calculating penalties to magnify platform liability, the same could again be said of the per-ad approach. Here, a single request made for no purpose other than to test Meta's compliance with the law resulted in million-dollar penalties.

To further the law's purpose, liability should hinge on responsiveness to requests for information—not how much speech a platform disseminates.[3] Meta provided the example of a newspaper that refuses *one hundred* requests from the public to reveal the sponsor of a highly inflammatory full-page ad published days before an election. Pet.23-24. Under a per-ad

[3] Indeed, political ads proliferate on Meta's platform (and thereby increase Meta's liability exposure) precisely because Facebook provides a uniquely accessible and cost-effective method of political advertising. *See* Pet.30-31. The Court of Appeals' per-ad reading of the penalties provision is at odds with the FCPA's directive that such "small contributions by individual contributors are to be encouraged." WAC 42.17A.001(9).

interpretation, the newspaper would face significantly less liability than a platform that fails to respond to one request seeking the mailing addresses associated with every digital ad from the past five years. It is no answer that trial courts have "discretion" in assessing penalties. Answer.21. This Court should adopt a reading of the disclosure law faithful to its purpose and plain terms—not rely on downward discretion to correct for arbitrary calculations of penalties.

c. To the extent this Court finds ambiguity, the rule of lenity would require a "[per-request] approach that would restrain [FCPA] penalties over a [per-ad] theory that would greatly enhance them." *Bittner v. United States*, 598 U.S. 85, 101 (2023) (Gorsuch, J., concurring). This rule ensures that, consistent with due process, defendants are given "'fair warning … of what the law intends to do if a certain line is passed.'" *Id.* at 102 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

The record here establishes that Meta lacked fair warning

of what constitutes a violation. The State initially interpreted the statute to impose per-request penalties. CP8010-11. Only later did the State advance the theory that penalties must be assessed both per-request and per-ad. CP440 (seeking penalties for 12 per-request violations and 782 per-ad violations). And as the Court of Appeals observed, the trial court initially agreed with Meta that violations must be calculated per-request—but then "changed its method of calculation" without "elaborat[ing] as to why." Op.59; *compare* RP61-62, *with* CP5575-76. Given these inconsistent interpretations, a per-ad reading of the statute cannot have been clearly communicated to regulated parties like Meta.

2. The $35 million judgment is so disproportionate to Meta's offenses that it violates the Eighth Amendment.

The trial court double-counted ads subject to overlapping requests, imposed the maximum $10,000 base penalty for each of the 822 purported violations, and trebled the judgment—including its award of fees and costs—as punitive damages. CP5792-93; CP5816. The resulting $35 million judgment is

unconstitutionally "disproportional to the gravity of [Meta's] offense." *City of Seattle v. Long*, 198 Wn.2d 136, 166 (2021); *see* U.S. Const. amend. VIII.

Meta has already undertaken massive efforts to maintain an Ad Library that indisputably provides most of the information sought by the relevant requests. Op.3. And while Meta responded to most of the 12 requests, Meta was faulted for minor infractions, like supposedly providing insufficiently granular location-targeting information. *See* State Ct. App. Br. 26. None of the requests for information was placed to inform the requester's vote. *Supra* 7. Yet the Court of Appeals affirmed "top-of-the[-]range" damages. Answer.26.

Nearly every guidepost used to assess excessiveness establishes that the fine here is unconstitutional. *Long*, 198 Wn.2d at 173 (considering "nature and extent of the crime," "whether the violation was related to other illegal activities," "other penalties," and the "extent of the harm caused"). Meta effectively committed a "reporting offense," "unrelated to any

other illegal activities," impacting just three individuals, and each "in a relatively minor way." *United States v. Bajakajian*, 524 U.S. 321, 337-39 (1998).

The State argues that the "considerations" leading this Court to uphold a campaign-finance penalty in *State v. Grocery Manufacturers Association*, 198 Wn.2d 888 (2022) (*GMA*), establish that the fine here is constitutional. Answer.24-25. But those "considerations" cut the other way on these very different facts. In *GMA*, a political action committee had orchestrated a secret "campaign strategy" to deploy millions of dollars in opposition to a ballot initiative while "shielding [members] from … negative public response." 198 Wn.2d at 894. The defendant had "directly violat[ed] the core principles of the FCPA." *Id.* at 899. Moreover, the $18 million penalty at issue "directly correlated to the harm caused": Base penalties equaled the total amount of concealed campaign expenditures. *Id.* at 902 n.4.

This case is nothing like *GMA*. Meta, as a platform operator, is not even among the "class for whom this statute was

principally designed—candidates and political action committees." *Id.* at 903 n.5. Unlike in *GMA*, the penalties assessed here vastly exceed the campaign expenditures involved. Some of the ads cost a dollar or less but resulted in a $30,000 trebled penalty. *See, e.g.*, CP2420, 2484. Yet the overall penalty here is *twice* the size of the *GMA* fine.

Last, the State argues that the trial court's penalty assessment is statutorily authorized and must be "reviewed for abuse of discretion." Answer.26-29. But fines are reviewed "de novo" for constitutionality. *Long*, 198 Wn.2d at 163; *Bajakajian*, 524 U.S. at 336. Because the $35 million sum bears no relation to Meta's misconduct, it must be invalidated.

V. CONCLUSION

For these reasons, this Court should reverse the Court of Appeals' decision.

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DECLARATION OF SERVICE

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

Dated July 14, 2025.

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