LEAGUE OF WOMEN VOTERS® OF WASHINGTON

Summary of Amicus Brief, Filed 8/9/2023

Interests of Amici Curiae (p. 1)

- Amici curiae are nonprofit, nonpartisan groups working to create a fair, transparent democracy accessible to all voters, including by supporting effective public disclosure laws.
- Identifies each party: League of Women Voters of WA, Fix Democracy First, Brennan Center for Justice and Campaign Legal Center

Introduction and Statement of the Case (p. 3)

- Summarizes Meta's constitutional challenge to Washington's Disclosure Law: It has no basis in law and ignores almost a half-century of judicial decisions upholding a range of political disclosure measures, including many provisions of Washington's Fair Campaign Practices Act ("FCPA"). Meta also ignores that the public inspection requirements it now challenges have been on the books since 1976, and commercial advertisers far smaller and less sophisticated than Meta have been complying without incident for decades.
- States that Amici groups are addressing Meta's First Amendment arguments and the need for transparency.
- States that this is in the context of many decades of federal and Washington precedents recognizing the importance of disclosure.
- States that Meta fails to engage with this well-established precedent and instead relies almost exclusively on an irrelevant case, Washington Post v. McManus, which has to do with content control, not disclosure.
- Argues that the Disclosure Law is consistent with the First Amendment and the Superior Court's judgment should be affirmed.

Arguments (p. 6)

There are two main arguments:

I. Voters Benefit from Knowing Who Finances Election Messaging; and
II. Washington's Disclosure Law is Consistent with the First Amendment

Voters Benefit from Knowing Who Finances Election Messaging. The Supreme Court has repeatedly recognized that voters benefit and democracy functions better from campaign finance transparency and that democracy functions better when there is disclosure of the interests funding and influencing campaign-related debate are disclosed.

- Notes that these interests are even more acute in the context of political advertising (anonymity and micro-targeting. Washington's disclosure law provides voters with critical information in the digital age and protects against false information and more.

- Points out that this need is even more acute in the context of online political advertising, where anonymity and technical innovations such as microtargeting and user data harvesting enable advertisers to subject voters to ever more finely-targeted campaign advertising with little disclosure of who is behind the messages.
- Explains how Washington's Disclosure Law provides voters with critical information and protects against various factors, including the influence of dark money. The Fair Campaign Practices Act was implemented over 50 years ago to ensure that political funding is fully disclosed to the public. Specifies required information under the law that commercial advertisers (most media entities) must provide. Also requires additional information from platforms like Meta specific to digital communications, including the demographics of the audiences targeted by the ad, and the number of impressions the ad generated.
- Explains how the Disclosure Law serves the voting public in multiple respects.
- Gives history of and LWVWA role in I-276 in 1972 and later with WA Disclose Act of 2018 and PAC-to-PAC Disclosure of Campaign Donations Act. Footnotes the LWWA study of local news. Cites need for journalists to have information.
- Points out that the rise in political spending online underscores the critical need for transparency in internet-based electioneering. (p.10) Without transparency, the move to online political advertising can create voter confusion, mis- and dis-information and exacerbate polarization.
- Explains that the increase in digital political advertising presents a new threat to democracy. (p.10) Cites growth rates in digital political advertising and amount spent at Facebook. Explains that the increase is significant not only because of increased volume and cost but also because there are fundamental differences from traditional advertising, and the risks are unique. The new ability to invisibly direct a range of specially-tailored, and perhaps even conflicting, messages to different audiences is incompatible with the core legitimizing aspects of democratic society—such as "publicity and transparency for the deliberative process. Hyper-targeting is part of an already-siloed social media ecosystem where algorithms filter content based on users' predetermined preferences, resulting in a dangerous echo-chamber effect which "creates an antidemocratic space in which people are shown things with which they already associate and agree, leading to nondeliberative polarization."
- Requiring disclosure is key to addressing this problem. Disclosure helps voters make reasoned decisions. Washington's Disclosure Law is a bulwark against dark money**.** (p.16) The federal government has been slow to respond to this shift to digital advertising and even when they responded it was insufficient; so legislatures have stepped in. Cites other states' legislation similar to Washington's.
- Without the guardrails provided by disclosure laws, the potential harms posed by digital electioneering will only multiply as technologies continue to advance. Artificial intelligence is already revolutionizing the creation and targeting of digital advertising materials.

Washington's Disclosure Law is Consistent with the First Amendment. (p. 19) There is a standard of "scrutiny", which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest. Multiple provisions of Washington's Fair Campaign Practices Act have been upheld by a range of courts under this standard. Meta has provided no reason why this should not be affirmed by the court as has been done before.

- Unable to counter this precedent, Meta simply ignores it, arguing that strict scrutiny should apply, based in part on the reasoning of an out-of-state Fourth Circuit case, Washington Post v. McManus (Maryland). This case is not relevant, because it applied strict scrutiny on the theory that Maryland's disclosure law regulated newspapers and other third-party publishers of advertising, rather than the advertisers themselves.
- The brief states that more fundamentally, Meta's argument would countermand the basic principle of First Amendment jurisprudence that disclosure laws warrant only exacting scrutiny because they "impose no ceiling on campaign-related activities." They do not prevent anyone from speaking and only requires that platforms make available on request information about the political advertising they accept. The brief refutes Meta's claim that the Disclosure Law bans political speech, stating that declining political ads in Washington State is a choice by Meta, not by Washington Law.
- Additionally, the compelling governmental interests of Washington's law address three important democratic interests: provide citizens with the information needed to hold elected officials accountable; deter actual political corruption and the appearance of corruption; and gather the data needed to detect violations of the law. Meta argues wrongly that Washington's Disclosure Law should be reviewed in terms of the burden it imposes; rather, that it provides the public with critical information about who is behind the advertising and promotes the values and principles of free speech.
- The brief notes that the Supreme Court has explained ""each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies." And that to participate fully in the political process, voters need enough information to determine which constituencies and interests are served by candidates and ballot referenda. (p. 25)
- The brief argues that the Court's review should not be guided by the McManus case, (p.26) stating that McManus concerned a fundamentally different type of disclosure law. Washington's Disclosure Law operates as an "open books" obligation, requiring covered media, including online platforms, to produce information about political advertising upon request by a member of the public. Although the Maryland law included a somewhat analogous requirement, its principal mandate was about hosting information on their own websites, which the Fourth Circuit considered problematic from a compelled speech perspective, reasoning that it "'intru[des] into the function of editors' and forces news publishers to speak in a way they would not otherwise." Since Washington law contains no analogous hosting requirement, much of the McManus opinion is simply off-point. The brief makes several other points about why the McManus case is not applicable here.

- The brief further points out that the McManus case relies on a "compelled speech" analysis that is inconsistent with the overwhelming majority of court decisions upholding disclosure laws. The "compelled speech" doctrine sets out the principle that the government cannot force an individual or group to support certain expression; the First Amendment not only limits the government from punishing a person for his speech, it also prevents the government from punishing a person for refusing to articulate, advocate, or adhere to the government's approved messages.

Conclusion (p. 33): For the reasons above, the decision of the Superior court should be affirmed.