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November 16, 2020

**VIA EMAIL (CELA@FEC.GOV)**  
**CONFIDENTIAL**

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

**Re: Matter Under Review 7807 (Snap Inc. et al.)**

Dear Mr. Jordan:

On October 2, 2020, the Federal Election Commission (the "FEC" or "Commission") notified our clients Snap Inc. ("Snap") and Evan Spiegel of a complaint filed by Donald J. Trump for President, Inc. (the "Trump campaign"). The complaint's central allegation is that Snap violated the Federal Election Campaign Act of 1971, as amended (the "FECA"), by ceasing to actively promote the Trump campaign's account on a popular Snap product, an application known as "Snapchat."

The complaint's claim that Snap's action amounted to a prohibited corporate contribution under the FECA fails as a matter of fact and law, is belied by the complaint's own assertions, and should be dismissed. That is so for at least five separate and independent reasons. First, Snap's decision to no longer promote the Trump campaign's account was an electorally-neutral business decision. It was not made to "influence an election," a prerequisite to regulation as a contribution under the FECA. Second, Snap's decision is protected from regulation under the First Amendment. Snapchat contains a news and communications platform, and Snap has a First Amendment right to shape that platform's voice by deciding what content and speakers it is willing to associate with and include. Third, and relatedly, Snap's decision is protected from regulation under the FECA's media exemption. The complaint acknowledges that Snap produces and curates news content. That is quintessential media activity the FECA wholly exempts from regulation even when the content concerns a federal campaign. Fourth, there is no allegation (nor could there be) that Snap's actions were coordinated with another campaign, as would be required to make them a regulated contribution. Finally, the Communications Decency Act also frees Snap from regulation under the FECA.

These substantive defenses apply with equal force to Snap's officers, including Mr. Spiegel, when they are acting on behalf of the company. But Mr. Spiegel should be dismissed from this matter at the threshold anyway because the complaint made no allegations against him. The Office of General Counsel's decision to include him as a Respondent despite this lack of allegations was inconsistent with applicable FEC regulations, departs from FEC

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practice, and runs counter to the complaint's allegation that a corporation – not an individual – contributed its resources in violation of the FECA.

## **FACTUAL BACKGROUND**

### **I. Snap and Snapchat**

**Corporate Background.** Snap is a publicly traded company<sup>1</sup> first incorporated in Delaware in 2012 under the name Snapchat, Inc.<sup>2</sup> The company is currently headquartered in Santa Monica, California,<sup>3</sup> had over \$679 million in revenues in the third quarter of this year,<sup>4</sup> and employs over 3,700 people.<sup>5</sup>

Snap's Chief Executive Officer, Evan Spiegel, is one of the company's co-founders.<sup>6</sup> A list of Snap's entire management team and board members is available on the company's website.<sup>7</sup> None of these individuals are candidates for federal office or represent federal political parties.

**Snapchat's Features.** Snap's flagship product, Snapchat, is "a camera application that was created to help people communicate through short videos and images called 'Snaps.'"<sup>8</sup> Snapchat currently has 249 million daily active users.<sup>9</sup> Snaps can be modified and personalized by the user to include text, stickers, augmented reality features, and other information before the content is shared with friends and contacts.<sup>10</sup> The following are illustrative examples of Snaps:

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<sup>1</sup> Kaya Yurieff, *Snap Stock Soars over 20% on Strong User Growth*, CNN.com (Oct. 20, 2020), at <https://www.cnn.com/2020/10/20/tech/snap-earnings/index.html>.

<sup>2</sup> Snap, *Snap Inc.*, at <https://www.snap.com/en-US/>; Snap, *Form 10-Q* at 10 (Oct. 21, 2020), at <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001564408/461758eb-1c14-400e-a425-08873e878de9.pdf>.

<sup>3</sup> See Snap, *Form 10-Q* at 10.

<sup>4</sup> See Kaya Yurieff, *Snap Stock Soars over 20% on Strong User Growth*.

<sup>5</sup> Press Release, *Snap Inc. Announces Third Quarter 2020 Financial Results*, Snap (Oct. 20, 2020), at <https://investor.snap.com/news/news-details/2020/Snap-Inc.-Announces-Third-Quarter-2020-Financial-Results/default.aspx>.

<sup>6</sup> See Snap, *Leadership Team*, at <https://investor.snap.com/governance/leadership-team/default.aspx>.

<sup>7</sup> See *id.*

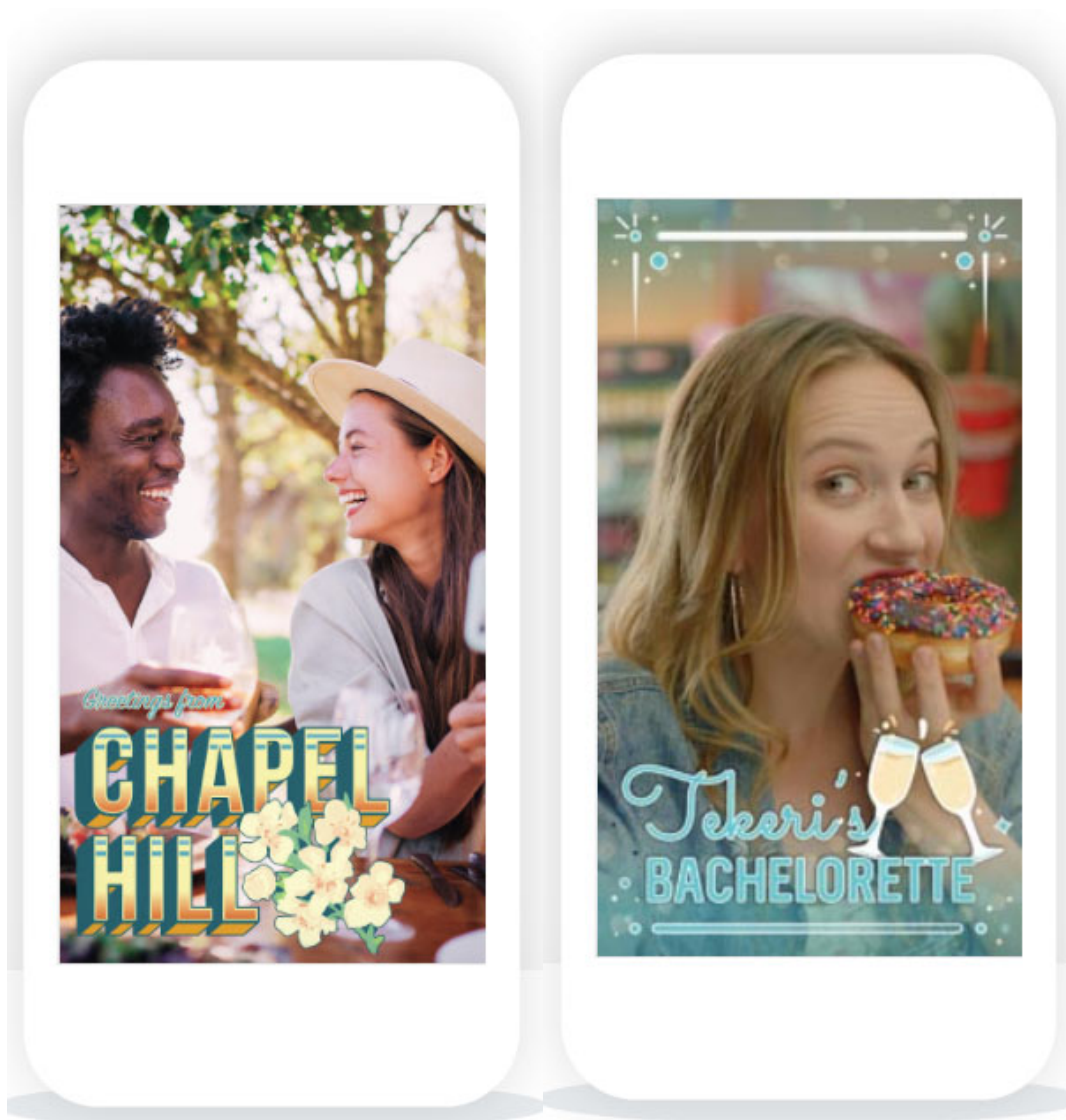
<sup>8</sup> Snap, *Form 10-Q* at 10.

<sup>9</sup> Kaya Yurieff, *Snap Stock Soars over 20% on Strong User Growth*.

<sup>10</sup> See also Tiffany Peon, *A Guide to Snapchat for People Who Don't Get Snapchat*, N.Y. Times (Feb. 7, 2018), at <https://www.nytimes.com/2018/02/07/smarter-living/snapchat-guide.html>.

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In addition to this camera and communications function, Snapchat offers a number of other features. For example, users, including journalists and political figures, can and do use the platform to create video and text-based Stories and share them with large audiences. Moreover, Snapchat offers a “Discover” platform that features Snap-produced news coverage as well as news from many leading news outlets around the world, from the Wall Street Journal to the BBC to ESPN.<sup>11</sup>

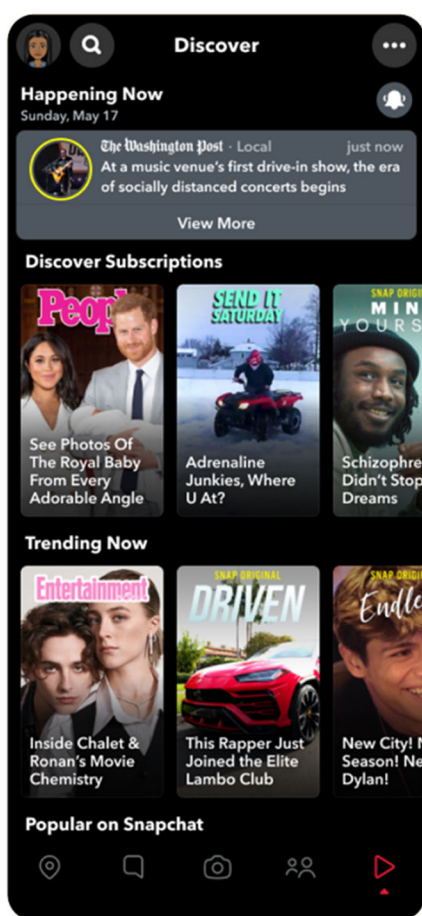
<sup>11</sup> See, e.g., Kayla Carmichael, *Is Snapchat Discover Right for Your Brand?*, HubSpot.com (Jan. 28, 2020), at <https://blog.hubspot.com/marketing/how-to-get-on-snapchat-discover>; see also Digital Brew, *Snapchat’s New Discover Platform – What that Means for Marketing*, at <https://www.digitalbrew.com/snapchats-new-discover-platform-means-marketing/> (noting participation by Comedy Central, National Geographic).

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The Discover section is in a separate part of the Snapchat application from the application's communications features. Discover is “basically a news feed,” but a carefully curated one, where Snap aggregates content in “story format from news publishers”<sup>12</sup> and “publishes content from established media brands.”<sup>13</sup> In the Discover section, users see thumbnails containing news headlines and associated photos. Users can then choose to click on a thumbnail to open and read the story. A user can choose to subscribe to a particular news source/channel, and can choose to receive updates on new posts from these channels. Users also will see other content that is popular or aligned with their interests even if they have not subscribed to it.

Over half of Generation Z gets at least some of its news from Discover.<sup>14</sup> Illustrative examples of Discover content follow:



<sup>12</sup> *Id.*

<sup>13</sup> Katie Benner, *Snapchat Discover Takes a Hard Line on Misleading and Explicit Images*; see also Katie Benner, *In Discover, Snap Sees a Bright Spot as It Tries to Fend Off Facebook* (describing Discover as “a place in the messaging app where media companies can publish original stories”).

<sup>14</sup> See Remarks of Evan Spiegel, *Snap Inc. (SNAP) Q1 2020 Earnings Call Transcript*, *The Motley Fool* (Apr. 22, 2020), at <https://www.fool.com/earnings/call-transcripts/2020/04/22/snap-inc-snap-q1-2020-earnings-call-transcript.aspx>.

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**Snapchat & News.** While Snap is primarily known as a camera and communications company, it also features a large and growing media platform. The company has found success by adding high-end news and entertainment content on Snapchat, including “via revenue-sharing agreements with media partners.”<sup>15</sup> The content is designed specifically for Snapchat, often “shot in vertical format with episodes of around 5 minutes each, and include[s] graphics, split screens, and quick cuts optimized for smartphone viewing.”<sup>16</sup> This content reaches tens and sometimes hundreds of millions of viewers: in the first quarter of this year, more than 60 shows on the Snapchat platform reached monthly audiences of over 10 million people.<sup>17</sup>

While Snapchat features many kinds of content, it specifically has “become a competitive player as a medium for news.”<sup>18</sup> To begin with, as a communications academic noted, “[o]ne of the things Snapchat is great at is citizen journalism[.] You get more of, ‘This is what it’s like being a part of the crowd. Here’s the energy of the event.’”<sup>19</sup> But Snap’s integration into news media runs much deeper. The company has in-house news teams<sup>20</sup> and has been “investing more in political news programming[, having] recently moved its political news show ‘Good Luck America,’ hosted by Peter Hamby, from weekly to daily, upon seeing that political news consumption is becoming more of a daily habit of Snapchat users.”<sup>21</sup> Snap even “built a studio for the show at the company’s Santa Monica headquarters, where Hamby interviews candidates and political experts, on top of hosting shows on the road.”<sup>22</sup> Over 10 million viewers watched the program’s 2018 election coverage.<sup>23</sup>

In addition to pure news coverage, Snapchat hosts content and commentary from politicians and their supporters, who use the platform to promote their views. Snap itself,

<sup>15</sup> Adam Levy, *Snap’s Transforming into a Media Company*, The Motley Fool (Sept. 27, 2019), at <https://www.fool.com/investing/2019/09/27/snap-transforming-into-media-company-originals.aspx>.

<sup>16</sup> Todd Spangler, *Snapchat Sets Slate of New Scripted Originals and Docu-Series, Doubling Down on Mobile TV*, Variety (Oct. 10, 2018), at <https://variety.com/2018/digital/news/snap-snapchat-originals-scripted-shows-1202973565/>.

<sup>17</sup> Snap Inc. Q1 2020 Earnings Slides (Apr. 21, 2020), at [https://s25.q4cdn.com/442043304/files/doc\\_presentations/presentation/q1-2020-earnings-slides.pdf](https://s25.q4cdn.com/442043304/files/doc_presentations/presentation/q1-2020-earnings-slides.pdf).

<sup>18</sup> Kerry Flynn, *Snapchat CEO Evan Spiegel to Stephen Colbert: Despite GOP Embrace, 2016 White House Race ‘Definitely Not The Snapchat Election’*, Int’l Bus. Times (Oct. 1, 2015), at <https://www.ibtimes.com/snapchat-ceo-evan-spiegel-stephen-colbert-despite-gop-embrace-2016-white-house-race-2122481>; see also Katie Benner, *In Discover, Snap Sees a Bright Spot as It Tries to Fend Off Facebook*, N.Y. Times (May 7, 2017), at <https://www.nytimes.com/2017/05/07/technology/discover-snap-rival-facebook.html> (noting ad agency’s observation that “[f]or a generation of people, Snapchat is the place where they’re getting all of their news”).

<sup>19</sup> Katie Blackley, *Images May Disappear But Snapchat’s Presence In Politics Is Growing*, WESA Radio (Nov. 2, 2016), at <https://www.wesa.fm/post/images-may-disappear-snapchats-presence-politics-growing>.

<sup>20</sup> Remarks of Evan Spiegel, *Snap Inc. (SNAP) Q1 2020 Earnings Call Transcript*; see also Mike Shields, *Snap Suddenly Has a Leg Up on Facebook and Google — But It Still Needs to Do 2 Things to Steal Their Advertisers*, Business Insider (Oct. 7, 2017), at <https://www.businessinsider.com/snapchats-closed-doors-keep-fake-news-out-2017-10> (“Snapchat’s internal team reviews all Snaps posted from a breaking-news event . . . not unlike a producer team for a TV news show would”).

<sup>21</sup> Sara Fischer, *Snapchat Readies 2020 News Push*, Axios (Sept. 10, 2019), at <https://www.axios.com/snapchat-readies-2020-news-push-674f0789-ef7b-4801-ac6d-c7071bccd2a2.html>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*



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however, does not “promot[e] a particular political agenda or any particular candidate.”<sup>24</sup> Instead, the company “want[s] a marketplace of ideas,” and “believe[s] people are better off having exposure to a range of viewpoints.”<sup>25</sup> Snapchat has, for example, been called an “inescapable presence” at the Republican National Convention.<sup>26</sup> A major conservative organization used Snapchat to advocate for repeal of Obamacare.<sup>27</sup> The National Republican Senatorial Committee and the Republican Governors Association have used Snapchat to attack political opponents.<sup>28</sup> Similarly, Democratic candidates use the platform to campaign for votes, particularly among so-called millennials and Generation Z.<sup>29</sup>

**Snap’s Policies & Approach to Curation.** Snap works hard to ensure that the Snapchat platform is a safe, positive, and factual environment for its users. To advance that goal, Snap has long promulgated and enforced a set of Community Guidelines<sup>30</sup> that apply to all content on Snapchat, including content from users and media partners. The Community Guidelines’ key animating rule is that Snap “want[s] Snapchat to be a safe and positive experience for everyone.”<sup>31</sup> To advance that goal, the Guidelines “prohibit bullying or harassment of any kind”; they prohibit content “[e]ncouraging violence or dangerous behavior”; they prohibit “content that advocates or advances violent extremism or terrorism”; and they prohibit “spreading false information that causes harm or ... undermin[es] the integrity of civic processes.”<sup>32</sup> The Guidelines state that if users violate them, Snap “may remove the offending content, terminate or limit the visibility of your account, and/or notify law enforcement.”<sup>33</sup>

These Guidelines, and Snap’s commitment to promote positive voices, apply to the Snapchat Discover platform. Material on the Discover platform is “carefully curated content

<sup>24</sup> Todd Spangler, *Snapchat Sets New Election-Season Originals, Taps Barack Obama, Snoop Dogg, Arnold Schwarzenegger to Promote Voter Registration*, Variety (Sept. 22, 2020), at <https://variety.com/2020/digital/news/snapchat-sets-news-election-season-originals-taps-snoop-dogg-arnold-schwarzenegger-and-other-stars-to-promote-voter-registration-1234778838/>.

<sup>25</sup> See *id.*

<sup>26</sup> Terry Collins and Dan Patterson, *Social Media’s Inescapable Presence at the RNC*, CNET.com (July 21, 2016), at <https://www.cnet.com/news/rnc-donald-trump-republicans-facebook-twitter-snapchat-cleveland/>; see also Eliza Collins and Fernanda Crescente, *Snapchat Is This Year’s Convention Revolution*, USA Today (July 19, 2016), at <https://www.usatoday.com/story/news/politics/elections/2016/07/19/snapchat-2016-political-conventions-social-media/87264792/>.

<sup>27</sup> Ben Kamisar, *Conservative Group Launches Snapchat Filter Targeting GOP Retreat*, The Hill (Jan. 26, 2017), at <https://thehill.com/homenews/campaign/316222-conservative-group-sends-obamacare-message-to-republicans-gathered-in>.

<sup>28</sup> Nick Corasaniti, *The Political Ad Wars Come to Snapchat*, N.Y. Times (Aug. 6, 2015), at <https://www.nytimes.com/live/republican-debate-election-2016-cleveland/the-political-ad-wars-come-to-snapchat/>; Press Release, *RGA Launches Snapchat Filters For New Mexico Delegates Attending Democratic Party Convention*, Republican Governors Ass’n (Mar. 9, 2018), at <https://www.rga.org/rga-launches-snapchat-filters-new-mexico-delegates-attending-democratic-party-convention/>.

<sup>29</sup> See, e.g., Christina Manduley and Ashley Codianni, *Democratic Candidates Make Pitch on Snapchat for the Millennial Vote*, CNN.com (Jan. 27, 2016), at <https://www.cnn.com/2016/01/26/politics/democratic-candidates-snapchat-cnn-discover-iowa/index.html>.

<sup>30</sup> Snap Inc., *Community Guidelines* (updated Sept. 2020), at <https://www.snap.com/en-US/community-guidelines>.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

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from news organizations” and others<sup>34</sup> where Snap “decide[s] what [to] promote.”<sup>35</sup> Importantly, the “Discover page is strict about its content meeting Snapchat's community guidelines.”<sup>36</sup> “Basically, there’s no way your content can reach the Discover page if you don’t follow [Snap’s] rules.”<sup>37</sup> News reports have chronicled Snap’s commitment to ensure that its “editorial partners . . . do their part to keep Snapchat an informative, factual and safe environment for everyone.”<sup>38</sup>

Long before the 2020 election, the *New York Times* chronicled Snap’s approach to regulating content, particularly on Discover:

From the start, Snapchat approached news differently from other social networks. While Facebook has said it is not a media company and does not want to be an arbiter of truth in news on its website, Snapchat has long prohibited false or deceptive content and is thoroughly involved in editorial standards for content on Discover. . . .

As a result, Snapchat has always exercised a large degree of control over Discover. To secure a place on Discover, publishers have had to agree to fairly stringent guidelines around editing and video production, including having audio play at a consistent volume and a ban on images that are misleading or gimmicky. Snapchat also mandated that all images and headlines be appropriate for an audience as young as 13 years old.<sup>39</sup>

The *New York Times* also compared Snap to other platforms and explained how Snap’s approach could improve the company’s competitive position. It wrote that “Facebook and Twitter typically give users, including publications, wide latitude in what they can post, which has led the companies into one controversy after another — including criticism over fake news and outrage over harassment and abuse by internet trolls. Snapchat is pre-emptively acting to limit those problems in a way that is reminiscent of how traditional media companies curate what they show people.”<sup>40</sup> And it observed:

Cleaning up what is published on Discover could have many benefits for Snapchat, like helping the service appeal to advertisers, which would not have to worry as much that they would be advertising alongside inappropriate content for Snapchat’s primary audience of teenagers and 20-somethings.

The new rules could also whet investors’ appetites for Snapchat if they help the

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<sup>34</sup> Madison Malone Kircher and Caroline Moss, *The Snapchat 101: The Best, Coolest, Smartest, Weirdest Accounts on the Hottest Social Network on Your Phone*, N.Y. Mag (Apr. 27, 2016), at <https://nymag.com/intelligencer/2016/04/snapchat-101-accounts-you-need-to-follow.html>.

<sup>35</sup> Memorandum of Evan Spiegel to Snap Employees, Introducing Our First CitizenSnap Report (July 29, 2020), at <https://www.snap.com/en-US/news/>.

<sup>36</sup> Kayla Carmichael, *Is Snapchat Discover Right for Your Brand?*, The latest version of the Community Guidelines is available at <https://www.snap.com/en-US/community-guidelines>.

<sup>37</sup> *Id.*

<sup>38</sup> Katie Benner, *Snapchat Discover Takes a Hard Line on Misleading and Explicit Images* (internal quotation marks omitted).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

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company avoid the taints of fake news and online abuse that have dogged its rivals.<sup>41</sup>

Others have documented Snap's unique market position, including how the company's values-driven approach distinguishes it from other platforms. Snap has, for example, "prioritized bullying prevention, mental health, and suicide prevention on the Snapchat platform," supporting a "'Because of You' [campaign] that encourages teens to reflect on the positive impact they can have in creating a more empathetic and inclusive culture."<sup>42</sup> These and other initiatives are consistent with the company's model as "a friendlier, less incendiary place than Facebook, Twitter or Instagram."<sup>43</sup> In addition, the company "fact-checks all political advertising that runs on its platform, laying bare the contrast in approaches [with] social networks."<sup>44</sup> Snap places particular importance on the need to reach young people and first-time voters, but without misinformation and other negative elements that have proliferated elsewhere.<sup>45</sup>

By adhering to these core principles, the company has purposefully cultivated a "Snapchat Generation" that "is the most informed, tolerant, active and diverse group in history."<sup>46</sup> Discover has been a key driver to the platform's popularity among these users. "Discover programming on Snapchat has continued to gain traction with the platform's coveted young audiences."<sup>47</sup> More than "100 million Snapchat users view content on Discover each month."<sup>48</sup>

Snap's values-based approach – and the large user base aligned with it – has positioned the company well with advertisers. Corporate brands have "boycotted Facebook over its handling of incendiary posts from President Donald Trump, as well as ongoing issues with misinformation."<sup>49</sup> At the same time, these brands sought to partner with Snap as they looked "to align their marketing efforts with platforms who share their corporate values."<sup>50</sup> Indeed,

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Christina Binkley, *Miranda Kerr and Evan Spiegel: A Marriage of Mindfulness*, Wall St. Journal (July 14, 2020), at <https://www.wsj.com/articles/miranda-kerr-evan-spiegel-at-home-photos-profile-11594729523>.

<sup>44</sup> Jessica Goodfellow, *Snapchat Fact-checks Political Ads, CEO Says*, PR Week (Nov. 19, 2019), at <https://www.prweek.com/article/1666273/snapchat-fact-checks-political-ads-ceo-says>.

<sup>45</sup> See *id.*; see also Will Feuer, *Snapchat Fact-checks Political Ads, Unlike Facebook, Says CEO Evan Spiegel*, CNBC (Nov. 18, 2019), at <https://www.cnbc.com/2019/11/18/snapchat-fact-checks-political-ads-unlike-facebook-ceo-evan-spiegel.html>; *Snapchat Joins EU Group Fighting Hate Speech*, Jakarta Post (May 8, 2018), at <https://www.thejakartapost.com/life/2018/05/08/snapchat-joins-eu-group-fighting-hate-speech.html> (discussing Snap's decision "to join an EU-sponsored group of US internet giants to combat hate speech and online extremism").

<sup>46</sup> Imogen Watson, *Snapchat Debuts First Brand-facing Campaign As It Looks to Reclaim Lost Ad Spend*, The Drum (Aug. 3, 2020), at <https://www.thedrum.com/news/2020/08/03/snapchat-debuts-first-brand-facing-campaign-it-looks-reclaim-lost-ad-spend>.

<sup>47</sup> Dade Hayes, *Snap Inc. Beats Q3 Estimates as Snapchat Discover Comes into Its Own*, Deadline (Oct. 22, 2019), at <https://deadline.com/2019/10/snap-inc-beats-q3-estimates-as-snapchat-discover-comes-into-its-own-1202766374/>.

<sup>48</sup> Katie Benner, *Snapchat Discover Takes a Hard Line on Misleading and Explicit Images*.

<sup>49</sup> Ashley Carman, *Snap Grows Its Daily User Base and Keeps Advertiser Money Coming in, Even During the Pandemic*, The Verge (July 21, 2020), at <https://www.theverge.com/2020/7/21/21333263/snap-earnings-pandemic-covid-19-daily-active-users>.

<sup>50</sup> Kaya Yurieff, *Snap Stock Soars over 20% on Strong User Growth*.



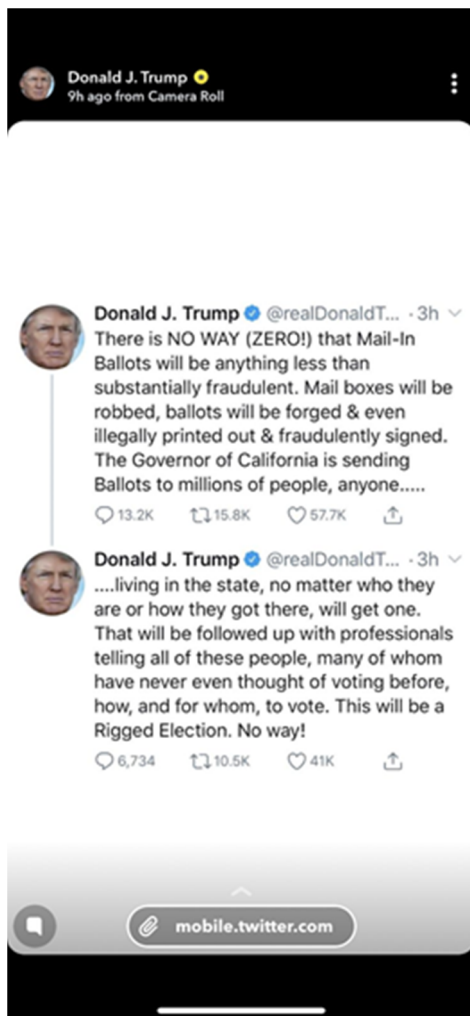
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Snap “appears to have reaped the biggest windfall” from the boycotts; advertiser “spending on the Snapchat app more than doubled from July to September compared to the same period last year.”<sup>51</sup> This included “advertisers that paused their Facebook spending during the boycott shift[ing] their entire monthly budget to Snapchat.”<sup>52</sup>

## II. The Trump Campaign’s Snapchat Account

President Donald Trump, like many leading U.S. political figures, maintains an account on Snapchat. On May 26, 2020, the account re-posted on Snapchat the following Tweet:



<sup>51</sup> Tom Dotan, *Ad Boycott of Facebook Proved to Be Boon to Snap and Pinterest, Data Shows*, The Information (Oct. 15, 2020), at <https://www.theinformation.com/articles/ad-boycott-of-facebook-proved-to-be-boon-to-snap-and-pinterest-data-shows>.

<sup>52</sup> See *id.*

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Like other platforms,<sup>53</sup> Snap was concerned with the spread of misinformation that could undermine the electoral process. As noted, Snap's Community Guidelines explicitly prohibit "spreading false information that causes harm or is malicious, such as . . . undermining the integrity of civic processes."<sup>54</sup> Snap informed the Trump campaign that its post violated the Guidelines and removed it.

Undeterred, the Trump campaign reposted the same Tweet seven more times over the next three days. Each time, Snap removed the post and informed the Trump campaign of its repeated violations of the Community Guidelines.

Then, in a series of Tweets on May 30, 2020, President Trump "threatened to send 'vicious dogs' and 'ominous weapons' into the protests that have erupted across the nation after the death of George Floyd, an African-American man who was killed in police custody in Minneapolis."<sup>55</sup> This followed earlier comments that "when the looting starts, the shooting starts":



These comments caught the attention of many companies, including Snap.

Twitter itself responded to these Tweets by placing some of them "behind warning screens for 'glorifying violence.'"<sup>56</sup> Snap also took action. Consistent with the company's user policies, values-driven approach, and the market position it had staked out, "Snap CEO Evan Spiegel sent a message to employees condemning racial violence."<sup>57</sup> He explained:

As for Snapchat, we simply cannot promote accounts in America that are linked to people who incite racial violence, whether they do so on or off our platform.

<sup>53</sup> See, e.g., Makena Kelly, *Twitter Labels Trump Tweets As 'Potentially Misleading' for the First Time*, The Verge (May 26, 2020), at <https://www.theverge.com/2020/5/26/21271207/twitter-donald-trump-fact-check-mail-in-voting-coronavirus-pandemic-california>.

<sup>54</sup> Snap, *Community Guidelines*, at <https://www.snap.com/en-US/community-guidelines/>.

<sup>55</sup> Cecilia Kang and Kate Conger, *Snap Says It Will No Longer Promote Trump's Account*, N.Y. Times (June 3, 2020), at <https://www.nytimes.com/2020/06/03/technology/snapchat-trump.html>.

<sup>56</sup> Casey Newton, *Snap Will Stop Promoting Trump's Account After Concluding His Tweets Incited Violence*, The Verge (June 3, 2020), at <https://www.theverge.com/2020/6/3/21279280/snapchat-snap-remove-trump-account-discover-promotion-incite-violence-twitter>.

<sup>57</sup> *Id.*

Our Discover content platform is a curated platform, where we decide what we promote. We have spoken time and again about working hard to make a positive impact, and we will walk the talk with the content we promote on Snapchat. We may continue to allow divisive people to maintain an account on Snapchat, as long as the content that is published on Snapchat is consistent with our community guidelines, but we will not promote that account or content in any way.<sup>58</sup>

A few days later, Snap made the decision to stop affirmatively promoting the Trump campaign account on Discover. Snap did not remove or hide the account; it remains accessible to those who follow it, search for it, or want to view its content.<sup>59</sup> Snap simply stopped pushing the account affirmatively to users who have not sought it out. In explaining Snap's decision, Mr. Spiegel stated that "the company was exercising its First Amendment right to free speech when it decided not to amplify President Donald Trump's content to a broader audience[.]"<sup>60</sup>

First Amendment and social media scholars defended Snap's decision, stating that "[s]ocial media companies are entitled to enforce their own standards on speech."<sup>61</sup> "Snap's decision 'shows that companies increasingly understand that they do not need to be in the binary leave-up or take-down dynamic,' said David Kaye, a law professor at the University of California, Irvine, and the United Nations special rapporteur on freedom of opinion and expression. 'They have multiple tools to deal with the dynamics of the spread of hateful content, disinformation, harassment and other kinds of content.'"<sup>62</sup>

### III. The Trump Campaign's Complaint to the FEC

On September 29 – nearly four months later – the Trump campaign filed a complaint with the FEC naming Snap as the Respondent. The Trump campaign argued, in particular, that Snap had made "potentially prohibited in-kind corporate contributions" to the presidential campaign of former Vice President Joe Biden by "actively promoting Biden Campaign [content] on Snapchat for free through Snapchat's 'Discover' feature . . . while at the same time excluding President Trump and his Campaign from using the Discover feature."<sup>63</sup>

The Trump campaign conceded in the complaint that to be a corporate contribution, the provision of goods or services must be made "for the purpose of influencing" a federal election.<sup>64</sup> It likewise noted that the FEC's media exemption "excludes from the definition of contribution '[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by

<sup>58</sup> Evan Spiegel, *We Stand Together*, Snap.com (June 1, 2020), at <https://www.snap.com/en-US/news/post/we-stand-together>.

<sup>59</sup> Ben Collins and Dylan Byers, *Snapchat to Stop Promoting Trump's Content*, NBC News (June 3, 2020), at <https://www.nbcnews.com/tech/tech-news/snapchat-stop-promoting-trump-s-content-n1223631>.

<sup>60</sup> Sarah Frier, *Snap CEO Says Exercising Free Speech Rights by Limiting Trump*, Bloomberg (June 11, 2020), at <https://www.bloomberg.com/news/articles/2020-06-11/snap-ceo-says-exercising-free-speech-rights-by-limiting-trump>.

<sup>61</sup> Cecilia Kang and Kate Conger, *Snap Says It Will No Longer Promote Trump's Account*.

<sup>62</sup> *Id.* Indeed, the Wall Street Journal editorial board agrees that "[t]here is no legal ban on censorship by private social-media firms." *Zuckerberg's Credibility Test*, Wall Street Journal (June 4, 2020), at <https://www.wsj.com/articles/zuckerbergs-credibility-test-11591313900>.

<sup>63</sup> Compl. ¶¶ 4, 5.

<sup>64</sup> *Id.* ¶ 20.

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any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication.”<sup>65</sup>

However, the complaint conflated Snap’s dissemination of media content – which falls under the media exception – with advertising on the platform. The complaint noted that when buying advertisements, the “average cost per view on Snapchat is 9 cents.”<sup>66</sup> But it failed to mention that advertising and advertising rates are completely separate from, and have nothing to do with, the free organic user accounts that are actually at issue here. It likewise failed to mention that the Trump campaign in fact advertised on Snapchat throughout 2020. Based on this sleight of hand, the complaint concluded that “Snap has given the Biden campaign approximately \$12.5 million in free advertising”<sup>67</sup> when, in fact, the complaint was referring to media content, not advertising.

The complaint’s failure to allege certain other facts is also important. The complaint did not allege that the decision to stop promoting President Trump on Discover was coordinated with the Biden campaign. In addition, the complaint did not allege a violation by Mr. Spiegel or name him as a Respondent.

### THE LAW

Corporations are prohibited from making a “contribution” and are regulated in various ways when making an “expenditure” in connection with a federal election.<sup>68</sup> 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.”<sup>69</sup> Similarly, the term “expenditure” means “anything of value, made by any person *for the purpose of influencing any election* for Federal office.”<sup>70</sup>

Federal law also “provides that an expenditure made by any person ‘in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents’ constitutes an in-kind contribution” to that candidate.<sup>71</sup>

The terms “contribution” and “expenditure” both contain an exemption for “any news story, commentary, [or] editorial.”<sup>72</sup> This so-called media exemption applies when an entity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) performing a traditional media function.<sup>73</sup>

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<sup>65</sup> *Id.* ¶ 26.

<sup>66</sup> *Id.* ¶ 17.

<sup>67</sup> *Id.* ¶¶ 3, 18.

<sup>68</sup> 52 U.S.C. § 30118.

<sup>69</sup> *Id.* § 30101(8)(A) (emphasis added).

<sup>70</sup> *Id.* § 30101(9)(A) (emphasis added).

<sup>71</sup> First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

<sup>72</sup> See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

<sup>73</sup> See FEC Adv. Op. 2016-01 (Ethiq); *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

## **SUMMARY OF ARGUMENT**

Mr. Spiegel is not a proper Respondent in this matter and should be dismissed at the threshold. The remainder of the complaint should be dismissed on the merits. As a curator of a public news platform, and as a speaker in its own right, Snap has First Amendment rights to shape its platform's voice and to decide the content and speakers it will associate with and include. Moreover, Snap has made the business decision to promote positivity on its platform and to curate news and commentary to avoid harmful and divisive content. Seen in this light, the complaint's assertion that Snap's curation choices amounted to FECA-regulated contributions are misguided. Indeed, they fail for five independent reasons.

*First*, Snap's actions were taken not to influence an election, but to protect its product and community. That means they do not amount to contributions under federal law. *Second*, the First Amendment protects Snap's right to choose the type of speech with which its platform is associated. *Third*, and relatedly, Snap's actions are exempt from FECA regulation under the media exemption. *Fourth*, there is no allegation (nor could there be) that Snap's actions were coordinated with the Biden campaign, as would be required to make them a regulated contribution. Finally, the Communications Decency Act immunizes Snap from allegations of the sort made here. For each of these reasons, the complaint fails.

## **DISCUSSION**

### **I. Mr. Spiegel Should Be Dismissed from this Matter at the Threshold.**

Disregarding the FEC's regulations, FEC practice, and the complaint itself, the Office of General Counsel *sua sponte* named Mr. Spiegel as a Respondent in this matter. It had no basis to do so. The complaint specifically named Snap as the sole Respondent and alleged that "Snap Inc. . . . – the owner and operator of the social media photo-sharing platform Snapchat – has violated the contribution limits, source prohibitions, and reporting requirements" of the FECA.<sup>74</sup> The FEC's regulations state that a complaint "should clearly identify as a respondent each person or entity who is alleged to have committed a violation" and "should contain a clear and concise recitation of the facts which describe a violation."<sup>75</sup> The complaint satisfied these minimal requirements as to Snap, but it did not name Mr. Spiegel as a Respondent or allege any facts that describe a personal violation by Mr. Spiegel. Although the Office of General Counsel may also identify violations "in the normal course of carrying out its supervisory responsibilities,"<sup>76</sup> it must inform the Respondent of the basis for the violation so that the Respondent has an adequate opportunity to answer.<sup>77</sup> Here, neither the complaint nor the Office of General Counsel explain why Mr. Spiegel should be a Respondent in this matter. Thus, the FEC's own regulations should have prevented the Office of General Counsel from naming Mr. Spiegel as a Respondent.

The only time Mr. Spiegel's name appears in the complaint is where he is quoted providing a single, generic statement about how Discover works. This hardly constitutes a basis

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<sup>74</sup> Compl. ¶ 1.

<sup>75</sup> 11 C.F.R. § 111.4(d).

<sup>76</sup> *Id.* § 111.8(a).

<sup>77</sup> See Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38617 (Aug. 9, 2009).



to name Mr. Spiegel personally as a Respondent.<sup>78</sup> The FEC does not, for example, routinely name as Respondents every executive or spokesperson who has commented on a corporate policy or decision.

Furthermore, the violation alleged by the complaint is that a corporation, not an individual, used corporate resources to make a prohibited contribution. Mr. Spiegel is not accused of making a personal contribution in violation of the FECA or of taking any other action unique to him as an individual that would justify including him personally as a Respondent. For all these reasons, Mr. Spiegel should be dismissed from this matter at the threshold.

In any event, Snap's actions did not violate the FECA. If Mr. Spiegel is a Respondent in this matter because of the actions taken by the company he leads, then these substantive defenses – detailed below – apply to him too.

## **II. Snap's Actions Were Not to Influence an Election, but were Electorally-Neutral Decisions Made to Protect Its Product.**

To be regulated as a contribution, activity must be undertaken “for the purpose of influencing an election.”<sup>79</sup> As both the courts and the Commission have made clear, activities undertaken for non-political business reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as regulated contributions.<sup>80</sup> 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].”<sup>81</sup>

More recently, 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.<sup>82</sup> The Commission cited Microsoft's concern that its brand reputation would be “at risk of experiencing severe and long-term damage” in the absence of

<sup>78</sup> See, e.g., Vote Certification, Matter Under Review 7544 (W-BOY-TV, LLC) (July 22, 2019); Vote Certification, Matter Under Review 7412 (Denver Metro Chamber Leadership Foundation) (July 11, 2019); Conciliation Agreement, Matter Under Review 7451 (Ring Power Corp.), at 1 (June 19, 2019).

<sup>79</sup> 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’”).

<sup>80</sup> 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”); 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).

<sup>81</sup> 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).

<sup>82</sup> FEC Adv. Op. 2018-11 (Microsoft).

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the account security services.<sup>83</sup> In addition, the Commission has explained that a technology company “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.”<sup>84</sup>

The decision to stop promoting the Trump campaign’s account on Discover was wholly consistent with these authorities. Corporate values and business decision-making are interconnected at Snap. As detailed above,<sup>85</sup> Snap has become commercially successful because it has conscientiously developed a user base of “informed, tolerant, active and diverse” young people<sup>86</sup> who “live in the moment,” “have fun together,”<sup>87</sup> and are not interested in hearing divisive rhetoric – particularly where that rhetoric would be amplified by the platform itself. This values-based approach is directly responsible for Snap’s commercial success. When advertisers began boycotting other platforms because of controversial comments by President Trump, Snap “reaped the biggest windfall.”<sup>88</sup> Companies directed their advertising to platforms like Snapchat that “share their corporate values.”<sup>89</sup> These commercial considerations, not electoral concerns, informed Snap’s decision to stop amplifying the Trump campaign on Discover.

Snap had good reason to worry about the Trump campaign’s effect on Snap’s brand and unique market position. Only days earlier, the Trump campaign violated Snap’s Community Guidelines when it posted a claim by President Trump that mail-in ballots are illegitimate and will lead to “a Rigged Election.”<sup>90</sup> This was a clear violation of Snap’s prohibition against “spreading false information that causes harm or is malicious, such as ... undermining the integrity of civic processes.”<sup>91</sup> Snap removed the content and informed the Trump campaign why, while other platforms took similar steps.<sup>92</sup> Then, in an extraordinary display of contempt for Snap’s Guidelines, the Trump campaign reposted the same content – verbatim – seven more times over the next three days.<sup>93</sup>

After repeated violations of Community Guidelines designed to promote the company’s values-driven business model, Snap was rightfully worried about the Trump campaign’s effect on the Snapchat platform. Once President Trump began threatening violence against protesters, Snap determined that the harm had reached a tipping point and it “simply cannot promote accounts in America that are linked to people who incite racial violence.”<sup>94</sup> As a result, Snap ceased amplifying the Trump campaign account on Discover. Because it acted for these

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<sup>83</sup> *Id.*

<sup>84</sup> FEC Adv. Op. 2017-06 (Stein and Gottlieb).

<sup>85</sup> *See supra* at 6-9.

<sup>86</sup> Imogen Watson, *Snapchat Debuts First Brand-facing Campaign As It Looks to Reclaim Lost Ad Spend*, The Drum (Aug. 3, 2020), at <https://www.thedrum.com/news/2020/08/03/snapchat-debuts-first-brand-facing-campaign-it-looks-reclaim-lost-ad-spend>.

<sup>87</sup> Snap, *Snap Inc.*

<sup>88</sup> *See supra* at 9.

<sup>89</sup> *See supra* at 8.

<sup>90</sup> *See supra* at 9.

<sup>91</sup> *See supra* at 6.

<sup>92</sup> *See supra* at 10.

<sup>93</sup> *See id.*

<sup>94</sup> *See supra* at 10-11.

business reasons and not “for the purpose of influencing any election for Federal office,” the demotion of the Trump campaign cannot satisfy the statutory definition of a contribution.

It is worth noting that these business considerations would have permitted Snap to go even further and remove the Trump campaign from the platform entirely. But Snap did not go that route. Instead, it took a more calibrated approach to ensure that Discover aligned with the company’s values and goals while still allowing an important political voice like that of President Trump to maintain an account on the platform.

### **III. The First Amendment Permits Snap to Moderate Content Free from Regulation under Federal Campaign Finance Law.**

Snap has a constitutional right to limit speech that the company finds objectionable. The guarantee of free speech “necessarily compris[es] the decision of both what to say and what not to say,”<sup>95</sup> and the First Amendment safeguards the “choice of material . . . [that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.”<sup>96</sup> Thus, for example, a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude.<sup>97</sup> 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.”<sup>98</sup>

These rights apply in full to corporations. The First Amendment specifically protects the right of corporations to publicly express their opinions on important issues of policy.<sup>99</sup> Corporate “[s]peech is an essential mechanism of democracy,”<sup>100</sup> and “political speech does not lose First Amendment protection simply because its source is a corporation.”<sup>101</sup> “The identity of the speaker is [simply] not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.”<sup>102</sup>

Here, Snap exercised its well-established First Amendment right to refrain from promoting, and associating itself with, speech to which it objects. Federal campaign finance law cannot proscribe Snap’s decision to stop promoting the Trump campaign account without running directly into these durable First Amendment protections and infringing on Snap’s fundamental freedoms.<sup>103</sup>

<sup>95</sup> *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

<sup>96</sup> *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

<sup>97</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>98</sup> *Hurley*, 515 U.S. at 559.

<sup>99</sup> *Citizens United v. FEC*, 558 U.S. 310, 371-72 (2010).

<sup>100</sup> *Id.* at 339.

<sup>101</sup> *Id.* (internal quotation mark omitted).

<sup>102</sup> *Id.* at 343 (internal quotation marks omitted).

<sup>103</sup> *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”).

#### IV. Snap's Actions Are Exempt from Regulation Pursuant to the FECA's Media Exemption.

Relatedly, Snap's actions were not contributions because Snap qualifies for the media exemption of federal campaign finance law.

The statutory definition of a contribution exempts activity by a media company – provided it is not owned or controlled by a political party, political committee, or candidate – when the company is performing a traditional media function.<sup>104</sup> The exemption excepts from regulation “any cost incurred in covering or carrying” news stories<sup>105</sup> and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address.”<sup>106</sup> The Commission has not limited the 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,”<sup>107</sup> as well as websites that curate news content.<sup>108</sup>

There is no doubt Snap is a media company pursuant to the media exemption. Snap has “become a competitive player as a medium for news.”<sup>109</sup> The company has in-house news teams, built a studio for broadcasting news shows, and is “investing more in political news programming.”<sup>110</sup> In fact, more than 10 million viewers watched Snap's 2018 election coverage programming.<sup>111</sup>

In addition, Snap's decision to stop amplifying the Trump campaign on Discover was a traditional media function given that – like a newspaper or television show – Snap exercised its editorial discretion over what content to include and exclude. Snap's content curation “is reminiscent of how traditional media companies curate what they show people.”<sup>112</sup> Snap “is thoroughly involved in editorial standards for content on Discover” and includes only “carefully curated content from news organizations” and others.<sup>113</sup> The complaint concedes as much noting that the “Discover content platform is a curated platform.”<sup>114</sup> Thus, Snap's decision to cease promoting the Trump campaign on Discover is entirely consistent with the work routinely performed by media entities.

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<sup>104</sup> See *supra* at 12.

<sup>105</sup> 11 C.F.R. § 100.73.

<sup>106</sup> 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).

<sup>107</sup> 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”).

<sup>108</sup> 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”).

<sup>109</sup> See *supra* at 5.

<sup>110</sup> See *id.*

<sup>111</sup> See *id.*

<sup>112</sup> See *supra* at 7.

<sup>113</sup> See *supra* at 4, 6.

<sup>114</sup> Compl. ¶ 12.

Finally, because Snap is not owned or controlled by a political party, political committee, or candidate,<sup>115</sup> it also satisfies the third element of the media exemption. Snap's decision to stop amplifying the Trump account on Discover, accordingly, was excepted from the definition of contribution.

## **V. Snap's Actions Were Not Regulated "Contributions" Because They Were Not Coordinated.**

Even if the First Amendment and the media exception did not apply, and even if Snap's actions were "for the purpose of influencing" an election – neither of which is true – the complaint *still* would fail because Snap did not act in coordination with the Biden campaign.

An "expenditure" only becomes a contribution when it is made "in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate, his authorized political committees or their agents."<sup>116</sup> The complaint does not allege that coordination occurred. Nor could it. The decision to stop promoting the Trump campaign on Discover was undertaken for the above-described business reasons. It was not done at the suggestion of, after discussions with, or with any involvement by the Biden campaign, as prescribed by the Commission's coordination regulations.<sup>117</sup> Without coordination, any possible expenditure by Snap cannot be converted into a regulated contribution.

## **VI. The Communications Decency Act Immunizes Snap from Liability.**

Finally, Snap's decision to stop amplifying the Trump campaign's account on Discover is wholly immune from liability pursuant to 47 U.S.C. § 230(c) of the Communications Decency Act ("CDA").

The CDA provides in relevant part that "[n]o 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," 47 U.S.C. § 230(c)(1), and that "[n]o provider or user of an interactive computer service shall be held liable on account of . . . 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," *id.* § 230(c)(2)(A). The first of these provisions, Section 230(c)(1), 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.<sup>118</sup> Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal

<sup>115</sup> See *supra* at 2.

<sup>116</sup> See *supra* at 12.

<sup>117</sup> See 11 C.F.R. § 109.21(d); see also Colin Kalmbacher, 'Yawn': Experts Dismiss 'Frivolous' RNC Complaint Against Twitter Over Blocked Access to NY Post Biden Story, Law & Crime (Oct. 16, 2020), at <https://lawandcrime.com/2020-election/yawn-experts-dismiss-frivolous-rnc-complaint-against-twitter-over-blocked-access-to-ny-post-biden-story/> (quoting Common Cause's "campaign finance expert" affirming that an illegal contribution by a technology company that limited public dissemination on its site would only result where money was spent in coordination with the Biden campaign).

<sup>118</sup> *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).



theories.<sup>119</sup> As the Ninth Circuit has explained, “any activity that can be boiled down to deciding *whether to exclude material that third parties seek to post* online is perforce immune under section 230.”<sup>120</sup>

To trigger immunity, a platform must satisfy three elements: (1) the platform 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 [platform] as a publisher [of that] information.”<sup>121</sup> Each of these criteria is met here.

*First*, Snap is an “Interactive Computer Service” within the meaning of the statute.<sup>122</sup> *Second*, the information at issue is a communication provided by another information content provider – i.e., the Trump campaign – not Snap. *Third*, the Trump campaign challenges Snap’s decision to stop actively promoting the Trump campaign on Discover. In other words, the Trump campaign seeks to impose campaign finance liability on Snap for performing “a publisher’s traditional editorial functions.”<sup>123</sup>

In applying this third criterion, and as noted above, courts have recognized that CDA immunity attaches to a wide range of activities, including “reviewing, editing, and deciding *whether to publish or to withdraw from publication* third-party content.”<sup>124</sup> 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.”<sup>125</sup> Courts have even concluded that “*providing accounts . . . is publishing activity*” subject to CDA immunity.<sup>126</sup> Put simply, “removing content is something publishers do,” and imposing

<sup>119</sup> 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.’”).

<sup>120</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

<sup>121</sup> *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 134 (2018).

<sup>122</sup> See, e.g., *Lemmon v. Snap, Inc.*, 440 F. Supp. 3d 1103, 1108–09 (C.D. Cal. 2020) (accepting without dispute that Snapchat is an “interactive computer service”); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588-89 (S.D.N.Y. 2018), aff’d, 765 F. App’x 586 (2d Cir. 2019); *Grossman v. Rockaway Twp.*, 2019 WL 2649153, at \*14 (N.J. Super. Ct. June 10, 2019).

<sup>123</sup> *Barrett*, 40 Cal. 4th at 43.

<sup>124</sup> *Barnes*, 570 F. 3d at 1102 (emphasis added) (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”).

<sup>125</sup> *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

<sup>126</sup> *Fields*, 217 F. Supp. 3d at 1123-24 (emphasis added) (“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

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liability on the basis of this conduct “necessarily involves treating” the platform as a publisher, triggering immunity.<sup>127</sup>

Here, Snap determined that actively amplifying the Trump campaign’s divisive rhetoric on the company’s platform would be detrimental to its users, advertisers, and market position. To avoid these problems, Snap decided to cease that amplification (while still leaving the Trump account intact and viewable). This is precisely the type of conduct immunized by the CDA.

### **CONCLUSION**

Snap is committed to offering a media product that is appealing to users, consumers, advertisers, and investors who share the company’s values. Snap’s decision to cease amplifying the Trump campaign’s account on Discover was motivated by these considerations – not to influence an election. Accordingly, Snap’s action does not satisfy the statutory definition of a contribution. Furthermore, the First Amendment, the media exemption, and the Communications Decency Act preclude application of federal campaign finance law here. For all these reasons, the Commission should find no reason to believe that Snap or its officers violated the FECA and dismiss this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Caleb P. Burns", is written over a light gray rectangular background.

Caleb P. Burns  
Andrew G. Woodson

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content” of the posts); *Cohen v. Facebook, Inc.*, 252 F. Supp. 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”).

<sup>127</sup> *Barnes*, 570 F.3d at 1103.