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March 12, 2019

VIA E-MAIL

Mx. Fox Blackhorn
Compliance Coordinator 2
Public Disclosure Commission
711 Capitol Way, Room 206
PO Box 40908
Olympia, WA 98504-0908

Re: Response to Complaint Filed by Eli Sanders

Dear Mx. Blackhorn:

I write on behalf of Facebook, Inc. (“Facebook”) in response to the Complaint filed by Eli Sanders on February 21, 2019. The Complaint contends that certain political advertisements appeared on Facebook’s platform and that Facebook did not “promptly” respond to Mr. Sanders’ request for information pursuant to RCW 42.17A.345 (“the Disclosure Law”), Washington’s Administrative Code 390-18-050, and Seattle’s Municipal Code § 2.04.280.

Facebook is committed to advertising transparency, especially for political advertisements. To that end, it has adopted policies to increase transparency on its platform and promote responsible advertising. However, as of December 28, 2018, Facebook no longer accepts or allows political advertising targeted at the state of Washington that relates to Washington state or local elected officials, candidates, elections or ballot initiatives (“Washington Political Ads”). For this and other reasons, the Public Disclosure Commission (“PDC”) should dismiss the Complaint. *First*, Facebook does not qualify as a “commercial advertiser” under Washington’s Disclosure Law because it is not accepting, providing, or selling Washington Political Ads. In fact, Facebook’s Advertising Policies prohibit users from purchasing Washington Political Ads,¹ and Facebook reviews and rejects them pursuant to that policy. *Second*, Mr. Sanders’ claims are preempted by federal law. Section 230 of the Communications Decency Act (“CDA”) bars claims that would impose liability on interactive computer service providers like Facebook for decisions relating to

¹ Facebook, *Advertising Policies - Restricted Content - 10.a Ads related to Politics or Issues of National Importance*, https://www.facebook.com/policies/ads/restricted_content/political (last visited Mar. 12, 2019).

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the screening, monitoring, or removal of third-party content. 47 U.S.C. § 230. That is exactly what Mr. Sanders' Complaint does here: it seeks to hold Facebook liable for failing to adequately screen and remove certain pieces of Washington political advertising from its platform. Those claims are barred by CDA § 230. The Complaint is also preempted by § 2702(a) of the Stored Communications Act ("SCA") which requires Facebook to keep certain user information private. 18 U.S.C. § 2702(a). Because Washington law mandates disclosure where the SCA prohibits it, Facebook cannot comply with both statutes. Mr. Sanders' claims are thus preempted by the SCA and should be dismissed. *Finally*, even if Facebook were subject to Washington's Disclosure Law, the PDC should exercise its discretion and decline to pursue Mr. Sanders' Complaint because Facebook's efforts to comply with Washington law and increase transparency on its platform promote the policies and interests underlying the Disclosure Law.

A. Issue and Background

On February 11, 2019, Mr. Sanders contacted Facebook, identifying a number of political advertisements relating to the Seattle city council elections and a Seattle ballot measure he had seen on the platform since January 1, 2019. 2/21/19 Compl. at 1. Although those ads were promptly removed from Facebook because they violated Facebook's policies, certain information about the advertisements remains available to the public in Facebook's Ad Archive. *Id.* at 2. Mr. Sanders requested "all the information that Facebook is legally required to disclose" under Washington law, the Washington Administrative Code, and the Seattle Municipal Code. *Id.* On February 21, 2019, Mr. Sanders filed this Complaint with the PDC.

B. Facebook does not qualify as a "commercial advertiser" subject to the disclosure requirements of Washington law.

The Complaint should be dismissed because Facebook does not "accept[] or provide[] political advertising or electioneering communications" related to Washington's state or local elected officials, candidates, elections or ballot initiatives in Washington. *See* RCW 42.17A.345. To the contrary, Facebook prohibits Washington Political Ads, and it therefore does not qualify as a "commercial advertiser" subject to the disclosure requirements of Washington law.

Before turning to Facebook's policies in Washington specifically, it is worth noting that Facebook reviews and screens political advertising content nationally to increase transparency on its platform. Pursuant to Facebook's policies, all advertisers must complete a verification process to post any political ads targeting the U.S. on the platform, and they must declare all ads containing political content as such when seeking to post them in the U.S. When an ad targets the U.S., Facebook also proactively reviews it for any U.S.-related political content. If such an ad is political but not declared as such by the advertiser, it will be rejected.

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As of December 28, 2018, Facebook no longer allows Washington Political Ads. If Facebook determines that an advertiser is attempting to place an ad that targets Washington state, and mentions a Washington state city, county, or state candidate, elected official, election or ballot initiative, Facebook rejects the ad. Facebook's policy prohibiting Washington Political Ads is clearly stated on its site.² Facebook also notifies advertisers who seek to post political ads that Facebook prohibits political advertisements targeting Washington. Thus, any Washington Political Ad that appears on Facebook is in violation of Facebook's policy.

To enforce its ban on Washington Political Ads on the platform, Facebook screens political ads targeting Washington state using a list of nearly 1,000 key words, including Washington state and local political candidates, elected officials, elections and ballot initiatives.³ Political ads that target only Washington state and hit on any of the key words are rejected. On a daily basis, Facebook also reviews all political ads delivered to Washington state to ensure compliance with its policies, and retroactively rejects any that are noncompliant. In both cases, when such ads are rejected, the advertiser receives a notification from Facebook that its advertisement was in violation of Facebook's policy prohibiting Washington Political Ads and is no longer running on the platform.⁴

In early 2019, Facebook discovered that its key word list did not yet include certain Washington state political candidates. Those candidates have since been added and advertisements containing those candidates' names would be rejected. Facebook continues to make efforts to update and improve its Washington state candidate list for enforcement purposes, including engaging in discussions with a third-party provider to update the list on a more-frequent basis.

While Facebook does not accept state and local political ads in Washington, advertisements posted in violation of this policy, even if subsequently removed from the platform, are nevertheless included in Facebook's Ad Archive. Facebook includes all ads that were delivered to ensure transparency in political advertising, even for those ads that were posted in violation of Facebook's policies. For example, here, even though the ads Mr. Sanders identified were ultimately rejected and removed from the platform, Mr. Sanders was able to access extensive information about the

² See https://www.facebook.com/policies/ads/restricted_content/political.

³ "Political ads" are ads that the advertiser has declared to be political via Facebook's political ads procedures.

⁴ If an advertiser is using Facebook on a desktop computer, the notification provides: "This ad isn't running because it relates to politics focusing on Washington State. At this time, you may not run ads related to politics in or targeted at the state of Washington that relate to Washington's state or local elected officials, candidates, elections or ballot initiatives. Please see our Advertising Policies to learn more. No further action may be taken at this point."

If an advertiser is using Facebook on a mobile device, the notification provides: "This ad isn't running because we no longer accept Washington State electoral ads."

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advertisements themselves, including who paid for them, the content of the ads, whether the ads were active or inactive, the duration the ads were posted, and information regarding the number of impressions the ads received and the demographic and geographic composition of the users who saw the ads.

C. The Complaint is preempted by federal law.

The PDC should also dismiss the Complaint because it is preempted by two federal statutes: the Communications Decency Act, 47 U.S.C. § 230, and the Stored Communications Act, 18 U.S.C. § 2702(a).

Section 230 of the CDA bars any claim seeking to hold interactive computer service providers liable for decisions relating to the screening or removal of third-party content. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”). Mr. Sanders’ claims fall squarely within the immunity afforded by § 230(c). An “important purpose of § 230 was to encourage service providers to self-regulate” material posted on their platforms by filtering and removing harmful or offensive third-party content. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Recognizing that it was “impossible for service providers to screen each of their millions of postings for possible problems,” however, Congress provided broad immunity to service providers like Facebook that sought to do so. *Id.* Section 230 thus shields service providers from liability “when they remove[] some—but not all—offensive material from their websites.” *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018). As the Ninth Circuit has recognized, claims that a website “failed to review each user-created profile” to detect and remove unlawful content “is precisely the kind of activity for which Congress intended to grant absolution with the passage of section 230.” *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171–72 (9th Cir. 2008) (en banc). The Complaint seeks to hold Facebook liable for explicitly protected activity—failing to detect and remove certain pieces of political advertising that were created and posted on the platform by third parties in violation of Facebook’s policies. Such claims are indisputably barred by § 230. *See, e.g., Caraccioli v. Facebook, Inc.*, 700 F. App’x 588, 590 (9th Cir. 2017); *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App’x 526, 526 (9th Cir. 2017); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

The Complaint may also be preempted by the SCA, which generally prohibits “providers” of electronic communication services from disclosing the contents of communications stored through those services unless one of several express exceptions applies. 18 U.S.C. § 2702(a), (b). Facebook is thus generally prohibited from knowingly disclosing “a record or other information pertaining to a subscriber to or customer of such service . . . to any governmental entity” absent an exception. 18 U.S.C. § 2702(a)(3).

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Washington's law broadly mandates that some private user information and advertising content be disclosed to the government and members of the public without a formal legal process and not as part of a civil or regulatory investigation. *See* RCW 42.17A.345; WAC 390-18-050. Such a scheme cannot be squared with the SCA, which requires that, absent a subpoena, court order, or other exception not applicable in this case, providers must keep user information and advertising content private. The SCA thus conflicts with, and likely preempts enforcement of, Washington's Disclosure Law. *See Arizona v. United States*, 567 U.S. 387, 399 (2012) (holding that conflict preemption applies where "compliance with both federal and state regulations is a[n] . . . impossibility" (citation omitted)). A federal court has also found that a statutory scheme with disclosure requirements similar to those in Washington's Disclosure Law raises important First Amendment concerns. *See Washington Post v. McManus*, --- F. Supp. 3d ----, 2019 WL 112639 (D. Md. Jan. 3, 2019) (enjoining a similar statutory scheme on First Amendment grounds).

D. Facebook's efforts comply with the policies and interests underlying the Washington Disclosure Law.

Additionally, the PDC should decline to pursue Mr. Sanders' Complaint against Facebook because Facebook has made a good-faith effort to comply with Washington law and to increase political advertising transparency on its platform. The PDC has broad discretion to resolve matters or decline to take action when enforcement is unwarranted based on a number of factors. *See* WAC 390-37-060 to -061. This includes a party's good faith efforts where noncompliance is alleged. *See id.* As noted above, Facebook has prohibited Washington Political Ads since December 2018. To enforce that policy, Facebook has adopted screening processes designed to detect and reject political advertisements targeting Washington that were improperly submitted by advertisers in violation of Facebook's policy. Facebook continues to enhance its screening processes to increase enforcement on the platform.

Facebook also remains broadly committed to transparency in political advertising on its platform, and it is thus aligned with the PDC's "Mission" and "Vision." The PDC "was created and empowered by Initiative of the People to provide timely and meaningful public access to accurate information about the financing of political campaigns, lobbyist expenditures, and the financial affairs of public officials and candidates"⁵ Facebook has adopted policies intended to increase transparency and responsible political advertising on its platform, including its policy that requires anyone seeking to run a political advertisement targeting the United States to go through an authorization process to post on the platform.⁶ Facebook also created its Ad Archive for the

⁵ *See* Public Disclosure Commission, *About the PDC*, <https://www.pdc.wa.gov/about-pdc> (last visited Mar. 12, 2019).

⁶ *See* https://www.facebook.com/policies/ads/restricted_content/political.

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purpose of providing timely and meaningful public access to accurate information about political advertising.

Finally, the advertisements at issue here, which were temporarily displayed in violation of Facebook's clear policies, were promptly removed with no harm to the public. Moreover, information relating to these inadvertently displayed advertisements, including information prescribed under Washington's Disclosure Law, remains accessible to the public in Facebook's Ad Archive.⁷

* * *

For these reasons, Facebook requests that the PDC dismiss Mr. Sanders' Complaint.

Sincerely,

/s/ Craig S. Primis

Craig S. Primis

⁷ See Facebook, *About the Ad Archive*, <https://www.facebook.com/business/help/2405092116183307> (last visited Mar. 12, 2019).