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December 14, 2020

**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 7832 (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 Anna Paulina Luna for Congress, the campaign committee of Ms. Anna Paulina Luna.

The complaint's central allegation is that Twitter violated the Federal Election Campaign Act of 1971, as amended ("FECA"), by refusing to "verify" Ms. Luna's Twitter account. Verification is a process Twitter undertakes to confirm the authenticity of certain accounts.

Twitter includes a checkmark symbol, , by each verified account. The complaint alleges that Twitter made a prohibited corporate contribution to Ms. Luna's campaign opponent when Twitter did not verify Ms. Luna's account.

The complaint is meritless. Rather than attempting to influence any election, Twitter declined to verify Ms. Luna's account because – prior to even becoming a candidate – she had

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previously violated Twitter's User Agreement, including the Twitter Rules and incorporated policies. Twitter's verification rules – that Twitter informed Ms. Luna of multiple times, and which she acknowledges – prohibit verification of candidate accounts that have violated Twitter's policies.

Both the FECA and Commission precedent confirm that activities undertaken by a business for non-political reasons – such as the application of politically neutral rules that encourage respect for Twitter's Rules and policies – are not “for the purpose of influencing an election” and, therefore, do not qualify as regulated contributions or expenditures under the law. Accordingly, Twitter respectfully requests that the Commission find no reason to believe that Twitter made an impermissible contribution when it declined to verify Ms. Luna's account.

Separately, as a media entity under the FECA, Twitter is entitled to rely upon both the FECA's media exemption as well as general First Amendment principles to choose – without regulatory second-guessing – the content that Twitter will verify on its platform. Moreover, the Communications Decency Act wholly immunizes Twitter's good faith actions in this regard. The Commission should find no reason to believe Twitter violated the FECA for these reasons too and dismiss the matter.

In addition, and without any jurisdictional or legal basis, the complaint claims the FEC should proceed against Twitter for violating the “Equal Time” requirements of the Communications Act. First, the Communications Act is outside the FEC's jurisdiction. Second, the “Equal Time” requirements only apply to broadcasters, not web-based platforms like Twitter. The Commission should dismiss this portion of the complaint as well.<sup>1</sup>

## **FACTUAL BACKGROUND**

### **I. Background on Twitter**

Twitter was incorporated in Delaware in April 2007.<sup>2</sup> While its principal offices are in San Francisco, California, the company has approximately 4,900 full-time employees and 35 offices worldwide.<sup>3</sup> Twitter also has 187 million monetizable daily active users and is a popular social media network around the world.<sup>4</sup> The company is publicly traded and had quarterly revenues of more than \$936 million in Q3 of 2020.<sup>5</sup> A listing of Twitter's board members is available on

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<sup>1</sup> The complaint also makes a passing reference to an alleged history of Twitter shadow banning Republican officials. See Compl. at 4-5. Not only does such a fleeting allusion fail to “describe a violation of a statute or regulation over which the Commission has jurisdiction,” 11 C.F.R. § 111.4(d)(3), but Twitter has already addressed these claims in its response to Matter Under Review 7443. If the Commission believes this or any other portion of the complaint in this matter merits additional attention, we are available to supplement this response.

<sup>2</sup> Twitter, *2018 Annual Report*, <http://www.viewproxy.com/Twitter/2018/AnnualReport2017.pdf>.

<sup>3</sup> 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](https://about.twitter.com/en_us/company.html).

<sup>4</sup> 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, at <https://www.businessinsider.com/twitter-q3-2020-earnings-jack-dorsey-2020-10>.

<sup>5</sup> See *id.*

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the company's website.<sup>6</sup> None of the board members are candidates for federal office 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.<sup>7</sup> All 100 senators, 50 governors, and nearly every Member of the House of Representatives reach their constituents through Twitter accounts,<sup>8</sup> with conservatives, in particular having “a strong presence on Twitter.”<sup>9</sup> Indeed, a study earlier this year concluded that “Twitter broadly represents the entire spectrum of ideologies,” with “more conservative opinion leaders on the platform than liberal ones.”<sup>10</sup>

Twitter's purpose is to serve the public conversation.<sup>11</sup> At its core, Twitter “stands for freedom of expression”<sup>12</sup> and the principle that “every voice has the power to impact the world.”<sup>13</sup> Twitter has been called a “powerful tool for democracy,”<sup>14</sup> 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.”<sup>15</sup>

To further advance these ideals, Twitter “live-stream[s] congressional hearings and political events, providing the public access to important developments in our democracy.”<sup>16</sup> 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.”<sup>17</sup> In fact, “[o]ne of the

<sup>6</sup> Twitter, *Board of Directors*, <https://investor.twitterinc.com/corporate-governance/board-of-directors>.

<sup>7</sup> 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/>.

<sup>8</sup> 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”).

<sup>9</sup> *Id.* at 6.

<sup>10</sup> Subhayan Mukerjee *et al.*, *Our Study Found Little Evidence That Twitter Is Biased Against Conservative Opinion Leaders*, Wash. Post, July 9, 2020, <https://www.washingtonpost.com/politics/2020/07/09/our-study-found-little-evidence-that-twitter-is-biased-against-conservative-opinion-leaders/>.

<sup>11</sup> Twitter, *The Twitter Rules*, <https://help.twitter.com/en/rules-and-policies/twitter-rules>.

<sup>12</sup> 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](https://blog.twitter.com/official/en_us/topics/events/2017/national-voter-reg-day-2017.html).

<sup>13</sup> Twitter, *Our Values*, [https://about.twitter.com/en\\_us/values.html](https://about.twitter.com/en_us/values.html).

<sup>14</sup> 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>.

<sup>15</sup> 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/>.

<sup>16</sup> See Dorsey Testimony at 2.

<sup>17</sup> 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->

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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.”<sup>18</sup> That is why 71% of Twitter users rely on the platform for news coverage.<sup>19</sup> In recognition of these facts, Twitter has even recategorized “itself from ‘social networking’ to ‘news’ in Apple’s App Store.”<sup>20</sup>

Since 2009, Twitter has employed a procedure to “verify” certain accounts.<sup>21</sup> Twitter initiated this process after concerns arose that impostors were impersonating high-profile users on the platform.<sup>22</sup> The company wanted to prevent Twitter’s misuse in ways that deceived users and the general public.<sup>23</sup>

For a time, Twitter opened its verification program to the general public, meaning that any Twitter user could submit an application to have his, her, or its account verified if it met Twitter’s criteria.<sup>24</sup> Under that process, a user could request verification which generally required satisfying, *inter alia*, the following criteria:

- The user should be both notable and active. Twitter places particular emphasis on the verification of accounts belonging to government officials, news organizations, notable athletes, prominent companies/brands, etc.;<sup>25</sup>
- The user must ensure that the account includes the user’s real name or “nom de plume;”
- The user’s Twitter avatar must be a real photo or the logo of a business;

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[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”).

<sup>18</sup> 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>.

<sup>19</sup> 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>.

<sup>20</sup> 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>.

<sup>21</sup> Biz Stone, *Not Playing Ball*, Twitter: Blog (June 6, 2009), [https://blog.twitter.com/official/en\\_us/a/2009/not-playing-ball.html](https://blog.twitter.com/official/en_us/a/2009/not-playing-ball.html).

<sup>22</sup> See *id.*

<sup>23</sup> See *id.*

<sup>24</sup> See @tinab, *Announcing an Application Process for Verified Accounts*, Twitter: Blog (July 19, 2016), [https://blog.twitter.com/official/en\\_us/a/2016/announcing-an-application-process-for-verified-accounts-0.html](https://blog.twitter.com/official/en_us/a/2016/announcing-an-application-process-for-verified-accounts-0.html).

<sup>25</sup> Twitter, *About Verified Accounts*, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts>.

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- The user must provide documentation to confirm the accountholder's identity (e.g., driver's license or passport); and
- The user must state in the application why the account should be verified, identify links to websites that verify the accountholder's identity, etc.<sup>26</sup>

Once Twitter verifies an account, Twitter adds a blue checkmark to the user's profile like in the following example:



Given “how quickly false information can spread (and information in general), it’s a good thing too to know whether someone really is a journalist or that really is the company’s official account.”<sup>27</sup> Unverified accounts, particularly when there are many of them, can sow confusion and lead users to a less-satisfying experience on the platform.<sup>28</sup>

While the verification process worked well for a while, there were challenges. Because “[v]erification has long been perceived as an endorsement,” the company wrote in 2017, concerns arose that Twitter was approvingly associating itself with accounts – such as those

<sup>26</sup> Sara Martin, *How to Get Verified Your Twitter Account*, Metricool.com, undated, <https://metricool.com/how-to-verify-twitter-account/>. Please note, however, that these criteria are currently obsolete. Twitter is revising the public verification process with input from the public and anticipates releasing more information about the new process in 2021.

<sup>27</sup> Craig Kanalley, *Why Twitter Verifies Users: The History Behind the Blue Checkmark*, Huffington Post, May 12, 2013, [https://www.huffpost.com/entry/twitter-verified-accounts\\_b\\_2863282](https://www.huffpost.com/entry/twitter-verified-accounts_b_2863282).

<sup>28</sup> Luke Stowe, *Verified Social Accounts Are More Important Than Ever*, Government Technology, May 22, 2015, <https://www.govtech.com/social/Verified-Social-Accounts-Are-More-Important-Than-Ever.html>.

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belonging to white supremacists – that were acting contrary to platform’s rules.<sup>29</sup> Accordingly, Twitter began a review of already-verified accounts, working to “remov[e] verification badges from users who violate[d] its rules,”<sup>30</sup> including users “who are famous for their racism or sexism or hate speech.”<sup>31</sup> Twitter emphasized that currently-unverified Twitter users were ineligible for verified status if they were “[a]ccounts of individuals or groups associated with coordinated harmful activity, or hateful content as defined in Twitter’s Ads Policies.”<sup>32</sup>

Twitter also updated its verification guidelines to explain that hateful “conduct could cost someone their blue checkmark, whether it takes place via tweet or offline.”<sup>33</sup> “The new guidelines [were] an attempt by the company to put forth a universal set of criteria for verified status, in order to avoid confusion, establish company values and prevent abuse on the platform.”<sup>34</sup> Twitter was motivated by its users’ “heightened outrage over the little blue checkmarks,” particularly as to their issuance to controversial figures,<sup>35</sup> and the importance marketers place on Twitter and others to “do more to minimize divisive content on their platforms” or risk losing advertising dollars.<sup>36</sup> Major online advertisers – “the main source of revenue for the company”<sup>37</sup> – have specifically insisted that “tech companies . . . do more to minimize divisive content on their platforms.”<sup>38</sup> “Brand safety,” in particular, “has been top of mind,” with hundreds of advertisers yanking or freezing ads “running next to objectionable content that promoted racism” or other controversial material.<sup>39</sup> For example, Procter & Gamble has expressed to Twitter and others that it “simply will not accept or take the chance that [its] ads are associated with violence, bigotry or hate.”<sup>40</sup>

<sup>29</sup> Casey Newton, *Twitter Says It Will Remove Verification Badges from Accounts That Violate Its Rules*, The Verge, Nov. 15, 2017, <https://www.theverge.com/2017/11/15/16658600/twitter-verification-badge-rules-harassment>.

<sup>30</sup> *Id.*

<sup>31</sup> April Glaser, *Twitter Unverified a Bunch of White Nationalists and Anti-Muslim Activists*, Slate.com, Nov. 15, 2017, <https://slate.com/technology/2017/11/twitter-unverified-a-bunch-of-white-nationalists-and-anti-muslim-activists.html>.

<sup>32</sup> Twitter, *About Verified Accounts*.

<sup>33</sup> Lydia Belanger, *Twitter Says What You Do Offline Could Cost You Your ‘Verified’ Blue Checkmark*, Entrepreneur.com, Nov. 20, 2017, <https://www.entrepreneur.com/article/305006> (emphasis added).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Hamza Shaban, *Giant Advertiser Unilever Threatens to Pull Its Ads from Facebook and Google over ‘Toxic Content’*, Feb. 12, 2018, <http://www.latimes.com/business/technology/la-fi-tn-unilever-ads-google-facebook-20180212-story.html>.

<sup>37</sup> Craig Timberg and Elizabeth Dwoskin, *Twitter Is Sweeping Out Fake Accounts Like Never Before, Putting User Growth at Risk*, Wash. Post, July 6, 2018; Trefis Team, *Twitter’s Monetization Issues Don’t Appear To Be Going Away*, Forbes.com, June 30, 2017, <https://www.forbes.com/sites/greatspeculations/2017/06/30/twitters-monetization-issues-dont-appear-to-be-going-away/#3cdcf507835>.

<sup>38</sup> Shaban, *supra* note 36.

<sup>39</sup> Lauren Johnson, *Facebook Is Making Its Biggest Play to Improve Brand Safety, But Is It Enough to Gain Marketers’ Trust?*, Ad Week, Sept. 13, 2017, at <https://www.adweek.com/digital/facebook-is-making-its-biggest-play-to-improve-brand-safety-but-is-it-enough-to-gain-marketers-trust/>.

<sup>40</sup> 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



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In addition to implementing these guidelines, the company froze nearly all new verifications while it worked on improving the verification process and solicited public comments on how it might improve the process.<sup>41</sup> Excepted from the temporary freeze were political candidates and public health officials.<sup>42</sup> When it created these exceptions, Twitter reaffirmed that candidates must still “[c]omply with our Twitter Rules and Terms of Service”<sup>43</sup> – including Twitter’s policies against hateful conduct – in order to be verified.<sup>44</sup>

Importantly, Twitter’s process for verifying accounts was not then – and is not now – 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.”<sup>45</sup> 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.”<sup>46</sup> 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.”<sup>47</sup> In fact, “from a simple business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform.”<sup>48</sup>

Of particular note here, while Twitter worked hard to verify candidates in advance of the 2020 primary and general elections, candidates on *both* sides of the aisle raised issues with the

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Inc., Starbucks Corp. and General Motors Co. also have suspended their online advertising where, among other things, such ads were being matched up with racist and anti-Semitic content. See Jack Nicas, *Google’s YouTube Has Continued Showing Brands’ Ads With Racist and Other Objectionable Videos*, Wall Street Journal, Mar. 24, 2017, <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](http://news.bbc.co.uk/2/hi/uk_news/politics/6929161.stm).

<sup>41</sup> *Help Us Shape Our New Approach to Verification*, Twitter: Blog (Nov. 24, 2020), [https://blog.twitter.com/en\\_us/topics/company/2020/help-us-shape-our-new-approach-to-verification.html](https://blog.twitter.com/en_us/topics/company/2020/help-us-shape-our-new-approach-to-verification.html).

<sup>42</sup> Newton, *supra* note 29; Kim Lyons, *Twitter Is Working to Bring Back Verification*, The Verge, June 8, 2020, <https://www.theverge.com/2020/6/8/21284406/twitter-verified-back-badges-blue-check>.

<sup>43</sup> Bridget Coyne, *Helping Identify 2020 US Election Candidates on Twitter*, Twitter.com (rev. Feb. 28, 2020), [https://blog.twitter.com/en\\_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter.html](https://blog.twitter.com/en_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter.html).

<sup>44</sup> See Twitter, *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

<sup>45</sup> *Twitter: Transparency and Accountability: Hearing before the H. Comm. on Energy and Commerce*, 115th Cong. 12 (2018), (Statement of Jack Dorsey, Chief Executive Officer, Twitter, Inc.), <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Transcript-20180905.pdf>.

<sup>46</sup> *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>.

<sup>47</sup> Dorsey Testimony at 11.

<sup>48</sup> *Id.* at 1.

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verification process.<sup>49</sup> At least one outside observer of the verification process said that “she has not seen any evidence of bias against one party; she found Republicans and Democrats awaiting Twitter’s verification.”<sup>50</sup> And “a progressive Democrat running in California” complained that she had “reached out to Twitter to verify her active account with hundreds of followers multiple times, ‘with no response.’”<sup>51</sup>

## II. Background on Anna Paulina Luna

Anna Paulina Luna was the Republican candidate for Congress in Florida’s 13th Congressional District in 2020.<sup>52</sup> Ms. Luna filed her Statement of Candidacy with the Commission on September 4, 2019.<sup>53</sup> Her opponent in the general election was incumbent Democratic Representative Charlie Crist.<sup>54</sup>

Even before she became a candidate, Ms. Luna was “no stranger to controversy”<sup>55</sup> and had “a history of provocative statements that have landed her in hot water. She once compared Hillary Clinton to herpes during a Fox News interview, prompting the host to apologize to viewers.”<sup>56</sup> She was also labelled a “provocateur” for confronting Senator Kamala Harris at an airport and later saying that the Senator believes that “child rape and the slavery of Hispanic women and children is a joke.”<sup>57</sup> Ms. Luna has “notably faced sharp criticism for past social media posts, in which she related undocumented immigrants to a rise in human trafficking[] and jokingly compared Immigration and Customs Enforcement trucks to ice cream trucks.”<sup>58</sup> And a Fox News host even commented that Tweeting about Ms. Luna’s upcoming appearance on his

<sup>49</sup> Kim Lyons, *Twitter’s Messy Verification Process Is Making Candidates Wait*, The Verge, Feb. 21, 2020, <https://www.theverge.com/2020/2/21/21147563/twitter-verified-candidates-super-tuesday-elections-2020>.

<sup>50</sup> See *id.*

<sup>51</sup> Emily Birnbaum and Chris Mills Rodrigo, *Twitter Falling Short on Pledge to Verify Primary Candidates*, The Hill, Feb. 25, 2020, <https://thehill.com/policy/technology/484453-twitter-falling-short-on-pledge-to-verify-primary-candidates>; see also Aida Chavez, *Twitter Tips the Scale Toward Incumbents by Refusing to Verify Primary Challengers*, The Intercept, Oct. 11, 2019, <https://theintercept.com/2019/10/11/twitter-verification-2020-candidates-incumbents/> (cataloging a litany of Democratic candidates frustrated with Twitter’s verification procedures).

<sup>52</sup> Josh Solomon, *Republican Anna Paulina Luna Has a History of Clashing with Twitter*, Tampa Bay Times, Sept. 20, 2020, <https://www.tampabay.com/florida-politics/elections/2020/09/18/republican-anna-paulina-luna-has-a-history-of-clashing-with-twitter/>.

<sup>53</sup> See Anna Paulina Luna, *FEC Form 2 (Statement of Candidacy)*, <https://docquery.fec.gov/cgi-bin/forms/H0FL13158/1350634/>.

<sup>54</sup> See Solomon, *supra* note 52.

<sup>55</sup> “Green Conservative” Latina Seeks FL Congressional Seat, A View from the Right, Sept. 22, 2019, <https://aviewfromtheright.com/2019/09/22/green-conservative-latina-seeks-fl-congressional-seat/>.

<sup>56</sup> See Solomon, *supra* note 52.

<sup>57</sup> Benjamin Fearnow, *Watch: Kamala Harris, Aide Calmly Shut Down Persistent Turning Point USA Staffer at Airport*, Newsweek.com, Apr. 28, 2019, <https://www.newsweek.com/kamala-harris-airport-ambush-anna-paulina-provocateur-turning-point-usa-1407794>.

<sup>58</sup> Nik Popli, *Conservative Commentator Draws Backlash from Minority Students over Statements on Immigration*, Cavalier Daily, Dec. 11, 2018, <https://www.cavalierdaily.com/article/2018/12/conservative-commentator-draws-backlash-from-minority-students-over-statements-on-immigration>.



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show resulted in a vociferous backlash on Twitter.<sup>59</sup> Twitter has taken disciplinary action against Ms. Luna for her actions on the platform. Twitter's internal logs reflect that Ms. Luna was disciplined for posting abusive content on August 4, 2019.

Ms. Luna, who at that time “was not yet a candidate, [acknowledged that] her account was shut down for 13 hours [after a posting] and she was forced to delete the tweet before she could regain access.”<sup>60</sup> Her campaign spokesperson later admitted that “Twitter locked her out for violating the company’s guidelines pertaining to posting material dangerous to the community.” Instagram also reportedly blocked one of Ms. Luna’s posts earlier this year for violating its policies,<sup>61</sup> and there is a website that catalogues 32 alleged inaccuracies and other fallacies disseminated by Ms. Luna on Twitter.<sup>62</sup>

Both prior to and after the Republican primary, Ms. Luna contacted Twitter about verifying her account. As she readily acknowledges, Twitter repeatedly informed Ms. Luna that in “order to receive a verified badge, candidates . . . must [c]omply with our Twitter Rules and Terms of Service,” if “a Twitter account engages in, *or has engaged in*, activity that violates the Twitter rules, it may be ineligible for verification.”<sup>63</sup>

### THE LAW

Corporations are prohibited from making a “contribution” and are regulated in various ways when making an “expenditure” in connection with a federal election.<sup>64</sup> In relevant part, the term “contribution” is defined as “anything of value made by any person *for the purpose of influencing any election* for Federal office.”<sup>65</sup> Similarly, the term “expenditure” means “anything of value, made by any person *for the purpose of influencing any election* for Federal office.”<sup>66</sup>

Federal law also “provides that an expenditure made by any person ‘in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents’ constitutes an in-kind contribution” to that candidate.<sup>67</sup>

The terms “contribution” and “expenditure” both contain an exemption for “any news story, commentary, [or] editorial.”<sup>68</sup> This so-called media exemption applies when an entity is:

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<sup>59</sup> Kyle Beck, *Santa Visit at Harrods Could Cost How Much?*, Fox Business, Nov. 12, 2019, <https://www.foxbusiness.com/money/harrods-santa-visits-cost>; see also Tamar Auber, *Fox News Panel Goes Off the Rails After Guest Calls Trump’s LeBron Tweet ‘Borderline Racist’*, FoxNews.com (Aug. 4, 2018), at <https://www.mediaite.com/tv/watters-world-panel-goes-off-the-rails-after-guest-calls-trumps-lebron-tweet-borderline-racist/>.

<sup>60</sup> Solomon, *supra* note 52.

<sup>61</sup> See Anna Paulina Luna (@realannapaulina), Twitter (Apr. 20, 2020, 2:29 P.M.), <https://twitter.com/realannapaulina/status/1252303418053611523>.

<sup>62</sup> Blather, *Anna Paulina Luna*, <https://blather.io/pages/twitter/realannapaulina>.

<sup>63</sup> Compl., Attachments B, C, and D (emphasis added).

<sup>64</sup> 52 U.S.C. § 30118.

<sup>65</sup> *Id.* § 30101(8)(A) (emphasis added).

<sup>66</sup> *Id.* § 30101(9)(A) (emphasis added).

<sup>67</sup> First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

<sup>68</sup> See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

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(a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) performing a traditional media function.<sup>69</sup>

## **DISCUSSION**

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

The complaint first alleges that Twitter made a prohibited corporate contribution to Ms. Luna's opponent when the company refused to verify Ms. Luna's Twitter account.<sup>70</sup> This claim 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."<sup>71</sup> As both the courts and the Commission have made clear, activities undertaken for non-political business reasons are not "for the purpose of influencing an election" and, therefore, do not qualify as regulated contributions.<sup>72</sup> For example, in Advisory Opinion 2012-28 (CTIA), the Commission held that a business "may decide, for commercial reasons, to [provide services to] some political committees and not others" based on "eligibility criteria [designed] to protect the commercial viability of the [business]."<sup>73</sup>

More recently, the Commission applied these general principles to conclude that Microsoft's commercially reasonable efforts "to protect its brand reputation" did not amount to a prohibited in-kind contribution when the company provided election-sensitive customers with free account security services.<sup>74</sup> The Commission cited Microsoft's concern that its brand reputation would be "at risk of experiencing severe and long-term damage" in the absence of the account security services.<sup>75</sup> In addition, the Commission has explained that a technology company "need not make its services available to [candidates] representing all political

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<sup>69</sup> See FEC Adv. Op. 2016-01 (Ethiq); *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

<sup>70</sup> Compl. at 6-7.

<sup>71</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 80 (1976) (explaining that "the FECA regulates activity that is 'unambiguously related to the campaign of a particular federal candidate'").

<sup>72</sup> See, e.g., *Orloski v. FEC*, 795 F.2d 156, 160 (D.C. Cir. 1986); FEC Adv. Op. 2012-31 (AT&T) (finding no in-kind contribution where business's activity "reflects commercial considerations and does not reflect considerations outside of a business relationship"); FEC Adv. Op. 2012-22 (skimmerhat) (concluding that no contribution would result where company provided Internet services "on a commercial basis only" and where the company "has a vested commercial interest in seeking participation of users from all political parties and ideological backgrounds"); Factual & Legal Analysis in Matter Under Review 7163 (Citizens for Joe Miller) ("explaining that a thing of value given to a campaign is not a 'contribution' if it was not for the purpose of influencing an election"); Factual and Legal Analysis in MUR 6586 (World Wrestling Entertainment, Inc.) (finding no contribution where corporation's intent was to protect its business reputation).

<sup>73</sup> See also FEC Adv. Op. 1994-30 (Conservative Concepts, Inc.) (explaining that activity that is undertaken "for genuinely commercial purposes," among other relevant considerations, would not be a contribution or expenditure).

<sup>74</sup> FEC Adv. Op. 2018-11 (Microsoft).

<sup>75</sup> *Id.*

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ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the [candidates] that meet those criteria.”<sup>76</sup>

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,”<sup>77</sup> 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.’”<sup>78</sup>

Here, Twitter’s decision to not verify Ms. Luna’s account was not rooted in any desire to oppose her campaign. The initial suspension of her account – for posting abusive content – occurred *before* she became a candidate and was part of a larger pattern of controversial social media posts.<sup>79</sup> When Twitter adopted its updated verification policies in 2017, it made clear that the company did not want its imprimatur – indeed, what was perceived by some as the company’s formal seal of approval – on accounts with a history of violating Twitter’s Rules. Action by Twitter against users with a history of Rules violations was important to re-establish trust with Twitter users and to maintain the health and efficacy of the platform. As companies have repeatedly made clear this year, they are willing to take their advertising dollars elsewhere if an online platform does not do enough to combat controversial speech.<sup>80</sup>

Even before Ms. Luna became a candidate, she was “no stranger to controversy.”<sup>81</sup> Ms. Luna had “a history of [making] provocative statements” for which she was labelled a “provocateur.”<sup>82</sup> In so doing, she earned “sharp criticism for past social media posts,” including those on Twitter.<sup>83</sup> So when Ms. Luna made her request for verification, Twitter denied the request by applying its politically neutral verification rules designed to further the company’s user experience, reputation, and ultimately its brand and commercial success.

Rather than support her arguments, much of the Luna campaign’s complaint undercuts them and proves why Twitter’s decision was based on factors other than to influence an election. Most notably, the complaint acknowledges (at 2) that to be verified, an account “must . . . comply with Twitter’s Rules and Terms of Service.” As noted above,<sup>84</sup> Ms. Luna’s

<sup>76</sup> FEC Adv. Op. 2017-06 (Stein and Gottlieb).

<sup>77</sup> 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).

<sup>78</sup> 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.

<sup>79</sup> Popli, *supra* note 58.

<sup>80</sup> 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/>.

<sup>81</sup> “Green Conservative” Latina Seeks FL Congressional Seat, *supra* note 55.

<sup>82</sup> Fearnow, *supra* note 57.

<sup>83</sup> Popli, *supra* note 58.

<sup>84</sup> See *supra* at 9.

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campaign has admitted that she has violated those Rules. In addition, as support for its legal arguments, the Luna campaign cited to an article acknowledging that Twitter has been unable to verify every account and that the accounts of significant numbers of Democratic candidates – as well as Republican candidates – were not verified.<sup>85</sup>

For these reasons, the Commission need not proceed further and should dismiss the complaint's allegation that Twitter made a prohibited contribution when it refused to verify Ms. Luna's account. For the sake of completeness, however, we note that the Commission could also dismiss this allegation 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.<sup>86</sup> The exemption excepts from regulation “any cost incurred in covering or carrying” news stories<sup>87</sup> and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address.”<sup>88</sup> The Commission has not limited the exemption to “traditional news outlets” and has applied it to “news stories, commentaries, and editorials *no matter in what medium they are published*,” [including] Internet Web sites and entities that distribute their content exclusively on the Internet,<sup>89</sup> as well as websites that curate news content.<sup>90</sup>

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.”<sup>91</sup> 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.”<sup>92</sup>

In addition, Twitter's decision to verify specific accounts is a traditional media function. Each Twitter account holder provides information, and Twitter – through the verification process – “help[s] steer people to know when they [are] looking at more authentic voices.”<sup>93</sup>

<sup>85</sup> Birnbaum and Rodrigo, *supra* note 51.

<sup>86</sup> See *supra* at 9-10.

<sup>87</sup> 11 C.F.R. § 100.73.

<sup>88</sup> Statement of Reasons of Commissioners Darryl R. Wold, Danny L. McDonald, David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, Matters Under Review 4929, 5006, 5090, and 5117 (ABC, CBS, NBC, New York Times, Los Angeles Times, and Washington Post et al.) (Dec. 20, 2000).

<sup>89</sup> FEC Adv. Op. 2008-14 (Melothe); see also *id.* (explaining that the Commission “has also recognized the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach”).

<sup>90</sup> FEC Adv. Op. 2016-01; see also FEC Adv. Op. 2005-16 (Fired Up) (finding that a website qualified as a media entity where it was “viewable by the general public and akin to a periodical or news program distributed to the general public”).

<sup>91</sup> See Dorsey Testimony at 2.

<sup>92</sup> Kantrowitz, *supra* note 17; see also Eule, *supra* note 17.

<sup>93</sup> Ingrid Lunden, *Twitter Prioritizes Blue-check Verifications to Confirm Experts on COVID-19 and the Novel Coronavirus*, TechCrunch.com, Mar. 21, 2020, <https://techcrunch.com/2020/03/21/twitter-prioritizes-blue-check-verifications-to-confirm-experts-on-covid-19-and-the-novel-coronavirus/>.

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Commenters have suggested that a blue-check verification provides “an instant shot of credibility” to particularly trusted information sources, distinguishing them from the millions of other users who share information on the platform.<sup>94</sup> This is “especially useful when trying to get out official statements and breaking news.”<sup>95</sup> Verification also makes a user’s Tweets and “profile easier to find for other Twitter users,” and Twitter gives verified accounts “visual prominence on the service” as well.<sup>96</sup> In other words, Twitter is choosing between “competing claims of parties” and deciding what content to prominently feature on the site – precisely the type of activity the media exemption is meant to protect from regulation.<sup>97</sup>

Finally, because Twitter is not owned or controlled by a political party, political committee, or candidate,<sup>98</sup> it also satisfies the third and final element of the media exemption. Therefore, Twitter’s decision to not verify Ms. Luna’s account was not a contribution, but a media activity exempt from regulation under the FEC.

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,”<sup>99</sup> and the First Amendment safeguards the “choice of material . . . [that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.”<sup>100</sup> Thus, for example, a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude.<sup>101</sup> Nor can private citizens organizing a parade on city streets be compelled “to include among the marchers a group imparting a message that the organizers do not wish to convey.”<sup>102</sup>

These rights apply in full to corporations. The First Amendment specifically protects the right of corporations to publicly express their opinions on important issues of policy.<sup>103</sup> Corporate “[s]peech is an essential mechanism of democracy,”<sup>104</sup> and “political speech does not lose First Amendment protection simply because its source is a corporation.”<sup>105</sup> “The identity of the speaker is [simply] not decisive in determining whether speech is protected. Corporations

<sup>94</sup> Sam Weber, *How to Get Verified on Twitter*, Opendorse.com, Apr. 13, 2020, <https://opendorse.com/blog/how-to-get-verified-on-twitter/>.

<sup>95</sup> Michelle Castillo, *Does Being Verified on Twitter Really Matter?*, CNBC.com, May 19, 2015, <https://www.cnbc.com/2015/05/19/does-being-verified-on-twitter-really-matter.html>; see also Dustin Volz, Rob Barry, and Jenny Strasburg, *Fake Twitter Accounts Posing as News Organizations Prematurely Declare Election Victories*, Wall Street Journal, Nov. 5, 2020, <https://www.wsj.com/articles/fake-twitter-accounts-posing-as-news-organizations-prematurely-declare-election-victories-11604541638>.

<sup>96</sup> Twitter Support (@TwitterSupport), Twitter (Nov. 15, 2017 at 5:30 P.M.), <https://twitter.com/TwitterSupport/status/930926124892168192>.

<sup>97</sup> See *supra* at 12.

<sup>98</sup> See *supra* at 2-3.

<sup>99</sup> *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

<sup>100</sup> *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

<sup>101</sup> *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>102</sup> *Hurley*, 515 U.S. at 559.

<sup>103</sup> *Citizens United v. FEC*, 558 U.S. 310, 371-72 (2010).

<sup>104</sup> *Id.* at 339.

<sup>105</sup> *Id.* (internal quotation mark omitted).



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and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster.”<sup>106</sup>

Although the First Amendment would protect Twitter if it had suspended Ms. Luna’s account entirely, it did not do that. Instead, Twitter exercised its well-established First Amendment rights in a measured and narrow fashion that still allowed Ms. Luna to use its platform. Ms. Luna would nonetheless require Twitter to label her account against its wishes, and contrary to its preexisting, politically neutral, and publicly stated policies, even though that label might be viewed as an “endorsement”<sup>107</sup> of an account that has violated its rules. Federal campaign finance law cannot proscribe Twitter’s decision without running directly into these 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.<sup>108</sup>

*Second*, an “expenditure” only becomes a contribution when it is made “in cooperation, consultation, or concert, with, or at the request or suggestion of a candidate, his authorized political committees or their agents.”<sup>109</sup> The complaint does not allege that coordination occurred. Nor could it. The decision to not verify her campaign 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 Crist campaign, as prescribed by the Commission’s coordination regulations.<sup>110</sup> 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, a denial of verification to Ms. Luna cannot result in Twitter making a regulated contribution or expenditure subject to sanction under federal campaign finance law.<sup>111</sup>

<sup>106</sup> *Id.* at 343 (internal quotation marks omitted).

<sup>107</sup> See Newton, *supra* note 29.

<sup>108</sup> See *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (noting the Commission’s prior failure, under the doctrine of constitutional avoidance, to “tailor its [regulations] to avoid unnecessarily infringing upon First Amendment rights”); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress”).

<sup>109</sup> See *supra* at 9.

<sup>110</sup> See 11 C.F.R. § 109.21(d); see also Colin Kalmbacher, ‘Yawn’: Experts Dismiss ‘Frivolous’ RNC Complaint Against Twitter Over Blocked Access to NY Post Biden Story, *Law & Crime* (Oct. 16, 2020), at <https://lawandcrime.com/2020-election/yawn-experts-dismiss-frivolous-rnc-complaint-against-twitter-over-blocked-access-to-ny-post-biden-story/> (quoting Common Cause’s “campaign finance expert” affirming that an illegal contribution by a technology company that limited public dissemination on its site would only result where money was spent in coordination with the Biden campaign).

<sup>111</sup> 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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## II. The FCC's Equal-Time Rule – Which Is Outside the FEC's Jurisdiction – Applies to Broadcasters, Not Twitter.

The other allegation made by the complaint is that Twitter failed to provide “equal access” to Ms. Luna under the Equal Time requirements of the Communications Act.<sup>112</sup> This claim is frivolous. First, the FEC clearly has no jurisdiction over alleged violations of the Communications Act.<sup>113</sup> Second, the “Equal Time Rule” applies only to candidate uses of radio and television “broadcasting station[s].”<sup>114</sup> On its face, it does not apply to an online platform like Twitter.

## III. The Communications Decency Act Immunizes Twitter from Liability.

Finally, Twitter's decision to not verify Ms. Luna's account on Twitter is wholly immune from liability pursuant to 47 U.S.C. § 230(c) of the Communications Decency Act (“CDA”).

The CDA provides in relevant part that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” 47 U.S.C. § 230(c)(1), and that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected,” *id.* § 230(c)(2)(A). The 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.<sup>115</sup> Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal theories.<sup>116</sup> As the Ninth Circuit has explained, “any activity that can be boiled down to deciding *whether to exclude material that third parties seek to post* online is perforce immune under section 230.”<sup>117</sup>

To trigger immunity, a platform must satisfy three elements: (1) the platform must be a provider of an “interactive computer service;” (2) the challenged communication must be “provided by another information content provider;” and (3) “the asserted claims must treat the [platform] as a publisher [of that] information.”<sup>118</sup> These criteria are all met here.

<sup>112</sup> Compl. at 7-8.

<sup>113</sup> See 52 U.S.C. § 30109 (limiting the FEC's enforcement jurisdiction to FECA matters and those involving presidential matching funds). Indeed, the only relief mechanism is through a complaint filed with the Federal Communications Commission. See *Forbes v. Arkansas Educ. Television Comm'n Network Found.*, 22 F.3d 1423, 1427 (8th Cir. 1994) (stating that the “proper course of action is to bring [a] claim before the Federal Communications Commission”); *Schneller v. WCAU Channel 10*, 413 F. App'x 424, 426 (3d Cir. 2011) (collecting authority).

<sup>114</sup> 47 U.S.C. §§ 153(6), 307(a).

<sup>115</sup> *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

<sup>116</sup> See, e.g., *Jefferson v. Zuckerberg*, Civ. A. No. 17-3299, 2018 WL 3241343, at \*4 (D. Md. July 3, 2018) (“CDA immunity is broad and must be determined at ‘the earliest possible stage of the case.’”).

<sup>117</sup> *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

<sup>118</sup> *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 134 (2018).

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*First*, Twitter is an “Interactive Computer Service” within the meaning of the statute.<sup>119</sup> *Second*, the communications were provided by another information content provider – Ms. Luna – and Twitter refused to verify her account based on those communications. *Third*, the Luna campaign challenges Twitter’s decision not to verify – and, thus, not promote – Ms. Luna’s account. In other words, the Luna campaign seeks to impose campaign finance liability on Twitter for performing “a publisher’s traditional editorial functions.”<sup>120</sup>

In applying this third criterion, and as noted above, courts have recognized that CDA immunity attaches to a wide range of activities, including “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.”<sup>121</sup> Thus, it is well-established that the removal of content and decisions about what content to include or block are inextricably bound up in the role of publisher and is “conduct immunized by the CDA.”<sup>122</sup>

Twitter has determined that verifying the accounts of individuals with a history of violating Twitter’s Rules would be detrimental to its users, advertisers, and the platform overall. To avoid these problems here, Twitter declined to verify Ms. Luna’s account, but otherwise left it intact and viewable. This is precisely the type of conduct immunized by the CDA. Indeed, courts have concluded that “*providing accounts . . . is publishing activity*” subject to CDA immunity.<sup>123</sup> Promoting accounts through a verification process is the same conduct and should not be treated differently.

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<sup>119</sup> 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.

<sup>120</sup> *Barrett*, 40 Cal. 4th at 43.

<sup>121</sup> *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”).

<sup>122</sup> *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

<sup>123</sup> *Fields*, 217 F. Supp. 3d at 1123-24 (emphasis added) (“Despite being aimed at blocking Twitter accounts instead of particular tweets, plaintiffs’ provision of accounts theory is still based on Twitter’s alleged violation of a duty . . . derive[d] from [its] status or conduct as a publisher”); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889-90 (N.D. Cal. 2017) (finding immunity even where plaintiffs argued their claims depended on access to Twitter’s services generally because plaintiffs “explicitly base their claims on the 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”).

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### **CONCLUSION**

Twitter is committed to maintaining a robust platform for all users – be they conservative, liberal or somewhere in between – to engage and debate public issues, including those involving political candidates and policies. At the same time, Twitter believes that users of its platform – particularly those seeking special recognition and indicia of trustworthiness – need to abide by Twitter’s Rules.

Verifying the account of someone who had violated Twitter’s Rules would have been detrimental to Twitter’s platform and, therefore, its brand and business. In declining to verify Ms. Luna, Twitter acted lawfully to protect its business interests and not to influence any election. Twitter’s actions were also 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. Accordingly, the Commission should find no reason to believe that Twitter violated the FECA and should dismiss this matter.

Sincerely,

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

Caleb P. Burns  
Andrew G. Woodson