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

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

Re: MUR 7841 (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 Eugene Delgaudio and an advocacy organization known as Public Advocate of the United States ("Public Advocate"). The complaint alleges that Twitter violated the Federal Election Campaign Act of 1971, as amended ("FECA"), by making a contribution to the Biden-Harris presidential campaign when Twitter suspended Public Advocate's account. The complaint also speculates that Twitter coordinated its activities with the Biden-Harris campaign, although complainants readily concede they "know of no direct evidence" to support this claim.

Contrary to the allegations in the complaint, Twitter suspended the account because Public Advocate failed to verify the account's authenticity after it exhibited signs of automated behavior. The suspension was not coordinated with the Biden-Harris campaign or an attempt to influence an election, but was motivated by business reasons, i.e., protecting the platform

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against spam.¹ Both the FECA and Commission precedent confirm that activities undertaken by a business for non-political reasons are not “for the purpose of influencing an election” and, therefore, do not qualify as regulated contributions under the law. Accordingly, Twitter respectfully requests that the Commission find no reason to believe that Twitter made an impermissible contribution when it suspended Public Advocate’s account. For the sake of completeness, however, this submission explains how the FECA’s media exemption and the Communications Decency Act also exempt Twitter from regulation.

For all these reasons, Twitter respectfully requests that the Commission find no reason to believe that Twitter violated the FECA and dismiss this matter.

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.

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

¹ Complainants could have allowed Twitter to complete its normal review process before complaining to the FEC. As of December 14, 2020, that review process is now complete, and Public Advocate’s account has been unsuspended. Rather than wait, complainants rushed to file this FEC complaint, issued a press release about it, and then issued another release asking the United Nations to send foreign election observers to Twitter’s corporate headquarters to address Public Advocate’s legal concerns. See Press Release, Public Advocate, Federal Election Commission Complaint Against Twitter Filed by Public Advocate, (Oct. 28, 2020), <https://www.publicadvocateusa.org/news/article.php?article=11856>; Press Release, Public Advocate, FEC and Now United Nations Complaint Against Twitter filed by Public Advocate, (Oct. 28, 2020), <https://www.publicadvocateusa.org/news/article.php?article=11857>. That sequence, in a nutshell, tells the Commission all it needs to know about the validity of this complaint.

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*, 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>.

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/>.

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constituents through Twitter accounts,⁸ with conservatives, in particular having “a strong presence on Twitter.”⁹ Third parties are also prominent on the platform and often turn to Twitter to get their message out when other means are not available.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 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 site for news coverage.¹⁹ In

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

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*, Twitter: Blog (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 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”).

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>.

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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 concerns²¹ because “[i]nauthentic accounts, spam, and malicious automation disrupt everyone’s experience” on the platform.²² Twitter continuously works to address these issues to improve the health of the conversations on its platform.²³ Twitter employs “technology to be more aggressive in detecting and minimizing the visibility of certain types of abusive and manipulative behaviors.”²⁴ Twitter places significant emphasis “on proactively identifying problematic accounts and behavior rather than waiting until [it] receive[s] a report” alleging abuse on the platform.²⁵ When Twitter’s algorithms determine that an account might be controlled by an automated bot, rather than a human, or that an account may be engaging in “spammy” behavior, the account is put “into a read-only state (where the account can’t engage with others or Tweet) . . . until it passes a challenge, like confirming a phone number” through a text message authentication process.²⁶ This authentication process occurs more than 9.9 million times a week at Twitter.²⁷ Companies like Amazon, Apple, Google, Facebook, and Instagram engage in similar efforts to protect their users from abuse.²⁸ As a result of these processes, Twitter has more than doubled the number of accounts it is disciplining for spam policy violations, which has led to a precipitous drop in user complaints.²⁹ By focusing on healthy

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

²³ 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*, Aug. 20, 2014, https://blog.twitter.com/engineering/en_us/a/2014/fighting-spam-with-botmaker.html.

²⁴ 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.

²⁵ Roth and Harvey, *supra* note 22 (further 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”).

²⁶ *Id.*

²⁷ See *id.*

²⁸ Matt Elliot, *Why You Are at Risk If You Use SMS for Two-Step Verification*, CNet.com, July 23, 2017, <https://www.cnet.com/how-to/why-you-are-at-risk-if-you-use-sms-for-two-step-verification/>.

²⁹ Roth and Harvey, *supra* note 22.

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conversations and combating abuse, Twitter's audience has grown substantially and analysts have noted a commensurate increase in the company's revenue and profits.³⁰

Importantly, Twitter's automated spam processes and its efforts to address harmful speech are not motivated by a desire to influence any election. In sworn testimony before Congress, Twitter CEO Jack Dorsey confirmed that Twitter does not "consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions, period."³¹ 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."³² 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."³³ In fact, "from a simple business perspective and to serve the public conversation, Twitter is incentivized to keep all voices on the platform."³⁴

II. Background on Eugene Delgaudio and Public Advocate

Eugene Delgaudio is an activist who is the President of Public Advocate, a non-profit organization recognized under section 501(c)(4) of the Internal Revenue Code.³⁵ Mr. Delgaudio previously served on the Loudon County Board of Supervisors, where he earned notoriety for "demand[ing] to know whether [his Muslim constituents] 'come in peace' and whether they pledge allegiance to the United States."³⁶ During his tenure, Mr. Delgaudio also faced "allegations that he used his county office to benefit his political campaign."³⁷ In fact, a special grand jury investigated "several instances that appeared to present a conflict of interest among Delgaudio's (Board of Supervisors) staff activities, Public Advocate and his campaign that created the potential for perceived malfeasance and unintentional cross-over between county

³⁰ Seth Fiegerman, *Twitter's Audience Is Growing Again As It Works to Combat Abuse*, CNN.com, April 23, 2019, <https://www.cnn.com/2019/04/23/tech/twitter-q1-earnings/index.html>.

³¹ *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>.

³² *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>.

³³ Dorsey Testimony at 11.

³⁴ *Id.* at 1.

³⁵ Caitlin Gibson, *Judge Orders Loudoun Supervisor Delgaudio to Appear in Court*, Wash. Post, Jan. 28, 2014, https://www.washingtonpost.com/local/virginia-politics/loudoun-county-group-files-court-petition-to-remove-supervisor-delgaudio-from-office/2014/01/27/b4143046-878b-11e3-a5bd-844629433ba3_story.html.

³⁶ Jacqueline Salmon, *Candidates Reach Out to Muslims*, Wash. Post, Aug. 26, 2007, <https://www.washingtonpost.com/wp-dyn/content/article/2007/08/25/AR2007082501139.html>.

³⁷ Caitlin Gibson, *No Indictment for Loudoun Supervisor Eugene Delgaudio*, Wash. Post, June 24, 2013, https://www.washingtonpost.com/local/dc-politics/investigation-of-loudoun-supervisor-eugene-delgaudio-concludes-with-no-indictment/2013/06/24/64a7c750-dce8-11e2-bd83-e99e43c336ed_story.html.

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business and the supervisor's private activities."³⁸ Not long afterward, Mr. Delgaudio was defeated for re-election.³⁹

Mr. Delgaudio's work with Public Advocate takes several forms. Most prominently, he organizes "street theater" to call attention to various government policies and officials.⁴⁰ For example, Mr. Delgaudio organized a singing troupe to support now-Justice Brett Kavanaugh's nomination and a "sobriety checkpoint" to mock Nancy Pelosi during the impeachment of President Trump. Mr. Delgaudio has also rallied against well-known conservatives, one time protesting at the White House against elevating conservative Judge William Pryor, of the U.S. Court of Appeals for the Eleventh Circuit, to the Supreme Court.⁴¹

Mr. Delgaudio is also active on the Internet. He has "criticized airport security pat-downs as 'part of a wide-scale 'homosexual agenda,' claiming in a broadly circulated email that 'the next TSA official that gives you an 'enhanced pat down' could be a practicing homosexual secretly getting pleasure from your submission.'"⁴² Through Public Advocate, Mr. Delgaudio issues online press releases with titles like "New York Times Involved in Murder Attempt on Fox News Host, FBI Notified"⁴³ and "Canada Government To Begin Mass Abductions of Christian Children, Prison for Christian Parents."⁴⁴ He is critical of Republicans too, as noted in the headline: "131 Conservatives: McConnell Is 'Turtle' Responsible for Slow Confirmations."⁴⁵

Mr. Delgaudio frequently uses Twitter as a medium for his commentary. Various themes are prevalent throughout the accounts Mr. Delgaudio administers. For example, Mr. Delgaudio has Tweeted about Joe Biden and pedophilia a number of times, using hash tags like #PedoJoeBiden and #Notmypedophile, the latter accompanied by images of Joe Biden interacting with children. For example:

³⁸ *Id.*

³⁹ Trevor Baratko, *Eugene Delgaudio Not Ruling Out a Future Bid for Office*, Loudon Times-Mirror, Nov. 13, 2015, https://www.loudountimes.com/news/eugene-delgaudio-not-ruling-out-a-future-bid-for-office/article_cde08c68-920d-5d38-8ad1-c913947ce1e5.html.

⁴⁰ Natalie Hopkinson, *Conservative Activist Proves Liberals Aren't Alone in Staging Political Theatrics*, Dallas Morning News, Nov. 14, 1997, http://www.ipsn.org/characters/coia/conservative_activist_proves_lib.htm.

⁴¹ See, e.g., Public Advocate, *Inauguration Day: Stop William Pryor!*, <https://www.publicadvocateusa.org/photogallery/gallery.php?id=857>.

⁴² Aaron Morrissey, *Loudoun Co. Official: TSA Pat Downs Are Part Of "Homosexual Agenda"*, DCist.com, Nov. 30, 2010, <https://dcist.com/story/10/11/30/loudoun-county-official-tsa-pat-dow/>.

⁴³ Press Release, Public Advocate, *New York Times Involved in Murder Attempt on Fox News Host, FBI Notified*, (July 21, 2020), <https://www.publicadvocateusa.org/news/article.php?article=11777>.

⁴⁴ Press Release, Public Advocate, *Canada Government To Begin Mass Abductions of Christian Children, Prison for Christian Parents*, (June 7, 2017), <https://www.publicadvocateusa.org/news/article.php?article=11028>.

⁴⁵ Press Release, Public Advocate, *131 Conservatives: McConnell Is "Turtle" Responsible for Slow Confirmations*, (Oct. 20, 2017), <https://www.publicadvocateusa.org/news/article.php?article=11123>.

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⁴⁶ Public Advocate Backup Account (@PublicBackup), Twitter (Nov. 9, 2020, 4:09 P.M.), <https://twitter.com/PublicBackup/status/1325908342120779777>.

⁴⁷ Hon. Eugene Delgaudio (@eugenedelgaudio), Twitter (Nov. 11, 2020, 3:06 P.M.), <https://twitter.com/eugenedelgaudio/status/1326617367238111233>.

III. The Complaint

The complaint alleges that Twitter suspended Public Advocate's account on October 8 and October 23, 2020.⁴⁸ During both of these suspensions, Public Advocate was unable to post any content.⁴⁹

The complaint claims that these suspensions resulted in Twitter making a prohibited, in-kind contribution of corporate resources to the Biden-Harris campaign.⁵⁰ In particular, the complaint argues that Twitter "provided valuable services to the political campaign of Presidential candidate Joe Biden and Vice Presidential candidate Kamala Harris by suppressing criticism" of them "for the purpose of influencing [an] election."⁵¹

The complaint also alleges that Twitter "coordinated its activities with federal political candidates," although complainants readily concede they "know of no direct evidence" to support this claim.⁵² Instead, they point to the following "circumstantial evidence":

- Twitter's "senior Communications manager" once "worked as Press Secretary and Deputy Press Secretary for Kamala Harris";
- Twitter's Deputy General Counsel, James Baker, previously worked at the FBI and handled information allegedly related to Hillary Clinton's presidential campaign; and
- The Biden presidential campaign hired Twitter's public policy director to its transition team and that individual served as "co-chair of candidate Biden's infrastructure policy."⁵³

THE LAW

As a general statutory matter, corporations are prohibited from making a "contribution" and are otherwise regulated when making an "expenditure" in connection with a federal election.⁵⁴ 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."⁵⁵ Similarly, the term "expenditure" means "anything of value, made by any person *for the purpose of influencing any election* for Federal office."⁵⁶

A corporate "expenditure" that is coordinated with a candidate may also be regulated as a prohibited "contribution." Specifically, federal law "provides that an expenditure made by any person 'in cooperation, consultation, or concert, with, or at the request or suggestion of, a

⁴⁸ Compl. at 2.

⁴⁹ *Id.* at 2-3.

⁵⁰ *Id.* at 5-6.

⁵¹ *Id.* at 5-6.

⁵² *Id.* at 7.

⁵³ *Id.*

⁵⁴ See 52 U.S.C. § 30118.

⁵⁵ *Id.* § 30101(8)(A) (emphasis added).

⁵⁶ *Id.* § 30101(9)(A) (emphasis added).

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candidate, his authorized political committees or their agents' constitutes an in-kind contribution" to that candidate.⁵⁷

The terms "contribution" and "expenditure" both contain an exemption for "any news story, commentary, [or] editorial."⁵⁸ In particular, this media exemption applies when an entity engaging in an activity is: (a) a media entity; (b) not owned or controlled by a political party, political committee, or candidate; and (c) is acting as a media entity when conducting its activities.⁵⁹

DISCUSSION

I. Twitter Did Not Make a Corporate Contribution by Suspending the Public Advocate Account.

The complaint alleges that Twitter made in-kind, corporate contributions to the Biden-Harris campaign by suspending the Public Advocate Twitter account. This allegation is without merit for numerous reasons, most notably that to be regulated as a contribution, an activity must be "for the purpose of influencing an election."⁶⁰ 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.⁶¹ 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]."⁶²

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.⁶³ 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

⁵⁷ First General Counsel's Report, Matters Under Review 7199, 7219, 7242 (Patrick Murphy), Nov. 2, 2017.

⁵⁸ See 52 U.S.C. § 30101(9)(B); 11 C.F.R. § 100.73.

⁵⁹ See FEC Adv. Op. 2016-01 (Ethiq); *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981).

⁶⁰ 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'").

⁶¹ 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 at n.19, 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).

⁶² 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).

⁶³ FEC Adv. Op. 2018-11 (Microsoft).

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the account security services.⁶⁴ In addition, the Commission has explained that a technology company “need not make its services available to [candidates] representing all political ideologies, but rather may establish objective business criteria to protect the commercial viability of its business without making contributions to the [candidates] that meet those criteria.”⁶⁵

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,”⁶⁶ 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.’”⁶⁷

Here, Twitter’s decision to suspend the Public Advocate Twitter account was not rooted in a desire to support or oppose Mr. Delgaudio’s – or anyone else’s – political views in connection with an election. Instead, Twitter’s anti-spam rules and enforcement mechanisms exist to protect the overall quality of discourse on the platform and are applied to all accounts – Republican, Democratic, and non-partisan alike – when any of them exhibits automated behavior. When the Public Advocate account exhibited such behavior, Twitter sent the account holder an automated phone challenge to confirm the authenticity of the account. This resulted in a temporary freeze on the account that began October 8. After Public Advocate failed to complete the phone challenge, which had been pending for over two weeks, Twitter suspended the account indefinitely on October 23. Mr. Delgaudio appealed Twitter’s action through the company’s internal review process, but the company had not processed the appeal before Public Advocate filed its FEC complaint. Twitter ultimately lifted the suspension on December 14, 2020.

At bottom, Twitter’s suspension of the Public Advocate account was a ministerial business action, not an attempt to influence an election. Therefore, the suspension cannot qualify as a regulated contribution. The Commission need not examine this allegation any further and should dismiss it altogether. For the sake of completeness, however, we explain further below how the Commission can dismiss the complaint for several other, equally compelling reasons.⁶⁸ But first, we address the complaint’s coordination allegations.

⁶⁴ *Id.*

⁶⁵ FEC Adv. Op. 2017-06 (Stein and Gottlieb).

⁶⁶ Matter Under Review 6911 (Lois Frankel for Congress et al.), Statement of Reasons of Chairman Matthew S. Petersen and Comm’rs Lee E. Goodman and Caroline C. Hunter (Apr. 12, 2016).

⁶⁷ 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.

⁶⁸ We also note that the Commission could dismiss this allegation because Twitter’s services are offered for free, and the definition of contribution is predicated on providing something of value. *Cf.* Matter Under Review 6911 (Lois Frankel for Congress et al.), 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).

II. Twitter Did Not Engage in FECA-Regulated Coordination.

The complaint attempts to buttress its claim that Twitter made a prohibited, in-kind contribution by alleging that Twitter coordinated its activities with the Biden-Harris campaign. An “expenditure,” or other use of resources on behalf of a candidate, 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.”⁶⁹ The complaint concedes there is no “direct evidence” of coordination, but offers only “circumstantial” speculation.⁷⁰

That speculation is extraordinarily thin. First, the complaint states that a Twitter employee, Nick Pacilio, previously worked for Kamala Harris. However, that was *over six years ago* when Ms. Harris was California Attorney General.⁷¹ The complaint offers no evidence of a more recent or relevant relationship between Mr. Pacilio and Ms. Harris or the Biden-Harris campaign. In fact, a news outlet reviewed the claim that Mr. Pacilio was involved in Twitter’s enforcement decisions as an agent of Ms. Harris’s and rated those claims “false.”⁷² Another media source even issued an apology and correction to its original story mischaracterizing Mr. Pacilio’s role at Twitter.⁷³

Second, the fact that Twitter hired an attorney, James Baker, who – taking the complaint’s allegations as true – had some previous connection to Hillary Clinton’s presidential campaign *in 2016* has no bearing on coordination with the Biden-Harris campaign *in 2020*.

Third, the complaint’s allegation that a former Twitter employee, Carlos Monje, left Twitter to work on the Biden-Harris transition team actually makes it less likely – not more so – that coordination occurred. Mr. Monje is no longer at Twitter and, therefore, cannot affect what the company does. To the extent the complaint alleges that Mr. Monje’s personal political activities have impacted his work at Twitter (and he departed before any Twitter actions at issue here), Mr. Monje has rebutted such speculation in sworn Senate testimony. In his words: “the Twitter platform itself does not take sides” and “we do not make value judgments on personal beliefs.”⁷⁴ Twitter “believe[s] strongly in being impartial, and we strive to enforce our rules dispassionately.”⁷⁵ In other words, neither Mr. Monje nor Twitter at his direction has made enforcement decisions for the benefit of a political campaign.

⁶⁹ See *supra* at 8-9.

⁷⁰ Compl. at 7.

⁷¹ See Nicholas Pacilio, LinkedIn, <https://www.linkedin.com/in/nicholas-pacilio-24b74130/>.

⁷² See, e.g., McKenzie Sadeghi, *Fact Check: Claim That Kamala Harris’ Current Press Secretary Works for Twitter Is False*, USA Today, Oct. 22, 2020, <https://www.usatoday.com/story/news/factcheck/2020/10/22/fact-check-claim-kamala-harris-press-secretary-false/3693598001/>.

⁷³ See Mikael Thalen, *Why Conservatives Think Kamala Harris’ Old Employee Runs Twitter*, DailyDot.com, Aug. 12, 2020, <https://www.dailydot.com/debug/kamala-harris-twitter-censor-nick-pacilio/>.

⁷⁴ *Stifling Free Speech: Technological Censorship and the Public Discourse: Hearing Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary* 116th Cong. (2019) (testimony of Carlos Monje, Director, Public Policy & Philanthropy, Twitter, Inc., at 9), <https://www.judiciary.senate.gov/imo/media/doc/Monje%20Testimony.pdf>.

⁷⁵ *Id.* at 2.

The Commission routinely dismisses speculative allegations like these.⁷⁶ In any event, the speculation here is refuted in the attached declaration of Mr. Pacilio who confirmed that he did not coordinate with the Biden-Harris presidential campaign and is aware of no basis for a coordination allegation against Mr. Baker or Mr. Monje.⁷⁷

For all of these reasons, the complaint's coordination allegations should be dismissed.

III. The Complaint's Allegations Against Twitter Are Also Exempt from Regulation Pursuant to the FECA's Media Exemption.

Twitter also 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.⁷⁸ The exemption excepts from regulation “any cost incurred in covering or carrying” news stories⁷⁹ and permits a media entity to choose between “competing claims of parties” and which content “to feature, investigate or address.”⁸⁰ 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,⁸¹ as well as websites that curate news content.⁸²

First, 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.”⁸³ 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

⁷⁶ See, e.g., Matter Under Review 6171 (Cooney for Congress), First General Counsel's Report (Aug. 14, 2009) (an “allegation [that] is merely speculative . . . does not provide a sufficient threshold to support reason to believe findings”); Matter Under Review 5467 (Michael Moore), First General Counsel's Report (July 22, 2004) (“The Commission should not entertain a complaint that offers no more” than “unsupported speculation”).

⁷⁷ See, e.g., Matter Under Review 4960 (Hillary Rodham Clinton), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas (Dec. 21, 2000) (“speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred”).

⁷⁸ See *supra* at 9.

⁷⁹ 11 C.F.R. § 100.73.

⁸⁰ 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).

⁸¹ 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”).

⁸² 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”).

⁸³ See Dorsey Testimony at 2.

news and the surrounding conversation so they can stay informed about what matters to them.”⁸⁴

Second, Twitter’s decisions to host accounts and their content on its platform – and to suspend accounts, if necessary – is part of the media’s traditional role in choosing between “competing claims of parties” and which content “to feature, investigate or address in news, editorial and opinion coverage.”⁸⁵ These decisions about what content to disseminate to Twitter users is at the very heart of the media function.⁸⁶ And both the Commission and individual commissioners have repeatedly observed that “the press exemption shields press entities from investigations into alleged coordination.”⁸⁷

Third, because Twitter is not owned or controlled by a political party, political committee, or candidate,⁸⁸ it also satisfies the third and final element of the media exemption. Therefore, Twitter’s decision to suspend the Public Advocate account was not a contribution, but a media activity exempt from regulation under the FECA.

IV. The Communications Decency Act Immunizes Twitter from Liability.

Finally, Twitter’s decision to suspend the Public Advocate Twitter account is wholly immune from liability pursuant to 47 U.S.C. § 230(c) of the Communications Decency Act (“CDA”).

The CDA provides in relevant part that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another 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.⁸⁹ Courts have consistently recognized that this grant of immunity is broad and applies to a wide array of claims and legal theories.⁹⁰ As the Ninth Circuit has

⁸⁴ Kantrowitz, *supra* note 17; *see also* Eule, *supra* note 17.

⁸⁵ 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).

⁸⁶ *See* FEC Adv. Op. 2016-01.

⁸⁷ Internet Communications, 71 Fed. Reg. 18,589, 18,610 (Apr. 12, 2006) (quoting Commissioner Ellen Weintraub’s Statement of Reasons in an enforcement matter involving CBS); *see also* Statement of Reasons of Commissioners Michael E. Toner, David M. Mason, and Bradley A. Smith, MURs 5540 & 5545 (CBS Broadcasting, Inc.) (July 11, 2005).

⁸⁸ *See supra* at 2.

⁸⁹ *Barrett v. Rosenthal*, 146 P.3d 510, 515 (Cal. 2006) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)).

⁹⁰ *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.”⁹¹

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.”⁹² These criteria are met here.

First, Twitter is an “Interactive Computer Service” within the meaning of the statute.⁹³ *Second*, the communications at issue were provided by another information content provider, Public Advocate. *Third*, Public Advocate challenges Twitter’s decision to remove content from the platform.

In applying this third criterion, courts have recognized that CDA immunity attaches to a wide range of activities, including “reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.”⁹⁴ 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 are thus “immunized by the CDA.”⁹⁵ Indeed, courts have concluded that “*providing accounts . . . is publishing activity*” subject to CDA immunity.⁹⁶ Thus, Twitter’s

⁹¹ *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170-1171 (9th Cir. 2008) (en banc) (emphasis added).

⁹² *Maynard v. Snapchat, Inc.*, 816 S.E.2d 77, 80 (Ga. Ct. App. 2018).

⁹³ *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.

⁹⁴ *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”).

⁹⁵ *Sikhs for Justice (SFJ) v. Facebook, Inc.*, 144 F. Supp.3d 1088, 1095 (N.D. Cal. 2015).

⁹⁶ *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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suspension of Public Advocate's account is precisely the type of conduct immunized by the CDA, which wholly bars the complaint here.

CONCLUSION

Twitter is committed to maintaining a robust platform for all citizens – be they liberal, conservative, or somewhere in between – to engage and debate public issues, including those involving political candidates and policies. As part of this commitment, Twitter continually works to improve the user experience by eliminating automated content. The Public Advocate account exhibited spam-like behavior, so Twitter suspended the account to address a business concern. Twitter did not coordinate the suspension with the Biden-Harris campaign nor suspend the account to influence an election. Moreover, Twitter's actions were consistent with its editorial function as a media entity and its statutorily-conferred rights under section 230 of the CDA.

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

Sincerely,

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

BEFORE THE FEDERAL ELECTION COMMISSION

Response of Twitter, Inc. in
Matter Under Review 7841

DECLARATION OF NICHOLAS PACILIO

I, Nicholas Pacilio, hereby declare as follows:

1. I have personal knowledge of all information contained in this Declaration.
2. I have been employed at Twitter, Inc. ("Twitter") since November 2014. I am currently Twitter's Senior Communications Manager, a position I have held since February 2020. Prior to serving in that position, I was a Senior Communications Associate and Communications Manager with Twitter.
3. In my capacity as Senior Communications Manager, I focus on communicating Twitter's messaging to political, policy, tech and media reporters. While my position sometimes requires me to explain why Twitter takes action against certain accounts or posts on the platform, I have no authority to make enforcement decisions.
4. Prior to working at Twitter, I served as California Attorney General Kamala Harris's Deputy Press Secretary and, ultimately, Press Secretary from February 2011 until November 2014.
5. I was not employed by Kamala Harris when she represented California in the United States Senate.
6. I was not employed by Kamala Harris or her campaign when Ms. Harris ran for the Democratic nomination for President of the United States beginning in 2019.
7. I was not employed by Kamala Harris in her capacity as a vice-presidential candidate, her campaign, former Vice President Joe Biden, his 2020 presidential campaign, or any other Democratic candidate or campaign committee during the 2020 election cycle.
8. I have not discussed Twitter's decision to suspend Public Advocate's Twitter account (@publicfreedom) with any of the entities identified in the preceding paragraph, much less coordinated Twitter's suspension of this account with them.

9. I am familiar with James Baker, Twitter's Deputy General Counsel, and Carlos Monje, a former Twitter employee who now works with the Biden-Harris transition team. I am not aware that either individual coordinated Twitter's suspension of the Public Advocate account with any federal candidate, party, or committee.

Under penalty of perjury, I declare that the foregoing is true to the best of my knowledge and belief.

Nicholas Pacilio

Nicholas Pacilio (Dec 17, 2020 14:27 PST)

Nicholas Pacilio

Dec 17, 2020

Date

Signature: *Nicholas Pacilio*

Nicholas Pacilio (Dec 17, 2020 14:27 PST)

Email: npacilio@twitter.com

Title: Senior Communications Manager

Company: Twitter







Pacilio Declaration

Final Audit Report

2020-12-17

Created:	2020-12-16
By:	Paul Alsdorf (palsdorf@twitter.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAIH-2C0VLipvZFvmScjZjrx9e8k-4aQ6_

"Pacilio Declaration" History

-  Document created by Paul Alsdorf (palsdorf@twitter.com)
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