



Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Tel: 202.719.7000

wiley.law

Caleb P. Burns
202.719.7451
cburns@wiley.law

Andrew G. Woodson
202.719.4638
awoodson@wiley.law

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VIA E-MAIL (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, DC 20463

Re: MUR 7829 (Twitter, Inc.)

Dear Mr. Jordan:

On October 29, 2020, the Federal Election Commission (“FEC” or “Commission”) notified our client, Twitter, Inc. (“Twitter”), of a complaint filed by Mr. Matthew Rafat, a self-described “unaffiliated individual.” The complaint alleges that Twitter violated the Federal Election Campaign Act of 1971, as amended (“FECA”), by suspending Mr. Rafat’s Twitter account. According to the complaint, the suspension prevented Mr. Rafat from commenting on the October 7, 2020 vice-presidential debate and deprived him of the ability to support minor political parties.

The reality is far different. Twitter flagged and suspended Mr. Rafat’s account – which had exhibited spam-like behavior and made repeated “Uncle Tom” references – as part of a politically neutral effort to remove automated and harmful content from the platform. Mr. Rafat exacerbated his initial suspension for spam-like behavior when he refused to provide a mobile phone number for Twitter to authenticate his account. Twitter’s subsequent suspension of the account for hateful speech was only intended to be temporary. But to this day, Mr. Rafat has

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refused to take down the “Uncle Tom” Tweet. If Mr. Rafat removes that Tweet, Twitter will unlock his account and he can resume communicating on the platform.

Mr. Rafat’s voluntary choices do not become Twitter’s FECA violation. Both the FECA and Commission precedent confirm that activities undertaken by a business for non-political reasons – like the phone verification process and suspension at issue here – are not “for the purpose of influencing an election” and, therefore, do not qualify as regulated contributions or expenditures under the law. That basic tenet of federal campaign finance law should end this matter. For the sake of completeness, however, this submission explains how the FECA’s media exemption, the First Amendment, and the Communications Decency Act all exempt Twitter’s actions from regulation.

At bottom, there is simply no reason to believe that Twitter violated the FECA. Accordingly, Twitter respectfully requests that the Commission dismiss this matter.

FACTUAL BACKGROUND

I. Background on Twitter

Twitter was incorporated in Delaware in April 2007.¹ While its principal offices are in San Francisco, California, the company has approximately 4,900 full-time employees and 35 offices worldwide.² Twitter also has 187 million monetizable daily active users and is a popular social media network around the world.³ The company is publicly traded and had quarterly revenues of more than \$936 million in Q3 of 2020.⁴ A listing of Twitter’s board members is available on the company’s website.⁵ None of the board members are candidates for federal office in the United States or represent federal political parties.

Twitter is a free service that allows users to publicly communicate in messages of up to 280 characters – regardless of the substantive content of the communication.⁶ All 100 senators, 50 governors, and nearly every Member of the House of Representatives reach their constituents through Twitter accounts,⁷ with conservatives, in particular having “a strong

¹ Twitter, *2018 Annual Report*, <http://www.viewproxy.com/Twitter/2018/AnnualReport2017.pdf>.

² See Twitter, *2019 Annual Report*, [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); Twitter, *Our Company*, https://about.twitter.com/en_us/company.html.

³ Katie Canales, *Twitter’s Q3 Earnings Just Blew Past Wall Street’s Expectations with \$936 million in Revenue, But User Growth Majorly Slumped*, Business Insider, Oct. 29, 2020, <https://www.businessinsider.com/twitter-q3-2020-earnings-jack-dorsey-2020-10>.

⁴ See *id.*

⁵ Twitter, *Board of Directors*, <https://investor.twitterinc.com/corporate-governance/board-of-directors>.

⁶ Twitter, *Twitter Via SMS FAQs*, <https://help.twitter.com/en/using-twitter/twitter-sms-faqs>; Selena Larson, *Welcome to a World with 280-Character Tweets*, CNN.com, Nov. 7, 2017, <https://money.cnn.com/2017/11/07/technology/twitter-280-character-limit/>.

⁷ See *Twitter: Transparency and Accountability: Hearing before the H. Comm. on Energy and Commerce*, 115th Cong. (2018) (Testimony of Jack Dorsey, Chief Executive Officer, Twitter, Inc. at 2), <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”).

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presence on Twitter.”⁸ Third parties are also prominent on the platform and often turn to Twitter to get their message out when other means are not available.⁹

Twitter’s purpose is to serve the public conversation.¹⁰ At its core, Twitter “stands for freedom of expression”¹¹ and the principle that “every voice has the power to impact the world.”¹² Twitter has been called a “powerful tool for democracy,”¹³ and “has bolstered grassroots conversations, disrupted the top-down nature of political leadership and thought, and has given voice to groups long hidden on the political periphery [like] the Tea Party movement.”¹⁴

To further advance these ideals, Twitter “live-stream[s] congressional hearings and political events, providing the public access to important developments in our democracy.”¹⁵ Twitter also has emphasized news content and is using algorithmically and human-curated timelines to feature “tweets from news organizations and users that are not news professionals . . . to make it easier for everyone to find relevant news and the surrounding conversation so they can stay informed about what matters to them.”¹⁶ In fact, “[o]ne of the most basic truisms of the social media era is that social media offers the fastest indicator of breaking events, ‘beating the news’ by allowing witnesses and participants to live stream stories as they happen.”¹⁷ That is why 71% of Twitter users rely on the site for news coverage.¹⁸ In

⁸ *Id.* at 6.

⁹ See, e.g., Jessica Gregory, *Third-party Candidates Voice Disapproval as They’re Excluded from Televised Debates*, WSUM.org, Sept. 28, 2020, <https://wsum.org/2020/09/28/third-party-candidates-voice-disapproval-as-theyre-excluded-from-televised-debates/>.

¹⁰ Twitter, *The Twitter Rules*, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

¹¹ Bridget Coyne, *Empowering Freedom of Expression for National Voter Registration Day*, Twitter: Blog, Sept. 27, 2017, https://blog.twitter.com/official/en_us/topics/events/2017/national-voter-reg-day-2017.html.

¹² Twitter, *Our Values*, https://about.twitter.com/en_us/values.html.

¹³ Doug Gross, *5 Ways Twitter Changed How We Communicate*, CNN.com, Mar. 21, 2011, <http://edition.cnn.com/2011/TECH/social.media/03/21/twitter.birthday.communication/index.html>.

¹⁴ Van Newkirk, *The American Idea in 140 Characters*, The Atlantic, Mar. 24, 2016, <https://www.theatlantic.com/politics/archive/2016/03/twitter-politics-last-decade/475131/>.

¹⁵ See Dorsey Testimony at 2.

¹⁶ Alex Kantrowitz, *Twitter Is Experimenting with a Way to Show You Even More Breaking News Tweets*, BuzzFeed.News, Mar. 15, 2018, <https://www.buzzfeednews.com/article/alexkantrowitz/twitter-is-experimenting-with-a-way-to-show-you-even-more#.yqa44w9LKW>; see also Alex Eule, *Twitter’s Plan For Growth: Layoffs*, Barrons.com, Oct. 27, 2016, <https://www.barrons.com/articles/twitters-plan-for-growth-layoffs-1477584370> (explaining that “much of the most relevant election news breaking [in 2016 is] on the [Twitter] service”).

¹⁷ Kaev Leetaru, *Is Twitter Really Faster Than The News?*, Forbes.com, Feb. 26, 2019, <https://www.forbes.com/sites/kalevleetaru/2019/02/26/is-twitter-really-faster-than-the-news/?sh=4578d5f41cf7>.

¹⁸ Peter Suci, *More Americans Are Getting Their News from Social Media*, Forbes.com, Oct. 11, 2019, <https://www.forbes.com/sites/petersuci/2019/10/11/more-americans-are-getting-their-news-from-social-media/?sh=e0dd92f3e179>.

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recognition of these facts, Twitter has even recategorized “itself from ‘social networking’ to ‘news’ in Apple’s App Store.”¹⁹

At Twitter, “abuse, malicious automation, and manipulation” are company-wide concerns²⁰ because “[i]nauthentic accounts, spam, and malicious automation disrupt everyone’s experience” on the platform.²¹ Twitter continuously works to address these issues to improve the health of the conversations on its platform.²² Twitter employs “technology to be more aggressive in detecting and minimizing the visibility of certain types of abusive and manipulative behaviors.”²³ Twitter places significant emphasis “on proactively identifying problematic accounts and behavior rather than waiting until [it] receive[s] a report” alleging abuse on the platform.²⁴ When Twitter’s algorithms determine that an account might be controlled by an automated bot, rather than a human, or that an account is engaging in “spammy” behavior, the account is put “into a read-only state (where the account can’t engage with others or Tweet) . . . until it passes a challenge, like confirming a phone number” through a text message authentication process.²⁵ This authentication process occurs more than 9.9 million times a week at Twitter.²⁶ Companies like Amazon, Apple, Google, Facebook, and Instagram engage in similar efforts to protect their users from abuse.²⁷ As a result of these processes, Twitter has more than doubled the number of accounts it is disciplining for spam policy violations, which has led to a precipitous drop in user complaints.²⁸

¹⁹ Tim Peterson, *Twitter Recategorized Itself from “Social Networking” to “News” in Apple’s App Store*, MarketingLand.com, Apr. 28, 2016, <https://marketingland.com/twitter-recategorized-app-social-networking-news-apples-app-store-175070>.

²⁰ Dorsey Testimony at 1.

²¹ Yoel Roth and Del Harvey, *How Twitter Is Fighting Spam and Malicious Automation*, Twitter: Blog (June 26, 2018), https://blog.twitter.com/official/en_us/topics/company/2018/how-twitter-is-fighting-spam-and-malicious-automation.html; see also Jack Dorsey (@jack), Twitter (Mar. 1, 2018, 10:33 A.M.), <https://twitter.com/jack/status/969234279321419776> (explaining that “harassment, troll armies, manipulation through bots and human-coordination, misinformation campaigns, and increasingly divisive echo chambers” are receiving particular attention at Twitter).

²² See Del Harvey and David Gasca, *Serving Healthy Conversation*, Twitter: Blog (May 15, 2018), https://blog.twitter.com/official/en_us/topics/product/2018/Serving_Healthy_Conversation.html; Raghav Jeyaraman, *Fighting Spam with Botmaker*, Twitter: Blog (Aug. 20, 2014), https://blog.twitter.com/engineering/en_us/a/2014/fighting-spam-with-botmaker.html.

²³ Dorsey Testimony at 3. Indeed, “[i]ndependent researchers and some investors long have criticized the company for not acting more aggressively to address what many considered a rampant problem with bots, trolls and other accounts used to amplify disinformation.” Craig Timberg and Elizabeth Dwoskin, *Twitter Is Sweeping Out Fake Accounts Like Never Before, Putting User Growth at Risk*, Wash. Post, July 6, 2018.

²⁴ Roth and Harvey, *supra* note 21 (explaining that Twitter has developed “machine learning tools that identify and take action on networks of spammy or automated accounts automatically[, letting the company] tackle attempts to manipulate conversations on Twitter at scale, across languages and time zones, without relying on reactive reports”).

²⁵ *Id.*

²⁶ See *id.*

²⁷ Matt Elliot, *Why You Are at Risk If You Use SMS for Two-Step Verification*, CNet.com, July 23, 2017, <https://www.cnet.com/how-to/why-you-are-at-risk-if-you-use-sms-for-two-step-verification/>.

²⁸ Roth and Harvey, *supra* note 21.

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In addition to combatting automated behavior, Twitter actively monitors the substance of the conversations it hosts to ensure compliance with its rules. Of particular relevance is Twitter's hateful conduct policy which states:

Repeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone. We prohibit targeting individuals with repeated slurs, tropes or other content that intends to dehumanize, degrade or reinforce negative or harmful stereotypes about a protected category. . . .

When determining the penalty for violating this policy, we consider a number of factors including, but not limited to the severity of the violation and an individual's previous record of rule violations. For example, we may ask someone to remove the violating content and serve a period of time in read-only mode before they can Tweet again.²⁹

Compliance with these rules is critical to Twitter's business success. "Marketers are mindful of the backlash they can face on social media when customers feel they advertised in offensive content."³⁰ Major online advertisers – "the main source of revenue for the company"³¹ – have insisted that "tech companies . . . do more to minimize divisive content on their platforms."³² "Brand safety," in particular, "has been top of mind," and hundreds of advertisers have discontinued their advertising when it was "running next to objectionable content that promoted racism" or other controversial material.³³

For example, Unilever – which spent \$2.4 billion in 2017 for online marketing of its brands like Lipton tea, Dove soap, Axe body spray and Ben & Jerry's ice cream – has "called on Silicon Valley . . . to better police . . . a toxic online environment where propaganda, hate speech and disturbing content" exists.³⁴ In fact, Unilever has indicated that it will only work with companies like Google and Twitter if they "promise to boost more 'responsible content'" and "improve consumer ad experiences."³⁵ Procter & Gamble has similarly expressed to Twitter and others that it "simply will not accept or take the chance that [its] ads are associated with

²⁹ Twitter, *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

³⁰ Suzanne Vranica, 'Shooting,' 'Bomb,' 'Trump': Advertisers Blacklist News Stories Online, Wall Street Journal, Aug. 15, 2019, <https://www.wsj.com/articles/advertisers-blacklist-hard-news-including-trump-fearing-backlash-11565879086?mod=searchresults&page=1&pos=2>.

³¹ Timberg and Dvoskin, *supra* note 23; Trefis Team, *Twitter's Monetization Issues Don't Appear To Be Going Away*, Forbes.com, June 30, 2017, <https://www.forbes.com/sites/greatspeculations/2017/06/30/twitters-monetization-issues-dont-appear-to-be-going-away/#3cdcfe507835>.

³² Hamza Shaban, *Giant Advertiser Unilever Threatens to Pull Its Ads from Facebook and Google over 'Toxic Content'*, Los Angeles Times, Feb. 12, 2018, <http://www.latimes.com/business/technology/la-fi-tn-unilever-ads-google-facebook-20180212-story.html>.

³³ Lauren Johnson, *Facebook Is Making Its Biggest Play to Improve Brand Safety, But Is It Enough to Gain Marketers' Trust?*, Ad Week, Sept. 13, 2017, <https://www.adweek.com/digital/facebook-is-making-its-biggest-play-to-improve-brand-safety-but-is-it-enough-to-gain-marketers-trust/>; see also Garrett Sloane, *Twitter Begins Purging Offensive Tweets, Is Testing a Mute Button*, Ad Age, Apr. 16, 2019, <https://adage.com/article/digital/twitter-begins-purging-offensive-tweets-testing-mute-button/2165076> (explaining that "Advertisers are concerned about the Twitter environment, because brands don't want to appear on the same screen as offensive messages").

³⁴ Shaban, *supra* note 32.

³⁵ *Id.*

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violence, bigotry or hate.”³⁶ The company, “which spends billions of dollars every year marketing products from paper towels to shampoo, [stated that it] would move its money to services that [are not only] completely free of offensive content,”³⁷ but that “have more civility when it comes to editorial content, so [that] we have a civil internet.”³⁸ Companies continue to underscore that they will take their advertising dollars elsewhere if a platform does not do more to address controversial and offensive speech.³⁹ By focusing on healthy conversations and combating abuse, Twitter’s audience has grown substantially and analysts have noted a commensurate increase in the company’s revenue and profits.⁴⁰

Importantly, Twitter’s automated spam processes and its efforts to address harmful speech are not motivated by a desire to influence any election. In sworn testimony before Congress, Twitter CEO Jack Dorsey confirmed that Twitter does not “consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period.”⁴¹ He recently reaffirmed that Twitter works to “ensure that all decisions are made without using political viewpoints, party affiliation, or political ideology, whether related to automatically ranking content on our service or how we develop or enforce the Twitter Rules. Our Twitter Rules are not based on ideology or a particular set of beliefs.”⁴² Indeed, as Mr. Dorsey noted, the very “purpose of Twitter is to serve the public conversation, and [the company] does not make value judgments based on personal beliefs.”⁴³ In fact, “from a simple

³⁶ Barrett Brunsman, *P&G to YouTube: Don’t Pair Our Ads with Terrorist Propaganda – or Cat Videos*, Cincinnati Business Courier, Sept. 25, 2017, <https://www.bizjournals.com/cincinnati/news/2017/09/25/p-g-to-youtube-don-t-pair-our-ads-with-terrorist.html>. Companies like Prudential, Coca-Cola, Wal-Mart Stores Inc., Starbucks Corp. and General Motors Co. also have suspended their online advertising where, among other things, their ads appeared with racist and anti-Semitic content. See Jack Nicas, *Google’s YouTube Has Continued Showing Brands’ Ads With Racist and Other Objectionable Videos*, Wall Street Journal, Mar. 24, 2017, <https://www.wsj.com/articles/googles-youtube-has-continued-showing-brands-ads-with-racist-and-other-objectionable-videos-1490380551>; *Firms Withdraw BNP Facebook Ads*, BBC.com, Aug. 3, 2007, http://news.bbc.co.uk/2/hi/uk_news/politics/6929161.stm.

³⁷ Gerrit de Vynck, *Procter & Gamble Puts Digital Ad Platforms Like Facebook and Google on Notice*, Los Angeles Times, Apr. 11, 2019, <https://www.latimes.com/business/la-fi-pg-digital-ads-facebook-google-20190411-story.html>.

³⁸ Julia Boorstin, *If Facebook and Google Don’t Fix Their Problems, Advertising Execs Say They Could Go Somewhere Else*, CNBC.com, June 21, 2019, <https://www.cnbc.com/2019/06/21/facebook-and-google-face-scrutiny-from-ad-execs-at-cannes.html>.

³⁹ See, e.g., *Coca Cola Joins Facebook, Twitter Ad Boycott Over Hate Speech Content*, CBS5.com, June 27, 2020, <https://sanfrancisco.cbslocal.com/2020/06/27/coca-cola-joins-facebook-twitter-ad-boycott-over-hate-speech-content/>.

⁴⁰ Seth Fiegerman, *Twitter’s Audience Is Growing Again As It Works to Combat Abuse*, CNN.com, Apr. 23, 2019, <https://www.cnn.com/2019/04/23/tech/twitter-q1-earnings/index.html>.

⁴¹ *Twitter: Transparency and Accountability: Hearing Before the H. Comm. on Energy and Commerce*, 115th Cong. 12 (2018) (Statement of Jack Dorsey, CEO, Twitter, Inc.), <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Transcript-20180905.pdf>.

⁴² *Breaking the News: Censorship, Suppression, and the 2020 Election: Hearing Before the Senate Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Jack Dorsey, Chief Executive Officer, Twitter, Inc. at 3), <https://www.judiciary.senate.gov/imo/media/doc/Dorsey%20Testimony.pdf>; see also *Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 116th Cong. (2020) (testimony of Jack Dorsey, Chief Executive Officer, Twitter, Inc. at 2), <https://www.commerce.senate.gov/services/files/7A232503-B194-4865-A86B-708465B2E5E2>.

⁴³ Dorsey Testimony at 11.

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business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform.”⁴⁴

Twitter has applied its anti-spam measures across the platform. For example, Twitter suspended 70 accounts supporting the campaign of Democratic presidential candidate Michael Bloomberg for spam-like behavior after determining that the campaign’s employees were posting identical text, images, links, and hashtags from numerous Twitter accounts.⁴⁵ Twitter also took similar action against accounts purportedly belonging to black supporters of President Trump’s re-election campaign.⁴⁶ In that case, Twitter determined that the photos on the account did not match the account names and the messages – e.g., “YES IM BLACK AND IM VOTING FOR TRUMP!!!” – were virtually identical across all the accounts.⁴⁷ In other words, major party-related accounts are affected by these policies in the same way as unaffiliated individuals and the minor parties they may support.

II. Background on Matthew Rafat

Mr. Rafat describes himself as an “unaffiliated individual and amateur journalist.”⁴⁸ Mr. Rafat runs a blog, <https://willworkforjustice.blogspot.com/>, where he occasionally posts about various topics.⁴⁹ Some, but not all, of the posts on this site focus on criticism of the Catholic Church. For example:

[M]ainstream Christianity, especially Catholicism, appears nothing more than a political movement with tax-exempt status and private nepotism using public funds. . . . Men will never be free until the last king is strangled with the entrails of the last Catholic priest.⁵⁰

Mr. Rafat created a Twitter account in October 2011.⁵¹ During the intervening decade, he has accumulated 112 followers.⁵² As with his blog, some of Mr. Rafat’s Tweets have criticized Catholicism. For example:

If you are not #Catholic, re-consider attending any Catholic functions or institutions, including colleges. The "religion as nepotism" strategy probably won't work for you. . . .

⁴⁴ *Id.* at 1.

⁴⁵ Suhauna Hussain & Jeff Bercovici, *Twitter Is Suspending 70 Pro-Bloomberg Accounts, Citing ‘Platform Manipulation’*, Los Angeles Times, Feb. 21, 2020, <https://www.latimes.com/business/technology/story/2020-02-21/twitter-suspends-bloomberg-accounts>.

⁴⁶ *Twitter Suspends Accounts Claiming to Be Black Trump Supporters over Spam, Manipulation*, Reuters, Oct. 13, 2020, <https://www.reuters.com/article/us-usa-twitter-disinformation/twitter-suspends-accounts-claiming-to-be-black-trump-supporters-over-spam-manipulation-idUSKBN26Y2ZM>.

⁴⁷ *Id.*; see also Ben Collins, *Viral Pro-Trump Tweets Came from Fake African American Spam Accounts, Twitter Says*, NBC News, Aug. 27, 2020, <https://www.nbcnews.com/tech/security/viral-pro-trump-tweets-came-fake-african-american-spam-accounts-n1238553> (noting the rise in “copy-pasta” during the 2020 election, where the “repeated posting of a single string of text [is] used to troll or simulate support”).

⁴⁸ Compl. 1.

⁴⁹ *Id.* at 2.

⁵⁰ *Religion: Understanding the Abrahamic Trilogy*, Quiet Highway: Saga of a Gentleman (Sept. 23, 2020), <https://willworkforjustice.blogspot.com/2020/09/religion-understanding-abrahamic-trilogy.html> (internal quotation marks omitted).

⁵¹ See Matthew Rafat (@matthewrafat), Twitter, <https://twitter.com/matthewrafat>.

⁵² See *id.*

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#Catholics #CatholicTwitter #racism⁵³

And:

The Catholics already control a majority on the Supreme Court and Trump wants to add another? Where's a second Protestant Reformation--or a French Revolution when you need one?⁵⁴

And finally:

When a systematic coverup of child molestation occurs at the highest ranks of a *centralized* org, its members are either apathetic or amoral if they continue to fund the same organization. In this case, the same org also produced Hitler, Joseph McCarthy, & pro-war priests.⁵⁵

On September 21 and 23, Twitter's automated processes suspended Mr. Rafat's account for spam-like behavior. Apparently, and despite an initial reluctance to provide his mobile phone number, Mr. Rafat ultimately supplied information sufficient enough for Twitter to authenticate his account and restore access.

Then, on October 8, Mr. Rafat Tweeted the following message:

@davidminpdx Uncle Tom. In one of Malcom X's speeches, he calls the Chinese Revolution a Revolution against Uncle Tom Chinese.⁵⁶

As on many other occasions,⁵⁷ Twitter flagged the "Uncle Tom" references in the Tweet as potential violations of the company's hateful conduct policy.⁵⁸ Here, Mr. Rafat directed the first "Uncle Tom" reference at another user rather than – as with the second reference – integrating it into an academic discussion. As a result, Twitter suspended Mr. Rafat's account for 12 hours, just as it has done in many similar cases. At the conclusion of this temporary suspension, Twitter required Mr. Rafat to delete the offending Tweet to regain access to his account. Mr. Rafat has yet to do so, and his account remains suspended.

⁵³ Matthew Rafat (@matthewrafat), Twitter (Oct. 5, 2020, 2:46 P.M.), <https://twitter.com/matthewrafat/status/1313188766022987777>.

⁵⁴ Matthew Rafat, (@matthewrafat), Twitter (Sept. 25, 2020, 5:55 P.M.), <https://twitter.com/matthewrafat/status/1309612447821488129>.

⁵⁵ Matthew Rafat, (@matthewrafat), Twitter (Sept. 21, 2020, 10:19 P.M.), <https://twitter.com/matthewrafat/status/1308229427025723393>.

⁵⁶ Compl. at 7.

⁵⁷ See, e.g., Elie Mystal, *That Time I Got Suspended on Twitter For Calling Kanye West an 'Uncle Tom' and Other Things*, AboveTheLaw.com, May 2, 2018, <https://abovethelaw.com/2018/05/that-time-i-got-suspended-on-twitter-for-calling-kanye-west-an-uncle-tom-and-other-things/>; see also Tanasia Kenney, *Sportscaster Who Called Sen. Tim Scott 'Uncle Tom' Is Out of a Job, CT Station Says*, The State, Oct. 2, 2020, <https://www.thestate.com/news/nation-world/national/article246172055.html> (explaining that an Emmy-winning sportscaster was fired for an "Uncle Tom" Tweet critical of Senator Tim Scott).

⁵⁸ See Twitter, *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

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As a general statutory matter, corporations are prohibited from making a “contribution” and are otherwise regulated when making an “expenditure” in connection with a federal election.⁵⁹ 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.”⁶⁰ Similarly, the term “expenditure” means “anything of value, made by any person *for the purpose of influencing any election* for Federal office.”⁶¹

A corporate “expenditure” that is coordinated with a candidate may also be regulated as a prohibited “contribution.” Specifically, federal law “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.⁶²

The terms “contribution” and “expenditure” both contain an exemption for “any news story, commentary, [or] editorial.”⁶³ In particular, this media exemption applies when an entity engaging in an activity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) is acting as a media entity when conducting its activities.⁶⁴

DISCUSSION

I. **Twitter Did Not Make a Corporate Contribution Regulated by the FECA.**

The complaint alleges that Twitter made prohibited contributions to the presidential campaigns of Vice President Biden and President Trump by suspending Mr. Rafat’s Twitter account “to prevent independent political commentary . . . from independent sources re: the [October 7, 2020] VP debate.”⁶⁵ The complaint also alleges that the suspension hindered Mr. Rafat’s efforts to “promot[e] the attempts of any minor party to gain at least 5% of the national vote.”⁶⁶

The complaint is without merit for numerous reasons, most notably that to be regulated as a contribution or expenditure, an activity must be “for the purpose of influencing an election.”⁶⁷ 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,

⁵⁹ 52 U.S.C. § 30118.

⁶⁰ *Id.* § 30101(8)(A) (emphasis added).

⁶¹ *Id.* § 30101(9)(A) (emphasis added).

⁶² First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

⁶³ See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

⁶⁴ See FEC Adv. Op. 2016-01 (Ethiq); *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁶⁵ Compl. at 3.

⁶⁶ *Id.*

⁶⁷ 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’”).

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do not qualify as regulated contributions.⁶⁸ 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].”⁶⁹

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.⁷⁰ 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 the account security services.⁷¹ 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.”⁷²

Commissioners and FEC staff have also recognized the authority of Twitter, in particular, to control content and access to its platform. In their words, “Twitter controls the terms by which users may access the website,” the company “maintains the right to restrict content on its website,”⁷³ and “Twitter maintains ownership interests in software . . . and retains the right to ‘remove or refuse to distribute any content on its services, suspend or terminate users, and reclaim usernames.’”⁷⁴

Here, Twitter’s decision to suspend Mr. Rafat’s account was not rooted in a desire to oppose his political views in connection with an election. Instead, Twitter’s anti-spam rules and enforcement mechanisms affect all accounts – Republican, Democratic, and non-partisan

⁶⁸ 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).

⁶⁹ 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).

⁷⁰ FEC Adv. Op. 2018-11 (Microsoft).

⁷¹ *Id.*

⁷² FEC Adv. Op. 2017-06 (Stein and Gottlieb).

⁷³ Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016).

⁷⁴ FEC Adv. Op. 2017-05 (Great America PAC) (internal brackets omitted). Likewise, in the enforcement context, the Commission’s Office of General Counsel has noted without disapproval that Twitter “maintains the right to restrict content on [its] website.” First General Counsel’s Report, MUR 6911 (Lois Frankel for Congress et al.), at 4 & n.14 (Sept. 3, 2015) (citing Twitter’s Terms of Service). Similarly, the Office of General Counsel has referenced Twitter’s reservation of its “right at all times . . . to remove or refuse to distribute any Content on the Services[and] to suspend or terminate users.” *Id.* at 5 n.17.

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alike – when any of them exhibit automated behavior or contain hateful content like references to “Uncle Tom.”⁷⁵ To protect the overall quality of the discourse on its platform, Twitter imposed limited suspensions of Mr. Rafat’s account. Twitter did not suspend the account to prevent Mr. Rafat from communicating with his 112 followers about the vice-presidential debate or to otherwise influence an election.⁷⁶ In fact, Mr. Rafat could have regained control of his account, and resumed Tweeting to his followers, by deleting the offending Tweet. But he didn’t. The continued suspension of Mr. Rafat’s account is his own doing.

In short, Twitter’s suspension of Mr. Rafat’s account was a ministerial business action, not an attempt to influence an election. Therefore, the suspension cannot qualify as a regulated contribution. The Commission need not examine the complaint any further and should dismiss it altogether. For the sake of completeness, however, we explain below how the Commission can dismiss the complaint for several other, equally compelling reasons.

First, Twitter qualifies for the so-called media exemption from federal campaign finance law. This provision 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.⁷⁷ The exemption excepts from regulation “any cost incurred in covering or carrying” news stories⁷⁸ and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address.”⁷⁹ 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,⁸⁰ as well as websites that curate news content.⁸¹

There is no doubt Twitter is a media company pursuant to the media exemption. Twitter “live-stream[s] congressional hearings and political events, providing the public access to important developments in our democracy.”⁸² Twitter also has emphasized news content and is using algorithmically and human-curated timelines to feature “tweets from news organizations and users that are not news professionals . . . to make it easier for everyone to find relevant

⁷⁵ See, e.g., *Why African-Americans Loathe 'Uncle Tom'*, NPR.com, July 30, 2008, <https://www.npr.org/templates/story/story.php?storyId=93059468>; Clifford Thompson, *Dear White People: Stop Using the Term 'Uncle Tom'*, Wash. Post, Nov. 16, 2018, https://www.washingtonpost.com/outlook/dear-white-people-stop-using-the-term-uncle-tom/2018/11/15/8a68e9c0-e84e-11e8-a939-9469f1166f9d_story.html.

⁷⁶ Notably, even though Mr. Rafat Tweeted more than 35 times about the vice-presidential debate, his posts generated 1 like and 0 Retweets.

⁷⁷ See *supra* at 9.

⁷⁸ 11 C.F.R. § 100.73.

⁷⁹ 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).

⁸⁰ 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”).

⁸¹ 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”).

⁸² See Dorsey Testimony at 2.

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news and the surrounding conversation so they can stay informed about what matters to them.”⁸³

In addition, Twitter’s decisions to host accounts and their content on its platform – and to suspend accounts, if necessary – is part of the media’s role in choosing between “competing claims of parties” and which content “to feature, investigate or address in news, editorial and opinion coverage.”⁸⁴ Indeed, decisions about what content to disseminate to Twitter users is at the very heart of the media function.⁸⁵

Finally, because Twitter is not owned or controlled by a political party, political committee, or candidate,⁸⁶ it also satisfies the third and final element of the media exemption. Therefore, Twitter’s decision to suspend Mr. Rafat’s account was not a contribution.

Moreover, Twitter 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,”⁸⁷ and the First Amendment safeguards the “choice of material . . . [that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.”⁸⁸ Thus, for example, a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude.⁸⁹ 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.”⁹⁰

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.⁹¹ Corporate “[s]peech is an essential mechanism of democracy,”⁹² and “political speech does not lose First Amendment protection simply because its source is a corporation.”⁹³ “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.”⁹⁴

Here, Twitter exercised its well-established First Amendment right to refrain from disseminating content – and, in turn, publicly associating with speakers – Twitter finds objectionable. Federal campaign finance law cannot proscribe Twitter’s decision to suspend Mr. Rafat’s account for using the “Uncle Tom” language without running directly into these

⁸³ Kantrowitz, *supra* note 16; see also Eule, *supra* note 16 (explaining that “much of the most relevant election news breaking [in 2016 is] on the [Twitter] service”).

⁸⁴ 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).

⁸⁵ See FEC Adv. Op. 2016-01.

⁸⁶ See *supra* at 2.

⁸⁷ *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

⁸⁸ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

⁸⁹ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)

⁹⁰ *Hurley*, 515 U.S. at 559.

⁹¹ *Citizens United v. FEC*, 558 U.S. 310, 371-72 (2010).

⁹² *Id.* at 339.

⁹³ *Id.* (internal quotation mark omitted).

⁹⁴ *Id.* at 343 (internal quotation marks omitted).

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durable First Amendment protections and infringing on Twitter's fundamental freedoms. While it is not necessary to reach these constitutional issues to resolve this matter, the Commission would be well served to construe its regulations to avoid infringing upon such fundamental freedoms.⁹⁵

Second, even if the First Amendment and the media exception did not apply, and even if Twitter's actions were "for the purpose of influencing" an election – neither of which is true – the complaint *still* would fail because Twitter did not act in coordination with the Biden and Trump presidential campaigns to suspend Mr. Rafat's account.

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."⁹⁶ The complaint does not allege that coordination occurred. Nor could it. The decision to suspend the account 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 or Trump campaigns, as prescribed by the Commission's coordination regulations.⁹⁷ Without coordination, any possible expenditure by Twitter cannot be converted into a regulated contribution.

Third, because Twitter's services are offered for free, and the definitions of contribution and expenditure are predicated on providing something of value, the decision to suspend Mr. Rafat's account cannot result in Twitter making a regulated contribution or expenditure subject to sanction under federal campaign finance law.⁹⁸

II. The Communications Decency Act Immunizes Twitter from Liability.

Finally, Twitter's decision to suspend Mr. Rafat's Twitter account 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

⁹⁵ 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").

⁹⁶ See *supra* at 9.

⁹⁷ 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, <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).

⁹⁸ Cf. Matter Under Review 6911 (Lois Frankel for Congress), Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016) (noting that "Twitter is a free service that does not charge users to create accounts, display profiles, or send tweets"); see also First General Counsel's Report, MUR 6911 (Lois Frankel for Congress et al.), at 3 (Sept. 3, 2015) (noting same).

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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 CDA bars legal action “seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content” created by third parties.⁹⁹ Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal theories.¹⁰⁰ 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.”¹⁰¹

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.”¹⁰² These criteria are met here.

First, Twitter is an “Interactive Computer Service” within the meaning of the statute.¹⁰³ *Second*, the communications at issue were provided by another information content provider, Mr. Rafat. *Third*, Mr. Rafat challenges Twitter’s decision to remove content from the platform.

In applying this third criterion, 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.”¹⁰⁴ It is well-established that the removal of content and decisions about what content to include or block are inextricably bound up in the

⁹⁹ *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

¹⁰⁰ 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.’”).

¹⁰¹ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

¹⁰² *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 134 (2018).

¹⁰³ See, e.g., *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1166, 1121 (N.D. Cal. 2016) (noting that no party “dispute[s] that Twitter is an interactive computer service provider”); *Frenken v. Hunter*, 2018 WL 1964893, at *2 (N.D. Cal. Apr. 26, 2018) (same). Courts have stated that “the prototypical service qualifying for this statutory immunity is an online messaging board . . . on which Internet subscribers post comments and respond to comments posted by others.” *Jefferson v. Zuckerberg*, 2018 WL 3241343, at *5.

¹⁰⁴ *Barnes*, 570 F. 3d at 1102 (noting that “it is immaterial whether this decision comes in the form of deciding what to publish in the first place or what to remove among the published material”); *Joseph v. Amazon.com, Inc.*, 46 F. Supp. 3d 1095, 1106 (W.D. Wash. 2014) (“Whether the website operator removes certain reviews, publishes others, or alters content, it is still entitled to CDA immunity, since those activities constitute a publisher’s traditional editorial functions”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (“Decisions relating to the monitoring, screening, and deletion of content [are] actions quintessentially related to a publisher’s role”); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (“[P]ublisher’ 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”).

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role of publisher and is thus “immunized by the CDA.”¹⁰⁵ Indeed, courts have concluded that “*providing accounts . . . is publishing activity*” subject to CDA immunity.¹⁰⁶ Thus, Twitter’s suspension of Mr. Rafat’s account is precisely the type of conduct immunized by the CDA, which wholly bars Mr. Rafat’s claims.

CONCLUSION

Twitter is committed to maintaining a robust platform for all citizens – be they liberal, conservative, or somewhere in between – to engage and debate public issues, including those involving political candidates and policies. As part of this commitment, Twitter continually works to improve the user experience by eliminating automated and offensive content. Mr. Rafat’s account exhibited both, so Twitter suspended the account (which Mr. Rafat can choose to reactivate at any time) to address these business concerns and not to influence an election. Furthermore, Twitter’s actions were consistent with its editorial functions as a media entity, the company’s First Amendment right to choose the messages it will disseminate and the persons with whom it will associate, and its statutorily-conferred rights under section 230 of the CDA.

At bottom, the complaint describes a garden variety customer service issue, not a campaign finance violation. Accordingly, the Commission should find no reason to believe that Twitter violated the FECA and should dismiss this matter.

Sincerely,



Caleb P. Burns
Andrew G. Woodson

¹⁰⁵ *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

¹⁰⁶ *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 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”).