IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

v.

META PLATFORMS, INC.,

Defendant.

Case No. 20-2-07774-7 SEA

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Hon. Douglass A. North

Hearing Date: August 26, 2022, 9:00 a.m.

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INTRODUCTION

"'The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Rickert v. State, PDC*, 161 Wash.2d 843, 848 (2007) (quoting *Burson v. Freeman*, 504 U.S. 191, 196 (1992)). Despite this express protection, Washington has enacted an extraordinary disclosure regime that has shut down digital fora for core political speech statewide. The statute (RCW 42.17A.345), as implemented by the regulation (WAC 390-18-050), unduly burdens political speech by requiring digital platforms to provide any member of the public who demands it a litany of information about political advertisements that appear on their services, including the name and address of the person who paid for the ad, the payment method used, the amount paid, detailed demographic information about the audiences the advertiser targeted and reached, and the number of "impressions" generated—in no more than two business days of receiving the request. And platforms must make those rapid disclosures 365 days a year, while the actual speakers—political advertisers—are only required to disclose information on a short turn during the few weeks before an election. Under the State's interpretation of the law, a requester does not have to be a Washington citizen (even Russian or Chinese government operatives could invoke its provisions); does not have to identify themselves (even anonymous requests must be complied with); does not have to identify specific ads (a requester can ask for *every* political ad shown to anyone in Washington in the last five years); and can seek the information for any purpose (including targeting or harassment of the speakers). Platforms must turn over the requested information no questions asked. And if they fail to do so within two business days (or, until recently, within 24 hours), they face potential fines of $10,000 (and sometimes $30,000) per violation, though what constitutes a violation is undefined.

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The record amply demonstrates that Washington's onerous regime severely burdens political speech. Indeed, multiple platforms have been forced to take unprecedented action because it is virtually impossible to fully comply with the law's onerous demands. Meta (which operates Facebook and Instagram) already provides most of the categories of information the law requires in its Ad Library, but the remaining disclosures are so burdensome it has nonetheless banned state and local political advertising in Washington—and only Washington—from its services. Other platforms, including Google and Yahoo, have enacted similar bans, closing off entire channels of communication for core political speech. To make matters worse, the loss of digital advertising platforms in Washington tilts the playing field in favor of certain political speakers. The record shows that the loss of digital advertising benefits big-money campaigns and incumbents who can afford other, more expensive and traditional kinds of advertising. It hamstrings small, upstart challengers who rely on inexpensive digital advertising to efficiently and effectively spread their message. However well-intentioned Washington's disclosure rules may be, the First Amendment "prohibits such attempts to tamper with the 'right of citizens to choose who shall govern them.'" *FEC v. Cruz*, 142 S.Ct. 1638, 1652 (2022) (citations omitted). Because the disclosure regime singles out political speech for disfavored treatment (and compels speech to boot), it is presumptively unconstitutional.

The State cannot justify the law under heightened scrutiny. The disclosure regime requires digital *platforms* to disclose certain information about political speakers that other sections of Washington law already require the speakers themselves to disclose. Such redundancy proves the disclosure regime is neither narrowly tailored nor the least restrictive means for the State to achieve its goals. And while the State insists the disclosure regime helps ferret out corruption and foreign interference in its elections, the State cannot identify *any* example of the laws being used in this

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way. Further, much of the information the State requires platforms to produce—such as demographic information about the audiences "targeted and reached," the total number of "impressions" made, and payment method (*e.g.*, debit or credit)—bears no discernible relationship to that interest. Likewise, while the State claims the disclosure regime provides the public with important information about candidates for office, it has never explained why, for example, Washington voters need to know the demographics of people who see a digital ad, the total number of impressions of the ad served, or how the buyer paid for the ad to evaluate a candidate's qualifications. It is no surprise, therefore, that these regulations have rarely been invoked by Washington citizens, and even then for reasons unrelated to election integrity.

Holding that Washington's unprecedented disclosure regime is unconstitutional here would not jeopardize other disclosure laws, whether in Washington or elsewhere. It would simply bring Washington into line with the 49 other states that impose disclosure requirements that do not have the effect of shutting off entire channels of core political speech. In almost all other jurisdictions, disclosure obligations appropriately fall only on *political speakers*—not *platforms* that display political and all manner of other ads. That is a critical distinction. The State readily admits its disclosure regime is one of the most onerous in the nation. Only Maryland has tried something similar, and the Fourth Circuit struck it down under the First Amendment. *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019). As the Fourth Circuit put it, a third-party disclosure law like this "burdens too much and furthers too little, and this one-sided tradeoff falls short of what the First Amendment requires." *Id.* at 523.

RELIEF REQUESTED

The Court should grant Meta's motion for summary judgment. *See* CR 56(c).

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FACTS

A. Washington's Disclosure Regime

Washington has one of the most onerous political-speech-disclosure regimes in the country. Like many jurisdictions, Washington requires political *speakers* to disclose information about themselves and their speech. Candidates and organizations running political ads must disclose certain information on the face of the ad, RCW 42.17A.320, and are subject to detailed reporting requirements, *e.g.*, RCW 42.17A.260; RCW 42.17A.305; RCW 42.17A.235.

But Washington does not stop there. Unlike any other state, Washington also imposes disclosure obligations on third parties who are "[c]ommercial advertisers," including those who provide a digital platform to those who wish to run political ads. RCW 42.17A.345. The "[c]ommercial advertisers" section of Washington's law imposes disclosure requirements on "any person that sells the service of communicating messages ... appealing, directly or indirectly, for votes or for financial or other support in any election campaign." RCW 42.17A.005(10). Under RCW 42.17A.345, "commercial advertiser[s]" must "maintain current books of account and related materials" that "shall be open for public inspection during normal business hours during the campaign and for a period of no less than five years after the date of the applicable election." These records must include "[t]he names and addresses of persons from whom it accepted political advertising or electioneering communications;" "[t]he exact nature and extent of the services rendered;" and "[t]he total cost and the manner of payment for the services." RCW 42.17A.345(1)(a)-(c).

Washington's Public Disclosure Commission (the state agency charged with enforcing RCW 42.17A.345) has promulgated regulations "specifying the information that commercial advertisers must maintain and disclose as part of the 'exact nature and extent of the services

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rendered.'" Am. Compl. ¶4.16. WAC 390-18-050, the regulation interpreting the phrase "exact nature and extent of the services rendered," requires that commercial advertisers disclose a plethora of information, including cost information, dates of service, who made a payment and when and how it was made, and identifying information for the persons or entities paying for an advertisement or supported or opposed in an advertisement. WAC 390-18-050(5).[1] All this information "must be made available within twenty-four hours of the time when the advertisement or communication initially has been publicly distributed or broadcast, and within twenty-four hours of any update or change to such information." WAC 390-18-050(4). And the information must be either be available online or produced "promptly upon request" via email. WAC 390-18-050(3)(b)(i)-(ii). Though the regulation does not define "promptly," the PDC interpreted it at all relevant times to require production within 24 hours, until the regulation was later amended to provide for two business days (or three in some instances). *See* Bryant Decl., Ex. 1, at 6-7.[2]

In 2018, the State expanded its outlier disclosure regime even further. It amended the statute to include "digital platforms," sweeping in platforms like Facebook and Google. Am. Compl. ¶4.4. Thereafter, the PDC promulgated additional regulations, imposing even more

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[1] Unless otherwise noted, all citations to WAC 390-18-050 are to the version effective January 24, 2020 through March 6, 2022.

[2] In March 2022, the PDC amended WAC 390-18-050 to specify that "promptly upon request" means "no later than two business days" after the request, or three business days for certain ads. WAC 390-18-050(4)-(5) (eff. Mar. 7, 2022). But because the conduct at issue in this case occurred prior to March 2022, the previous version of the regulations applies. That said, the PDC's decision to relax the 24-hour requirement confirms that mandating disclosure in 24 hours is not narrowly tailored to serve the State's asserted interests, let alone the least restrictive means of doing so. *See infra* §I.B.2. In all events, the State did not resolve the law's unconstitutionality by lengthening the disclosure period from 24 hours to two business days—both regimes fail scrutiny.

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onerous obligations on digital platforms. *See* WSR 18-13-005. Under those regulations, digital platforms must provide, in addition to all of the information listed above, "[a] description of the demographic information (e.g., age, gender, race, location, etc.) of the audiences targeted and reached, to the extent such information is collected by the commercial advertiser as part of its regular course of business, and the total number of impressions [i.e., views] generated by the advertisement of communication" for each Washington political ad run on their platforms. WAC 390-18-050(6)(g).

Failure to comply with the law is punishable by up to $10,000 per undefined "violation." RCW 42.17A.750(1)(c). In certain circumstances, those fines can be trebled—exposing digital platforms to a $30,000 fine for a single "violation." RCW 42.17A.780.

B. Advertising on Facebook

Meta operates a variety of online services and applications, including Facebook. Facebook provides an affordable and wide-reaching service for political advertising. Digital advertising on platforms like Facebook allows candidates and campaigns to target specific audiences. Bryant Decl., Ex. 3 ¶¶3-4; *id.*, Ex. 4 ¶¶5-6. Yet it is far less expensive than advertising through more traditional means, like print, television, or radio. *Id.*, Ex. 4 ¶8; *see also id.*, Ex. 5, 270:20-271:10; *see also id.*, Ex. 6, 22:9-20 (describing Facebook ads as "a way to reach people," "highly targeted," and "so very cost effective"). As one political candidate explained, advertising on digital platforms like Facebook "is often the most cost effective and accessible way for many state and local politicians to engage in political speech." Bryant Decl. Ex. 4, ¶9; *see id.*, Ex. 3, ¶5; *id.*, Ex. 7, ¶5. "Digital political advertising is especially important to candidates without significant financial resources, non-incumbents who lack name recognition, first-time candidates, and third-party candidates." *id.*, Ex. 4, ¶9; *see id.*, Ex. 8, at 172:24-173:7.

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Transparency is a priority for Meta to help prevent election interference. *See* https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US&media_type=all. Meta voluntarily works to further that goal by offering the Ad Library, a comprehensive, searchable collection of ads displayed on Facebook. *Id.* Any person with an internet connection can access the Ad Library at any time. Bryant Decl., Ex. 9, at 8. The Ad Library provides an extensive amount of information about political ads, including much of the information the Washington disclosure regime requires platforms to disclose. *Id.* at 8-9; *see id.*, Ex. 8, at 57:12-23 (the Ad Library is "an invaluable source of digital ad spending"). The Ad Library provides, for example, a copy of the ad; information about who paid for it; a range of how much they spent; age, gender, and location information regarding the audience reached; a range of impressions the ad received; and contact information for the advertiser. Bryant Decl., Ex. 9, at 8. The Ad Library retains all of that information for seven years. *Id.*, Ex. 10, 53:16-54:4. Despite this wealth of information, the Ad Library does not contain certain data points the disclosure regime requires: street addresses of sponsors, exact cost per advertisement, payment dates, payment method, precise audience targeted, and exact of number of impressions (though the Ad Library contains number of impressions expressed as a range). *See id.*, Ex. 1, at 3-4.

Until December 2018, political speakers could use Facebook to run ads related to Washington state or local elections and ballot measures. That changed after the 2018 amendments to the disclosure regime, when it became "immediately apparent" that compliance with the new obligations would prove so burdensome and impracticable that Meta had no choice but to withdraw from the market. *Id.*, Ex. 9, at 8. Meta therefore banned *all* political advertising regarding Washington state or local elected officials, candidates, elections, or ballot initiatives. *Id.* at 9. At the time Meta introduced the ban, Google already had a similar prohibition in place. *Id.* Yahoo

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and Choozle have since imposed similar bans. Yahoo, *Global Yahoo Advertising Policies*, https://adspecs.yahooinc.com/pages/policies-guidelines/yahoo-ad-policy; Choozle, *Political Advertising Policy & Guidelines*, https://help.choozle.com/political-advertising-policy-guidelines.

The disclosure regime is unduly burdensome in several ways. To start, digital platforms cannot comply with the disclosure regime without identifying which ads the law covers. Bryant Decl., Ex. 9, at 8. The disclosure regime requires platforms to update information about covered ads and to make the information "available for inspection by any person" within a very short period of time (originally 24 hours, now two business days). *See id.*, Ex. 1, at 7; *id.*, Ex. 11, 79:17-80:13 (similar). Moreover, under the PDC's interpretation of its rules, a requester need not identify any specific ads. *See id.*, Ex. 12 at AG-00000358-359. The requester could simply ask for information about *all* political ads in the preceding five years, and the platform must comply. Digital platforms must therefore develop methods to monitor all ads and attempt to identify which ads are covered by the law. Weber Decl., Ex. A ("Weber Report") ¶39; Bryant Decl., Ex. 9, at 11; Bryant Decl., Ex. 14, 323:13-20.

That is not an easy task. To be prepared to respond to requests within two business days, Meta must identify all state, local, and judicial candidates for non-federal elections ongoing in the State of Washington. Bryant Decl., Ex. 9, at 12. Likewise, Meta must identify every ballot proposition at the state or local level. *Id.* As far as Meta is aware, there is no single exhaustive database that collects this information, so Meta must constantly update its database of keywords for new elections, candidates, and ballot initiatives. *Id.*; *id.*, Ex. 16, 196:3-16; *see id.*, Ex. 14, 323:13-14. That is a manual and time-intensive process, particularly given that "information related to digital ads is dynamic and changes frequently." *Id.*, Ex. 9, at 11; *see also id.*, Ex. 15, 137:17-20; *id.*, Ex. 16, 88:13-93:2. New candidates enter races quickly; some candidates drop out

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quickly. And citizens can initiate ballot propositions on the state, district, and county levels. Ballotpedia, *Washington 2020 ballot measures*, https://ballotpedia.org/Washington_2020_ballot_measures; King County, *Petitions*, https://kingcounty.gov/depts/elections/for-jurisdictions/petitions.aspx. Almost 7,000 candidates ran for office in 2020 alone across the state's 39 different counties; 1,285 special districts; and 281 cities, towns, and villages. Kim Wyman, *2020 Annual Report of Washington State Elections* 2 (Jan. 2021), https://www.sos.wa.gov/_assets/elections/research/2020 annual elections report.pdf; Ballotpedia, *Counties in Washington*, https://ballotpedia.org/Counties_in_Washington. That same year, citizens initiated 37 unique ballot initiatives at just the state level. Ballotpedia, *Washington 2020 ballot measures*, https://ballotpedia.org/Washington_2020_ballot_measures. To cover the breadth of information required, these keywords need to come from a variety of sources and expertise. *See* Bryant Decl., Ex. 17, 41:17-42:04; *id.*, Ex. 10, 103:15-19. Each of these difficulties also mean it is not viable to simply identify the ads via machine review, Bryant Decl., Ex. 9, at 12, because any data used to train an algorithm would be "both inaccurate and insufficient," Weber Report ¶¶22, 56.

Even if digital platforms like Meta could somehow create and maintain a real-time master dataset with 100% accuracy, it would still be difficult to identify all relevant advertisements. The law defines "[p]olitical advertising" as advertisements that "directly or *indirectly*" appeal for "financial or *other support*" in a Washington election. RCW 42.17A.005(40) (emphases added). The law does not define "indirectly" or "other support," meaning that platforms must perform a "detailed and nuanced analysis" to determine what falls within its scope. Bryant Decl., Ex. 9, at 10. The law also defines "[e]lectioneering communication" to include ads that "identify[] the candidate without using the candidate's name," RCW 42.17A.005(21), greatly expanding the

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number of ways a candidate might be identified. One of the advertisements at issue in this case includes a quote from a political candidate thanking the "Talk to Seattle" podcast host for inviting him on to speak. Bryant Decl., Ex. 18, at AG-00018966. Another urges people to "vote now," but does not mention any specific candidate or ballot initiative in its text. *Id.*, Ex. 19, 22:7-23:1; *id.*, Ex. 20, at AG-00022760. Discovery has revealed that even the PDC has difficulty determining whether something is a political ad or electioneering communication, and staff members sometimes disagree. *E.g.*, *id.*, Ex. 21, 61:3-18; *id.*, Ex. 22, 193:24-194:15; *id.*, Ex. 23, at AG-00020394; *id.*, Ex. 24, at AG-00021011. It is therefore unsurprising that platforms may have difficulty applying the law as well. The task is even harder when one accounts for the sheer number of ads that platforms must review. Meta, for example, had *8 million* active advertisers across its platforms in January 2020. Meta, *Facebook IQ* (Jan. 2020), https://www.facebook.com/iq/insights-to-go/8m-there-are-8-million-active-advertisers-across-all-facebook-platforms. Even if digital platforms like Meta could quickly identify qualifying ads, collecting and disclosing the relevant information and turning it over within 24 hours or two business days is virtually impossible. Bryant Decl., Ex. 25, 95:7-18; *id.*, Ex. 16, 42:14-43:17.

Given the near-impossibility of full compliance and the threat of significant per-violation penalties, Meta (like other companies) had little choice but to ban political ads in Washington. *See id.*, Ex. 25, 108:23-109:4. Meta uses multiple levels of both automated and human review to block prohibited ads in Washington. *Id.*, Ex. 26, 71:20-73:3. Even that multi-layered review process, however, cannot achieve 100% accuracy, and some ads inevitably slip through. *Id.*, at 137:18-138:2, 138:12-140:13. In those instances, Meta must still collect and produce the information required under the disclosure law—and indeed, it has voluntarily done so for the few requesters who have sought it—but the burden of compliance is significantly reduced by Meta's ad ban

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because there are fewer ads that Meta ultimately must identify and track. *Id.*, Ex. 14, 313:6-314:14; *id.*, Ex. 26, 194:13-19. Although Meta's supplemental productions contain nearly all of the required disclosures not included in the Ad Library, because Meta takes the privacy of its users very seriously, the productions do not include personally identifying information such as sponsor address or targeting data smaller than the state level. *See id.*, Ex. 26, at 203:22-204:9; *id.*, Ex. 16, at 62:7-63:8; *id.*, Ex. 25, at 89:22-91:16.

C. Procedural History

This case involves some of the ads that inevitably slipped through Meta's ban on Washington political ads and requests that Meta received for information regarding those ads. Two requests were made in 2019—one by a journalist named Eli Sanders, and another by an individual named Tallman Trask. Bryant Decl., Ex. 1, at 4-6. Both filed complaints with the PDC when Meta failed to provide the requested information within 24 hours (although Meta did ultimately respond to both). *Id.* The State later amended its lawsuit to add details about three new complaints that the PDC received. Two concern a July 2021 request by Mr. Sanders, Am. Compl. ¶4.60, who sought information for a "journalistic" purpose (not a political one), *see* Bryant Decl., Ex. 27, 13:12-15, 17:17-21, 65:1-14. Meta provided Mr. Sanders with three large productions of advertising data, the first seven days after the request, the second thirteen days after the request, and the third twenty-one days after the request. *See id.*, Ex. 28, at 1-2. Mr. Sanders nevertheless filed two complaints with the PDC. *See id.*, Exs. 28, 29. The third complaint involves multiple requests by Zachary Wurtz, who requested information as part of his "business activities," which involve tracking political campaign spending for political committees and campaigns. *See* Wurtz Decl. ¶¶4-14. Meta tried to work with Mr. Wurtz, but he refused to fill out a form Meta had developed to facilitate requests, *see id.* ¶¶34, 42, 46, 49, 51, 57, 61, 65, and even refused to provide

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his real name, instead using aliases like "Joe Public" and "Public Filing Service," Bryant Decl., Ex. 30, at 11-12; Wurtz Decl. ¶49. Meta did not feel comfortable sending non-public, sensitive advertising data to an individual who had provided no identifying information whatsoever. *See* Bryant Decl., Ex. 26, 164:6-17. Those concerns were compounded by Mr. Wurtz's erratic behavior, which included threatening to come to Meta's Seattle office if Meta did not provide "the information on every political ad shown to Washington state voters over the last calendar year," *id.*, Ex. 31, showing up at Meta's Seattle office (where the police were called), *id.*, Ex. 32, threatening to file baseless ethics complaints against Meta's attorneys, *id.*, Ex. 33, and pretending that Meta's correspondence contained "hidden malware," *e.g.*, *id.*, Ex. 34.

STATEMENT OF ISSUES

1. Whether RCW 42.17A.345, as implemented by WAC 390-18-050, violates the First Amendment.

2. Whether the State's claims are barred by Section 230 of the Communications Decency Act. 47 U.S.C. §230(c)(1).

3. Whether WAC 390-18-050 is an arbitrary and capricious interpretation of RCW 42.17A.345.

EVIDENCE RELIED UPON

Meta relies on the Declarations of Tracie Bryant, Dr. Steven Weber, and Zachary Wurtz and their accompanying exhibits.

LEGAL STANDARD

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Michael v. Mosquera-Lacy*, 165 Wash.2d 595, 601 (2009); CR 56(c).

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ARGUMENT

I. THE DISCLOSURE REGIME VIOLATES THE FIRST AMENDMENT.

Like the similar Maryland law that the Fourth Circuit held unconstitutional, Washington's third-party disclosure regime is a "compendium of traditional First Amendment infirmities." *McManus*, 944 F.3d at 513. In *McManus*, the Fourth Circuit invalidated a Maryland law that imposed similar disclosure requirements on online platforms regarding political ads displayed on their websites. Like the Maryland law, Washington's disclosure regime implicates three core First Amendment concerns—content-based regulation, political speech, and compelled speech—that each independently trigger strict scrutiny. Strict scrutiny requires the government to adopt "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The disclosure law fails that standard. Indeed, even if strict scrutiny did not apply and this Court were to apply an intermediate level of review known as "exacting scrutiny," the law would still violate the First Amendment because it is not "narrowly tailored to the interest it promotes." *Ams. for Prosperity Found. v. Bonta*, 141 S.Ct. 2373, 2385 (2021) (citation omitted).

A. Strict Scrutiny Applies.

Washington's disclosure regime triggers strict scrutiny several times over. First, the regime is a content-based regulation on speech. It singles out one particular topic of speech—speech that supports or opposes campaigns or ballot measures—for disfavored treatment. *NIFLA v. Becerra*, 138 S.Ct. 2361, 2371 (2018). "When the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft-censorship." *McManus*, 944 F.3d at 513. For that reason, content-based laws demand strict scrutiny and are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015).

Second, the law singles out political speech. While generic content-based regulations are problematic enough, "content-based regulations that target *political* speech are especially suspect." *McManus*, 944 F.3d at 513-14. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam). "As a result, the First Amendment '"has its fullest and most urgent application" to speech uttered during a campaign for political office.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citations omitted). The U.S. and Washington Supreme Courts have therefore applied strict scrutiny to invalidate all manner of restrictions on political speech. *See, e.g.*, *Buckley*, 424 U.S. at 51-54 (personal campaign expenditures); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (restraints on independent expenditures by express advocacy groups); *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (limits on uncoordinated political party spending); *Rickert*, 161 Wash.2d 843 (regulation prohibiting false political advertisements); *State ex rel. PDC v. 119 Vote No! Comm.*, 135 Wash.2d 618 (1998) (same).

Third, the disclosure regime compels speech. The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). That protection extends "not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995) (citations omitted). The disclosure regime forces private parties to convey state-mandated messages that they would not otherwise convey. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

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While the disclosure regime does not directly prohibit political speech, it is far too late in the day to argue that the government is free to burden political speech so long as it does not directly prohibit it. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), illustrates the point. There, the Supreme Court struck down a statute that required newspapers to provide equal print space for a political candidate's response whenever a newspaper published material critical of the candidate. The Court reasoned that, faced with "[the] economic reality" of additional "cost in printing and composing time and materials," and the potential for "penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy." *Id.* at 256-57. "Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or reduced," "dampen[ing] the vigor and limit[ing] the variety of public debate." *Id.* (citations omitted); *see also Catlett v. Teel*, 15 Wash.App.2d 689, 707 (2020) (similar).

Similarly, by making it more burdensome to host political speech than other speech, Washington's disclosure regime has ensured that "many platforms would simply conclude: Why bother?" *McManus*, 944 F.3d at 516. When it becomes more burdensome to host one type of speech, the rational response is to stop hosting that speech. That is not a hypothetical concern. Faced with the prospect of having to comply with the disclosure law if they continued to host Washington political ads, Meta, Google, Yahoo, and Choozle all concluded that hosting core political speech is simply not worth it. *See* Weber Report ¶32; *see also McManus*, 944 F.3d at 516-17 (describing how Maryland's similar law drove Google and newspapers to ban Maryland political ads). Like the law in *Tornillo*, the disclosure regime "dampens the vigor and limits the variety of public debate," 418 U.S. at 257 (citation omitted), undermining the "profound national

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commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Washington's treatment of political speech is "particularly problematic because it … favors certain groups of candidates over others." *Collier v. City of Tacoma*, 121 Wash.2d 737, 752 (1993). The PDC, local politicians, and campaign managers all readily acknowledge that digital advertising on platforms like Facebook is especially important for smaller campaigns that lack the resources to reach voters through more expensive and traditional means. *See* Bryant Decl., Ex. 35, at 9 ("[T]he digital world can be a game-changer, particularly for small campaigns that might otherwise lack the resources to reach voters."); *id.*, Ex. 3 ¶4 ("Advertising on digital platforms is particularly important for local candidates like myself because it is the only cost-effective way to reach voters in my district."); *id.*, Ex. 4 ¶9 (similar); *id.*, Ex. 36 ¶9 (similar); *id.*, Ex. 7 ¶11 (similar); *see also Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017) ("Social media offers 'relatively unlimited, low-cost capacity for communication of all kinds.'" (citation omitted)). The loss of digital advertising thus tends to benefit well-known candidates and hurt upstart challengers. As one political consultant in Washington put it: "By causing Facebook and Google to shut off political ads in Washington, the Public Disclosure Commission has limited the reach of small campaigns and has provided a huge advantage to big money campaigns and incumbents who can afford to adjust their strategy and purchase expensive television, radio, and newspaper advertisements." Bryant Decl., Ex. 7 ¶11; *see also id.*, Ex. 3 ¶4; *id.*, Ex. 4 ¶9; *id.*, Ex. 36 ¶9. Laws that skew the debate by benefiting some candidates at the expense of others are "particularly problematic." *Collier*, 121 Wash.2d at 752 (striking down yard sign regulation that tended to benefit the well-known incumbent at the expense of "[t]he underfunded challenger … who relies on the inexpensive yard sign to get his message before the public").

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To be sure, courts have sometimes crafted exceptions to these general First Amendment principles for disclosure requirements that are less likely to chill protected expression. For example, laws that impose disclosure requirements on *political speakers themselves* are subject to exacting (rather than strict) scrutiny. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). That is because such laws are much less likely to chill speech, as political actors are highly motivated to spread their message regardless of required disclosures. *McManus*, 944 F.3d at 516. And even if speaker-focused disclosure requirements cause some potential speakers to remain silent, the requirements do not stop *others* from speaking. That "rationale falters," however, "when extended to neutral third-party platforms." *Id.* Laws that impose disclosure requirements on third-party platforms are much more likely to close off an entire avenue of speech—something that never happens when the state merely imposes disclosure obligations on speakers.

Courts have also applied exacting scrutiny in limited circumstances to laws that impose disclosure requirements on the state itself, *John Doe No. 1. v. Reed*, 561 U.S. 186, 196-97 (2010), and laws that impose disclosure obligations on broadcasters, *McConnell v. FEC*, 540 U.S. 93, 137 (2003). But neither exception applies here. The State is not a neutral third party, but the very regulator the First Amendment protects against. And courts have "given the government wider latitude in regulating" broadcast than is permitted for internet speech due to broadcast's unique qualities. *McManus*, 944 F.3d at 519; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637 (1994).

B. Washington's Disclosure Regime Fails Both Strict And Exacting Scrutiny.

The Court need not ultimately decide which standard of scrutiny applies because the disclosure regime fails any level of heightened scrutiny. Strict scrutiny requires the government to adopt "the least restrictive means of achieving a compelling state interest." *McCullen*, 573 U.S.

at 478. Exacting scrutiny requires the government to show the law is "narrowly tailored to serve a significant governmental interest." *Packingham*, 137 S.Ct. at 1736 (quotations omitted); *see also Bonta*, 141 S.Ct. at 2383. Under either standard, Washington's regime fails.

1. Washington's disclosure regime fails to serve an important (let alone compelling) interest.

The Supreme Court has recognized only one governmental interest sufficiently compelling to justify burdens on political speech: preventing quid pro quo corruption. *See Cruz*, 142 S.Ct. at 1652. Much of the information the State requires Meta to produce bears no relationship to that interest. For instance, the State requires digital platforms to provide demographic information about the audiences "targeted and reached," the "total number of impressions" generated by an ad, and how the sponsor paid for the ad (*e.g.*, debit or credit card). WAC 390-18-050(6)(g); RCW 42.17A.345(1)(c). Such information is wholly unrelated to exposing quid pro quo corruption. It is the source of money behind political speech, not the identity of the audience (let alone the method of payment), that helps constituents understand to whom their officials may feel beholden.

The State also claims that the disclosure regime serves an important interest in "combatting foreign interference in elections." MTD Opp. 9. That argument suffers from the same flaw as the first. Information about the audience *hearing* the speech does nothing to expose foreign interference in elections. Nor does payment method. Again, the *source* of money behind the speech is what matters. In any event, the State must set forth "concrete evidence showing the chosen means warrants the accompanying First Amendment burdens." *McManus*, 944 F.3d at 521-22. Washington has not identified any evidence of foreign interference in state or local Washington elections, *see* Bryant Decl., Ex. 19, 58:4-8; *id.*, Ex. 5, 255:13-256:17; *id.*, Ex. 37, at AG-00023042, let alone that foreign actors use *paid* advertisements (rather than unpaid posts) to influence the electorate, *McManus*, 944 F.3d at 521. At most, the State alleges Russian

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interference in *federal* elections. Am. Compl. ¶¶4.1-4.3, 4.7. But the disclosure regime does nothing to address *that* problem.[3]

The State claims that it has an "'important, if not compelling, government interest' in informing the electorate about who is expending money to influence an election and how that money is being spent." MTD Opp. 9 (citation omitted). To the extent the State asserts a generalized informational interest, such an interest cannot justify burdening political speech. At most, courts have recognized—in the context of laws that impose disclosure requirements on *political speakers*—that a state has an important interest in providing "the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' *in order to aid the voters in evaluating those who seek ... office*." *Buckley*, 424 U.S. at 66-67 (emphasis added) (footnote omitted). But even if that interest could justify laws that impose disclosure requirements on third-party platforms, *but see supra* at 4-6, it is hard to see why the electorate needs to know how sponsors pay for the advertisements or the demographics of the people who see them. Whether an ad sponsor pays with check or credit, targets voters on First Street or Second Street, or generates thirty views or three thousand does little to assist voters in evaluating candidates for office.

The fact that Washingtonians virtually never use the law underscores that it fails to further the State's purported interests, even though complying with just one request is highly challenging. *See* Bryant Decl., Ex. 39, at AG-00031185 ("To the best of my knowledge there hasn't been a

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[3] The disclosure rules might even *facilitate* foreign election interference. Under the State's interpretation of the provision, *anyone* can request detailed information about political ads under the disclosure regime, including foreign agents. *See* Bryant Decl, Ex. 38, at Resp. to Req. 21.

great deal of use of the provision by interested citizens[.]"). The PDC is aware of just one instance before 2018 in which it sought to enforce the law. *Id.*, Ex. 11, 17:11-19:4. And there is no evidence that the law has been put to serious use since then. This case proves the point. The requests at issue in this case stem from just three individuals. None asserted any interest in using the information to assess a candidate's qualifications or ferret out corruption or foreign interference. Instead, one of the complainants is a "political tracker" who sought the information because he "make[s] [his] money on the compiling of this data." *Id.*, Ex. 40, 299:1-8. And another is a journalist who sought information for a "journalistic purpose"—to report on "whether or not an entity is complying with state disclosure laws." *Id.*, Ex. 27, 13:12-15; 17:17-21; 65:1-14.

2. Washington's disclosure regime is not narrowly tailored.

Even assuming that the disclosure regime serves sufficiently important or compelling State interests, it is still unconstitutional because it is not narrowly tailored to achieve those interests—let alone the least restrictive means of doing so. The disclosure regime requires anyone who hosts political speech to provide to any individual who asks for it a long list of details about others' political speech. Under the PDC's reading of the law, any person *in the world* can request the information about Washington political ads, and platforms must turn it over within an extremely short period of time. Worse, the PDC has interpreted the law to prohibit platforms from taking common sense measures to make compliance easier, such as by asking requesters to identify the ads about which they are requesting information. In the PDC's view, a requester may simply ask a platform to turn over detailed information on *every* political ad shown to its users in Washington in the last five years, and the platform would have to comply within 24 hours. That is not a hypothetical scenario. One of the requests at issue in this case did exactly that. Am. Compl. ¶4.45. According to the PDC, it is *the platform's* job to sort through all the ads on its platform to divine

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which ones qualify, compile all the necessary information, and turn it over—all within 24 hours or two business days. That is already an impossibly tall task, and even more so when accounting for the sheer number of potential ads at issue (even after Meta implemented the ad ban). For example, in 2020, nearly 7,000 candidates ran for state, local, or judicial office in Washington, and Washingtonians voted on forty-seven different ballot measures; Meta must track each of these data points to facilitate compliance. Weber Report ¶43.

The impossibility of compliance becomes even clearer when one accounts for the difficulty in assessing which ads qualify as "political advertising" or "electioneering communication." *See* Bryant Decl., Ex. 41, at FB-WA-00007787-89; *see also id.*, Ex. 42, at FB-WA-00007794; *id.*, Ex. 9, at 11; Weber Report ¶¶41-60. The law defines "[p]olitical advertising" to include advertising that appeals "directly or *indirectly*" for "financial or *other support*." RCW 42.17A.005(40) (emphases added). And it defines "[e]lectioneering communication" to include communications "identifying the candidate without using the candidate's name." RCW 42.17A.005(21). Those are vague terms that even the PDC struggles to apply. *See* Bryant Decl., Ex. 44, at AG-00023455; *id.*, Ex. 45, at AG-00021011; *id.*, Ex. 46, at AG-00020394; *id.*, Ex. 47, at AG-00020662. It is no wonder that platforms likewise "struggle to … identify all political ads and capture all of the information required to be disclosed about them." *Id.*, Ex. 48, at FB-WA-00045241; *see also id.*, Ex. 25, 85:11-21, 89:14-21; *id.*, Ex. 49, 44:23-46:17; *id.*, Ex. 50, 259:9-260:6. These unprecedented burdens stretch even beyond those imposed by the Maryland law the Fourth Circuit struck down in *McManus*. Unlike Washington's law, Maryland at least required sponsors of ads to notify the platform they were placing qualifying ads and supply the platform with all the information needed to comply with the law. *McManus*, 944 F.3d at 512. But the PDC has rejected

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proposals to place similar requirements on sponsors in Washington. Bryant Decl., Ex. 21, at 56:22-61:5.

To see the implications of the burdens imposed by the law, one need look no further than how the industry has reacted. The disclosure regime has forced Meta, Google, Yahoo, and Choozle to exit the market for Washington political ads entirely. *See supra*, at 8. That these companies have concluded that it is too risky and costly to fully comply is all one needs to know about the law's chilling effect. *See McManus*, 944 F.3d at 516-17. Such a burdensome regime demands a particularly tight fit—a fit the State does not come close to satisfying. The State's approach is wildly out of proportion with any permissible interest it may advance. Indeed, the PDC acknowledges that the disclosure regime is one of the most stringent in the nation. Bryant Decl., Ex. 43, 115:4-17; *see also id.*, Ex. 51, at FB-WA-00041607. And when Maryland imposed a similar, though arguably less stringent regime, the Fourth Circuit held it unconstitutional.

The Supreme Court has cautioned that, when a law takes a "prophylaxis-upon-prophylaxis approach" to regulating speech, courts must be "particularly diligent" in evaluating whether that law is narrowly tailored. *McCutcheon v. FEC*, 572 U.S. 185, 218-21 (2014) (plurality opinion) (citations omitted). Numerous other Washington laws suffice to safeguard Washington electoral integrity because Washington already requires candidates and political speakers to disclose the most important information it compels platforms to disclose: who is sponsoring the ad. For example, political speakers must disclose the sponsor's name and address on the face of written political advertising. RCW 42.17A.320(1); *see also* WAC 390-18-010. Party affiliation must "be clearly identified in electioneering communications, independent expenditures, or political advertising." RCW 42.17A.320(1); *see also* WAC 390-18-020. The State broadly defines "[p]olitical advertising," RCW 42.17A.005(40), and "[e]lectioneering communication," RCW

42.17A.005(21)(a), ensuring that the source of virtually any election-related advertising must be disclosed on the face of the ad. Moreover, starting 21 days before an election, Washington requires sponsors of political ads to file a special report within 24 hours of when the ad is published, including details such as who paid for the ad, when it was first published, and the sponsor's address. RCW 42.17A.260(1)-(3). Sponsors of electioneering communications must make similar disclosures. RCW 42.17A.305(1)-(2). Candidates and political committees also must report contributions and expenditures on a rolling basis. RCW 42.17A.235.

There is no evidence that most (or even many) people who wish to run political ads in Washington fail to comply with this speaker-disclosure regime. Yet the disclosure law nonetheless demands that third-party platforms like Meta supply much of the same information. That alone raises serious doubts about the constitutionality of the law, as imposing duplicative burdens on political speech is nearly the opposite of endeavoring to "avoid unnecessary abridgment" of First Amendment rights. *McCutcheon*, 572 U.S. at 218 (citations omitted); *see also McManus*, 944 F.3d at 523. And even assuming some speakers fail or refuse to comply with their obligations to provide that information, the State does not explain why it must demand that information from platforms preemptively, rather than as a last resort in the rare instance when efforts to get information from the speaker fall short.

The disclosure regime is insufficiently tailored in other ways as well. The State offers no justification for why platforms must make information available on demand in 24 hours or two business days, nor why they must do so 365 days a year, as opposed to within short periods immediately before an election. Surely whatever interests the State has could be accomplished as effectively in a timeframe that does not make compliance virtually impossible. The State admitted as much when it amended the law a few months ago to eliminate the 24-hour requirement. *See*

WAC 390-18-050(4)(b)(i) (eff. Mar. 7, 2022) (substituting two-business-day requirement). In fact, prior to the amendment, the PDC's executive director expressed serious doubt about whether the requirement was necessary, explaining that he "thought 24 hours might be aggressive and was open to a longer timeframe for commercial advertisers to respond to requests." Bryant Decl., Ex. 53, at AG-00098956. And when the PDC's own employees asked platforms to turn over ad information, they rarely asked them to do so in 24 hours, underscoring that the draconian requirement is unnecessary. *Id.*, Ex. 54, at 180:11-18; *id.*, Ex. 55, at AG-00040512. Nor has the State ever articulated why the 24-hour requirement must be in place 365 days a year, particularly when campaigns themselves only have to provide information within 24 hours during the three weeks preceding an election. *See* RCW 42.17A.260(1). Though advertisers now have up to two business days to comply, allotting just one more day cannot cure the defect: "[T]his is a burdensome process regardless of the time period specified." Bryant Decl., Ex. 56, at 62:18-21.

The State also fails to explain why all the data it requires platforms to disclose is necessary to its goals. The Maryland law the Fourth Circuit held unconstitutional required platforms to provide only "the identity of the purchaser, the individuals exercising control over the purchaser, and the total amount paid for the ad." *McManus*, 944 F.3d at 511-12. Washington's law goes much further. It requires platforms to turn over not just the name of the ad's sponsor, but the sponsor's address, federal employee identification number, and other identifying information. WAC 390-18-050(5)(b); Am. Compl. ¶4.56. The law not only requires platforms to provide the total cost of the ad, but the method of payment as well. WAC 390-18-050(5)(c). And turning over state-level targeting information is not enough—if the platform collects county-level, neighborhood-level, and block-level data, it must disclose that too. Bryant Decl., Ex. 57, at AG-0086199; Am. Compl. ¶4.56, Ex. H. Even if forcing platforms to disclose all of that information

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serves the State's interests (it does not), the State has never articulated why all that detail—much of it highly private information about ad sponsors and their audiences—is necessary to accomplish its goals.

All these burdens are compounded by the fact that the law never actually specifies what conduct constitutes a "violation" punishable by up to $30,000. RCW 42.17A.750(1)(c); *see* RCW 42.17A.780 (providing for treble damages). The law does not identify whether a platform "violates" the law by failing to provide information in response to an individual advertisement or a request, nor does it specify if a "violation" occurs each day that information is not provided. Faced with uncertain—but possibly staggering—potential liability, it is no wonder that platforms have sought to ban political advertisements rather than attempt to comply.

At the very least, the State could have lightened the load by requiring advertisers to provide platforms the information they need to comply. The legislature considered a proposed amendment that would have done just that, but failed to enact it.[4] Alternatively, the State could have built its own ad archive. California, New York, and Maryland took that approach. *See* Bryant Decl., Ex. 58, at AG-00112135. The PDC explored doing so as well. *See id.*, Ex. 59, at AG-00098741-2; WAC 390-18-050(3). While the State may find it more convenient or efficient to demand platforms provide the public with all of the information that it wants digital platforms to disclose, "the prime objective of the First Amendment is not efficiency." *McCullen*, 573 U.S. at 495; *Bonta*, 141 S.Ct. at 2387. That the State is unwilling to shoulder the burden itself undermines its claim that the disclosure regime serves important and compelling interests.

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[4] *See* Proposed Amend. to SHB 2772, http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Amendments/Senate/2772-S%20AMS%20ZEIG%20S7599.1.pdf.

II. THE STATE'S CLAIMS ARE BARRED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT.

The State's claims also are barred by Section 230 of the Communications Decency Act. 47 U.S.C. § 230(c)(1). Section 230 establishes "broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (citation omitted). The central inquiry under this prong is "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). Editorial activity covered by the CDA includes any activity that "involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id*. If a legal duty "would necessarily require an internet company to monitor third-party content," it is barred. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019).

Section 230 precludes liability here because the disclosure regime creates obligations that expressly "derive[] from the defendant's status or conduct as a 'publisher'" of political ads. *Barnes*, 570 F.3d at 1102. The law imposes a duty on any "commercial advertiser" who accepts or provides third-party "political advertising" or "electioneering communications." RCW 42.17A.345(1). In turn, a "[c]ommercial advertiser" is defined as "any person that sells the service of communicating messages" in relation to a Washington election campaign. RCW 42.17A.005(10). The statute thus expressly creates a duty based on an entity's "status or conduct as a 'publisher or speaker,'" and is triggered by the publication of third-party content. *Barnes*, 570 F.3d at 1102.

The disclosure regime's restriction on Meta's editorial discretion is underscored by its content-based nature. Washington does not demand disclosure as to all ads; it demands it only as

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to political ads. It thus necessarily requires "recourse to [third-party] content to establish liability"—which Section 230 prohibits. *Cohen v. Facebook, Inc.*, 252 F.Supp.3d 140, 156 (E.D.N.Y. 2017). To comply with the law, Meta must monitor and screen ads based on their content, determining to the best of its ability which might involve Washington political speech, as vaguely defined by the regime. *See* Bryant Decl., Ex. 9, at 8; *see also, e.g.*, *id.*, Ex. 18, at AG-00018966; *id.*, Ex. 20, at AG-00022760. But any law that "necessarily require[s]" a platform "to monitor third-party content" intrudes upon activity protected by the CDA. *HomeAway.com*, 918 F.3d at 682; *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Barnes*, 570 F.3d at 1101-02.

III. WAC 390-18-050 IS INVALID AS A MATTER OF ADMINISTRATIVE LAW.

Provisions of WAC 390-18-050 also are invalid as a matter of state administrative law. First, requiring productions to be made within 24 hours or two business days reflects no meaningful consideration of "the attending facts or circumstances," particularly as they pertain to large internet platforms. *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish & Wildlife*, 157 Wash.App. 935, 945-46 (2010); *see Ghattas v. United States*, 40 F.3d 281, 285-86 (8th Cir. 1994). When the PDC revised WAC 390-18-050 in 2018, several groups explained that, unlike broadcast ads, "[t]he timing and placement of many digital ads varies based on user queries, advertising auctions, and other factors." Bryant Decl., Ex. 41, at FB-WA-00007790. Accordingly, "to provide completely and accurately the disclosures the Proposed Rule requires, commercial advertisers must be allowed an interval of time to gather and verify their records regarding ads placed through the commercial advertiser's platform." *Id.*; *see also id.*, Ex. 42, at FB-WA-00007794-95. In promulgating this rule, the PDC did not explain if or how platforms could comply in such a short period time.

Second, in requiring that digital platforms produce targeting, reach, and impressions data, the PDC also acted "cursorily in considering the facts and circumstances surrounding its actions." *Puget Sound*, 157 Wash.App. at 951. When the PDC adopted these requirements in 2018, stakeholders pointed out that these novel disclosures stretched far beyond the disclosures required of print advertisers. *See* Bryant Decl., Ex. 60, at FB-WA-00049073. The PDC staff's own notes state that the "[l]aw never required targeting information for direct mailers, even though it is common for mailings to specifically target demographics and interests[.]" *Id.* When the PDC reconsidered the rule in 2022, campaigns and providers reiterated their concerns. They told the PDC that seeking "information about targeting and reach of an ad … might be redundant, duplicative, and therefore, burdensome -- more burdensome than they needed to be to get the right amount of information to the public." *Id.*, Ex. 54, at 47:24-48:15; *id.*, Ex. 61. They also warned this demographic criteria could "reveal sensitive campaign strategy" and "raise potential privacy concerns for the targeted individual." *Id.*, Ex. 62, at AG-00063041. Again, the PDC did not change the law or justify the heavy burdens imposed on digital advertisers.

CONCLUSION

The Court should grant Meta's motion for summary judgment.

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I certify that this memorandum contains 8,396 words, in compliance with the Local Civil Rules.

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