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Via Electronic Mail

December 21, 2020

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination
and Legal Administration
1050 1st Street NE
Washington, DC 20463

Re: MUR 7821

Dear Mr. Jordan:

We write on behalf of our client, Twitter, Inc., in response to the complaint filed by the Republican National Committee (“RNC”) in the above-captioned matter under review. The complaint asserts that Twitter made an impermissible corporate in-kind contribution to Biden for President, the principal campaign committee for President-elect Joe Biden, when Twitter removed from its platform two articles published by the New York Post (“N.Y. Post”) that violated Twitter’s pre-existing, politically neutral Rules and policies. For the reasons stated below, Twitter’s enforcement of its Rules and policies concerning hacked materials and private information did not constitute an in-kind contribution or in any way violate the Federal Election Campaign Act of 1971, as amended (“FECA”).

First, the decision by Twitter to block potentially hacked content that contained private information such as email addresses, phone numbers, and personal photographs was not an impermissible in-kind contribution because it was not undertaken for the purpose of influencing a federal election. Rather, Twitter undertook, for bona fide commercial reasons, to enforce pre-existing Rules and policies intended to protect the safety, integrity, and commercial viability of its social media platform.

Second, Twitter’s content moderation decision was not coordinated with the Biden campaign. Because there was no coordination, nor even an expenditure, there was no in-kind contribution.

Third, Twitter’s enforcement of its Rules and policies falls within the Commission’s media exemption, and therefore the decision to remove the N.Y. Post articles could not constitute a contribution or expenditure.

Fourth, Section 230 of the Communications Decency Act, as well as the First Amendment to the United States Constitution, preclude any finding of liability for Twitter’s content moderation decisions.

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The RNC's premise, that enforcement of a social media company's content moderation policies causes an in-kind contribution when the content at issue relates even indirectly to a campaign committee, is also troubling as a matter of policy. It would call for the Commission to micromanage, through enforcement actions rather than rule-making, the social media industry's judgments regarding the balance to be struck between safety of their platforms on the one hand and unfettered political speech on the other. The Commission need not reach those uncharted waters here, for under current law, no violation occurred.

Accordingly, the Commission should find that there is no reason to believe that Twitter violated FECA and should dismiss the complaint with no further action.

I. Factual Background

Twitter is a publicly traded corporation that allows users to communicate through 280-character messages called "Tweets" that are posted on its website and through its associated mobile apps. Many users employ Twitter to share and consume news and commentary on current events.¹ Twitter, which is free to use for all users, is designed "to serve the public conversation."² Like many media organizations, it derives the vast majority of its revenue from advertising.³

A. Content Moderation Policies

In keeping with industry standards, Twitter enforces its own Rules and policies to ensure that all people can participate in the public conversation freely and safely. This content moderation entails reviewing and, if necessary, removing content that may implicate concerns ranging from user safety, individual privacy, and sexually explicit content, to threats of violence, hacking, and foreign disinformation campaigns. Twitter's Terms of Service, which all users acknowledge when they open their accounts, specifies that Twitter may "remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the service, suspend or terminate users, and reclaim usernames."⁴ The Terms of Service therefore provide a contractual basis for the steps Twitter needs to take to enforce its Rules and policies when they appear to have been violated.

In its public securities filings, Twitter has identified a significant risk to its business if "there is a decrease in the perceived quality, usefulness, trustworthiness or relevance of the content generated by people on Twitter or content partners."⁵ Twitter also sees a business risk

¹ See, e.g., Elisa Shearer & Elizabeth Grieco, *News Use Across Social Media Platforms 2018*, Pew Research Center (Sept. 10, 2018).

² Twitter, The Twitter Rules, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Dec. 20, 2020).

³ Twitter, Inc. Quarterly Report (Form 10-Q), at 14 (Oct. 30, 2020).

⁴ Twitter, Terms of Service, <https://twitter.com/en/tos> (effective June 18, 2020).

⁵ Form 10-Q, *supra* note 3 at 46.

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from negative publicity based on the “quality and reliability” of content shared on the platform and from lax policy enforcement.⁶ In fact, advertisers have pressed for Twitter to take greater steps to police content on the platform.⁷ Recognizing the expectations of its users and advertisers, Twitter has undertaken efforts “to improve the health of the public conversation on Twitter,” and as a core commercial objective, it has concentrated on the “reduction of abuse, harassment, spam, manipulation and malicious automation on the platform.”⁸

The company has established a variety of policies that seek to balance its commercial interest in promoting a free and active dialogue among its users with the reputational imperative to address false, misleading, and harmful content on its platform. Enforcement of Twitter’s politically neutral policies has resulted in actions against content posted by users across the political spectrum, Democrats and Republicans alike.⁹

Twitter’s Site Integrity Team is responsible for creating and enforcing the content moderation policies, and it reviews all content identified for review, for compliance with these policies.¹⁰ Content may be flagged for review to determine compliance with Twitter’s Rules and policies based on reports from visitors to the website or users of the mobile application, or through internal machine-learning processes that identify content that may violate Twitter Rules and policies.¹¹

⁶ *Id.* at 52.

⁷ *See, e.g.*, Kurt Wagner & Thomas Buckley, *Facebook, Twitter Tumble on Unilever’s Social-Media Pullback*, Bloomberg, June 26, 2020, <https://www.bloomberg.com/news/articles/2020-06-26/unilever-will-halt-us-ads-on-facebook-twitter-through-2020>.

⁸ Form 10-Q, *supra* note 3 at 49.

⁹ *See, e.g.*, @TwitterComms, Twitter (Oct. 2, 2020, 7:09 PM), <https://twitter.com/TwitterComms/status/1312167835783708672>; Matt Keeley, *Twitter Fact-Checks Debra Messing Trump-Hitler Tweet after Newsweek Query*, Newsweek, June 2, 2020, <https://www.newsweek.com/twitter-fact-checks-debra-messing-trump-hitlertweet-after-newsweek-query-1508253>; Cristiano Lima, *Twitter Forces Democratic Candidate to Delete Post Flouting Voter Suppression Rules*, Politico, Sept. 1, 2020, <https://www.politico.com/news/2020/09/01/texas-democrat-deleted-twitter-post-407031>; Derrick Bryson Taylor, *Twitter Permanently Suspends Accounts of Ilhan Omar’s Potential Challenger*, N.Y. Times, Nov. 30, 2019, <https://www.nytimes.com/2019/11/30/us/Danielle-Stella-Twitter-Ilhan-Omar.html>.

¹⁰ Declaration of Yoel Roth (“Roth Decl.”) ¶ 5 (attached as Exhibit A).

¹¹ *Id.* ¶¶ 3-4. Officeholders, candidates, campaigns, and party committees may submit requests for Tweets to be reviewed for compliance with Twitter’s Rules and policies to the Public Policy group, their primary point of contact at Twitter. *See* Declaration of Lauren Culbertson (“Culbertson Decl.”) ¶¶ 3-5 (attached as Exhibit B). The Public Policy teams forward these requests to the Site Integrity Team for review. *Id.* ¶ 5.

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1. Distribution of Hacked Materials Policy

In 2018, partly in response to events during the 2016 election, Twitter instituted a “Distribution of Hacked Materials Policy”¹² to discourage and mitigate harms associated with hacks and unauthorized exposure of private information (referred to below as the “Hacked Materials Policy”).¹³ The version of the Hacked Materials Policy in place on October 14, 2020, when the N.Y. Post published its articles about Hunter Biden, prohibited the distribution of “hacked materials,” including by “posting hacked content on Twitter (*e.g.*, in the text of a Tweet, or in an image)” or “linking to hacked content hosted on other websites.”¹⁴ The policy explicitly applied only to republished hacked materials and not to *discussion of* “a hack that has taken place (including reporting on a hack, or sharing press coverage of hacking)” if such discussions did not include someone’s “private information, information that could put people at risk of physical harm or danger; and/or information related to trade secrets.”¹⁵ In other words, a news article or Tweet that only described hacked materials would not violate the policy, but one reproducing those materials would. Under this policy, “hacked materials” included materials obtained in any way by “compromis[ing] or infiltrat[ing] computer systems for malicious purposes.”¹⁶

Twitter’s Site Integrity Team assesses content on Twitter’s platform and makes a determination regarding whether material should be considered “hacked” for purposes of the policy.¹⁷ In many cases, content distributors will assert publicly that the information was hacked, thus eliminating the need for a determination.¹⁸ In other cases, the Site Integrity Team looks for indicia of hacking to evaluate whether the materials being shared appear to have been hacked.¹⁹ Per the version of the Hacked Materials Policy in effect on October 14, 2020, violations of the Hacked Materials Policy were enforced, depending on whether the user participated in the underlying hack, either by permanently suspending the user from Twitter or

¹² Twitter, Distribution of Hacked Materials Policy (effective Oct. 30, 2020), <https://help.twitter.com/en/rules-and-policies/hacked-materials>.

¹³ Twitter, Distribution of Hacked Materials Policy (effective Mar. 2019), <https://web.archive.org/web/20200930214928/https://help.twitter.com/en/rules-and-policies/hacked-materials>; *see also* @TwitterSafety, Twitter (Oct. 15, 2020, 10:06 PM), <https://twitter.com/vijaya/status/1316923552549998594>.

¹⁴ Distribution of Hacked Materials Policy (effective Mar. 2019), *supra* note 13.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Roth Decl. ¶¶ 2, 9.

¹⁸ *Id.* ¶ 9.

¹⁹ *Id.*

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by preventing the user's account from sending new Tweets until the offending Tweet was deleted by the user.²⁰

2. Private Information Policy

In addition to the Hacked Materials Policy, Twitter has a "Private Information Policy" that prohibits sharing "other people's private information without their express authorization and permission," regardless of whether release of the private information is associated with hacking.²¹ Personally identifying information subject to this policy includes: home address or physical location information; identity documents, including government-issued IDs and social security or other national identity numbers; contact information, including non-public personal phone numbers or email addresses; financial account information, including bank account and credit card details; and other private information, including biometric data or medical records.²² First-time violations of the Private Information Policy are enforced by preventing the user's account from tweeting until the offending Tweet is deleted, and subsequent violations are enforced by permanent suspension from Twitter.²³

B. Twitter's Response to Tweets Disseminating the N.Y. Post Articles

On October 14, 2020, the N.Y. Post, a daily tabloid publication, published two articles on its website regarding emails and other personal materials said to have been found on a hard drive allegedly belonging to Hunter Biden, the son of then-presidential candidate Joe Biden (together, "the N.Y. Post articles").²⁴ The N.Y. Post articles republished unredacted copies of emails that clearly included personal email addresses and phone numbers, along with personal photographs of Hunter Biden and his family.²⁵

Twitter had been warned throughout 2020 by federal law enforcement agencies to be on the alert for expected "hack-and-leak operations" undertaken by malign state actors, in which those state actors might hack electronic communications of individuals associated with political

²⁰ Distribution of Hacked Materials Policy (effective Mar. 2019), *supra* note 13.

²¹ Twitter, Private Information Policy (effective Mar. 2019), <https://help.twitter.com/en/rules-and-policies/personal-information>.

²² *Id.*

²³ *Id.*

²⁴ Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-Gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. Post, Oct. 14, 2020, <https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad> [hereinafter *Smoking Gun*]; Emma-Jo Morris & Gabrielle Fonrouge, *Hunter Biden Emails Show Leveraging Connections with His Father to Boost Burisma Pay*, N.Y. Post, Oct. 14, 2020, <https://nypost.com/2020/10/14/hunter-biden-emails-show-leveraging-connections-with-dad-to-boost-burisma-pay/> [hereinafter *Hunter Biden Emails*].

²⁵ *Smoking Gun*, *supra* note 24; *Hunter Biden Emails*, *supra* note 24.

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campaigns and seek to disseminate the leaked materials over Twitter and other social media platforms.²⁶ Reports from the law enforcement agencies even suggested there were rumors that such a hack-and-leak operation would be related to Hunter Biden.²⁷ Significant questions about the provenance of the materials arose immediately after the N.Y. Post published the articles.²⁸ The N.Y. Post asserted in the articles that it obtained the materials from Rudolph Giuliani who, per Mr. Giuliani's lawyer, received them from the owner of a Delaware computer repair shop.²⁹ According to the N.Y. Post, the computer shop owner said that a customer, whom the "shop owner couldn't positively identify," brought in a "water-damaged MacBook Pro for repair" but "never paid for the service or retrieved it or a hard drive on which its contents were stored."³⁰ The N.Y. Post reported that the shop owner said that he alerted federal law enforcement to the existence of the hard drive, but, before it was seized by law enforcement, he made a copy of the hard drive and gave it to Mr. Giuliani's lawyer.³¹

On October 14, 2020, the same day the N.Y. Post articles were published and disseminated by the N.Y. Post on its Twitter account, Twitter's Site Integrity Team, led by Yoel Roth, reviewed the articles for compliance with Twitter's content moderation policies.³² Given the prior warnings of a hack-and-leak operation and doubts about the provenance of the materials republished in the N.Y. Post articles, the Site Integrity Team preliminarily determined that the materials could have been obtained through hacking, as defined in the Hacked Materials Policy.³³ Additionally, the published materials contained unredacted private email addresses, including one that appeared to belong to Hunter Biden, and phone numbers, in clear violation of the Private Information Policy.

Mr. Roth escalated the matter internally, and Twitter determined that, based on then-available information, the N.Y. Post articles violated the policies on Hacked Materials and

²⁶ See Roth Decl. ¶¶ 10-11; see also Alfred Ng, *How Social Networks Are Preparing for a Potential October Hack-and-Leak*, CNET, Oct. 9, 2020, <https://www.cnet.com/news/how-tech-platforms-are-preparing-for-a-potential-october-hack-and-leak>.

²⁷ Roth Decl. ¶ 11.

²⁸ See *id.* ¶¶ 10-11; see also Devin Coldewey, *Suspect Provenance of Hunter Biden Data Cache Prompts Skepticism and Social Media Bans*, TechCrunch, Oct. 14, 2020, <https://techcrunch.com/2020/10/14/suspect-provenance-of-hunter-biden-data-cache-prompts-skepticism-and-social-media-bans/>.

²⁹ See Smoking Gun, *supra* note 24.

³⁰ *Id.*

³¹ *Id.*

³² Roth Decl. ¶¶ 12-14.

³³ *Id.* ¶ 13.

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Private Information that were in effect at the time.³⁴ Accordingly, Twitter imposed the measures set out in those policies: It prohibited users from sharing links to the articles, and it prevented the accounts of users who had previously shared the links from sending new Tweets until those users deleted the offending Tweet.³⁵ Because Twitter does not delete users' Tweets, the company instead puts a restriction on accounts that have posted material that violates Twitter's policies.³⁶ The restriction allows the user's profile and all non-offending Tweets to remain visible, but prevents the user from posting any additional Tweets until they themselves delete the Tweets that were found to violate the site's policies.³⁷ None of these steps prevented users from discussing the N.Y. Post articles on Twitter, including the content of those articles, as long as the Tweets did not link to or show, and therefore further disseminate, the specific articles that Twitter had determined contained materials that violated its policies.

No one at Twitter, including the personnel responsible for applying and enforcing the content moderation policies, had any communications with the Biden presidential campaign, the Democratic National Committee, or their agents regarding the N.Y. Post articles before making the determination that the materials violated the Twitter Rules and policies.³⁸

II. Analysis

Twitter's enforcement of its commercially reasonable, pre-existing content moderation policies did not cause the company to make an in-kind contribution to the Biden for President campaign committee.

A. Twitter's Actions Were Not "for the Purpose of Influencing" a Federal Election.

Temporarily blocking the N.Y. Post articles from the platform when enforcing its Hacked Materials Policy and Private Information Policy was not an expenditure by Twitter for the

³⁴ *Id.* ¶¶ 15-16; see also @TwitterSafety, Twitter (Oct. 14, 2020, 7:44 PM), <https://twitter.com/TwitterSafety/status/1316525306656718848> ("The images contained in the articles include personal and private information — like email addresses and phone numbers — which violate our rules."); @TwitterSafety, Twitter (Oct. 14, 2020, 7:44 PM), <https://twitter.com/TwitterSafety/status/1316525305796980737> ("As noted this morning, we also currently view[ed] materials included in the articles as violations of our Hacked Materials Policy.").

³⁵ Roth Decl. ¶ 17; Distribution of Hacked Materials Policy (effective Mar. 2019), *supra* note 13; Private Information Policy (effective Mar. 2019), *supra* note 21.

³⁶ Twitter, Our Range of Enforcement Options, <https://help.twitter.com/en/rules-and-policies/enforcement-options> (last visited Dec. 20, 2020).

³⁷ *Id.*

³⁸ See Roth Decl. ¶¶ 18-19; Culbertson Decl. ¶¶ 8-9.

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benefit of Biden for President. Twitter enforced those policies for bona fide commercial reasons and not “for the purpose of influencing any election for Federal office.”³⁹

FECA and Commission regulations prohibit corporations from making contributions or expenditures in connection with federal elections.⁴⁰ A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office.*”⁴¹ Prohibited corporate contributions also include, “any direct or indirect payment . . . or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [federal] election.”⁴²

Longstanding Commission precedents establish that a “corporation’s bona fide commercial activity is neither ‘for the purpose of influencing any election for federal office’ nor ‘in connection with any election’ and thus is not a contribution or otherwise subject to regulation under the Act.”⁴³ These precedents reflect the Commission’s prudent reluctance to second guess reasonable business judgments, absent evidence that they are made for the purpose of influencing a federal election rather than for legitimate commercial reasons.

An action taken by a corporation in the ordinary course of business does not become subject to FECA merely because it is alleged to provide an incidental benefit to a political candidate, as the RNC claims here.⁴⁴ The Commission, for example, has determined that a business does not make a contribution or expenditure to a federal candidate when it uses corporate resources to demand a retraction to a negative news story about that candidate, if the purpose of the demand is “to defend its business reputation.”⁴⁵ A business may provide free services to federal candidates without making a contribution when it does so “based on commercial and not political considerations.”⁴⁶ A business may also mention federal candidates

³⁹ See 52 U.S.C. §§ 30101(8)(A), 30118(b)(2).

⁴⁰ *Id.* § 30118(a).

⁴¹ *Id.* §§ 30101(8)(A), 30118(b)(2) (emphasis added).

⁴² *Id.* § 30118(b)(2).

⁴³ Advisory Opinion 2014-06 (Ryan, Ryan for Congress, and Prosperity Action) at 9 (citing MUR 5474 and 5539 (Dog Eat Dog Films, Inc.), First General Counsel’s Report at 13-17; Advisory Opinion 1994-30 (Conservative Concepts/Pence) at 3-7; and Advisory Opinion 1989-21 (Create-a-Craft) at 4); *see also* MUR 5485 (Conversagent, Inc.), First General Counsel’s Report; MUR 5485, Certification (voting 4-0 to find no reason to believe).

⁴⁴ MUR 6586 (World Wrestling Entertainment, Inc.), Notification with Legal and Factual Analysis.

⁴⁵ *See id.*

⁴⁶ *See* Advisory Opinion 2018-11 (Microsoft) (determining that Microsoft’s commercially reasonable efforts “to protect its brand reputation” did not amount to a prohibited in-kind

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by name in paid advertisements to promote itself without those advertisements becoming contributions or expenditures.⁴⁷ A vendor providing services to political committees “may establish objective business criteria to protect the commercial viability of its business without making contributions to the committees that meet those criteria.”⁴⁸ And “businesses that provide services to contributors . . . may also rely on commercial considerations to target customers and limit the range of services provided, without making any contributions themselves.”⁴⁹

In this case, Twitter enforced its Hacked Materials Policy and Private Information Policy for bona fide commercial reasons, in the ordinary course of business, and in accordance with its pre-existing policies. Its enforcement action was fully consistent with its stated business purpose of “serving the public conversation.” Twitter engages in content moderation to maintain trust in the service and keep its users engaged, so that it can sell goods and services—advertising and data licensing. As Twitter’s federal securities filings recognize, non-enforcement of known violations of its content policies can lead to reputational and business risks, and Commission precedents rightly afford Twitter the needed latitude to take actions to minimize those risks.

That Twitter did not exclude the N.Y. Post articles for the purpose of influencing an election is particularly clear because the company simply implemented its pre-existing policies, which are politically neutral on their face. The N.Y. Post articles plainly violated Twitter’s Private Information Policy, as they reproduced materials containing personal email addresses and phone numbers. That alone justified the enforcement action. Additionally, the company reasonably agreed with other observers (and, apparently, with members of the N.Y. Post’s own staff)⁵⁰ in its determination that the materials republished in the N.Y. Post articles appeared to have been obtained through hacking and thus violated the Hacked Materials Policy. Once it was determined that sharing the N.Y. Post articles violated the policies, Twitter enforced the rules as

contribution when the company provided election-sensitive customers with free account security services that were “in the ordinary course of [its] business”).

⁴⁷ See Advisory Opinion 2019-18 (IDF) (concluding that advertisements mentioning presidential candidates that are meant to drive internet traffic to a commercial website and that “do not espouse any public positions on any candidate or political party or contain express advocacy” are not contributions or expenditures).

⁴⁸ Advisory Opinion 2017-06 (Stein and Gottlieb); see also Advisory Opinion 2012-28 (CTIA) (“A change in business practices or rates would not necessarily result in an in-kind contribution.”).

⁴⁹ Advisory Opinion 2017-06 (Stein and Gottlieb).

⁵⁰ Katie Robertson, *New York Post Published Hunter Biden Report amid Newsroom Doubts*, N.Y. Times, Oct. 18, 2020, <https://www.nytimes.com/2020/10/18/business/media/new-york-post-hunter-biden.html> (reporting that N.Y. Post “staff members questioned whether the paper had done enough to verify the authenticity of the hard drive’s contents” and “also had concerns about the reliability of its sources and its timing”).

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set out in its policy documents, by preventing the user from sending new Tweets until the offending Tweet was deleted. Also consistent with its policies, Twitter did not take any action to block or minimize distribution of content that merely discussed the subject matter of the N.Y. Post articles without republishing the unredacted emails included within the articles.⁵¹

While the RNC complaint calls Twitter's enforcement of its policies "unprecedented actions,"⁵² in actual fact Twitter constantly evaluates and takes action against material that violates its Rules and policies. In the last period for which data is publicly available, Twitter took down almost 16,000 Tweets per day.⁵³ Twitter enforces its Rules and policies without regard to political considerations. For example, when President Trump was diagnosed with COVID-19, Twitter announced that "tweets that wish or hope for death, serious bodily harm or fatal disease against *anyone* are not allowed and will need to be removed."⁵⁴ In August 2020, Twitter required a Democratic candidate for the House of Representatives to remove a Tweet for violating the platform's voter suppression rules.⁵⁵ In June 2020, Twitter labeled a Tweet by actress Debra Messing that compared "President Donald Trump's photo op at St. John's church to an edited image of Nazi dictator Adolf Hitler appearing to show a Bible in a similar pose" as "manipulated media."⁵⁶ The treatment of the N.Y. Post articles was nonpolitical and consistent with the version of Twitter's Hacked Materials Policy in effect on October 14, 2020, as well as with past content moderation decisions relating to potentially hacked materials.

⁵¹ This treatment is consistent with the version of Twitter's Hacked Materials Policy in effect on October 14 and with past moderation decisions relating to potentially hacked materials. For instance, the September 2020 New York Times story regarding President Trump's tax returns cited by the RNC merely *discussed* but did not *republish* those tax returns and therefore was not subject to enforcement action. Nor did that story contain any of the specified private information covered by Twitter's Private Information Policy established in March 2019 and in effect at the time. See Complaint at 3-4, MUR 7821.

⁵² *Id.* at 2.

⁵³ Twitter, Rules Enforcement (July – Dec. 2019), <https://transparency.twitter.com/en/reports/rules-enforcement.html#2019-jul-dec>.

⁵⁴ @TwitterComms, Twitter (Oct. 2, 2020, 7:09 PM), <https://twitter.com/TwitterComms/status/1312167835783708672>; see also Bobby Allyn, *Facebook, Twitter and TikTok Say Wishing Trump's Death from COVID-19 Is Not Allowed*, NPR, Oct. 2, 2020, <https://www.npr.org/sections/latest-updates-trump-covid-19-results/2020/10/02/919778961/facebook-twitter-and-tiktok-say-wishing-trumps-death-from-covid-is-not-allowed>.

⁵⁵ Lima, *supra* note 9. The violative Tweet was a reply Tweet that read, "Thank you! And remind all of your Trump supporting relatives to vote on Wednesday, November 4! (Since they're Trump supporters, they might fall for it. Just saying....)." *Id.*

⁵⁶ Keeley, *supra* note 9.

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The RNC has made no showing, beyond mere speculation, that Twitter's enforcement action excluding the N.Y. Post articles from its platform was made for any political purpose, let alone for the purpose of influencing the 2020 presidential election. The RNC's blanket assertions about the partisan leanings of Twitter officers and employees are legally and factually irrelevant. The Commission correctly disregards such speculative allegations, particularly where the respondent, as Twitter does here, refutes them.⁵⁷

Twitter's actions were squarely consistent with the company's commercial interests and were undertaken in keeping with Twitter's pre-existing content moderation policies, resulting in no expenditure.

B. Twitter Did Not Coordinate with Any Federal Candidate or Political Party.

FECA treats a coordinated expenditure as an in-kind contribution.⁵⁸ Here there was neither an expenditure nor coordination, however, and for this reason as well, there was no in-kind contribution.

The Commission's regulations provide that "any expenditure" by an individual or organization "that is coordinated" with a campaign or political party is "an in-kind contribution to . . . the candidate or political party committee with whom or with which it was coordinated."⁵⁹ An expenditure is "coordinated" with a campaign or political party committee if it is "made in cooperation, consultation or concert with, or at the request or suggestion of" the campaign or party.⁶⁰

As explained below, Twitter's content moderation decisions with respect to the N.Y. Post articles are subject to the media exemption and therefore do not constitute an "expenditure" within the meaning of FECA. Moreover, it is doubtful that any actual expenditure could be associated with Twitter's nearly automatic enforcement of its policies. Regardless, there was no coordination. Twitter did not receive a request from the Biden campaign to review (much less restrict) the N.Y. Post articles.⁶¹ Nor did decision-makers at Twitter, or to the best of the company's knowledge, anyone authorized to act on Twitter's behalf even communicate with the

⁵⁷ See MUR 5467 (Michael Moore), First General Counsel's Report at 5 ("Purely speculative charges, especially when accompanied by a direct refutation, do not form the adequate basis to find reason to believe that a violation of [the Act] has occurred.") (quoting MUR 4960 (Hillary Rodham Clinton et al.), Statement of Reasons at 3); see also MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Darryl R. Wold and Commissioners David M. Mason and Scott E. Thomas at 2 ("[a] mere conclusory allegation without any supporting evidence does not shift the burden of proof to the respondents").

⁵⁸ 11 C.F.R. § 109.20(b).

⁵⁹ *Id.*

⁶⁰ *Id.* § 109.20(a).

⁶¹ Culbertson Decl. ¶¶ 8-9.

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Biden campaign regarding Twitter's decision to enforce its content moderation policies with respect to the N.Y. Post articles.⁶²

Accordingly, there was no coordinated expenditure resulting in an in-kind contribution to the Biden for President campaign committee.

C. Twitter's Content Moderation Decisions Are Subject to the Media Exemption.

Twitter is a "media entity," as defined under the Commission's media exemption, carrying news and commentary. For this reason too, its decisions regarding moderation of the news and commentary posted on its website do not constitute contributions or expenditures subject to regulation by the Commission. Deciding what content to include or exclude from a media platform, including under applicable content policies, is a core function associated with any media entity, whether a newspaper, television station, or social media website. Twitter's enforcement of its pre-existing content moderation policies with respect to the N.Y. Post articles therefore falls squarely within the media exemption.

Commission regulations exclude from the definition of contribution or expenditure "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by 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*."⁶³ To determine whether this media exemption applies, the Commission uses a two-step analysis, first asking whether the entity engaging in the activity is a media entity. If it is, the Commission then asks whether it is owned or controlled by a political party, political committee, or candidate (which would take it outside the scope of the media exemption) and whether it is acting in its capacity as a media entity in conducting the activity at issue. The Commission has framed this latter inquiry as whether the activity at issue is within the entity's "legitimate press function."⁶⁴

Twitter is a media entity because its platform is a "Web site" that is both an "Internet . . . publication" itself and a carrier of content posted by other Internet publications. The Commission "has not limited the definition of 'media entity' to 'traditional news outlets.'" Instead, it gives the term "media entity" a "broad interpretation."⁶⁵ This is especially so with respect to the Internet because the Commission has recognized the Internet to be "a unique and evolving mode of mass communication and political speech that is distinct from other media in

⁶² Roth Decl. ¶¶ 18-19; *see also* Culbertson Decl. ¶¶ 8-9.

⁶³ *Id.* § 100.73 (addressing contributions) (emphasis added); *see also* 52 U.S.C. § 30101(9)(B)(i) (addressing expenditures); 11 C.F.R. § 100.132.

⁶⁴ *See* Advisory Opinion 2019-05 (System73) at 4 (citing Advisory Opinion 2016-01 (Ethiq) at 2-4 and *Reader's Digest Ass'n v. FEC*, 509 F. Supp 1210, 1215 (S.D.N.Y. 1981)).

⁶⁵ *Id.*

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a manner that warrants a restrained regulatory approach.”⁶⁶ As “used in the Commission’s media exemption regulations, [t]he terms “Web site” and “any Internet or electronic publication” are meant to encompass a wide range of existing and developing technology, such as websites, “podcasts,” etc.”⁶⁷

Media entities covered by the media exemption are entities that “cover *or carry* news stories, commentary, and editorials on the Internet.”⁶⁸ Twitter routinely carries news stories, commentary, and editorials on its website.⁶⁹ Moreover, an entity does not need to create its own content to be covered by the media exemption. To the contrary, the Commission has held repeatedly that a website or other internet publication, like Twitter, that mostly distributes content created by third parties is treated as a media entity for purposes of the media exemption.⁷⁰ For example, in Advisory Opinion 2019-05 (System73), the Commission noted that it interprets the term “commentary” in its regulatory media exemption “broadly to include not only commentary by the media entity and its staff, but also guest commentary.”⁷¹ The Commission has also indicated “that a characteristic of periodicals qualifying as press entities is that they derive revenues from the sale of subscriptions or advertising.”⁷² Twitter derives the majority of its revenue from advertising.⁷³ Accordingly, because Twitter is a website that carries third-party news and commentary to generate advertising revenue, it is a “media entity” within the meaning of the Commission’s regulations.

⁶⁶ Advisory Opinion 2008-14 (Melothé) at 3-4.

⁶⁷ Advisory Opinion 2016-01 (Ethiq) (quoting Internet Communications, 71 Fed. Reg. at 18608 n.52).

⁶⁸ Internet Communications, 71 Fed. Reg. 18589, 18608 (Apr. 12, 2006) (emphasis added).

⁶⁹ See, e.g., Shearer & Grieco, *supra* note 1.

⁷⁰ Advisory Opinion 2000-13 (iNEXTV) (determining that an internet video service that “does not create programming under its own name” but “operates its own network of specialized news and information sites” qualified for the media exemption); see also Advisory Opinion 1996-16 (Bloomberg) (determining that an online candidate forum in which non-journalist online guests asked questions of the candidates qualified for the media exemption); Advisory Opinion 2005-16 (Fired Up) (determining that websites qualified for the media exemption when “a primary function of the websites is to provide news and information to readers through Fired Up’s commentary on, quotes from, summaries of, and hyperlinks to news articles appearing on other entities’ websites and through Fired Up’s original reporting”).

⁷¹ Advisory Opinion 2019-05 (System73).

⁷² Advisory Opinion 2000-13 (iNEXTV).

⁷³ Form 10-Q, *supra* note 3 at 14.

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To avail itself of the media exemption, a media entity must not be owned or controlled by a political party, political committee, or candidate. Twitter, a publicly traded company, is not so owned or controlled.⁷⁴

The Commission has interpreted the legitimate press function of media entities to encompass a broad range of activities, finding that a media entity providing coverage of campaign events would be a legitimate press function even if the media entity covered campaigns only from one political party and not the other.⁷⁵ Likewise, the Commission has held that an Internet-based media entity that streamed campaign events consisting solely of content created by the campaign committees would be engaged in a legitimate press function.⁷⁶ In contrast, the Commission has found activities by media entities *not* to be a legitimate press function only when they involve direct campaigning unrelated to any press function. For example, in Advisory Opinion 2008-14 (Melothe), the Commission held that issuing awards to campaign volunteers, conducting regular fundraising drives for candidates, and holding daily briefings for campaign volunteers would not be “legitimate press function[s].”⁷⁷

Twitter’s enforcement of its content moderation policies with respect to the N.Y. Post articles, unlike conducting fundraising for a candidate or issuing awards to campaign volunteers, reflects a core function of any social media organization to ensure that news and commentary posted on its site conform to its Rules and policies intended to protect users of the site and third parties. Traditional media organizations have long exercised the same editorial control over content they publish to preserve editorial standards and respect privacy interests of individuals. Content moderation is a legitimate press function, and Twitter’s decision to remove the N.Y. Post articles therefore falls within the media exemption.

D. Twitter’s Content Moderation Decisions Are Protected under Section 230, and Requiring Twitter to Host Materials on Its Platform Would Violate the First Amendment.

Section 230 of the Communications Decency Act provides a broad grant of immunity for “interactive computer services” such as Twitter.⁷⁸ First, Section 230 provides that no interactive computer service “shall be treated as the publisher or speaker of any information” provided by a

⁷⁴ Twitter, 2019 Annual Report, Form 10-K, [https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual-Report-\(3\).pdf](https://s22.q4cdn.com/826641620/files/doc_financials/2019/FiscalYR2019_Twitter_Annual-Report-(3).pdf).

⁷⁵ Advisory Opinion 2008-14 (Melothe).

⁷⁶ Advisory Opinion 2019-05 (System73).

⁷⁷ Advisory Opinion 2008-14 (Melothe) at 5-6.

⁷⁸ Twitter is unquestionably an interactive computer service, as it “provides . . . computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014).

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third party.⁷⁹ Second, Section 230 provides that no “interactive computer service shall be held liable” on the basis of any action restricting access to material provided by a third party.⁸⁰ In short, Section 230 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.⁸¹ Because “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,”⁸² decisions by Twitter to exclude the N.Y. Post articles from its platform are absolutely immune from civil liability, including federal civil enforcement.

Additionally, the First Amendment right to free speech extends to a right against compelled speech.⁸³ Just as a newspaper cannot be compelled to host editorials by political candidates,⁸⁴ the First Amendment protects the right of social networks to decide what content to host.⁸⁵ Finding reason to believe that Twitter violated the Act by moderating the N.Y. Post articles would essentially require Twitter to host that content. Such a mandate would violate the First Amendment.

⁷⁹ 47 U.S.C. § 230(c)(1).

⁸⁰ *Id.* § 230(c)(2)(A).

⁸¹ *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

⁸² *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008).

⁸³ *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (“We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).

⁸⁴ *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁸⁵ *See, e.g., Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (“[T]he First Amendment’s protections apply . . . whether or not the speaker generated the underlying content in the first place.”).

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For the reasons stated above, we respectfully request that the Commission dismiss the Complaint.

Respectfully submitted,



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Exhibit A

BEFORE THE FEDERAL ELECTION COMMISSION

In re MUR 7821

DECLARATION OF YOEL ROTH

1. My name is Yoel Roth. This declaration is made upon my personal knowledge and belief.
2. I am Head of Site Integrity at Twitter, which is part of Twitter's Trust & Safety department. In this role, I lead the company's Site Integrity Team, which assesses content posted on Twitter to determine whether it violates the company's policies.
3. Visitors to the Twitter website and users of the mobile application can report content that may violate the company's policies. Twitter also uses machine-learning programs to identify content that may violate Twitter policies.
4. The Site Integrity Team also receives and reviews reports, including from security consultants, regarding hacking incidents.
5. The Site Integrity Team assesses content flagged for review under Twitter's policies.
6. Twitter regularly enforces its policies, including the Distribution of Hacked Materials Policy and Private Information Policy. The TwitterService team assists with implementation of such enforcement actions.

7. As a matter of practice, neither I nor the other members of the Site Integrity Team communicate directly with persons outside Twitter that report content for violating Twitter's policies.

8. For routine content moderation decisions, the Site Integrity Team makes enforcement decisions. For high-profile matters and content that presents more complex considerations, the Site Integrity Team performs an initial assessment and escalates the matter internally for a final enforcement decision.

9. When evaluating potentially hacked material to determine if there is a violation of Twitter's Distribution of Hacked Materials Policy, the Site Integrity Team considers public declarations of hacking as determinative. If no such claim is made, the Site Integrity Team considers other indicia of hacking to assess whether the material was obtained through hacking based on the team's experience and expertise.

10. Since 2018, I have had regular meetings with the Office of the Director of National Intelligence, the Department of Homeland Security, the FBI, and industry peers regarding election security.

11. During these weekly meetings, the federal law enforcement agencies communicated that they expected "hack-and-leak operations" by state actors might occur in the period shortly before the 2020 presidential election, likely in October. I was told in these meetings that the intelligence community expected that individuals associated with political campaigns would be subject to hacking attacks and that material obtained through those hacking attacks would likely be disseminated over social media platforms, including Twitter. These expectations of hack-and-leak operations were discussed throughout 2020. I also learned in

these meetings that there were rumors that a hack-and-leak operation would involve Hunter Biden.

12. On October 14, 2020, I learned from media coverage that the New York Post had posted articles to its website that morning containing emails and other personal materials purportedly found on a hard drive that allegedly belonged to Hunter Biden.

13. The Site Integrity Team preliminarily determined that the information in the articles could have been obtained through hacking, based on, among other things, the type of material, the sourcing described in the articles, and the information security community's initial reactions.

14. The materials in the New York Post articles also contained personal email addresses and telephone numbers, and so sharing them on Twitter violated the Private Information Policy.

15. Given the high-profile nature of the material and publisher, the Site Integrity Team escalated the New York Post articles for further review.

16. Twitter's Trust & Safety leadership determined that the New York Post articles violated the Distribution of Hacked Materials Policy and the Private Information Policy and instructed the Site Integrity Team to execute enforcement of those policies.

17. At approximately 10:20 a.m. Pacific time on October 14, 2020, the Site Integrity Team implemented the enforcement action. Per the procedures and sanctions set out in the policies, the Site Integrity Team blocked Twitter users from sharing links over Twitter to the applicable New York Post articles and prevented users who had previously sent Tweets sharing those articles from sending new Tweets until they deleted the Tweets violating Twitter's policies.

18. I did not receive any communications from or have any communications with representatives of Biden for President, the Democratic National Committee, or any of their agents regarding the New York Post articles before Twitter implemented the enforcement actions on October 14, 2020.

19. To the best of my knowledge, no Twitter employee received any communications from or had any communications with representatives of Biden for President, the Democratic National Committee, or any of their agents regarding the New York Post articles before Twitter implemented the enforcement actions on October 14, 2020.

* * *

Yoel Roth
Yoel Roth (Dec 17, 2020 16:15 PST)

Yoel Roth

Date: Dec 17, 2020

Signature: *Yoel Roth*
Yoel Roth (Dec 17, 2020 16:15 PST)

Email: yoel@twitter.com

Title: Head of Site Integrity

Company: Twitter Inc.

Exhibit B

BEFORE THE FEDERAL ELECTION COMMISSION

In re MUR 7821)))
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DECLARATION OF LAUREN CULBERTSON

1. My name is Lauren Culbertson. This declaration is made upon my personal knowledge and belief.
2. I am employed by Twitter, Inc. as Head of U.S. Public Policy. In that role, I lead Twitter's Public Policy team devoted to state and federal policy work.
3. Twitter's Public Policy team serves as the primary point of contact at Twitter for officeholders, election officials, candidates, campaigns, and party committees. At least one member of Twitter's legal team also worked with officeholders, election officials, candidates, campaigns, and party committees during the 2018 U.S. midterm election and the 2020 presidential campaign.
4. The Public Policy team provides user support to governmental Twitter users, including executive branch agencies and officials, members of Congress, the President, and others in the administration. The Public Policy team maintains a general email account (gov@twitter.com) for government contacts to direct questions and concerns and to report content that they believe violates Twitter policies.
5. As the primary points of contact for officeholders, election officials, candidates, campaigns, and party committees, the Public Policy team receives requests from those persons for Tweets to be reviewed for compliance with Twitter's policies. The Public

Policy team forwards these requests to review content to enforcement agents, including members of the TwitterService and the Trust & Safety teams.

6. I am aware that the New York Post published a series of articles on October 14, 2020, containing images and emails purportedly sent and received by Hunter Biden (the “Articles”).

7. I am also aware that on October 14, 2020, Twitter’s Trust & Safety leadership determined the Articles violated Twitter policies and enforced those policies against the Articles, removing associated content from the platform.

8. I did not receive any communications from or have any communications with representatives of Biden for President, the Democratic National Committee, or any of their agents regarding the Articles before Twitter implemented the enforcement actions on October 14, 2020.

9. To the best of my knowledge, no Twitter employee received any communications from or had any communications with representatives of Biden for President, the Democratic National Committee, or any of their agents regarding the Articles before Twitter implemented the enforcement actions on October 14, 2020.

Lauren M Culbertson

Lauren M Culbertson (Dec 17, 2020 18:43 EST)

Lauren Culbertson

Date: Dec 17, 2020

Signature: *Lauren M Culbertson*

Lauren M Culbertson (Dec 17, 2020 18:43 EST)

Email: lculbertson@twitter.com

Title: Head of U.S. Public Policy

Company: Twitter