FEDERAL ELECTION COMMISSION
1150 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MURs 7821, 7827 & 7868
Twitter, Inc., *et al.*	)	
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND COMMISSIONER JAMES E. "TREY" TRAINOR, III

We joined our colleagues in unanimously finding that there is no reason to believe Twitter violated the Federal Election Campaign Act ("FECA" or "the Act") in these Matters.[1] As the Factual and Legal Analysis explains, "the information before the Commission indicates that Twitter's actions" to block the sharing on its platform of October 2020 *New York Post* articles concerning the President's son "were undertaken for commercial reasons and not for the purpose of influencing an election."[2]

That analysis reflects the judgment of a majority of the Commission. We would go further and acknowledge the additional legal, constitutional, and prudential hurdles to FEC action in this context.

This agency operates against an especially sensitive constitutional background. As the D.C. Circuit has pointedly observed, we are "[u]nique among federal administrative agencies" because our "sole purpose [is] the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes.'"[3] Accordingly, our

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[1] Certification at 1, MURs 7821/7827/7868 (Twitter, *et al.*), Aug. 10, 2021.

[2] Factual and Legal Analysis ("F&LA") at 22, MURs 7821/7827/7868 (Twitter, *et al.*). While there were other allegations in the complaints, they were largely speculative or disconnected from the Act. *See* F&LA at 16-22.

[3] *Am. Fed'n of Labor and Cong. of Indus. Organizations v. Fed. Election Com'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)) (brackets supplied).

authority is limited both by the Act itself,[4] which denies us a roving commission to police elections and limits our jurisdiction to "contributions" and "expenditures,"[5] and by nearly a half century of accumulated judicial decisions narrowing that legislative grant.[6]

Despite this narrow mission, there is a tendency to recast political disputes as campaign finance violations and enlist the Commission as a party to larger conflicts. At some level this is understandable; people of good will, believing in the virtues of a cause, will naturally reach for whatever tools come to hand.

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[4] By contrast, consider the enabling statutes of certain of our sister agencies. *E.g.,* 15 U.S.C. § 78b (Securities and Exchange Commission, granting power to "insure the maintenance of fair and honest markets in [securities] transactions"); 47 U.S.C. § 151 ("For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission'").

[5] 52 U.S.C. § 30101 *et seq*.

[6] Famously, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) dramatically reduced the scope of FECA by imposing constitutional limits on our ability to enforce the Act's expenditure caps, independent expenditure limitations, and PAC registration requirements. Landmark cases since then have further narrowed our discretion. *Fed. Election Comm'n v. Nat'l Conservative Pol. Action Comm.*, 470 U.S. 480 (1985) (striking down expenditure limits for independent PACs); *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (holding corporate expenditure prohibition unconstitutional as applied to qualified nonprofits); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (striking down prohibition on corporate electioneering communications); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185 (2014) (striking down aggregate contribution limits). We are also bound by numerous lower court orders. *E.g. SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*) (striking down contribution limits as applied to independent expenditure only groups); *Fed. Election Comm'n v. Swallow*, 304 F.Supp.3d 1113, 1118 (D. Utah 2018) (striking Commission regulation on the aiding or abetting of contributions as "exceeding [the agency's] authority to write regulations and improperly intruding into the realm of law-making that is the exclusive province of Congress"); *Fed. Election Comm'n v. Christian Coal.*, 52 F. Supp.2d 45, 92-97 (D.D.C. 1999) (reversing Commission enforcement action predicated on an overly aggressive reading of the Act's coordination rules).

"Congress did not update the definitions of 'contribution,' 'expenditure,' or 'political committee' in the years after *Buckley,*" or seriously address any of these other foundational judicial decisions. Statement of Reasons of Vice Chair Dickerson and Comm'r Trainor at 3, MUR 7181 (Independent Women's Voice), May 10, 2021. As a result, the enforcement of FECA is a complicated endeavor, and we must apply the law as it is written yet also as it is refracted through binding court decisions.

But one need not shrink from the difficult policy questions involved with social media moderation to realize that they are not, at their core, campaign finance issues. Nor is it false modesty to note that this agency has little expertise in these matters.

The Act long predated everyday citizen access to the internet and was last significantly amended in 2002—back when America Online "was able to keep a 40 percent market share of dial-up service for years."[7] The application of ambiguous standards against individual acts of content moderation on a website accessible by virtually the entire country was simply never contemplated by FECA's drafters. Since 2002, internet access has leapt from modems and desktop computers used to access static websites to nearly-ubiquitous, instantaneous connectivity with virtually any other person on the planet, often using handheld devices. This state of affairs reflects the most hopeful predictions of late 1970s science fiction. Mapping the Act, legislation designed to regulate the giving of physical checks and the broadcasting of 30-second television ads, onto this new territory is a fraught exercise in the absence of notice-and-comment rulemaking or new statutory text.

And there are practical concerns. The sheer scale of modern social media platforms advises caution. We have an obligation under the Act and our regulations to address public political advertising placed for a fee on the internet. Such communications mirror, if darkly, the paid political advertisements that have always been the heartland of campaign finance law. But moderation decisions—the treatment of billions of pieces of individual content, and how individuals choose to interact with, boost, modify, and critique other social media posts—involve orders-of-magnitude more data. With such a sample size, even well-meaning observers may see political intent where there is none, and our investigations to suss out allegations of political bias will be either incomplete, possibly to the point of being misleading, or else extraordinarily invasive and costly. The problem is compounded by the fact that most moderation decisions are automated or respond to complex, proprietary algorithms that will be vigorously protected, in court if necessary, by the targets of complaints.

These difficulties are very real, and explain why Congress, and not this Commission, is the proper forum for debate over the regulation of social media companies. Yet we are obligated to address complaints that come before us.[8] Ultimately, we were able to avoid these pitfalls here because, despite the societal challenges that may lurk in the background, these matters raised straightforward legal concerns.

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[7] Saul Hansell, "Can AOL Keep Its Subscribers In a New World of Broadband?", N.Y. Times, July 29, 2002, https://www.nytimes.com/2002/07/29/business/can-aol-keep-its-subscribers-in-a-new-world-of-broadband.html.

[8] 52 U.S.C. § 30109(a)(1).

a. The complaints were sufficiently refuted by Twitter's defense that it was acting for commercial purposes.

At the reason-to-believe stage, we cannot proceed to authorize an investigation based upon "[u]nwarranted legal conclusions from asserted facts or mere speculation."[9] "In addition," we will not find reason-to-believe when a complaint "consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response."[10]

The Complainants argue that Twitter has engaged in "an unprecedented act of media suppression" intended to privilege and "support[] the [2020] Biden campaign."[11] But, as the F&LA notes, Twitter responds that it "has enacted a number of content policies…as part of its efforts to concentrate on the 'reduction of abuse, harassment, spam, manipulation[,] and malicious automation on the platform.'"[12] There is little doubt that such moderation is a central component of Twitter's product, and the Commission has long recognized that "business activity [that] 'reflects commercial considerations'" cannot be considered a contribution or an expenditure under the Act.[13] Moreover, Twitter vigorously maintains that its decision to throttle the sharing of the *Post* articles at issue in these Matters resulted from the evenhanded application of its content moderation policies.[14]

Given Twitter's clear denials and lacking any indications, other than pure conjecture, to the contrary, the Commission found that these allegations simply did not meet our evidentiary standard and voted accordingly.

So much is clear from the F&LA. But we would go further and note that our commercial activities exemption does not turn on the viewpoint neutrality of a particular commercial product. As the Commission has explained, even products

[9] Statement of Reasons of Comm'rs Mason, Sandstrom, Smith, and Thomas at 2, MUR 4960 (Clinton), Dec. 21, 2000 (internal citations omitted).

[10] *Id*.

[11] Complt. at 1, MUR 7821 (Twitter, Inc.), Oct. 16, 2020.

[12] F&LA at 4 (quoting Twitter Resp. at 3, MUR 7821, Dec. 21, 2020).

[13] F&LA at 12 (quoting Advisory Opinion 2012-31 at 4 (AT&T) (brackets supplied).

[14] As the F&LA notes, "Twitter states that this was because its Site Integrity Team assessed that the *New York Post* articles likely contained hacked and personal information, the sharing of which violated both Twitter's Distribution of Hacked Materials and Private Information Policies" and "users were still permitted to otherwise discuss the content of the *New York Post* articles because doing so did not directly involve spreading any hacked or personal information." F&LA at 13-14.

developed with an explicit partisan bias can reflect commercial considerations and fall outside the Act's scope.[15] So while the F&LA takes the time to rebut an allegation that Twitter treated a negative story about former President Trump's personal finances differently than the *New York Post* articles here,[16] we do not believe that a particular course of moderation need be politically "neutral" – whatever that may mean in practice, and however it might be accomplished at a scale involving billions of individual posts. A single commercial decision is still an exercise of commercial judgment; there is no requirement that it be part of a proven pattern of ideological or partisan evenhandedness, so long as it is not itself done for the purpose of encouraging Americans to vote one way or another.[17]

b. Twitter's editorial decisions are protected by the Act's media exemption and the First Amendment.

Moreover, even if Twitter's commercial defense had failed, we agree that Twitter's actions are protected by our media exemption and by the First Amendment itself. In this, we join Commissioner Cooksey's analysis of our regulatory media exemption.[18]

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[15] Advisory Op. 2017-06 (Stein & Gottlieb) at 6 ("Here, the Project proposes to select only Democratic candidates as Featured Candidates, and plans to market its App and services to Democratic users, based on its determination that this is the best way to attract users and promote the Project's commercial success in the current political environment… The Project has determined that featuring Democratic candidates in swing districts on the App is the most marketable way for it to provide a service to users, by helping them identify which candidates will benefit most from their contributions"); *see also* Advisory Op. 2012-28 (CTIA – The Wireless Ass'n), Advisory Op. 2012-26 (Cooper for Congress, *et al.*), Advisory Op. 2006-34 (Working Assets); *cf.* Statement of Vice Chair Dickerson at 3, Advisory Opinion 2021-01 ("Aluminate, Inc."), June 14, 2021 ("Advisory opinions are not casual pronouncements; the Act specifically immunizes requesters from legal liability for relying on them, and we have long stated, correctly, that materially similar fact patterns are also protected").

[16] F&LA at 15 ("Two of the Complaints allege that, even if Twitter did follow its policies, Twitter has been inconsistent in the enforcement of its policies, reflecting an ideological bias… However, as Twitter's Response points out, unlike the *New York Post* articles, the *New York Times* article only *discussed* but did not *republish* the tax returns at issue, and thus did not contain any hacked or private information") (emphasis in original).

[17] In fact, as a publicly traded corporation, Twitter and its peers may have fiduciary obligations that foreclose strict political neutrality. After all, Twitter notes that its content moderation concerns are driven, at least in part, by the commercial judgment and risk preferences of the advertisers that drive its revenue. *See* n. 30, *infra*. The question is outside the scope of these Matters, but it helps illustrate the many ways in which overzealous enforcement may place companies between two bodies of conflicting law, an obvious sign that something is amiss.

[18] Statement of Reasons of Comm'r Cooksey at 3, MURs 7821/7827/7868 (Twitter, *et al.*), Sept. 13, 2021.

The Act has always included an explicit statutory protection for "the press" and "the media."[19] As relevant here, the Act exempts from its coverage any expenditures made for the purpose of a "news story, commentary, or editorial distributed through the facilities of any broadcasting station, news, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[20] Guided by judicial opinions interpreting this provision,[21] we have long held that when a respondent is acting as a "legitimate press entity" in its "legitimate press function," its actions—partisan, ideological, or otherwise—are outside the Commission's regulatory purview.[22]

The prospect of a federal agency passing judgment on the "legitimacy" of a press entity is perilous. The project smacks of hubris and raises significant constitutional concerns, but the exception is Congress's creation, not ours, and we have been obligated to give it force. Accordingly, we have extended the press exemption to those entities that are "'in the business of producing…a program that disseminates news stories, commentary, and/or editorials."[23] Twitter does just that: 15 per cent of American adults state that they regularly get news via Twitter.[24] Extrapolated to the entire U.S. adult population in 2020 of 258.3 million[25], this works out to nearly 39 million voting-age Americans using Twitter as a news source—roughly the population of California.[26]

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[19] 52 U.S.C. § 30101(9)(B)(i); 52 U.S.C. § 30104(f)(3)(B)(i)

[20] 52 U.S.C. § 30101(9)(B)(i).

[21] *Fed. Election Comm'n v. Phillips Pub'g.*, 517 F. Supp. 1308 (D.D.C. 1981); *Reader's Digest Ass'n v. Fed. Election Comm'n*, 509 F. Supp. 1210 (S.D.N.Y. 1981).

[22] *E.g.* Advisory Op. 2016-01 ("Ethiq"); Advisory Op. 2010-08 ("Citizens United"); Advisory Op. 2008-14 ("Melothé"); Advisory Op. 2005-07 ("Mayberry"); Advisory Op. 2004-07 ("MTV"); Advisory Op. 2003-34 ("Showtime").

[23] Advisory Op. 2008-14 ("Melothé") at 4.

[24] Elisa Shearer and Amy Mitchell, "News Use Across Social Media Platforms in 2020," Pew Research Ctr., Jan. 12, 2021, https://www.pewresearch.org/journalism/2021/01/12/news-use-across-social-media-platforms-in-2020/.

[25] Stella U. Ogunwole, *et al.*, "U.S. Adult Population Grew Faster Than Nation's Total Population From 2010 to 2020," U.S. Census Bureau, Aug. 12, 2021 ("In 2020, the U.S. Census Bureau counted 331.4 million people living in the United States; more than three-quarters (77.9%) or 258.3 million were adults, 18 years or older — a 10.1% increase from 234.6 million in 2010"), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html.

[26] U.S. Census Bureau, "QuickFacts: California," https://www.census.gov/quickfacts/CA, last accessed: Sept. 13, 2021 ("Population, Census, April 1, 2020 California:39,538,233").

Moreover, the decision as to precisely which news to distribute is, in many ways, the *sine qua non* of "the business of producing…news stories, commentary, and/or editorials."[27] The *New York Times* famously emblazons its masthead with the slogan "All The News That's Fit To Print," suggesting the paper's published materials were carefully selected and contextualized to fit the *Times*'s subjective view of "news" that is "fit to print." That is precisely what Twitter did here: it made the editorial judgment that links to the *New York Post* articles were not "fit to print"—or, restated, "fit to share."

Under FECA, then, Twitter is likely a press entity.[28] Even so, under the Act press entities only get the media exemption's protections when they act in their "legitimate press function," which we have historically viewed under a two-part analysis: "(1) whether the entity's materials are available to the general public, and (2) whether they are comparable in form to those ordinarily issued by the entity."[29]

Twitter's platform is available to any American willing to access it via an app or web browser. And when Twitter chooses to limit the sharing of a news story, it does not fundamentally change the appearance or underlying function of the platform itself. Indeed, Twitter argues that its content moderation policies are central to its users' experience and a core part of its overall commercial product.[30]

Accordingly, Twitter's activities fall within our press exemption. But this regulatory safe harbor operates as a floor, not a ceiling. As the *Citizens United* Court noted, the judicial branch has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[31] So even if Twitter's decision to limit distribution of the *New York Post*'s articles were not protected by the Act's press exemption, it would likely be protected by the Constitution itself.

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[27] Advisory Op. 2008-14 ("Melothé") at 4.

[28] It is undisputed that Twitter, unlike, say *Forbes Magazine* during the 1996 or 2000 elections, is "not owned or controlled by a political party, political committee, or candidate." Advisory Op. 2010-08 ("Citizens United") at 6.

[29] *Id.*

[30] Twitter Resp. at 2-3, MUR 7821, Dec. 21, 2020 ("Twitter enforces its own Rules and policies to ensure that all people can participate in the public conversation freely and safely…In fact, advertisers have pressed for Twitter to take greater steps to police content on the platform").

[31] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010).

There is a lack of clarity surrounding the First Amendment's Press Clause, but strong reason to believe it extends beyond the entities protected by the Act.[32] The "press" referred to in the constitutional text is not the modern journalistic class, which did not exist at the founding,[33] but rather "the printing press" and its modern analogues—the technologies that allows for the distribution of words and images.[34] Accordingly the Press Clause, properly understood, defends "the right of any person to use the technology of the press to disseminate opinions."[35]

"Everyone" includes online platforms and websites—whether controlled by an individual, a labor union, a small business, or a large corporation. And the right to distribute, contextualize, and editorialize concerning current events, even political ones, is central to the freedom of the press.[36] Accordingly, even if Twitter's actions did not fall within the statutory and regulatory immunities described above, we

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[32] Michael W. McConnell, Reconsidering *Citizens United* as a Press Clause Case, 123 Yale L.J. 412 (Nov. 2013). "This is not to say that a statute can never properly distinguish the news media from other speakers," as our media exemption does. *Citizens United v. Gessler*, 773 F.3d 200, 212 (10th Cir. 2014). "But that distinction has no basis in the First Amendment." *Id.*

[33] Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today, 160 U. Pa. L. Rev. 459, 468-469 (2012) ("Newspapers of the era were small enterprises, with few or no employees. Woodward and Bernstein were many decades in the future; Framing-era newspapers didn't do sustained investigative journalism. And while those newspapers doubtless contributed facts and opinions to public debate, some of the most important such contributions in newspapers came from people who were not publishers, printers, editors, or their employees – Madison, Hamilton, and Jay's The Federalist essays are a classic example. '[N]ot a few of the country editors . . . depended for what literary work their vocation demanded upon the assistance of friends who liked being 'contributors to the press' without fee'") (quoting Frank Luther Mott, American Journalism: A History of Newspapers in the United States Through 250 Years, 1690 to 1940, at 162 (1941) (brackets and ellipses in original)).

[34] As Chief Justice Burger noted, "The very task of including some entities within the 'institutional press' [for constitutional protection] while excluding others, whether undertaken by legislature, court, or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England—a system the First Amendment was intended to ban from this country." *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 801 (1978) (Burger, C.J., concurring op.) (citing *Lovell v. City of Griffin*, 303 U.S. 444, 451-452 (1938)); *cf. Citizens United*, 558 U.S. at 335 (striking down ban on corporate electioneering communications because the Commission's test for determining whether a proposed ad is the functional equivalent of express advocacy "function[ed] as the equivalent of prior restraint by giving the FEC power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit").

[35] 123 Yale L.J. at 441.

[36] *See* 160 U. Pa. L. Rev. at 538-540 ("The historical evidence points powerfully in one direction—throughout American history, the dominant understanding of the 'freedom of the press' has followed the press-as-technology model…[any] argument for a press-as-industry interpretation of the Free Press Clause must rely on something other than original meaning, text, purpose, tradition, or precedent").

believe the Commission would have been obligated to deal with the significant constitutional difficulties enforcement would have entailed.[37]

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We joined the Commission's F&LA in this matter, which reflects our considered judgment as a body. But these matters raised fundamental challenges that should be publicly addressed.

Were the Commission to inject itself into social media content moderation decisions, it would quickly exceed its institutional competence and resources. Lacking any requirement that we do so under the Act, and recognizing the grave constitutional questions our meddling would raise, we joined our colleagues in declining to take that path.

Allen Dickerson
Vice Chair

September 13, 2021
Date

James E. "Trey" Trainor, III
Commissioner

September 13, 2021
Date

[37] *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 239 (2010) (discussing the constitutional avoidance canon).