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December 14, 2020

VIA E-MAIL (CELA@FEC.GOV)
CONFIDENTIAL

Mr. Jeff S. Jordan
Attn: Tracee Keeys, Paralegal
Office of Complaints Examination and Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7834 (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 Americans for Legal Immigration PAC (“ALIPAC”), a federally-registered political committee. ALIPAC’s President is William Gheen, who appears to be primarily responsible for operating ALIPAC’s Twitter account. The complaint also names several other technology companies as respondents.

The complaint makes three allegations against Twitter. First, the complaint alleges that Twitter violated the Federal Election Campaign Act of 1971, as amended (“FECA”), by refusing to “verify” ALIPAC’s Twitter account. Verification is a process Twitter undertakes to confirm the authenticity of certain accounts and to publicly note that fact with a checkmark symbol, . The complaint suggests Twitter’s decision to not verify the ALIPAC account was an attempt to influence an election. The reality is that, in 2017, Twitter made a business decision to suspend its public verification program for nearly all types of accounts while the company refined its

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verification process. This non-political business decision is not subject to regulation by the FECA.

The complaint's second and third allegations are that Twitter attempted to influence an election by preventing ALIPAC from disseminating an ad in 2017 on immigration and Tweeting about the same issue. However, the ad and Tweets included terms like "illegal alien" and "illegal immigrant" that Twitter has concluded are generally inconsistent with the company's hateful conduct policy. Again, Twitter's decision was motivated by non-political business reasons – that is, application of its politically-neutral user rules – and not for the purpose of influencing an election. Therefore, Twitter's actions do not qualify as contributions or expenditures regulated by the FECA. Accordingly, Twitter respectfully requests that the Commission find no reason to believe that Twitter violated the FECA and dismiss this matter.

Separately, as a media entity under the FECA, Twitter is entitled to rely on 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 and permit 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.¹

FACTUAL BACKGROUND

I. Background on Twitter

Twitter was incorporated in Delaware in April 2007.² While its principal offices are in San Francisco, California, the company has approximately 4,900 full-time employees and 35 offices worldwide.³ Twitter also has 187 million monetizable daily active users and is a popular social media network around the world.⁴ The company is publicly traded and had quarterly revenues of more than \$936 million in Q3 of 2020.⁵ A listing of Twitter's board members is available on the company's website.⁶ None of the board members are candidates for federal office or represent federal political parties.

¹ The complaint includes hyperlinks to approximately 150 news articles to claim that some combination of Twitter, Facebook, and Google have indirectly suppressed conservative voices. However, the complaint does not include any factual or legal analysis to support this claim and, therefore, fails the regulatory requirement that a complaint "should clearly identify as a respondent each person or entity who is alleged to have committed a violation" and "contain a clear and concise recitation of the facts which describe a violation." 11 C.F.R. § 111.4(d). Nonetheless, Twitter is available to supplement this response to address any of hyperlinked articles if directed by the Commission.

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

³ 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*, at https://about.twitter.com/en_us/company.html.

⁴ 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>.

⁵ See *id.*

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

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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.⁷ All 100 senators, 50 governors, and nearly every Member of the House of Representatives reach their constituents through Twitter accounts,⁸ with conservatives, in particular having “a strong presence on Twitter.”⁹ Indeed, a study earlier this year concluded that that “Twitter broadly represents the entire spectrum of ideologies,” with “more conservative opinion leaders on the platform than liberal ones.”¹⁰

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

To further advance these ideals, Twitter “live-stream[s] congressional hearings and political events, providing the public access to important developments in our democracy.”¹⁶ 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.”¹⁷ In fact, “[o]ne of the most basic truisms of the social media era is that social media offers the fastest indicator of

⁷ 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/>.

⁸ 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 at 2, <https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf> (“Dorsey Testimony”).

⁹ *Id.* at 6.

¹⁰ 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/>.

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

¹² Bridget Coyne, *Empowering Freedom of Expression for National Voter Registration Day* (Sept. 27, 2017), https://blog.twitter.com/official/en_us/topics/events/2017/national-voter-reg-day-2017.html.

¹³ Twitter, *Our Values*, https://about.twitter.com/en_us/values.html.

¹⁴ 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>.

¹⁵ 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/>.

¹⁶ See Dorsey Testimony at 2.

¹⁷ 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”).

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breaking events, ‘beating the news’ by allowing witnesses and participants to live stream stories as they happen.”¹⁸ That is why 71% of Twitter users rely on the platform for news coverage.¹⁹ In recognition of these facts, Twitter has even recategorized “itself from ‘social networking’ to ‘news’ in Apple’s App Store.”²⁰

At Twitter, “abuse, malicious automation, and manipulation” are company-wide concerns.²¹ Twitter continuously works to address these and other issues to improve the health of the conversations on its platform.²² For example, Twitter employs “technology to be more aggressive in detecting and minimizing the visibility of certain types of abusive and manipulative behaviors.”²³ The company 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 To this end, Twitter actively monitors the substance of the conversations it hosts to ensure compliance with its user 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

¹⁸ 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>.

¹⁹ 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>.

²⁰ 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>.

²¹ Dorsey Testimony at 1.

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 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 (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”).

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someone to remove the violating content and serve a period of time in read-only mode before they can Tweet again.²⁵

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."²⁶ Major online advertisers – "the main source of revenue for the company"²⁷ – have insisted that "tech companies . . . do more to minimize divisive content on their platforms."²⁸ "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.²⁹

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.³⁰ 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."³¹ 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 violence, bigotry or hate."³² The company, "which spends billions of dollars every year marketing products from paper towels to shampoo, [stated that it] would move its money to

²⁵ Twitter, *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

²⁶ 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>.

²⁷ 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/#3cdcf507835>.

²⁸ 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>.

²⁹ 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 "[a]dvertisers are concerned about the Twitter environment, because brands don't want to appear on the same screen as offensive messages").

³⁰ Shaban, *supra* note 28.

³¹ *Id.*

³² 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.

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services that [are not only] completely free of offensive content,”³³ but that “have more civility when it comes to editorial content, so [that] we have a civil internet.”³⁴ 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.³⁵ 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.³⁶

Since 2009, Twitter has also employed a procedure to “verify” certain accounts.³⁷ Twitter initiated this process after concerns arose that impostors were impersonating high-profile users on the platform.³⁸ The company wanted to prevent Twitter’s misuse in ways that deceived users and the general public.³⁹

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.⁴⁰ 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.;⁴¹
- 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;
- The user must provide documentation to confirm the accountholder’s identity (e.g., driver’s license or passport); and

³³ 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>.

³⁴ 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>.

³⁵ 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/>.

³⁶ 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>.

³⁷ Biz Stone, *Not Playing Ball*, Twitter: Blog (June 6, 2009), https://blog.twitter.com/official/en_us/a/2009/not-playing-ball.html.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ 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.

⁴¹ *About Verified Accounts*, Twitter, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts>.

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- The user must state in the application why the account should be verified, identify links to websites that verify the accountholder's identity, etc.⁴²

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.”⁴³ Unverified accounts, particularly when there are many of them, can sow confusion and lead users to a less-satisfying experience on the platform.⁴⁴

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 belonging to white supremacists – that were acting contrary to platform’s rules.⁴⁵ Accordingly,

⁴² 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.

⁴³ 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.

⁴⁴ 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>.

⁴⁵ 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>.

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Twitter began a review of already-verified accounts, working to “remov[e] verification badges from users who violate[d] its rules,”⁴⁶ including users “who are famous for their racism or sexism or hate speech.”⁴⁷

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.”⁴⁸ “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.”⁴⁹ Twitter was motivated by its users’ “heightened outrage over the little blue checkmarks,” particularly as to their issuance to controversial figures,⁵⁰ and the importance marketers place on Twitter and others to “do more to minimize divisive content on their platforms” or risk losing advertising dollars.⁵¹

In addition to implementing these guidelines, the company froze nearly all new verifications, including those submitted by members of the public to a verification “queue.”⁵² Excepted from the temporary freeze were political candidates and public health officials (though not political action committees).⁵³ When it created these exceptions, Twitter reaffirmed that accounts must still “[c]omply with our Twitter Rules and Terms of Service”⁵⁴ – including Twitter’s policies against hateful conduct – in order to be verified.⁵⁵

Importantly, Twitter’s processes for reducing harmful content and verifying accounts were not then – and are 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.”⁵⁶ 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.

⁴⁶ *Id.*

⁴⁷ 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>.

⁴⁸ 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).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Shaban, *supra* note 28.

⁵² *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.

⁵³ Newton, *supra* note 45; 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>.

⁵⁴ Bridget Coyne, *Helping Identify 2020 US Election Candidates on Twitter*, Twitter: Blog (rev. Feb. 28, 2020), https://blog.twitter.com/en_us/topics/company/2019/helping-identify-2020-us-election-candidates-on-twitter.html.

⁵⁵ See *Hateful Conduct Policy*, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>.

⁵⁶ *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>.

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Our Twitter Rules are not based on ideology or a particular set of beliefs.”⁵⁷ 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.”⁵⁸ In fact, “from a simple business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform.”⁵⁹

II. Background on ALIPAC and Mr. Gheen

ALIPAC is a federal political committee that filed its Statement of Organization with the FEC in 2004.⁶⁰ Its President is Mr. Gheen, who is well-acquainted with the FEC’s enforcement process – both as a respondent⁶¹ and a frequent complainant.⁶²

Mr. Gheen frequently discusses immigration-related issues in a provocative manner through various media outlets. In one of his numerous appearances on the Alex Jones Show, Mr. Gheen

blamed immigrants for the alleged demise of the white and black populations in the United States. . . . “Nobody out there is asking why black people are dying, why white people are dying out; why the white population suddenly has done something demographers have never seen before, and it started a reversal; and then you read the articles that says [*sic*] ‘natural decline, natural decline, it’s just a natural decline.’ There’s nothing natural about it.” Gheen later stated, “It’s genocidal, it’s nationally destructive... this is a controlled demolition.”⁶³

The Anti-Defamation league’s summary continued:

⁵⁷ *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?*, 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>.

⁵⁸ Dorsey Testimony at 11.

⁵⁹ *Id.* at 1.

⁶⁰ See Statement of Organization, Americans for Legal Immigration PAC, <https://docquery.fec.gov/cgi-bin/fecimg/?C00405878>.

⁶¹ See Factual & Legal Analysis, Matter Under Review 5896 (William Gheen), at 1 (Sept. 27, 2007), <https://www.fec.gov/files/legal/murs/5896/000067B3.pdf>.

⁶² See, e.g., ALIPAC, *ALIPAC: Complaint Filed over Illegal Alien Voters* (Nov. 7, 2012), <https://www.alipac.us/alipac-complaint-filed-over-illegal-alien-voters-1099/> (raising claims “that numerous illegal immigrants and non-citizens are registering and voting in federal elections”); see ALIPAC, *Official Letter of Complaint to FEC and Nevada Elections Boards* (Nov. 5, 2012), <https://www.alipac.us/f8/official-letter-complaint-fec-nevada-elections-boards-266580/> (noting that “[t]he woman at the FEC hung up the phone on me in a highly unprofessional manner” when Mr. Gheen called to discuss his complaint).

⁶³ Anti-Defamation League, *William Gheen of ALIPAC Blames Immigrants For “Genocidal” Demolition of White Population*, June 28, 2013, <https://www.adl.org/blog/william-gheen-of-alipac-blames-immigrants-for-genocidal-demolition-of-white-population>.

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This is not the first time Gheen has voiced his concerns with immigrants threatening “white America.” In 2011, Gheen joined right-wing radio host Janet Mefferd on her show and he argued that the U.S. government, with the help of immigrants, was preparing for a war with “white America.” Gheen claimed that the Department of Homeland Security was “putting out videos and propaganda” to telegraph what he believed “to be a conflict with White America they’re preparing for after they get another 10 or 15 million people in the country to back them up.”

In 2007 he claimed, “illegal aliens in this country have set up ethnic cleansing zones, ethnic cleansing zones where if you walk past the wrong sign post, the invisible line, you’re under the threat of death.”⁶⁴

Pinterest has reportedly banned Mr. Gheen over his actions on that platform.⁶⁵

Mr. Gheen has apparently operated the @ALIPAC Twitter account since February 2009.⁶⁶ His Twitter posts frequently attract controversy, even off Twitter’s platform. The Anti-Defamation League has said “anti-Semites and white supremacists posting on extremist forums promote ALIPAC, its activity, and Gheen’s statements. These extremists look to ALIPAC and use the group’s Web site and ideology to fuel their own hatred of non-white immigrants.”⁶⁷

Mr. Gheen often uses Twitter to directly confront his opponents. Take, for example, the following comments from Mr. Gheen toward a user who disagreed with him:

You are here on our Twitter page supporting Muslim immigrant child rape gangs by your attacks and oppression aimed at us and [British activist] Tommy Robinson and probably anyone else who would seek to stop those gangs from ever harming innocent children. Your support for them is on display here[.]

. . . We look forward to you stopping your attacks on Tommy Robinson and ALIPAC and all the other individuals and groups trying to stop illegal immigrants and foreign influences from coming into our nations, taking over, and mass raping our children[.]⁶⁸

Mr. Gheen frequently claims that various entities are censoring the speech of his organization and that of his allies. For example, he used Twitter to attack the conservative

⁶⁴ *Id.*

⁶⁵ William Gheen (@ALIPAC), Twitter (June 13, 2019, 8:57 P.M.), <https://twitter.com/ALIPAC/status/1139335906182213632>.

⁶⁶ See William Gheen (@ALIPAC), <https://twitter.com/ALIPAC>.

⁶⁷ Anti-Defamation League, *White Supremacists Promote ALIPAC and Take Action on its Behalf* (May 26, 2009), <https://www.adl.org/news/article/white-supremacists-promote-alipac-and-take-action-on-its-behalf>.

⁶⁸ William Gheen (@ALIPAC), Twitter (July 10, 2019, 11:35 A.M.), <https://twitter.com/ALIPAC/status/1148979083109457920>; William Gheen (@ALIPAC), Twitter (July 10, 2019, 1:44 P.M.), <https://twitter.com/ALIPAC/status/1149011557604646912>.

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media outlet Breitbart, accusing it of “censoring Americans who oppose amnesty for illegals.”⁶⁹ Glenn Beck,⁷⁰ Fox News,⁷¹ and Rick Perry’s presidential campaign⁷² have all at one time or another allegedly censored him. And even non-partisan websites like buycostumes.com are not immune to his censorship rhetoric.⁷³

Mr. Gheen often ties fundraising appeals to censorship claims. One such appeal, under the header “Censorship Attacks on Us as Deadline Approaches + New Matching Funds Offer,” stated:

Don't let Silicon Valley socialist corporations like Twitter silence and stop us from being heard! . . . To help ALIPAC have the resources we need to succeed despite massive censorship and to have any chance of attracting or retaining legal counsel to fight for all of our rights, please DONATE TODAY!

At the time of this e-mail there is less than two weeks for you to decide if you want Americans for Legal Immigration PAC to continue fighting against illegal immigration and Amnesty, or fold up shop and bow out of the national fight.⁷⁴

Ironically, Mr. Gheen admits to banning people from his Stop Anti-White Racism Facebook group when they do not share his views.⁷⁵

III. The FEC Complaint

ALIPAC’s FEC complaint broadly accuses Google, Facebook, and Twitter of “electronic totalitarianism” through its alleged making of in-kind corporate contributions to the Democratic Party, Joe Biden’s presidential campaign committee, and other unspecified Democrats running for public office.⁷⁶ As to Twitter, the complaint alleges the following specifics:

Twitter refuses to certify my account despite numerous requests and refuses to allow us to run ads or promote content. In November of 2017, [s]hortly after a Twitter employee briefly deactivated President Donald Trump’s account, Twitter rejected our ad to encourage Americans to call Congress against

⁶⁹ William Gheen (@ALIPAC), Twitter (May 18, 2018, 10:25 A.M.), <https://twitter.com/ALIPAC/status/997483254352613378> (internal capitalization omitted).

⁷⁰ William Gheen (@ALIPAC), Twitter (June 27, 2016, 11:50 P.M.), <https://twitter.com/ALIPAC/status/747638163284312065>.

⁷¹ William Gheen (@ALIPAC), Twitter (Aug. 7, 2019, 12:38 P.M.), <https://twitter.com/ALIPAC/status/1159141879851683840>; William Gheen (@ALIPAC), Twitter (May 10, 2010, at 1:17 P.M.), <https://twitter.com/middlebud/status/13737646841>.

⁷² William Gheen (@ALIPAC), Twitter (Sept. 28, 2011, 2:14 P.M.), <https://twitter.com/ALIPAC/status/119112857060261889>.

⁷³ William Gheen, (ALIPAC), Twitter (Oct. 22, 2009, 1:01 P.M.), <https://twitter.com/ALIPAC/status/5073879308>.

⁷⁴ ALIPAC, *Censorship Attacks on Us as Deadline Approaches + New Matching Funds Offer*, (Nov. 17, 2017, 10:50 A.M.), <https://www.alipac.us/f8/censorship-attacks-us-deadline-approaches-new-matching-funds-offer-352676/>.

⁷⁵ William Gheen (@ALIPAC), Twitter (Aug. 31, 2020, 4:29 P.M.), <https://twitter.com/ALIPAC/status/1300531252882296839>.

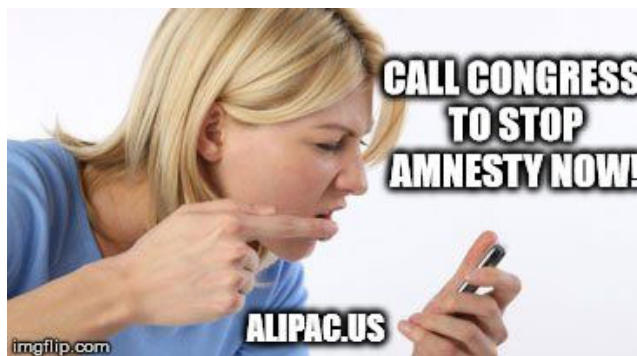
⁷⁶ Compl. at 1,3.

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Amnesty legislation falsely labeling our ad as “hateful content.” Our ad was an image of a woman shouting into her phone and simply read “CALL CONGRESS TO STOP AMNESTY NOW!”

Over Christmas of 2017, my account was suspended for 7 days over posts that did not violate Twitter TOS but was our celebration over defeating Dream Act Amnesty legislation before the break. Twitter called it “hateful content” and banned us for 7 days and took away our ability to ever place ads again.⁷⁷

The complaint did not include a copy of the ad, but referred to a Breitbart article purportedly containing the relevant material. The Breitbart article⁷⁸ provides a screenshot of what it says is the advertisement:

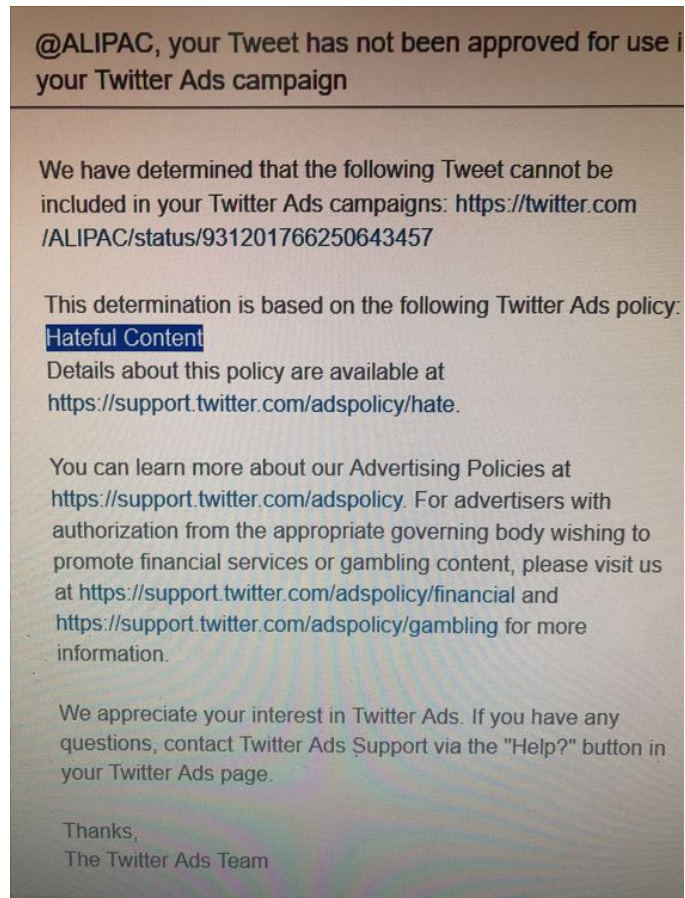


The article also included a screenshot of Twitter’s communication to ALIPAC. This message stated:

⁷⁷ *Id.* at 3-4.

⁷⁸ Allum Bokhari, *Twitter Bias Continues: Blocks Anti-Amnesty Ad Over ‘Hate Speech,’* Breitbart.com, Nov. 17, 2017, <https://www.breitbart.com/tech/2017/11/17/twitter-bias-continues-yanks-ad-promoting-legal-immigration-hate-speech/>.

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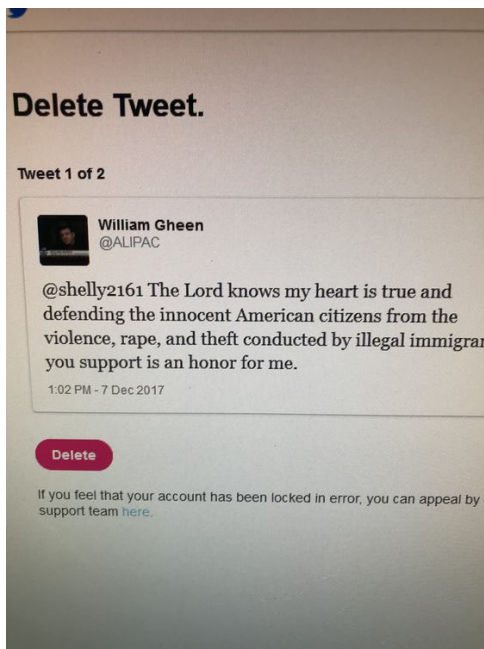
Importantly, this message indicates that it was not the image contained in the ad, but ALIPAC's accompanying text that violated Twitter's hateful conduct policy. The full ad, with the accompanying text, follows:



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Separately, the complaint refers to a World Net Daily article that contains information about what purportedly led to the seven-day suspension.⁷⁹ According to the article,⁸⁰ Twitter asked ALIPAC to remove the following Tweet:



The remainder of the complaint consists of approximately 150 links to news articles without discussion of specific facts or law relevant to Twitter.

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.⁸¹ 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.”⁸² Similarly, the term “expenditure” means “anything of value, made by any person *for the purpose of influencing any election* for Federal office.”⁸³

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.⁸⁴

⁷⁹ Please note that Twitter deletes – and does not routinely archive copies of – Tweets that are the subject of disciplinary action, so it is not able to independently verify this information.

⁸⁰ Alicia Powe, *Anti-invasion Group Hits Twitter with Civil-Rights Complaint*, World Net Daily (Jan. 4, 2018), <https://www.wnd.com/2018/01/twitter-being-hit-with-civil-rights-complaint/>.

⁸¹ 52 U.S.C. § 30118.

⁸² *Id.* § 30101(8)(A) (emphasis added).

⁸³ *Id.* § 30101(9)(A) (emphasis added).

⁸⁴ First General Counsel’s Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

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The terms “contribution” and “expenditure” both contain an exemption for “any news story, commentary, [or] editorial.”⁸⁵ This so-called media exemption applies when an entity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) performing a traditional media function.⁸⁶

DISCUSSION

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

All three of the complaint’s allegations claim that Twitter made a prohibited corporate contribution to various Democratic campaigns and committees when it “censored” ALIPAC’s account. 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.”⁸⁷ 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.⁸⁸ 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].”⁸⁹

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.⁹⁰ 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.⁹¹ In addition, the Commission has explained that a technology company “need not make its services available to [candidates] representing all political

⁸⁵ See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

⁸⁶ See FEC Adv. Op. 2016-01 (Ethiq); *Reader’s Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁸⁷ 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’”).

⁸⁸ 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).

⁸⁹ 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).

⁹⁰ FEC Adv. Op. 2018-11 (Microsoft).

⁹¹ *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.”⁹²

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,”⁹³ 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.’”⁹⁴

Here, Twitter’s decision to not verify ALIPAC’s account was based on the company’s decision – made on November 9, 2017 – to suspend its public verification program due to growing confusion over the purpose and significance of verification. As Twitter publicly explained: “Verification was meant to authenticate identity [and] voice[,] but it is interpreted as an endorsement or an indicator of importance. We recognize that we have created this confusion and need to resolve it.”⁹⁵

Since that date, Twitter has neither accepted new applications for verification through the public program, nor acted on the thousands of applications that were pending when Twitter paused the program. While Twitter has continued to verify the accounts of political candidates and officials involved in public health matters, these limited categories are the exception rather than the rule.⁹⁶ Thus, Twitter’s verification decision had nothing to do with the content of ALIPAC’s communications and, therefore, cannot be an attempt to influence an election. In addition, Twitter’s decision to prohibit ALIPAC from posting its advertisement alongside a reference to “illegal aliens” and Twitter’s subsequent decision to temporarily suspend ALIPAC’s account for accusing immigrants of violence, rape, and theft were likewise not for the purpose of influencing an election.

With increasing frequency, particularly over the past decade, media outlets and others have become concerned with the phrase “illegal aliens” and those like it. For example, in 2013, “the Associated Press dropped ‘illegal immigrant’ from its stylebook, saying ‘illegal’ should be used to describe actions, not people. Other publications followed suit, including USA Today.”⁹⁷

⁹² FEC Adv. Op. 2017-06 (Stein and Gottlieb).

⁹³ 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).

⁹⁴ 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.

⁹⁵ Twitter Support (TwitterSupport), Twitter (Nov. 15, 2017, 5:31 P.M.), <https://twitter.com/TwitterSupport/status/930926225517719552>.

⁹⁶ Newton, *supra* note 45; Lyons, *supra* note 53.

⁹⁷ Derek Hawkins, *The Long Struggle over What to Call ‘Undocumented Immigrants’ or, as Trump Said in His Order, ‘Illegal Aliens’*, Wash. Post., Feb. 9, 2017, <https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/>; see also Mihir Zaveri, *This Lawmaker Wants to Remove the Words ‘Illegal Alien’ From the Law*,

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Similarly, “California Gov. Jerry Brown in 2015 scrubbed ‘alien’ from the state’s labor code. More recently, the Library of Congress announced in March 2016 that it would seek to remove “illegal alien” from its subject headings.”⁹⁸ While some, including ALIPAC and Mr. Gheen, may disagree with this trend, Twitter generally believes this terminology is inconsistent with Twitter’s hateful conduct policy and is the type of language that deters individuals from using its platform. The company’s conclusion is entirely consistent with its desire to incentivize more users – and the advertisers who market to them – to remain on 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.⁹⁹

Clearly, Twitter’s actions were not “for the purpose of influencing any election” as required by the statutory definition of “contribution.” Thus, the Commission need not proceed further and should dismiss the complaint’s allegation that Twitter made a contribution in violation of the FECA. 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.¹⁰⁰ The exemption excepts from regulation “any cost incurred in covering or carrying” news stories¹⁰¹ and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address.”¹⁰² 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,”¹⁰³ as well as websites that curate news content.¹⁰⁴

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.”¹⁰⁵ Twitter also has emphasized news content and is using algorithmically and human-curated timelines to feature “tweets from news organizations

N.Y. Times, Feb. 16, 2020, <https://www.nytimes.com/2020/02/13/us/politics/colorado-illegal-immigrants.html>.

⁹⁸ Hawkins, *supra* note 97.

⁹⁹ 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/>.

¹⁰⁰ See *supra* at 15.

¹⁰¹ 11 C.F.R. § 100.73.

¹⁰² 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).

¹⁰³ 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”).

¹⁰⁴ 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”).

¹⁰⁵ See Dorsey Testimony at 2.

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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.”¹⁰⁶

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.”¹⁰⁷ 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.¹⁰⁸ This is “especially useful when trying to get out official statements and breaking news.”¹⁰⁹ 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.¹¹⁰ In other words, Twitter is choosing between “competing claims of parties” and deciding what content to prominently feature on the platform – precisely the type of activity media entities routinely conduct.¹¹¹ The same is true when Twitter decides whether it will disseminate specific content on the platform. Twitter’s content moderation is, fundamentally, a decision about what “to feature, investigate or address” that is also at the heart of the media function.¹¹²

Finally, because Twitter is not owned or controlled by a political party, political committee, or candidate,¹¹³ it also satisfies the third and final element of the media exemption. Therefore, Twitter’s decisions regarding the ALIPAC account are not contributions, but are media activities exempt from regulation under the FECA.

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,”¹¹⁴ and the First Amendment safeguards the “choice of material . . .

¹⁰⁶ 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”).

¹⁰⁷ 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/>.

¹⁰⁸ Sam Weber, *How to Get Verified on Twitter*, Opendorse.com, Apr. 13, 2020, at <https://opendorse.com/blog/how-to-get-verified-on-twitter/>.

¹⁰⁹ 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>.

¹¹⁰ Twitter Support (@TwitterSupport), Twitter (Nov. 15, 2017, 5:30 P.M.), <https://twitter.com/TwitterSupport/status/930926124892168192>.

¹¹¹ See *supra* at 17.

¹¹² See FEC Adv. Op. 2016-01.

¹¹³ See *supra* at 2.

¹¹⁴ *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781, 796-797 (1988).

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[that]—whether fair or unfair—constitute[s] the exercise of editorial control and judgment.”¹¹⁵ Thus, for example, a newspaper cannot be required to publish op-ed columns with which it disagrees or simply wishes to exclude.¹¹⁶ 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.”¹¹⁷

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.¹¹⁸ Corporate “[s]peech is an essential mechanism of democracy,”¹¹⁹ and “political speech does not lose First Amendment protection simply because its source is a corporation.”¹²⁰ “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.”¹²¹

Although the First Amendment would protect Twitter if it had suspended the ALIPAC 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 ALIPAC to use Twitter’s platform. ALIPAC would nonetheless require Twitter to label its account against Twitter’s wishes, and contrary to its preexisting, politically neutral, and publicly stated policies, even though that verification label might be viewed as an “endorsement”¹²² of an account that has violated its rules. Similarly, ALIPAC wants the FEC to require Twitter to keep individual Tweets on the platform that violates its rules. Federal campaign finance law cannot proscribe Twitter’s decisions to not verify ALIPAC’s account – or to restrict posts using certain terminology – 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.¹²³

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 a Democratic campaign in making its decisions here.

¹¹⁵ *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 575 (1995).

¹¹⁶ *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974)

¹¹⁷ *Hurley*, 515 U.S. at 559.

¹¹⁸ *Citizens United v. FEC*, 558 U.S. 310, 371-72 (2010).

¹¹⁹ *Id.* at 339.

¹²⁰ *Id.* (internal quotation mark omitted).

¹²¹ *Id.* at 343 (internal quotation marks omitted).

¹²² Newton, *supra* note 45.

¹²³ 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”).

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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.”¹²⁴ The complaint does not allege that coordination occurred. Nor could it. The actions here were all undertaken for the above-described business reasons. They were not done at the suggestion of, after discussions with, or with any involvement by Democratic campaigns, as prescribed by the Commission’s coordination regulations.¹²⁵ 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 or dissemination of a specific Tweet cannot result in Twitter making a regulated contribution or expenditure subject to sanction under federal campaign finance law.¹²⁶

II. The Communications Decency Act Immunizes Twitter from Liability.

Finally, Twitter’s decision to not verify ALIPAC’s account and to remove content from it, 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.¹²⁷ Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal theories.¹²⁸ As the Ninth Circuit has

¹²⁴ See *supra* at 12.

¹²⁵ 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).

¹²⁶ 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).

¹²⁷ *Barrett v. Rosenthal*, 40 Cal.4th 33, 43 (2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

¹²⁸ 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.’”).

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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.”¹²⁹

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.”¹³⁰ These criteria are all met here.

First, Twitter is an “Interactive Computer Service” within the meaning of the statute.¹³¹ *Second*, the communications were provided by another information content provider – ALIPAC. *Third*, ALIPAC challenges Twitter’s decision not to verify and to prohibit the posting of certain content from ALIPAC’s account. In other words, ALIPAC seeks to impose campaign finance liability on Twitter for performing “a publisher’s traditional editorial functions.”¹³²

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.”¹³³ 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.”¹³⁴ Indeed, courts have concluded that “*providing accounts . . . is publishing activity*” subject to CDA immunity.¹³⁵ Promoting accounts through a verification process and removing offensive content falls squarely within the CDA’s allowances.

¹²⁹ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

¹³⁰ *Maynard v. Snapchat, Inc.*, 346 Ga. App. 131, 134 (2018).

¹³¹ 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.

¹³² *Barrett*, 40 Cal. 4th at 43.

¹³³ *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”).

¹³⁴ *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

¹³⁵ *Fields*, 217 F. Supp. 3d at 1123-24 (emphasis added) (“Despite being aimed at blocking Twitter accounts instead of particular tweets, plaintiffs’ provision of accounts theory is still based on Twitter’s alleged violation of a duty . . . derive[d] from [its] status or conduct as a publisher”); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 889-90 (N.D. Cal. 2017) (finding immunity even where plaintiffs argued their claims depended on access to Twitter’s services generally because plaintiffs “explicitly base their claims on the

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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 applies politically-neutral procedures to user accounts and insists that users abide by Twitter’s rules.

When Twitter declined to verify ALIPAC’s account and removed content from it, 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". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Caleb P. Burns
Andrew G. Woodson

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”).