

WILMERHALE

January 7, 2021

Christopher E. Babbitt

+1 202 663 6681 (t)  
+1 202 663 6363 (f)  
christopher.babbitt@wilmerhale.com**VIA ELECTRONIC MAIL**

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

**Re: MUR 7858 — Response of Facebook, Inc.**

Dear Mr. Jordan:

This letter is submitted on behalf of our client, Facebook, Inc. (“Facebook”), in response to the complaint filed in the above-captioned matter under review.

The complaint is the latest in a series alleging violations of the Federal Election Campaign Act (“FECA” or the “Act”) based on the operation of Facebook’s third-party fact-checking program. Facebook has operated the program for years, in the ordinary course of business, as part of its broader effort to protect against all manner of misinformation on its platform (from simple internet hoaxes to public health and safety conspiracy theories related to COVID-19, as well as misleading information in the political realm).<sup>1</sup> Facebook has long made clear that “misinformation is bad for our community and bad for our business,” and it has taken various highly publicized steps to reduce the presence and effect of misinformation on its platform, including by enabling independent third-party organizations like the Associated Press, Reuters, USA Today, Check Your Fact, and PolitiFact to fact-check material posted on Facebook.<sup>2</sup>

American Principles Project (“APP”) complains that an online political advertisement it ran on Facebook was unfairly rated by PolitiFact and that the ad’s distribution was improperly reduced as a consequence. Although APP does not allege that Facebook coordinated with any campaign committee in connection with the circumstances giving rise to its complaint, it nonetheless contends that by carrying PolitiFact’s article and limiting the reach of APP’s online

---

<sup>1</sup> See MUR 7641, MUR 7812, and MUR 7825.

<sup>2</sup> See *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>; *Where We Have Fact-Checking*, FACEBOOK JOURNALISM PROJECT, <https://www.facebook.com/journalismproject/programs/third-party-fact-checking/partner-map> (last visited Jan. 6, 2021).

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 2

video over a three-day period from September 19 to September 21, Facebook made an unlawful in-kind contribution to the campaign committees of Senator Gary Peters and President-elect Joe Biden.<sup>3</sup> It asks the Commission to “conduct an immediate investigation” to answer the following questions: “[W]as Facebook really acting on the basis of a ‘fact-check,’ or on the basis of something else? And, if ‘something else,’ was it—as we submit, here, that it was—Facebook’s bald-faced attempt to influence an election in Michigan, a key battleground state?”<sup>4</sup>

Setting aside that it is the complainant’s obligation to provide “a recitation of the facts which describe a violation,” 11 C.F.R. § 111.4(d)(3), and not to speculate about hidden motives or pose questions to the Commission, APP’s theory of FECA liability is fundamentally flawed for at least the following reasons.<sup>5</sup>

**First**, Facebook’s display of the PolitiFact article is not—and cannot be—a “coordinated communication” under 11 C.F.R. § 109.21(a). The article posted on Facebook’s internet platform is, by definition, neither an “electioneering communication” nor a “public communication,” and the complaint alleges no coordination between Facebook and the Biden-Harris or Peters campaigns.

**Second**, the complaint does not allege any facts to establish that Facebook operated its third-party fact-checking program “for the purpose of influencing any election for Federal office,” 52 U.S.C. § 30101(8)(A)(i). The PolitiFact article at issue does not include any express advocacy or solicitation of funds, and the third-party fact-checking program is part of Facebook’s well-publicized effort to combat misinformation on its platform—across a range of topics—for independent business reasons related to maximizing users’ experience on the Facebook platform. The complaint’s assertion that Facebook “operated brazenly outside its ‘ordinary course of business’” with respect to APP’s advertisement is baseless.<sup>6</sup>

As explained in greater detail below, the complaint’s allegations are insufficient, lack substance, and fail to state any cognizable FECA violation as a matter of law. Accordingly, the Commission should find no reason to believe that Facebook violated the Act as alleged in the MUR 7858 complaint. In the alternative, the Commission should exercise its discretion to dismiss the complaint with no further action on the ground that it does not warrant further expenditure of Commission resources.

---

<sup>3</sup> APP also alleges that Facebook “has violated its duties of disclosure and reporting, inter alia, under 2 U.S.C. §§ 432, 433, and 434(a).” Those provisions (recodified at 52 U.S.C. §§ 30102-30104) apply only to “political committees,” as defined in 52 U.S.C. § 30101(4), and do not impose any reporting or disclosure obligations on Facebook.

<sup>4</sup> Compl. ¶ 2 & p. 25.

<sup>5</sup> In the interest of brevity, this response focuses on these fundamental defects in the complaint’s theory of liability. Were the Commission to take any action beyond either finding no reason to believe or dismissing the complaint at the outset, Facebook expressly reserves any defenses available under 11 C.F.R. §§ 100.73 & 100.132, 47 U.S.C. § 230, and the First Amendment.

<sup>6</sup> Compl. ¶ 44.

WILMERHALE

Mr. Jeff S. Jordan  
 January 7, 2021  
 Page 3

### FACTUAL BACKGROUND<sup>7</sup>

The complaint alleges violations of FECA related to a video advertisement APP posted on Facebook on September 3, 2020 and a subsequent article written about the advertisement by PolitiFact, one of Facebook’s third-party fact-checking program partners.

The APP video claims that Michigan Senator Gary Peters and President-elect Joe Biden support legislation—the proposed Equality Act—that APP contends would “destroy girls’ sports” by permitting transgender females to compete alongside biological females in school sports.<sup>8</sup> On September 15, PolitiFact ran an article under the headline, “Ad Watch: Conservative PAC Claims Gary Peters Would ‘Destroy Girls’ Sports.”<sup>9</sup> The article included a link to the APP ad and proceeded, in its words, to “lay out how the Equality Act would impact transgender student athletes and the arguments made by those who support allowing transgender athletes to compete according to their gender identity and those who oppose the idea.”<sup>10</sup> The complaint alleges that Facebook blocked the APP advertisement as a result of PolitiFact’s assessment and appended a link to the PolitiFact article where the APP video appeared on the platform.<sup>11</sup>

Facebook launched its third-party fact-checking program in the United States in December 2016 and has since grown the program globally.<sup>12</sup> Facebook has publicly explained how its third-party fact-checking program operates and previously explained its operation in responses submitted to the Commission in multiple pending matters under review.<sup>13</sup> If a post is identified as potentially false, Facebook may temporarily reduce its distribution pending third-party review and place it into a digital queue for potential review by third-party fact-checkers, who are independent of Facebook and certified through the non-partisan International Fact-Checking Network (“IFCN”).<sup>14</sup> Independent fact-checkers may also identify content to review on their own.<sup>15</sup> The fact-checkers select content in the digital queue to review, independently rate the content’s

---

<sup>7</sup> This factual background is drawn from the allegations in the complaint and the publicly available sources cited herein. While Facebook cites to factual allegations in the complaint for purposes of this response, it in no way endorses the veracity of the allegations and reserves all rights to dispute them should this matter proceed.

<sup>8</sup> The bill would “prohibit[] discrimination based on sex, sexual orientation, and gender identity in a wide variety of areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system.” Cong. Research Serv., Summary: Equality Act, H.R. 5, 116th Cong. (as passed by H.R., May 17, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/5>.

<sup>9</sup> Clara Henderson, *Ad Watch: Conservative PAC Claims Gary Peters Would ‘Destroy Girls’ Sports*, POLITIFACT (Sept. 15, 2020), <https://www.politifact.com/article/2020/sep/15/ad-watch-peters-supports-ending-discrimination-bas/>.

<sup>10</sup> *Id.*

<sup>11</sup> Compl. ¶¶ 2, 9.

<sup>12</sup> See *Hard Questions: How Is Facebook’s Fact-Checking Program Working?*, FACEBOOK NEWSROOM (June 14, 2018), <https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/>.

<sup>13</sup> See *supra* note 1.

<sup>14</sup> See *supra* note 12; see also *Helping to Protect the 2020 US Elections*, FACEBOOK NEWSROOM (Oct. 21, 2019), <https://newsroom.fb.com/news/2019/10/update-on-election-integrity-efforts/>.

<sup>15</sup> See *supra* note 12.

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 4

accuracy, and independently write an article (or link to one of their prior articles) explaining how they arrived at their rating.<sup>16</sup> If a fact-checker identifies content as misinformation, Facebook reduces its distribution in the News Feed so fewer people see it.<sup>17</sup> Facebook also shows more context by displaying the fact-checker's article alongside the rated content and labeling the content to indicate that it has been checked by independent fact-checkers and contains misinformation.<sup>18</sup>

Facebook does not allow ads that contain content that has been identified by third-party fact-checkers as "false," "partly false," "altered," or "missing context." If an ad is disapproved for containing misinformation, Facebook notifies the advertiser. Advertisers may directly approach the third-party fact-checker that rated their content to issue a correction for, or dispute a rating of, content that the advertiser created.<sup>19</sup>

Facebook content subject to fact-checking is not limited to political subjects; the program reaches misinformation on a broad range of topics. For example, the following claims have recently been fact-checked (and rated as false) by third parties as part of this program: (i) that wearing a face mask to slow the spread of COVID-19 could cause Legionnaires' disease;<sup>20</sup> (ii) that wildfires burning in California, Oregon, and Washington were the result of arson by political extremists;<sup>21</sup> and (iii) that a list of celebrities, including Beyoncé and Chrissy Teigen, traveled on Jeffrey Epstein's "Lolita Express" plane to his Caribbean island.<sup>22</sup> And to the extent content from the political realm are selected for third-party fact-checking, it spans the political spectrum. For example, the following claims about Republican political figures have recently been deemed false or misleading by third-party fact-checkers as part of this program: (i) that President Trump's remarks about a payroll tax deferral indicated that he will "take away your Social Security";<sup>23</sup>

---

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *Helping to Protect the 2020 US Elections*, FACEBOOK NEWSROOM (Oct. 21, 2019), <https://newsroom.fb.com/news/2019/10/update-on-election-integrity-efforts/>.

<sup>19</sup> *Facebook's Enforcement of Fact-Checker Ratings*, FACEBOOK BUSINESS HELP CENTER, <https://www.facebook.com/business/help/297022994952764?id=673052479947730> (last visited Jan. 6, 2021).

<sup>20</sup> Saranac Hale Spencer, *Face Masks Don't Cause Legionnaires' Disease*, FACTCHECK.ORG (Aug. 12, 2020), <https://www.factcheck.org/2020/08/face-masks-dont-cause-legionnaires-disease/>.

<sup>21</sup> Camille Caldera, *Fact Check: Oregon, Washington Fires Were Not Set By Anti-Fascist Activists*, USA TODAY (Sept. 11, 2020), <https://www.usatoday.com/story/news/factcheck/2020/09/11/fact-check-oregon-fires-were-not-set-antifa-any-other-activists/3460386001/>.

<sup>22</sup> Alexis Tereszczuk, *Fact Check: 'Leaked' Jeffrey Epstein Flight Log Is Fake - 40 Celebrities Including Beyonce, Chrissy Teigen & Barack Obama Were Never On 'Lolita Express'*, LEADSTORIES (Aug. 15, 2020), <https://leadstories.com/hoax-alert/2020/08/fact-check-leaked-jeffrey-epstein-flight-log-is-fake-40-celebrities-including-beyonce-chrissy-teigen-barack-obama-were-never-on-lolita-express.html>.

<sup>23</sup> Hallie Golden, *Fact Check: Trump's Payroll Tax Cut Remarks Do NOT Mean He 'Will Take Away Your Social Security'*, LEADSTORIES (Oct. 30, 2020), <https://leadstories.com/hoax-alert/2020/10/fact-check-trump-payroll-tax-cut-remarks-do-not-mean-he-will-take-away-your-social-security.html>.

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 5

(ii) that Senator Mitch McConnell is the richest senator while Kentucky is the poorest state;<sup>24</sup> and (iii) that President Trump “bailed out Wall Street, but not Main Street” by signing the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.<sup>25</sup>

### LEGAL STANDARD

The Act requires the Commission to find “reason to believe that a person has committed, or is about to commit,” a FECA violation before it may initiate an investigation.<sup>26</sup> And, as the Commission has explained: “The Commission may find ‘reason to believe’ *only if* a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA.”<sup>27</sup> The Commission may find “no reason to believe” if “the complaint, any response filed by the respondent, and any publicly available information, when taken together, *fail to give rise to a reasonable inference that a violation has occurred*, or even if the allegations were true, would not constitute a violation of the law.”<sup>28</sup> A “no reason to believe” finding is appropriate where the allegation “is so vague that an investigation would be effectively impossible” or where the complaint “fails to describe a violation of the Act.”<sup>29</sup>

The Commission has further clarified that “[u]nwarranted legal conclusions from asserted facts, ... or mere speculation, ... will not be accepted as true.”<sup>30</sup> More specifically, “[c]omplaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.”<sup>31</sup> The Commission does not find reason to believe FECA violations have occurred absent reliable evidence thereof and has repeatedly

---

<sup>24</sup> Camille Caldera, *Fact Check: Claims Are False About Mitch McConnell’s Wealth, Kentucky’s Lack of It*, USA TODAY (Oct. 20, 2020), <https://www.usatoday.com/story/news/factcheck/2020/10/20/fact-check-mitch-mcconnell-isnt-senates-richest-ky-isnt-poorest/3677447001/>.

<sup>25</sup> Louis Jacobson, *Fact Check: Lincoln Project’s ‘Mourning in America’ Ad Critical of Trump Misleads on Bailouts*, POLITIFACT (May 7, 2020), <https://www.politifact.com/factchecks/2020/may/07/lincoln-project/mourning-america-ad-critical-trump-misleads-bailou/>.

<sup>26</sup> 52 U.S.C. § 30109(a)(2).

<sup>27</sup> MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, *et al.*), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, at 1-2 (emphasis added); *see also* MUR 5467 (Michael Moore), First General Counsel’s Report, at 5 (citing MUR 4960) (“Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred.”).

<sup>28</sup> *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007), [https://www.fec.gov/resources/cms-content/documents/notice\\_2007-6.pdf](https://www.fec.gov/resources/cms-content/documents/notice_2007-6.pdf) (emphasis added).

<sup>29</sup> *Id.*

<sup>30</sup> MUR 4960, Statement of Reasons, at 2.

<sup>31</sup> *Id.* at 1 (first citing 11 C.F.R. § 111.4(d)(2); then quoting MUR 4545 (Clinton/Gore ’96 Primary Comm./Amtrak), First General Counsel’s Report, at 15; and then quoting MUR 3534 (Bibleway Church of Atlas Road, Inc., *et al.*), Statement of Reasons of Chairman Scott E. Thomas, Vice Chairman Trevor Potter, and Commissioners Joan D. Aikens, Lee Ann Elliot, Danny Lee McDonald, and John Warren McGarry, at 2).

Mr. Jeff S. Jordan

January 7, 2021

Page 6

found “no reason to believe” to dispose of complaints that do not allege specific facts sufficient to establish a violation.<sup>32</sup>

Even if the allegations in a complaint do not fail as a matter of law, the Commission also has discretion to dismiss complaints that do not warrant further expenditure of Commission resources.<sup>33</sup>

## ARGUMENT

### I. Facebook’s Display Of The PolitiFact Article Was Not A Coordinated Communication Under 11 C.F.R. § 109.21(a)

Commission regulations establish a three-prong test to determine whether a communication qualifies as a “coordinated communication” that constitutes an in-kind contribution.<sup>34</sup> First, the communication must be paid for by someone other than a candidate, a candidate’s authorized committee, a political party committee, or their authorized agents (the “payment prong”).<sup>35</sup> Second, the communication must satisfy one of the content standards in the Commission regulations (the “content prong”).<sup>36</sup> Third, the communication must satisfy one of the conduct standards in the Commission regulations (the “conduct prong”).<sup>37</sup> A communication qualifies as a “coordinated communication” only if *all three* prongs are satisfied. Here, even if one assumes *arguendo* that the payment prong is met, the internet communications at issue cannot

---

<sup>32</sup> See MUR 3534, Statement of Reasons, at 2 (unanimously rejecting OGC recommendation and finding no reason to believe because the complaint was “vague” as to the content of communications at issue, and because “there was a lack of evidence” of facts suggesting a FECA violation); MUR 4869 (American Postal Workers Union), Statement of Reasons of Chairman Darryl R. Wold, Vice Chairman Danny L. McDonald, and Commissioners David M. Mason, Karl J. Sandstrom, and Scott E. Thomas, at 2 (unanimously finding no reason to believe because the complaint failed to allege conduct that would constitute a violation of FECA); MUR 7169 (Democratic Congressional Campaign Committee, *et al.*), Factual and Legal Analysis, at 11 (rejecting complaints alleging an excessive in-kind contribution where “the Complaints do not allege specific facts that are sufficient to provide reason to believe that the conduct prong has been satisfied.”); MUR 6821 (Shaheen for Senate, *et al.*), Factual and Legal Analysis, at 7-8 (finding no reason to believe there had been a “coordinated communication” where the complaint “fails to identify any communication” between the relevant parties); MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis, at 3 (finding “the complaint does not contain sufficient information on which to base an investigation” into whether the conduct standard was met where it does not “even specifically identify which ‘conduct’ standard would apply to the activity complained of” and “does not connect any such discussions” to any alleged coordinated communications).

<sup>33</sup> See generally *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>34</sup> 11 C.F.R. § 109.21(b)(1).

<sup>35</sup> 11 C.F.R. § 109.21(a)(1).

<sup>36</sup> 11 C.F.R. §§ 109.21(a)(2), (c).

<sup>37</sup> 11 C.F.R. §§ 109.21(a)(3), (d).

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 7

satisfy either the content prong or the conduct prong.<sup>38</sup> Accordingly, there is no basis for concluding that a “coordinated communication” has occurred.<sup>39</sup>

**A. Facebook’s Actions Fail Under The “Content Prong” Because They Were Neither “Electioneering Communications” Nor “Public Communications”**

Facebook’s display of the PolitiFact article does not satisfy the “content prong” of the “coordinated communication” regulation because it is neither an “electioneering communication” nor a “public communication.”<sup>40</sup> And because the communication cannot satisfy the content prong as a matter of law, it cannot qualify as a “coordinated communication.”<sup>41</sup>

**1. The PolitiFact Article Is Not An “Electioneering Communication”**

An electioneering communication is “any broadcast, cable, or satellite communication” that refers to a clearly identified candidate for federal office and is publicly distributed within certain timeframes.<sup>42</sup> Facebook’s actions are not subject to the Commission’s rules on “electioneering communications” because those regulations apply only to activity on traditional broadcast media and do not extend to “communications over the Internet.”<sup>43</sup> Indeed, the Commission reinforced this position in an advisory opinion earlier this year, concluding that certain online advertisements do not constitute electioneering communications because they are “conducted exclusively on the internet.”<sup>44</sup> Facebook’s display of a link to the PolitiFact article with the APP video occurred “exclusively on the internet” and therefore cannot constitute an electioneering communication.<sup>45</sup>

---

<sup>38</sup> It is unnecessary to decide whether the payment prong is met for purposes of the present response, given the other independent reasons why the PolitiFact article does not qualify as a coordinated communication. Facebook notes, however, that APP does not allege that PolitiFact paid Facebook to post its article, or that Facebook was otherwise compensated for doing so.

<sup>39</sup> *Cf.* MUR 6522 (Lisa Wilson-Foley for Congress *et al.*), Factual & Legal Analysis at 6 (finding no reason to believe that advertisements on Facebook and other social media platforms constituted a contribution; reasoning that internet communications not placed for a fee on another person’s website were neither electioneering nor public communications).

<sup>40</sup> 11 C.F.R. § 109.21(c)(1).

<sup>41</sup> 11 C.F.R. § 109.21(a) (to be considered “coordinated,” communications must satisfy the payment prong, and at least one of the content standards and at least one of the conduct standards).

<sup>42</sup> 52 U.S.C. § 30104(f)(3); 11 C.F.R. § 100.29(a)(3).

<sup>43</sup> 11 C.F.R. § 100.29(c)(1).

<sup>44</sup> AO 2019-18, at 4 (Because IDF’s activities are conducted “exclusively on the internet, and [do] not include any ‘broadcast, cable, or satellite communications,’” the activities are not electioneering communications, regardless of when they take place in relation to any election.).

<sup>45</sup> *Id.*

Mr. Jeff S. Jordan  
 January 7, 2021  
 Page 8

## 2. The PolitiFact Article Is Not A “Public Communication”

While certain forms of “public communication” can also satisfy the content prong, Commission regulations expressly exclude from the definition of “public communication” all internet communications except for “general public political advertising” that is “placed for a fee on another person’s Web site.”<sup>46</sup> Here, there is no “public communication” because the complaint concerns an internet article by PolitiFact and does not allege that anyone paid Facebook to post it.

### B. The Complaint Also Fails Under The “Conduct Prong” Because It Does Not Allege Coordination Between Facebook And Any Campaign

Even if a communication meets the “content prong”—and the PolitiFact article posted on Facebook does not and cannot, as a matter of law—a communication cannot be a “coordinated communication” under Commission regulations unless it satisfies at least one of several standards under the “conduct prong.”<sup>47</sup> Specifically, the communication must be made “at the request or suggestion” of a candidate, include the “material involvement” of a candidate, be made “after one or more substantial discussions about the communication” with the candidate, be paid for by someone sharing a “common vendor” with the candidate, or be paid for by a “former employee or independent contractor” of the candidate.<sup>48</sup>

APP never even *alleges* that Facebook coordinated with any political candidate in connection with the circumstances at issue in the complaint. That unnamed Facebook employees may have donated to Democratic candidates, that a former Facebook employee may be working for the Biden-Harris Transition team, or that a former *Twitter* employee may be working for the Biden-Harris Transition team is irrelevant to the conduct prong under Commission regulations.<sup>49</sup>

---

<sup>46</sup> 11 C.F.R. § 100.26.

<sup>47</sup> 11 C.F.R. § 109.21(d); *see also Campaign Legal Ctr. v. Fed. Election Comm’n*, 466 F. Supp. 3d 141, 147 (D.D.C. 2020), *on reconsideration in part*, 2020 WL 7059577 (D.D.C. Dec. 2, 2020) (A communication is not public if it is “over the Internet, except for communications placed for a fee on another person’s Web site. In other words, the only Internet communications that could count as coordinated communications—and thus the only ones that could be regulated as contributions—are paid ones.” (emphasis and internal quotation marks omitted)).

<sup>48</sup> 11 C.F.R. § 109.21(d); *see also* MUR 6668 (Jay Chen for Congress, *et al.*), First General Counsel’s Report, at 7 n.7 (enumerating the categories of conduct that satisfy the conduct prong).

<sup>49</sup> *See* Compl. ¶¶ 34-35.

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 9

Indeed, the Commission has repeatedly found that coordination has not been established under circumstances far less attenuated than those alleged here.<sup>50</sup>

Absent any factual allegations regarding any coordination at all between Facebook and a political campaign about its actions, the complaint does not satisfy the “conduct prong.”<sup>51</sup> Where “the Complaint does not allege, and there is no information evidencing, any discussion, participation, or other activity” between the respondent and a political candidate, there can be no “coordinated communication.”<sup>52</sup> This provides an additional, independent reason why there has been no “coordinated communication” under Commission regulations.

## **II. Facebook’s Actions Were Undertaken In The Ordinary Course Of Business, Not “For The Purpose Of Influencing Any Election For Federal Office”**

To constitute an in-kind contribution under FECA, an activity must be undertaken “for the purpose of influencing [an] election for Federal office.”<sup>53</sup> By contrast, activities conducted “in the ordinary course of business,” on the same terms that apply in similar non-political circumstances, do not constitute contributions. Thus, for example, the Commission has concluded that Microsoft and Area 1 each could offer free or discounted cybersecurity services directly to candidates and political committees where the companies had independent business reasons for doing so and their services were made available on the same terms to similarly situated parties outside the political

---

<sup>50</sup> See, e.g., MUR 6664 (Wall for Congress, *et al.*), Factual and Legal Analysis, at 8 (finding no coordination where the complaint “fail[ed] ... to allege a specific incident of coordination” and instead merely “surmise[d]” that such coordination occurred because an employee of a labor organization later became campaign manager of a congressional campaign for a candidate supported by the union); MUR 6668, Factual and Legal Analysis, at 8 (finding no coordination despite the sibling relationship between a candidate and the principal donor to a Super PAC supporting his candidacy where the complaint did not allege “any discussion, participation, or activity between the ... brothers that might satisfy the conduct prong”); MUR 7067 (Friends of Patrick Murphy, *et al.*), Factual and Legal Analysis, at 5 (finding no coordination even though the candidate’s father and his father’s company, in which the candidate had an ownership interest, contributed to a Super PAC supporting his candidacy—reasoning that the close familial and business relationship, “without more, does not appear to satisfy any of the conduct standards”).

<sup>51</sup> MUR 5754 (MoveOn.org Voter Fund), Factual and Legal Analysis, at 3 (finding “the complaint does not contain sufficient information on which to base an investigation” into whether the conduct standard was met where it does not “even specifically identify which ‘conduct’ standard would apply to the activity complained of” and “does not connect any such discussions” to any alleged coordinated communications).

<sup>52</sup> MUR 6668, First General Counsel’s Report, at 10.

<sup>53</sup> 52 U.S.C. § 30101(8)(A)(i); see also, e.g., AO 1982-56 (“[A]lthough media or other public appearances by candidates may benefit their election campaigns, the person defraying the costs of such an appearance will not be deemed to have made a contribution in-kind to the candidate absent an indication that such payments are made to influence the candidate’s election to Federal office.”).

Mr. Jeff S. Jordan

January 7, 2021

Page 10

realm.<sup>54</sup> Likewise, the Commission has concluded that Meetup could provide free basic online meeting-coordination services to candidates and political committees where it also made such services available outside the political realm as part of its business model.<sup>55</sup>

Because the activities that APP challenges all occurred pursuant to a well-publicized program that operates in the ordinary course of Facebook’s business—and which applies to both political and non-political content—they do not result in an in-kind contribution.

#### A. The Complaint Rests On A Misunderstanding Of Facebook Policy

The complaint contends that by allowing the third-party fact-checking program to operate with respect to APP’s video, Facebook stepped “brazenly outside its ‘ordinary course of business,’” because (in APP’s view) the video was “clearly opinion” and fact-checking an opinion “should have been deemed a violation of Facebook policy.”<sup>56</sup> Irrespective of whether the APP’s statement that the Equality Act would “destroy women’s sports” is more properly viewed as an assertion of fact or opinion, APP’s contention rests on a fundamental misunderstanding of Facebook policy, which states:

Opinion content is generally not eligible for rating because the fact-checking program is not meant to interfere with individual expression or debate. However, the definition of “opinion” is not meant to give a free pass to content that spreads false information, solely on the basis of how it is presented. Therefore, *we ask fact-checkers to use their judgment to determine whether content is actually opinion or rather masking false information in the guise of opinion*, and to rate it as appropriate in these circumstances.<sup>57</sup>

Thus, the policy makes clear that “content presented as opinion but based on underlying false information may still be eligible for a rating.”<sup>58</sup> While APP may disagree with the manner in which Facebook’s third-party fact-checking partner exercised the judgment it was afforded under

---

<sup>54</sup> See AO 2019-12 (Area 1) at 1 (“Because Area 1 would offer these services in the ordinary course of business and on the same terms and conditions as offered to similarly situated non-political clients, the Commission concludes that the proposal would not result in prohibited in-kind contributions and thus is permissible.”); AO 2018-11 (Microsoft) at 3 (Microsoft may offer enhanced cybersecurity services to candidates and political committees at no charge without making an impermissible in-kind contribution because “Microsoft would be providing such services based on commercial and not political considerations, in the ordinary course of its business, and not merely for promotional consideration or to generate goodwill.”).

<sup>55</sup> See AO 2004-06 (Meetup) at 4 (“Meetup would not make a contribution or expenditure solely by providing these basic services to Federal candidates in the ordinary course of its business on the same terms and conditions on which they are offered to all members of the general public.”).

<sup>56</sup> Compl. ¶¶ 17, 44.

<sup>57</sup> See *Program Policies*, FACEBOOK BUSINESS HELP CENTER, <https://www.facebook.com/business/help/315131736305613?id=673052479947730> (last visited Jan. 6, 2021) (emphasis added).

<sup>58</sup> See *id.*

WILMERHALE

Mr. Jeff S. Jordan

January 7, 2021

Page 11

Facebook’s policy, APP cannot credibly contend that *Facebook* violated its own policy by allowing a third-party fact-checking organization to do so. To the contrary, Facebook policy expressly contemplates exactly that. Likewise, Facebook’s advertising policy states unequivocally: “Facebook prohibits ads that include claims debunked by third-party fact checkers or, in certain circumstances, claims debunked by organizations with particular expertise.”<sup>59</sup> And while APP may disagree with the consequences of PolitiFact’s analysis, its contention that Facebook “specifically throttled” its video in a “strangely incongruous way” is baseless.<sup>60</sup>

### **B. Facebook’s Third-Party Fact-Checking Program Did Not Result In An In-Kind Contribution**

APP’s complaints about Facebook’s fact-checking program as a whole are equally flawed and provide no reason to believe that Facebook made an in-kind contribution to the Biden or Peters campaigns.

To determine the “purpose” of an activity alleged to be a contribution, the Commission first applies a two-part test for distinguishing between political and nonpolitical intent. An activity is not a “contribution” under this test “if (1) there is an absence of any communication expressly advocating the nomination or election of the [candidate] appearing or the defeat of any other candidate, and (2) there is no solicitation, making, or acceptance of a campaign contribution for the [candidate] in connection with the event.”<sup>61</sup> Neither part of the test is satisfied here: The PolitiFact article does not expressly advocate for the nomination, election, or defeat of any candidate, nor does it solicit a campaign contribution. Accordingly, Facebook has not made a contribution under this test.

In the absence of express advocacy or a solicitation, the Commission may consider the totality of circumstances to assess whether an activity would be objectively perceived as an intentional attempt to influence an election.<sup>62</sup> Under this objective test, the Commission considers whether the “activity in question ... appear[s] to have any specific and significant non-election related aspects that might distinguish it from election influencing activity.”<sup>63</sup> It does not make this assessment based solely on the effects of the activity.<sup>64</sup>

---

<sup>59</sup> See *Misinformation*, FACEBOOK ADVERTISING POLICIES: PROHIBITED CONTENT, [https://www.facebook.com/policies/ads/prohibited\\_content/misinformation](https://www.facebook.com/policies/ads/prohibited_content/misinformation) (last visited Jan. 6, 2021).

<sup>60</sup> Compl. ¶ 44.

<sup>61</sup> *Orloski v. Fed. Election Comm’n*, 795 F.2d 156, 160 (D.C. Cir. 1986); see also AO 1996-11; AO 1994-15; AO 1992-06; AO 1992-05; AO 1988-27, AO 1977-42.

<sup>62</sup> See, e.g., AO 1990-05; AO 1983-12 (“The purpose and functions of an organizational entity are material and relevant to the Commission’s characterization of the underlying purpose of a specific activity or program of that entity.”).

<sup>63</sup> AO 1983-12.

<sup>64</sup> MUR 7024 (Van Hollen for Senate, *et al.*), Factual and Legal Analysis, at 5 (“Although the outcome of these actions could potentially have had an effect on candidates in future elections, the effect on any particular candidate’s election would be too indirect and attenuated to constitute a contribution.”).

Mr. Jeff S. Jordan  
 January 7, 2021  
 Page 12

Facebook has independent business reasons for seeking to minimize misinformation on its platform. It has publicly explained that misinformation on the platform “is bad for our community and bad for our business.”<sup>65</sup> The explicit goal of Facebook’s third-party fact-checking program is to prevent the spread of viral misinformation and help users better understand what they see online.<sup>66</sup> The program extends far beyond politics, with third-party fact-checkers responding to posts dealing with internet hoaxes and misinformation regarding, for example, matters of public health and safety.<sup>67</sup> Even for those posts that arise in the political arena, Facebook operates the third-party fact-checking program on a non-partisan basis. And to be eligible to participate as fact-checkers in Facebook’s program, organizations are required to be evaluated and certified through the non-partisan International Fact-Checking Network.<sup>68</sup> These independent third-party fact-checkers select from a digital queue of eligible content which content to evaluate, and they can also identify content to review on their own.<sup>69</sup> And while the PolitiFact article at issue here concerned Democratic politicians, another complainant could have just as easily identified posts concerning Republican political figures, as noted above.<sup>70</sup> Indeed, while APP alleges a partisan intent to the program by complaining about the lack of third-party fact-checking for a particular ad by the Lincoln Project critical of President Trump’s handling of the COVID pandemic, it ignores PolitiFact’s fact-checking of the Lincoln Project’s “Mourning in America” ad under the headline, “*Lincoln Project’s ‘Mourning in America’ ad critical of Trump misleads on bailouts.*”<sup>71</sup>

More generally, the complaint rests on APP’s unfounded—and easily disproven—assertion that Facebook has an unstated policy of “blocking paid ads that might compromise Democratic candidates.”<sup>72</sup> In fact, *APP itself* ran hundreds of ads on Facebook in the 2020 election cycle supporting Republican candidates and opposing Democrats, including modified versions of the ad that was the subject of the PolitiFact article.<sup>73</sup> And even a cursory review of Facebook’s ad library as a whole evidences paid Facebook ads across the political spectrum.<sup>74</sup>

APP’s individual grievance related to the treatment of *a single advertisement over a three-day period from September 19 to 21, 2020* provides no reason to believe that Facebook operated its third-party fact-checking program, or adopted advertising policies more generally,

---

<sup>65</sup> See *supra* note 12.

<sup>66</sup> See *supra* note 18.

<sup>67</sup> See *supra* notes 20-22.

<sup>68</sup> See *supra* note 12.

<sup>69</sup> See *id.*

<sup>70</sup> See *supra* notes 23-24.

<sup>71</sup> See *supra* note 25.

<sup>72</sup> Compl. ¶ 43.

<sup>73</sup> See Search results for “American Principles Project,” FACEBOOK AD LIBRARY, (last visited Jan. 6, 2021).

<sup>74</sup> See [https://www.facebook.com/ads/library/?active\\_status=all&ad\\_type=political\\_and\\_issue\\_ads&country=US](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=US) LIBRARY, (last visited Jan. 6, 2021).

WILMERHALE

Mr. Jeff S. Jordan  
January 7, 2021  
Page 13

“for the purpose of influencing” either the Biden or Peters races. Accordingly, the complaint provides no reason to believe the program resulted in an in-kind contribution to either campaign.

### CONCLUSION

The Commission should find no reason to believe that Facebook violated FECA—or, in the alternative, exercise its discretion to dismiss the complaint without further expenditure of Commission resources—and should dismiss this matter with no further action.

Respectfully submitted,

/s/ Christopher E. Babbitt

Christopher E. Babbitt

Adam Raviv

Jamie Yood

Jordan E. Orosz

WILMER CUTLER PICKERING HALE AND  
DORR LLP

1875 Pennsylvania Avenue, NW

Washington, D.C. 20006

Tel: (202) 663-6000

Fax: (202) 663-6363

christopher.babbitt@wilmerhale.com

adam.raviv@wilmerhale.com

jamie.yood@wilmerhale.com

jordan.orosz@wilmerhale.com

*Attorneys for Facebook, Inc.*