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October 26, 2018

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination and Legal Administration
Attention: Kathryn Ross, Paralegal
1050 First Street, NW
Washington, D.C. 20463

Re: Matter Under Review 7447 (Twitter, Inc.)

Dear Mr. Jordan:

On August 14, 2018, the Federal Election Commission (“FEC” or “Commission”) notified our client, Twitter, Inc. (“Twitter”), of a complaint filed by Paul F. Nehlen III, a Republican congressional candidate in Wisconsin.

The complaint’s central allegation is that Twitter violated the Federal Election Campaign Act of 1971, as amended (“FECA”) by banning Mr. Nehlen from its free, “interactive-news coverage website,”¹ thus spending corporate funds (which Twitter did not do) “for the purpose of influencing [an] election.”² But the FECA does not require Twitter to provide a platform to someone like Mr. Nehlen, who has used Twitter to espouse “white supremacist”³ and anti-Semitic views, facilitate intimidation, and employ violent imagery to depict those who do not share his positions. Such misuse of Twitter’s services is contrary to the company’s policies on abusive and hateful speech, and undermines its focus on serving a healthy public conversation. From a bottom line perspective, Mr. Nehlen is also damaging to the company’s long term prospects and financial condition, which are directly tied to the health of the conversation on the platform. Twitter’s decision to remove Mr. Nehlen from the platform for these reasons – rather than to influence an election – does not constitute a violation of the FECA.

Activities undertaken for non-political business reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as a regulated contribution or expenditure

¹ Compl. ¶ 3.

² 52 U.S.C. *Id.* § 30101(8)(A), (9)(A).

³ Alexandra Hutzler, *White Supremacist Paul Nehlen Wins More Than 10 Percent of Votes in Republican Wisconsin Primary*, Newsweek.com (Aug. 15, 2018), at <https://www.newsweek.com/white-supremacist-paul-nehlen-votes-republican-1074217>; Dave Goldiner, *White Supremacist Paul Nehlen Wins 11% In Republican Primary For Paul Ryan’s Seat*, The Forward (Aug. 14, 2018), at <https://forward.com/fast-forward/408277/white-supremacist-paul-nehlen-wins-12-in-republican-primary-for-paul-ryans/>; John Bowden, *Arizona GOP Senate Candidate Walks Back Past Support for ‘Fringe’ Candidate Paul Nehlen*, The Hill (June 13, 2018), at <https://thehill.com/homenews/campaign/392122-kelli-ward-walks-back-past-endorsement-of-white-supremacist-paul-nehlen>.

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under the FECA. In addition, as a media entity under the FECA, Twitter is entitled to rely upon both general First Amendment principles and the FECA's media exemption to choose the content Twitter will feature on its platform. Twitter's actions here are also exempt from liability pursuant to the Communications Decency Act, which immunizes Twitter when it takes good faith actions to remove violent, harassing, and otherwise objectionable content from its platform.

Accordingly, and as further detailed on the following pages, Twitter respectfully requests that the Commission find no reason to believe that Twitter violated the FECA and dismiss this matter.⁴

FACTUAL BACKGROUND

I. Background on Twitter

Twitter was incorporated in Delaware in April 2007.⁵ While its principal offices are in San Francisco, California, the company has over 3,000 full-time employees and 35 offices worldwide.⁶ Twitter also has 335 million active users and ranks as one of the largest social networks in the world.⁷ The company is publicly traded and has quarterly revenues of approximately \$700 million⁸ and an estimated overall value of approximately \$24 billion.⁹ A listing of Twitter's board members is available on the company's website.¹⁰ None of the board members are candidates for federal office in the United States or represent federal political parties.

⁴ At the outset, we note that much of the complaint consists of errant and irrelevant statements about Twitter and the services it provides to users. These statements appear to have no bearing on the three "Counts" at the end of the complaint. *See Compl.* ¶¶ 93-117. This response will address the legal claims in those three "Counts." To the extent that Mr. Nehlen alleges Twitter engaged in shadow-banning, those claims are addressed in Twitter's response to the complaint filed in Matter Under Review 7443. If the Commission believes any other portion of the complaint in this matter merits attention, we are available to supplement this response.

⁵ Twitter, *2018 Annual Report*, at <http://www.viewproxy.com/Twitter/2018/AnnualReport2017.pdf>.

⁶ *See id.*; Twitter, *Our Company*, at https://about.twitter.com/en_us/company.html.

⁷ *See Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Testimony of Jack Dorsey, Twitter Chief Executive Officer, before the U.S. House Comm. on Energy and Commerce at 3, at <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> ("Dorsey Testimony").

⁸ Todd Spangler, *Twitter Posts Strong Q2 Earnings, But Monthly Users Drop by 1 Million Amid Cleanup Effort*, Variety.com (July 27, 2018), at <https://variety.com/2018/digital/news/twitter-q2-2018-earnings-monthly-users-drop-1202887959/>; David Ingram, *Twitter Surprises with Revenue Turnaround, Shares Surge*, Reuters (Feb. 8, 2018), at <https://www.reuters.com/article/us-twitter-results/twitter-surprises-with-revenue-turnaround-shares-surge-idUSKBN1FS1RL>.

⁹ *See, e.g.*, NASDAQ, *Twitter, Inc. Stock Report*, at <https://www.nasdaq.com/symbol/twtr/stock-report> (last visited on Oct. 25, 2018).

¹⁰ Twitter, *Board of Directors*, at <https://investor.twitterinc.com/corporate-governance/board-of-directors>.

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Twitter is a free service that allows users to publicly communicate in messages of up to 280 characters – regardless of the substantive content of the communication.¹¹ At its core, Twitter “stands for freedom of expression”¹² and the principle that “every voice has the power to impact the world.”¹³ Twitter has been called a “powerful tool for democracy,”¹⁴ and “has bolstered grassroots conversations, disrupted the top-down nature of political leadership and thought, and has given voice to groups long hidden on the political periphery [like] the Tea Party movement.”¹⁵

Twitter also regularly works to “live-stream congressional hearings and political events, providing the public access to important developments in our democracy.”¹⁶ All 100 senators, 50 governors, and nearly every Member of the House of Representatives currently reach their constituents through Twitter accounts,¹⁷ with conservatives, in particular having “a strong presence on Twitter.”¹⁸ In recent years, Twitter has also emphasized news content and is using algorithmically and human-curated timelines to feature “tweets from news organizations and users that are not news professionals . . . to make it easier for everyone to find relevant news and the surrounding conversation so they can stay informed about what matters to them.”¹⁹ Twitter has also recategorized “itself from ‘social networking’ to ‘news’ in Apple’s App Store.”²⁰

Twitter, like almost every other business, must respond to marketplace demands. To that end, major online advertisers – “the main source of revenue for the company”²¹ – have insisted

¹¹ Twitter, *Twitter Via SMS FAQs*, at <https://help.twitter.com/en/using-twitter/twitter-sms-faqs>; Selena Larson, *Welcome to a World with 280-Character Tweets*, CNN.com (Nov. 7, 2017), at <https://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/>.

¹² Bridget Coyne, *Empowering Freedom of Expression for National Voter Registration Day* (Sept. 27, 2017), at https://blog.twitter.com/official/en_us/topics/events/2017/national-voter-reg-day-2017.html.

¹³ Twitter, *Our Values*, at https://about.twitter.com/en_us/values.html.

¹⁴ Doug Gross, *5 Ways Twitter Changed How We Communicate*, CNN (Mar. 21, 2011), at <http://www.cnn.com/2011/TECH/social.media/03/21/twitter.birthday.communication/index.html>.

¹⁵ Van Newkirk, *The American Idea in 140 Characters*, The Atlantic (Mar. 24, 2016), at <https://www.theatlantic.com/politics/archive/2016/03/twitter-politics-last-decade/475131/>.

¹⁶ Dorsey Testimony at 2.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 6.

¹⁹ Alex Kantrowitz, *Twitter Is Experimenting with a Way to Show You Even More Breaking News Tweets*, BuzzFeed.News (Mar. 15, 2018), at <https://www.buzzfeednews.com/article/alexkantrowitz/twitter-is-experimenting-with-a-way-to-show-you-even-more#.yqa44w9LKw>; see also Alex Eule, *Twitter’s Plan For Growth: Layoffs*, Barrons.com (Oct. 27, 2016), at <https://www.barrons.com/articles/twitters-plan-for-growth-layoffs-1477584370> (explaining that “much of the most relevant election news breaking [in 2016 is] on the [Twitter] service”)

²⁰ Tim Peterson, *Twitter Recategorized Itself from “Social Networking” to “News” in Apple’s App Store*, MarketingLand.com (Apr. 28, 2016), at <https://marketingland.com/twitter-recategorized-app-social-networking-news-apples-app-store-175070>.

²¹ Craig Timberg and Elizabeth Dwoskin, *Twitter Is Sweeping Out Fake Accounts Like Never Before, Putting User Growth at Risk*, Wash. Post (July 6, 2018); Trefis Team, *Twitter’s Monetization Issues Don’t Appear To Be Going Away*, Forbes.com (June 30, 2017), at <https://www.forbes.com/sites/greatspeculations/2017/06/30/twitters-monetization-issues-dont-appear-to-be-going-away/#3cdcf507835>.

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that “tech companies . . . do more to minimize divisive content on their platforms.”²² “Brand safety,” in particular, “has been top of mind,” with hundreds of advertisers yanking or freezing ads “running next to objectionable content that promoted racism” or other controversial material.²³ For example, Unilever – which spent \$2.4 billion in 2017 for online marketing of its brands like Lipton tea, Dove soap, Axe body spray and Ben & Jerry’s ice cream – has “called on Silicon Valley . . . to better police . . . a toxic online environment where propaganda, hate speech and disturbing content” exists.²⁴ In fact, Unilever has indicated that it will only work with companies like Google and Twitter if they “promise to boost more ‘responsible content’” and “improve consumer ad experiences.”²⁵ Procter & Gamble, another major company, has similarly expressed to Twitter and others that it “simply will not accept or take the chance that [its] ads are associated with violence, bigotry or hate.”²⁶

These concerns have directly impacted Twitter’s financial health and valuation. Commentators have noted that – prior to taking recent steps to curb abusive practices – “Twitter had been weathering harsh criticism for years for its hands-off approach to digital abuse and harassment on its service.”²⁷ Potential buyers such as Walt Disney Co. may have been wary of pursuing the company due to their perception of behavior on the platform.²⁸ Analysts have also

²² Hamza Shaban, *Giant Advertiser Unilever Threatens to Pull Its Ads from Facebook and Google over ‘Toxic Content’* (Feb. 12, 2018), at <http://www.latimes.com/business/technology/la-fi-tn-unilever-ads-google-facebook-20180212-story.html>.

²³ Lauren Johnson, *Facebook Is Making Its Biggest Play to Improve Brand Safety, But Is It Enough to Gain Marketers’ Trust?*, Ad Week (Sept. 13, 2017), at <https://www.adweek.com/digital/facebook-is-making-its-biggest-play-to-improve-brand-safety-but-is-it-enough-to-gain-marketers-trust/>.

²⁴ Hamza Shaban, *Giant Advertiser Unilever Threatens to Pull Its Ads from Facebook and Google over ‘Toxic Content’*.

²⁵ *Id.*

²⁶ Barrett Brunsman, *P&G to YouTube: Don’t Pair Our Ads with Terrorist Propaganda – or Cat Videos*, Cincinnati Business Courier (Sept. 25, 2017), at <https://www.bizjournals.com/cincinnati/news/2017/09/25/p-g-to-youtube-don-t-pair-our-ads-with-terrorist.html>. Companies like Prudential, Coca-Cola, Wal-Mart Stores Inc., Starbucks Corp. and General Motors Co. also have suspended their online advertising where, among other things, such ads were being matched up with racist and anti-Semitic content. *See* Jack Nicas, *Google’s YouTube Has Continued Showing Brands’ Ads With Racist and Other Objectionable Videos*, Wall Street Journal (Mar. 24, 2017), at <https://www.wsj.com/articles/googles-youtube-has-continued-showing-brands-ads-with-racist-and-other-objectionable-videos-1490380551>; *Firms Withdraw BNP Facebook Ads*, BBC.com (Aug. 3, 2007), at http://news.bbc.co.uk/2/hi/uk_news/politics/6929161.stm.

²⁷ Chriss Street, *Why Disney Passed on Buying Twitter*, Breitbart.com (Oct. 21, 2016), at <https://www.breitbart.com/california/2016/10/21/disney-passed-buying-twitter/>.

²⁸ *See* Alex Sherman, Christopher Palmeri, and Sarah Frier, *Disney Dropped Twitter Pursuit Partly Over Image*, Bloomberg (Oct. 17, 2016), at <https://www.bloomberg.com/news/articles/2016-10-17/disney-said-to-have-dropped-twitter-pursuit-partly-over-image>; *see also* Ananya Bhattacharya, *The Hate Speech on Twitter Reportedly Steered Disney Away from Buying the Company*, Quartz.com (Oct. 18, 2016), at <https://qz.com/812314/the-hate-speech-on-twitter-twtr-reportedly-steered-disney-dis-away-from-buying-the-company/> (citing concerns over the “rise of white nationalists on the site” in observing that the “trolls who take a toll on their fellow Twitter users with alarming regularity have finally taken a toll on Twitter itself”); Anna Codrea-Rado and Amie Tsang, *Twitter Users Split on Boycott Over Platform’s Move Against Rose McGowan*, N.Y. Times (Oct. 13, 2017) (explaining that “Twitter’s problems with unsavory content have also put off potential buyers”).

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attributed prior stock declines to this perception, which they believed was hampering the company's long term prospects.²⁹

In response to these developments, Twitter has been working to improve the health of the conversations it hosts.³⁰ “[A]buse, malicious automation, and manipulation” are constant concerns for the company,³¹ with “harassment, troll armies, manipulation through bots and human-coordination, misinformation campaigns, and increasingly divisive echo chambers” of particular concern.³² As a result, Twitter has been focusing on “building a systemic framework to help encourage more healthy debate, conversations, and critical thinking”³³ and removing content that violates Twitter’s Rules and Terms of Service.³⁴ Twitter’s Terms of Service explain that:

We reserve the right to remove Content that violates the User Agreement,³⁵ including for example . . . harassment.

We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no reason, including, but not limited to, if we reasonably believe: . . . you have violated these Terms or the Twitter Rules or . . . our provision of the Services to you is no longer commercially viable.³⁶

The Twitter Rules further elaborate on what constitutes abusive behavior:

²⁹ Timothy Green, *Why Twitter Stock Dropped 22% in October*, The Motley Fool (Nov. 8, 2016), at <https://www.fool.com/investing/2016/11/08/why-twitter-stock-dropped-22-in-october.aspx>; see also Suzanne Vranica, *Facebook and Google Face Emboldened Antagonists: Big Advertisers*, Wall Street Journal (Mar. 25, 2018), at <https://www.wsj.com/articles/facebook-and-google-face-emboldened-antagonists-big-advertisers-1521998394> (explaining that advertisers are watching to see the impact that various problems with online networks will have on consumer use of the platforms).

³⁰ See Del Harvey, *Serving Healthy Conversation* (May 15, 2018), at https://blog.twitter.com/official/en_us/topics/product/2018/Serving_Healthy_Conversation.html.

³¹ Dorsey Testimony at 1.

³² <https://twitter.com/jack/status/969234279321419776>.

³³ <https://twitter.com/jack/status/969234281653460992>.

³⁴ See Dorsey Testimony at 2; see also Twitter, *Twitter Terms of Service*, at <https://twitter.com/en/tos#update>; Twitter, *The Twitter Rules*, at <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

³⁵ The User Agreement consists of Twitter’s Terms of Service, Privacy Policy, and the Twitter Rules. See Twitter, *Twitter Terms of Service*.

³⁶ *Id.*

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Abusive Behavior

We believe in freedom of expression and open dialogue, but that means little as an underlying philosophy if voices are silenced because people are afraid to speak up. In order to ensure that people feel safe expressing diverse opinions and beliefs, we prohibit behavior that crosses the line into abuse, including behavior that harasses, intimidates, or uses fear to silence another user's voice.

Context matters when evaluating for abusive behavior and determining appropriate enforcement actions. Factors we may take into consideration include, but are not limited to whether:

- the behavior is targeted at an individual or group of people;
- the report has been filed by the target of the abuse or a bystander;
- the behavior is newsworthy and in the legitimate public interest. . . .

Abuse and hateful conduct

Abuse: You may not engage in the targeted harassment of someone, or incite other people to do so. We consider abusive behavior an attempt to harass, intimidate, or silence someone else's voice. . . .

Hateful conduct: You may not promote violence against, threaten, or harass other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.³⁷

Twitter's "Hateful Conduct Policy" provides the following "[e]xamples of what [Twitter] does not tolerate":

- violent threats;
- wishes for the physical harm, death, or disease of individuals or groups;
- references to mass murder, violent events, or specific means of violence in which/with which such groups have been the primary targets or victims;
- behavior that incites fear about a protected group;

³⁷ Twitter, *The Twitter Rules*, at <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

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- repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone.³⁸

Finally, the Twitter Rules clearly identify the consequences for failing to comply with these policies:

- requiring [the user] to delete prohibited content before [the user] can again create new posts and interact with other Twitter users;
- temporarily limiting [the user's] ability to create posts or interact with other Twitter users;
- asking [the user] to verify account ownership with a phone number or email address; or
- permanently suspending [the user's] account(s).³⁹

Twitter has applied these criteria in numerous situations to temporarily or permanently ban users from its platform.⁴⁰ In making these determinations, however, Twitter CEO Jack Dorsey explained in sworn testimony before Congress that Twitter does not “consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period.”⁴¹ Indeed, the very “purpose of Twitter is to serve the public conversation, and [the company] does not make value judgments based on personal beliefs.”⁴² In fact, “from a simple business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform.”⁴³

II. Background on Paul F. Nehlen III

Paul Nehlen has twice unsuccessfully sought the Republican nomination to represent Wisconsin’s First District in the U.S. House of Representatives.⁴⁴ Various observers have

³⁸ Twitter, *Hateful Conduct Policy*, at <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

³⁹ Twitter, *The Twitter Rules*.

⁴⁰ See, e.g., Daisy Naylor, *Famous People Who Have Been Banned from Twitter*, The Hook, at <http://thehookmag.com/2017/01/famous-people-banned-twitter-119081/>; *Twitter Suspensions*, Wikipedia, at https://en.wikipedia.org/wiki/Twitter_suspensions.

⁴¹ *Twitter: Transparency and Accountability*, 115th Cong. (Sept. 5, 2018), Transcript of Proceedings before the U.S. House Comm. on Energy and Commerce, at <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Transcript-20180905.pdf> (“Hearing Transcript”), lines 238-241.

⁴² Dorsey Testimony at 11.

⁴³ *Id.* at 1.

⁴⁴ Christopher Mathias, *White Nationalist Paul Nehlen Loses GOP Primary For Paul Ryan’s House Seat*, Huffington Post (Aug. 14, 2018), at https://www.huffingtonpost.com/entry/paul-nehlen-white-supremacist-loses-wisconsin-congressional-primary_us_5b6ded0ee4b0530743c9dbf9.

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described Mr. Nehlen as a “white nationalist,”⁴⁵ a “white supremacist,”⁴⁶ a “[h]ate-baiting Republican,”⁴⁷ and a “Nazi candidate.”⁴⁸ Another publication observed that Mr. Nehlen has “never been shy about his racism, anti-Semitism, Islamophobia, or xenophobia,”⁴⁹ and earlier this year Mr. Nehlen appeared on David Duke’s radio show and claimed it was “right and righteous” to “support preservation of a white-majority country.”⁵⁰ Even now, in the complaint, Mr. Nehlen proudly describes himself as a “pro-white candidate” and a “race realist.”⁵¹

Mr. Nehlen has made significant use of social media to promote his agenda. In particular, observers have warned that “the far-right populist Republican has been grabbing headlines by filling his Twitter feed with racially charged, anti-immigrant, anti-Muslim and anti-Semitic memes popular with the so-called alt-right movement.”⁵² Among other examples from Mr. Nehlen’s social media feeds:

- Mr. Nehlen posted the following picture “of himself at the desk in the Oval Office, surrounded by the spiked heads of Jewish men.”⁵³

⁴⁵ See *id.*

⁴⁶ Alexandra Hutzler, *White Supremacist Paul Nehlen Wins More Than 10 Percent of Votes in Republican Wisconsin Primary*; David Love, *The Strange Collection of Extremists Running for Office as Republicans*, CNN.com (May 4, 2018), at <https://www.cnn.com/2018/05/04/opinions/strange-collection-of-extremists-running-as-republicans-opinion-love/index.html>.

⁴⁷ Allison Kaplan Sommer, *Meet Paul Nehlen, the Hate-baiting Republican Trying to Unseat Paul Ryan*, Haaretz (Jan. 30, 2018), at <https://www.haaretz.com/us-news/paul-nehlen-bemoans-attacks-from-jewish-controlled-media-1.5781837>.

⁴⁸ CV Vitolo-Haddad, *Paul Nehlen: Nazi Ideology on the Republican Ticket*, Posting on Medium.com (Apr. 11, 2018), at <https://medium.com/@notcolloquial/paul-nehlen-nazi-ideology-on-the-republican-ticket-fcad9438499c>; see also Andrew O’Reilly, *Nazis and Anti-Semites Slip Through GOP Primaries, Causing Headaches for Party*, FoxNews.com (July 20, 2018), at <https://www.foxnews.com/politics/nazis-and-anti-semites-slip-through-gop-primaries-causing-headaches-for-party>.

⁴⁹ Tara Golshan, *Paul Nehlen, the Alt-right Candidate Running for Paul Ryan’s Seat, Explained* (Apr. 12, 2018), at <https://www.vox.com/policy-and-politics/2018/4/12/17224086/paul-nehlen-alt-right-paul-ryan-race>.

⁵⁰ Patrick Strickland, *Alarm over White Supremacist Candidates in US*, Al Jazeera (Feb. 9, 2018), at <https://www.aljazeera.com/news/2018/02/alarm-white-supremacist-candidates-180207165333394.html>

⁵¹ Compl. ¶ 38; see also David Love, *The Strange Collection of Extremists Running for Office as Republicans*.

⁵² Allison Kaplan Sommer, *Meet Paul Nehlen, the Hate-baiting Republican Trying to Unseat Paul Ryan*. See also Adam Peck, *The Top Republican Candidate to Replace Paul Ryan Is an Avowed White Supremacist*, Think Progress (Apr. 11, 2018), at <https://thinkprogress.org/paul-nehlen-gop-frontrunner-16e1882f2beb/> (explaining that since 2017, Mr. Nehlen has been “openly embracing classic anti-Semitic rhetoric, sharing deeply offensive memes on Twitter and the online white supremacist clearinghouse Gab”).

⁵³ CV Vitolo-Haddad, *Paul Nehlen: Nazi Ideology on the Republican Ticket*.

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- Mr. Nehlen “posted an image on Twitter showing [Congressman Paul Ryan] falling from a helicopter,” which was a meme referring to the dictatorial “South American practice of dropping political opponents out of helicopters” and is used as a reference “by members of the alt-right in jokes about executing their political opponents.”⁵⁴
- Mr. Nehlen used Twitter to disseminate “the contact information of his critics” earlier this year, claimed that “most of them are Jewish,” and “singl[ed] them out for harassing calls and messages.”⁵⁵ In response, at least one woman received historical photos of the Holocaust.⁵⁶
- Mr. Nehlen “shared tweets defending anti-Semitic Twitter user Ricky Vaughn from a Twitter ban, suggested that Bill and Hillary Clinton were murderers and shared anti-Muslim tweets from anti-Semitic commentator Jared Wyland.”⁵⁷
- Mr. Nehlen compiled “lists of Jews in the media and repost[ed] articles from The Daily Stormer, a neo-Nazi blog.”⁵⁸

⁵⁴ Bob Brigham, *Bannon-backed Candidate Advocates Murdering Paul Ryan with a Fascist ‘Death Flight’*, RawStory.com (Dec. 20, 2017), at <https://www.rawstory.com/2017/12/bannon-backed-candidate-advocates-murdering-paul-ryan-with-a-fascist-death-flight/>

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Andrew Kaczynski, *GOP Senate Candidate Kelli Ward Disavows Anti-Semite Paul Nehlen*, CNN (June 13, 2018), at <https://www.cnn.com/2018/06/13/politics/kfile-kelli-ward-disavows-anti-semite-paul-nehlen/index.html>.

⁵⁸ Donna Minkowitz, *Election 2018 Is Off to the Racists*, The Nation (Apr. 18, 2018), at <https://www.thenation.com/article/election-2018-is-off-to-the-racists/>.

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- On Facebook, Mr. Nehlen claimed that “Jews . . . commit a disproportionate number of mass shootings”⁵⁹ and once tweeted: “Poop, incest, and pedophilia. Why are those common themes repeated so often with Jews?”⁶⁰
- Mr. Nehlen also “figure[d] himself a heroic Hitler” by comparing his work fighting the bankers to that of the genocidal dictator:



- Mr. Nehlen engaged in a “Twitter fight with John Podhoretz, the Jewish pundit and editor of *Commentary Magazine*,” culminating with the message: “Do us all a favor, Podhoretz. Eat a bullet.”⁶¹
- Mr. Nehlen posted a photo on Twitter “of Prince Harry [and a] photoshopped photo of Harry’s fiancé [sic], biracial actress Meghan Markle, as the Cheddar Man — the dark-skinned man believed to be the first modern Briton — with the caption, ‘Honey, does this tie make my face look pale?’”⁶²
- Mr. Nehlen “started an ‘it’s okay to be white,’ campaign on social media and has regularly defended white supremacist messaging,”⁶³ including through the use of the “#ItsOkayToBeWhite hashtag on Twitter.”⁶⁴

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Allison Kaplan Sommer, *Meet Paul Nehlen, the Hate-baiting Republican Trying to Unseat Paul Ryan*.

⁶² Tara Golshan, *Paul Nehlen, the Alt-right Candidate Running for Paul Ryan’s Seat, Explained*.

⁶³ *Id.*

⁶⁴ Jason Stein and Mary Spicuzza, *Paul Nehlen Posts the Phone Numbers and Email Addresses of Critics After Claiming '74 Are Jews'*, *Journal Sentinel* (Jan. 31, 2018), at

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Mr. Nehlen's rhetoric spurred a "global outcry"⁶⁵ and led to editorials urging citizens to "stand up to the small-minded, anti-Semitic bigotry of Paul Nehlen."⁶⁶ Indeed, Mr. Nehlen's complaint acknowledges that "[m]any Twitter users were offended by [his] list of mostly Jewish critics" and his comments about Meghan Markle.⁶⁷ The complaint details some of the steps that Twitter undertook at various points – short of an outright ban – to bring Mr. Nehlen into compliance with Twitter's Rules.⁶⁸ Such steps included requiring Mr. Nehlen to delete specific content on Twitter that violated the platform's rules and a temporary, seven-day suspension.⁶⁹ Yet despite these and other efforts and warnings, Mr. Nehlen did not conform his behavior to Twitter's Rules. As a result, Twitter permanently banned Mr. Nehlen from the platform earlier this year.⁷⁰

THE LAW

As a general statutory matter, corporations are prohibited from making a "contribution" or "expenditure" in connection with a federal election.⁷¹ In relevant part, the term "contribution" is defined as "anything of value made by any person for the purpose of influencing any election for Federal office."⁷² Similarly, the term "expenditure" means "anything of value, made by any person for the purpose of influencing any election for Federal office."⁷³ Furthermore, federal law "provides that an expenditure made by any person 'in cooperation, consultation, or concert,

<https://www.jsonline.com/story/news/politics/2018/01/31/paul-nehlen-posts-phone-numbers-and-email-address-critics-after-posting-those-81-people-74-jews/1082125001/>.

⁶⁵ Allison Kaplan Sommer, *Anti-Semitic GOP Contender Nehlen Banned From Twitter After Racist Meghan Markle Tweet*, Haaretz (Feb. 12, 2018), at <https://www.haaretz.com/us-news/.premium-anti-semitic-gop-contender-nehlen-permanently-banned-from-twitter-1.5809836>; see also Jason Stein, *Paul Ryan's GOP Challenger Paul Nehlen Draws International Criticism for Tweet about Prince Harry's Fiancée*, Milwaukee Journal Sentinel (Feb. 11, 2018), at <https://www.jsonline.com/story/news/politics/2018/02/11/gop-paul-ryan-challenger-draws-international-criticism-tweet-prince-harrys-fiancee/327491002/>.

⁶⁶ David Haynes, *Editorial: We Must Stand Up to the Small-Minded, Anti-Semitic Bigotry of Paul Nehlen*, Journal Sentinel (Feb. 1, 2018), at <https://www.jsonline.com/story/opinion/editorials/2018/02/01/paul-ryan-opponent-paul-nehlen-antisemitic-bigotry-must-confronted/1085247001/>.

⁶⁷ Compl. ¶¶ 43, 63-64, 66, 70-71, 73.

⁶⁸ See id. ¶¶ 40-75.

⁶⁹ See id.

⁷⁰ See, e.g., Emily Sullivan, *Twitter Bans GOP Contender for Racist Tweet Targeting Meghan Markle*, NPR (Feb. 13, 2018), at <https://www.npr.org/sections/thetwo-way/2018/02/13/585339969/twitter-bans-gop-contender-for-racist-tweet-targeting-meghan-markle>. Mr. Nehlen also complains about the banning of @NehlenSpox, an account that he admits his campaign used to tweet during prior suspensions. See Compl. ¶¶ 54-55. These admissions fatally undermine his complaint: ban evasion like this is against Twitter policies and is grounds for immediate suspension of any related accounts.

⁷¹ 52 U.S.C. § 30118.

⁷² Id. § 30101(8)(A).

⁷³ Id. § 30101(9)(A).

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with, or at the request or suggestion of, a candidate, his authorized political committees or their agents' constitutes an in-kind contribution.”⁷⁴

The terms contribution and expenditure both contain an exemption for “any news story, commentary, [or] editorial.”⁷⁵ In particular, the media exemption applies when – like here – an entity engaging in an activity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) is acting as a press entity when conducting its activities.⁷⁶

Should a media entity or other qualified organization wish to stage a candidate “debate,” any staging-related activities will also be exempt from the definitions of contribution and expenditure provided that the debate is conducted in accordance with certain regulatory criteria.⁷⁷

DISCUSSION

I. Twitter Did Not Make a Corporate Contribution or Expenditure.

Count I of the complaint alleges that Twitter made a prohibited corporate contribution when, following multiple warnings about his violations of Twitter’s Terms of Service, the company banned Mr. Nehlen from its platform.⁷⁸ Count II of the complaint alleges that Twitter failed to report these “in-kind contributions” as “independent expenditures” with the Commission.⁷⁹

These claims are without merit for numerous reasons, most notably that in order to be a regulated contribution or expenditure, an activity must be undertaken “for the purpose of influencing an election.”⁸⁰ As both the courts and the Commission have made clear, activities undertaken for non-political reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as a contribution or expenditure.⁸¹

⁷⁴ First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

⁷⁵ See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

⁷⁶ See FEC Adv. Op. 2016-01 (Ethiq); *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁷⁷ See 11 C.F.R. § 110.13.

⁷⁸ Compl. ¶¶ 98, 102.

⁷⁹ Id. ¶¶ 106-107.

⁸⁰ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (explaining that “the FECA regulates activity that is ‘unambiguously related to the campaign of a particular federal candidate’”).

⁸¹ See, e.g., *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); FEC Adv. Op. 2012-31 (AT&T) (finding no in-kind contribution where business’s activity “reflects commercial considerations and does not reflect considerations outside of a business relationship”); FEC Adv. Op. 2012-22 (skimmerhat) (concluding that no contribution would result where company provided Internet services “on a commercial basis only” and where the company “has a vested commercial interest in seeking participation of users from all political parties and ideological backgrounds”);

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Of particular relevance here, the Commission has long recognized that decisions made for business reasons are not to influence elections. For example, in Advisory Opinion 2012-28 (CTIA), the Commission held that a business “may decide, for commercial reasons, to [provide services to] some political committees and not others” based on “eligibility criteria [designed] to protect the commercial viability of the [business].”⁸² Moreover, just last month, the Commission applied these general principles to conclude that Microsoft’s commercially reasonable efforts “to protect its brand reputation” did not amount to a prohibited in-kind contribution when the company provided election-sensitive customers with free account security services (e.g., cyber security training, technical support in tracking breaches and remedying them, etc.).⁸³ In particular, in approving the request, the Commission cited Microsoft’s concern that its brand reputation would be “at risk of experiencing severe and long-term damage” if hackers gained access to the accounts of election-sensitive users of Microsoft products, including Outlook and Hotmail.⁸⁴ The Commission also has previously gone so far as to tell a technology company that it “need not make its services available to [candidates] representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the [candidates] that meet those criteria.”⁸⁵ Twitter provides its services free of charge to conservatives and liberals without regard for ideology or party and is squarely within Commission guidance.

Commissioners and FEC staff have also specifically recognized Twitter’s authority to control content and access to its platform by stating: “Twitter controls the terms by which users may access the website,” the company “maintains the right to restrict content on its website,”⁸⁶ and “Twitter maintains ownership interests in software . . . and retains the right to ‘remove or refuse to distribute any content on its services, suspend or terminate users, and reclaim usernames.’”⁸⁷

Factual & Legal Analysis in Matter Under Review 7163 (Citizens for Joe Miller) (“explaining that a thing of value given to a campaign is not a ‘contribution’ if it was not for the purpose of influencing an election”); Factual and Legal Analysis in MUR 6586 (World Wrestling Entertainment, Inc.) (finding no contribution where corporation’s intent was to protect its business reputation).

⁸² See also FEC Adv. Op. 1994-30 (Conservative Concepts, Inc.) (explaining that activity that is undertaken “for genuinely commercial purposes,” among other relevant considerations, would not be a contribution or expenditure).

⁸³ FEC Adv. Op. 2018-11 (Microsoft).

⁸⁴ *Id.*

⁸⁵ FEC Adv. Op. 2017-06 (Stein and Gottlieb)

⁸⁶ Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016).

⁸⁷ FEC Adv. Op. 2017-05 (Great America PAC) (internal brackets omitted). Likewise, in the enforcement context, the Commission’s Office of General Counsel has noted without disapproval that Twitter “maintains the right to restrict content on [its] website.” First General Counsel’s Report, MUR 6911 (Lois Frankel for Congress et al.), at 4 & n.14 (Sept. 3, 2015) (citing Twitter’s Terms of Service). Similarly, OGC has referenced Twitter’s reservation of its “right at all times . . . to remove or refuse to distribute any Content on the Services[and] to suspend or terminate users.”

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Here, as the sworn testimony of Twitter’s CEO confirms, the decision to ban Mr. Nehlen from the Twitter platform had no connection to politics, let alone an attempt to influence an election. Instead, it was a business decision to prevent a Twitter user – who was intent on promoting hate and potential violence in violation of Twitter’s politically-neutral rules – from damaging the company’s platform, reputation, and ultimately its brand and prospects.⁸⁸ Thus, as a matter of fact and law, Twitter’s ban of Mr. Nehlen did not result in a contribution or expenditure.

For that reason, the Commission need not examine Counts I and II any further and should dismiss them based on the foregoing. But to the extent the Commission is interested in any of the other related claims made in these Counts, we now show why they are flawed too.

First, Twitter qualifies for the so-called press exemption of federal campaign finance law. Grounded in First Amendment principles, the exemption excepts from regulation “any cost incurred in covering or carrying” news stories⁸⁹ and includes – in no uncertain terms – choosing between “competing claims of parties” and which content “to feature, investigate or address in news, editorial and opinion coverage.”⁹⁰

The Commission “has not limited the press exemption to traditional news outlets” and has applied it to “news stories, commentaries, and editorials *no matter in what medium they are published*,” [including] Internet Web sites and entities that distribute their content exclusively on the Internet,⁹¹ as well as websites that curate news content.⁹² Given Twitter’s news-oriented nature,⁹³ there is little question that Twitter qualifies as a media entity as a matter of campaign finance law. Indeed, the complaint itself notes “that three-quarters of Twitter users reported that they used the platform to read news,”⁹⁴ and Counts I and II themselves fully concede that Twitter’s site is an “interactive news website” and a “news-coverage website.”⁹⁵

The Complaint’s only argument that the press exemption does not apply is a claim that Twitter was not engaging in a legitimate press function when it removed from its platform “the views [of which] it does not approve.” To be clear, Mr. Nehlen was banned because he violated

⁸⁸ See, e.g., *supra* at 12.

⁸⁹ 11 C.F.R. § 100.73.

⁹⁰ Statement of Reasons of Commissioners Darryl R. Wold, Danny L. McDonald, David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, Matters Under Review 4929, 5006, 5090, and 5117 (ABC, CBS, NBC, New York Times, Los Angeles Times, and Washington Post et al.) (Dec. 20, 2000).

⁹¹ FEC Adv. Op. 2008-14 (Melothe); *see also id.* (explaining that the Commission “has also recognized the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach”).

⁹² FEC Adv. Op. 2016-01; *see also* FEC Adv. Op. 2005-16 (Fired Up) (finding that a website qualified as a media entity where it was “viewable by the general public and akin to a periodical or news program distributed to the general public”).

⁹³ See *supra* at 3.

⁹⁴ Compl. ¶ 8.

⁹⁵ Id. ¶¶ 100, 106.

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the company's rules, not because the company took a position on his politics or his campaign for office. In any event, decisions about what content to disseminate to Twitter users is at the very heart of the media function.⁹⁶ It would come as a surprise to the editors of the New York Times, MSNBC, or FoxNews that they may be making a prohibited corporate contribution because they chose not to carry stories from or about a violent anti-Semitic candidate's campaign, did not invite him to appear on their television program, or did not provide written op-ed space for him to abuse others via violent and offensive rhetoric.

Moreover, Twitter also has a constitutional right to not be compelled to provide a platform for speech to which the company objects. The guarantee of free speech "necessarily compris[es] the decision of both what to say and what not to say,"⁹⁷ and the First Amendment safeguards the "choice of material . . . [that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment."⁹⁸ Thus, for example, a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude.⁹⁹ Nor can private citizens organizing a parade on city streets be compelled "to include among the marchers a group imparting a message that the organizers do not wish to convey."¹⁰⁰ While it is not necessary to reach these kinds of constitutional issues in order to resolve this matter, the Commission would be well served to construe its regulations to avoid infringing upon such fundamental freedoms.¹⁰¹

Second, the complaint claims that Twitter has made a prohibited corporate contribution to certain unspecified opponents of Republican candidates. But an in-kind contribution of the sort Mr. Nehlen alleges would require Twitter to act "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, [an opposing candidate's] authorized political committee[] or [its] agents."¹⁰² The decision to ban Mr. Nehlen, however, was not undertaken at the suggestion of, after any, let alone substantial, discussions with, or with the material involvement of his opponents, as required by the Commission's regulations.¹⁰³ The complaint does not allege (nor could it) that any such conduct – much less actual "coordination" – occurred.

⁹⁶ See FEC Adv. Op. 2016-01.

⁹⁷ *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

⁹⁸ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

⁹⁹ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

¹⁰⁰ *Hurley*, 515 U.S. at 559.

¹⁰¹ See *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (noting the Commission's prior failure, under the doctrine of constitutional avoidance, to "tailor its [regulations] to avoid unnecessarily infringing upon First Amendment rights"); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

¹⁰² See *supra* at 12.

¹⁰³ See 11 C.F.R. 109.21(d).

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Third, because Twitter’s services are offered for free, and the definitions of contribution and expenditure are predicated on providing something of value, a denial of free services to Mr. Nehlen cannot result in Twitter making a regulated contribution or expenditure subject to sanction under federal campaign finance law.¹⁰⁴

II. Tweets Are Not FEC-Regulated “Debates.”

In Count III, the complainant argues that Twitter’s role as a “modern public square . . . where political candidates gather to debate their platforms” makes the company subject to the FEC’s debate regulation. But this argument fundamentally misapprehends the type of “debate” the FEC regulates.

When the Commission established the rules for “candidate debates,” it did so with the “historical, traditional concept of candidate debates in mind.”¹⁰⁵ The Commission has further underscored that an FEC-regulated debate is a single “event” rather than a months-long series of conversations,¹⁰⁶ with an “inherent characteristic” of such events being a “face-to-face confrontation.”¹⁰⁷ In other words, “a debate does not consist of a series of candidate appearances at separate times over the course of a longer event.”¹⁰⁸

A series of Tweets by candidates is far removed from an FEC-regulated “debate.” They are not a single event like those the Commission sought to regulate, and Tweets do not result in a “face-to-face confrontation.” Instead, candidates engage opponents on Twitter from their home, office, or on the road at times of their choosing through various forms of electronic and other media. Such ongoing discussions – where candidates respond potentially hours or days later and from miles away – are simply outside the regulation.

In any event, the FEC’s debate regulation is an exception that allows the debate organizer to act where it may otherwise be making a regulated contribution or expenditure. As explained in the previous section, Twitter’s actions constituted neither. Therefore, there is no need for the Commission to consider application of the debate regulation here; Twitter’s activities were permissible in the first instance.

¹⁰⁴ Cf. Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016) (noting that “Twitter is a free service that does not charge users to create accounts, display profiles, or send tweets”); see also First General Counsel’s Report, MUR 6911 (Lois Frankel for Congress et al.), at 3 (Sept. 3, 2015) (noting same).

¹⁰⁵ FEC Adv. Op. 1986-37 (Nat’l Conservative Foundation) (citing, *inter alia*, the Lincoln-Douglas debates and the 1960, 1976, 1980, and 1984 presidential debates); see also Proposed Regulations, 44 Fed. Reg. 59,162 (Oct. 12, 1979) (confirming that the regulation was created in response to “the issues presented by the League of Women Voters in the 1976 sponsorship of [three nationally-televised] presidential debates”).

¹⁰⁶ 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995).

¹⁰⁷ FEC Adv. Op. 1986-37.

¹⁰⁸ 60 Fed. Reg. at 64,262.

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III. The Communications Decency Act Immunizes Twitter from Liability.

Even if, contrary to the foregoing, the Commission concluded that Twitter made a regulated contribution or expenditure under the FECA, Twitter’s decision to ban Mr. Nehlen from the platform is immune from liability pursuant to 47 U.S.C. § 230(c) of the Communications Decency Act (“CDA”), which provides as follows:

(c) Protection for “Good Samaritan” blocking and screening of offensive material

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material [provided by another information content provider].

Section 230(c)(1) of the CDA bars legal action ““seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content”” created by third parties.¹⁰⁹ Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal theories.¹¹⁰ As the Ninth Circuit has explained, “any activity that can be boiled down

¹⁰⁹ *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

¹¹⁰ See, e.g., *Jefferson v. Zuckerberg*, Civ. A. No. 17-3299, 2018 WL 3241343, at *4 (D. Md. July 3, 2018) (“CDA immunity is broad and must be determined at ‘the earliest possible stage of the case.’”)

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to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.”¹¹¹

To trigger immunity, three elements must be satisfied: (1) the defendant must be a provider of an “interactive computer service;” (2) the challenged communication must be “provided by another information content provider;” and (3) “the asserted claims must treat the defendant as a publisher or speaker of [that] information.”¹¹² Each of these criteria are met here.

First, Twitter is an “Interactive Computer Service” within the meaning of the statute.¹¹³ *Second*, the information at issue is a communication provided by another information content provider – i.e., Mr. Nehlen’s complaint involves Tweets that he – not Twitter – wishes to make. *Third*, Mr. Nehlen’s complaint challenges Twitter’s decision to remove content and, thus, impermissibly seeks to impose liability on Twitter for performing “a publisher’s traditional editorial functions.”¹¹⁴ In fact, as noted above, publication immunized by the statute involves a range of activities, including “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.”¹¹⁵ Thus, it is well-established that the removal of content and decisions about what content to include or block are inextricably bound up in the role of publisher and is thus “publisher conduct immunized by the CDA.”¹¹⁶ Courts have even stated that “providing accounts . . . is publishing activity” that triggers immunity.¹¹⁷ Put simply,

¹¹¹ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

¹¹² *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 134 (2018).

¹¹³ See, e.g., *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1166, 1121 (N.D. Cal. 2016) (noting that no party “dispute[s] that Twitter is an interactive computer service provider”); *Frenken v. Hunter*, 2018 WL 1964893, at *2 (N.D. Cal. Apr. 26, 2018) (same). Courts have stated that “the prototypical service qualifying for this statutory immunity is an online messaging board . . . on which Internet subscribers post comments and respond to comments posted by others.” *Jefferson v. Zuckerberg*, 2018 WL 3241343, at *5. Interactive service providers do not become information content providers ineligible for immunity “merely by virtue of reviewing the contents” of accounts and making decisions about removal. *Caraccioli v. Facebook, Inc.*, 700 F. App’x 588, 590 (9th Cir. 2017).

¹¹⁴ *Barrett*, 40 Cal. 4th at 43.

¹¹⁵ *Barnes*, 570 F. 3d at 1102 (noting that “it is immaterial whether this decision comes in the form of deciding what to publish in the first place or what to remove among the published material”); *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1106 (W.D. Wash. 2014) (“Whether the website operator removes certain reviews, publishes others, or alters content, it is still entitled to CDA immunity, since those activities constitute a publisher’s traditional editorial functions”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (“Decisions relating to the monitoring, screening, and deletion of content [are] actions quintessentially related to a publisher’s role”); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“Publisher liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material”); *Bennett v. Google, LLC*, 882 F. 3d 1163, 1167-68 (D.C. Cir. 2018) (“[The] decision to print or retract is fundamentally a publishing decision for which the CDA provides explicit immunity” and that a decision about “output control” is “the very essence of publishing”).

¹¹⁶ *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

¹¹⁷ *Fields*, 217 F. Supp. 3d at 1123-24 (“Despite being aimed at blocking Twitter accounts instead of particular tweets, plaintiffs’ provision of accounts theory is still based on Twitter’s alleged violation of a duty . . . derive[d] from [its] status or conduct as a publisher”); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889-90 (N.D. Cal. 2017) (finding immunity even where plaintiffs argued their claims depended on access to Twitter’s services generally because plaintiffs “explicitly base their claims on the content” of the posts); *Cohen v. Facebook, Inc.*, 252 F. Supp.

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“removing content is something publishers do,” and imposing liability on the basis of this conduct “necessarily involves treating” the defendant as a publisher, triggering immunity.¹¹⁸

In addition, section (c)(2) “presumptively immunizes an online provider’s termination of user accounts” and “wipes out most user claims against online providers for account termination because the online provider can argue that the termination was intended to shut down the user’s objectionable content or activity.”¹¹⁹ Importantly, “any provider of an interactive computer service” – can take advantage of this defense so long as “they act to restrict access to the content because they consider it obscene or otherwise objectionable.”¹²⁰

Here, Twitter faced a user who was misusing the company’s platform to broadcast anti-Semitic and white supremacist views and to facilitate intimidation, all while employing violent and threatening imagery of those who opposed his positions. Consistent with its existing policies and efforts to improve the health of the conversations it hosts, Twitter acted to restrict access to Mr. Nehlen’s individual offensive content and, ultimately, to permanently restrict Mr. Nehlen’s access to the platform. These actions are precisely the type of conduct immunized by the CDA, which wholly bars Mr. Nehlen’s claims.

CONCLUSION

Twitter is committed to maintaining a robust platform for all users – be they conservative, liberal or somewhere in between – to engage and debate public issues, including those involving political candidates and policies. At the same time, and to maintain its reputation as a place where individuals can safely share and debate ideas, Twitter remains committed to providing a space for engagement that is free from threats and harassment.

Having an “anti-Semitic Twitter troll” on the platform, whose “purpose [was] to flaunt and mock the norms of democratic discourse, not participate in them,” represented a threat both to the community and to Twitter’s brand and business.¹²¹ In banning Mr. Nehlen from the platform, Twitter reacted proportionately and lawfully, consistent with the Commission’s requirements for when a company makes a business decision to refrain from offering services to a candidate that is doing harm to the company’s commercial interests. The Commission should find no reason to believe that Twitter violated the FECA and should dismiss this matter.

¹¹⁸ 3d 140, 157 (E.D.N.Y. 2017) (“Facebook’s choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability [here]. . . would equally derive from Facebook’s status or conduct as a publisher or speaker”).

¹¹⁹ Barnes, 570 F.3d at 1103.

¹²⁰ Eric Goldman, *Online User Account Termination and 47 U.S.C. S 230(c)(2)*, 2 UC Irvine L. Rev. 659, 663, 670 (2012).

¹²¹ Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1105 (9th Cir. 2009), as amended (Sept. 28, 2009).

¹²² Emma Green, *Paul Nehlen Is an Anti-Semitic Clown*, The Atlantic (Jan. 24, 2018), at <https://www.theatlantic.com/politics/archive/2018/01/paul-nehlen/551312/>.

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Sincerely,

A handwritten signature in black ink, appearing to read "Caleb P. Burns".

Caleb P. Burns
Andrew G. Woodson