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March 26, 2021

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

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

Re: MUR 7870; Response of Google LLC

Dear Mr. Jordan,

On behalf of our client Google LLC (“Google”), we respond to the Complaint filed by Tony K. McDonald in the above-referenced matter.

The Complaint alleges Google violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by making prohibited in-kind corporate contributions to Biden for President. The Complaint, however, fails to describe any activities constituting a contribution.

The Complaint generally alleges that Google altered its algorithms, manipulated “fact checks,” and used demonetization and “Restricted Mode” on YouTube “in order to further Democratic aims and elect Joe Biden” and “to suppress conservative and pro-Trump” content. The Complaint speculates that political bias was the reason for these actions. However, political bias plays no part in how Google’s products function or how it enforces its policies.

Indeed, Google’s products are built for everyone without regard to politics or political viewpoint. As Google’s CEO Sundar Pichai has testified before Congress, “We approach our work without political bias, full stop. To do otherwise would be contrary to both our business interests and our mission, which compels us to make information accessible to every type of person, no matter where they live or what they believe.”¹

More fundamentally, the Complaint fails to recognize that the alleged actions—to the extent they occurred as described—are nothing more than bona fide commercial activities that Google undertakes countless times per day in the interests of its users and customers. The Commission has concluded on numerous occasions that bona fide commercial activities are not

¹ Sundar Pichai’s testimony before the Senate Commerce Committee (Oct. 28, 2020), at <https://blog.google/outreach-initiatives/public-policy/sundar-pichai-testimony-senate-commerce-committee/>; see also, e.g., Shirin Ghaffary and Kurt Wagner, Google CEO Sundar Pichai’s testimony to Congress today, Vox.Com (Dec. 11, 2018), at <https://www.vox.com/2018/12/11/18134984/live-google-ceo-congress-hearing-china-testimony-house-judiciary-committee-censored-search> (quoting Pichai as saying, “I lead this company without political bias and work to ensure that our products continue to operate that way . . . To do otherwise would be against our core principles and our business interests.”).

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contributions, regardless of the Complaint's speculations that political bias motivated those activities.

The Complaint also alleges Google coordinated its activities with the Biden campaign. However, the Complaint fails to identify any facts or conduct demonstrating coordination. Google does not engage in prohibited coordination with political actors, and independent activities cannot qualify as contributions.

Many of the Complaint's claims also relate to alleged activities that occurred *after* the 2020 election. Even if the Complaint's allegations were true, post-election activities could not have had the purpose of influencing *the 2020 election* and therefore could not qualify as a contribution.

For these reasons and others discussed below, the Complaint not only is based on mere speculation, but it also fails to describe any violation of the Act. Therefore, the Commission should find no reason to believe ("RTB") that Google violated the Act in any manner.

BACKGROUND

I. The Complaint

The Complaint alleges Google has "alter[ed] [its] algorithms to suppress conservative and pro-Trump podcasts, YouTube channels, and videos." In connection with this allegation, the Complaint claims that "[m]any YouTube channels have found themselves and their reach throttled in the aftermath of the election."

To support these sweeping claims, the Complaint offers only two specific examples: the YouTube channels of podcasters Taylor Marshall and Timothy Gordon, both of which the Complaint alleges "have experienced a drastic reduction in reach and viewership since November 3rd." The Complaint implies Google suppressed their content because they "have expressed concerns over election fraud."

More generally, the Complaint alleges Google has "censor[ed] those who cast doubt on the election results or argue there was fraud in the 2020 President [*sic*] election." The Complaint contends that this alleged action impeded "attempts to validate election results . . . by influencing judges, the Electoral College, and Congress itself."

The Complaint further alleges:

- Google and its YouTube division "used [their] tools of demonetization and Restricted Mode . . . in order to influence the November election";
- Google "determined whether a news source is credible or hate speech in order to further Democratic aims and elect Joe Biden"; and
- Google "alter[ed] [] its search results," "search algorithms," "search recommendations," and "fact checks" for the benefit of Biden for President.

The Complaint alleges all of these actions were "done in coordination with the Biden for President Campaign." The only "evidence" it cites to support this allegation is that some Google

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employees—along with employees from numerous other companies—served as volunteers on “Biden’s Innovation Policy Committee.”

II. Background on Google

Google is a commercial company with a mission to organize the world’s information and make it universally accessible and useful. More than one billion users across the world trust Google’s products to deliver the most helpful and reliable information available on the web. Google’s products include, among others, its internet search engine (“Search”) and YouTube internet video streaming website/digital device app. Both of these products are discussed in more detail below. Paid advertising and other sponsored content on these product platforms, in large part, make it possible for Google to provide both of these products for anyone to use for free.

Google operates, and its products function, in a completely apolitical manner. For example, Search and YouTube display content from, and sell advertising to, billions of users, including among them political users of all forms and beliefs. Google’s products and services are offered on the same terms to any user, regardless of belief or affiliation.²

To protect and enhance the user experience for each product and service that Google offers, Google tailors its generally applicable policies to distinguish between providing access to a diversity of voices and limiting harmful content and behaviors—such as policies against hate speech or material that is excessively violent, unlawful, deceptive, or obscene.³ Google also has generally applicable policies and procedures for users and advertisers to remediate policy violations or to appeal actions that Google has taken for policy violations.⁴ Google’s generally applicable terms of service⁵ further provide that Google reserves the right to take down any content that it reasonably believes breaches its terms of service, violates applicable law, or could harm its users, third parties, or Google. Google’s terms of service, policies, and procedures apply equally to every user and advertiser.

Google enforces its policies in an impartial manner using a mix of automated and manual efforts. To understand the full context and scale of Google’s policy enforcement: In 2019, Google blocked and removed approximately 2.7 billion ads—more than 5,000 ads per minute—for policy violations. Relatedly, it suspended nearly 1 million advertiser accounts for policy violations. On the publisher side, Google terminated more than 1.2 million accounts and removed ads from more than 21 million web pages that are part of its publisher network for

² Google also participates in the Defending Digital Campaigns program, which provides cybersecurity assistance to candidates and political party committees regardless of political affiliation. See Adv. Op. No. 2018-12 (Defending Digital Campaigns).

³ These publicly available policies include Advertising Policies (<https://support.google.com/adspolicy/answer/6015406>), Publisher Policies (<https://support.google.com/adspolicy/answer/9335564>), and YouTube Community Guidelines (<https://support.google.com/youtube/answer/9288567>).

⁴ See Reconsideration requests (<https://support.google.com/webmasters/answer/35843>), Disapprovals and suspensions (<https://support.google.com/adspolicy/topic/1308266>), Policy enforcements (<https://support.google.com/adspolicy/answer/7003627>), and Appeal Community Guidelines actions (<https://support.google.com/youtube/answer/185111>).

⁵ <https://policies.google.com/terms>. These terms of service also describe how users can appeal suspensions or terminations of their Google accounts.

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policy violations.⁶ While YouTube is discussed more below, we note here that more than 9.3 million videos and more than 2 million channels were removed from YouTube for violating YouTube's Community Guidelines in the fourth quarter of 2020 alone.⁷

A) Search

Google's Search product displays results from users' searches based on an algorithm. The algorithm ranks pages (i.e., determining the order in which search results appear) to provide the most useful and relevant information. It does so by matching search terms against available web pages and looking at factors like the number of times the search terms appear on the page and page freshness. The algorithm also analyzes signals to help surface more authoritative pages and demote low-quality content so that content such as Holocaust denial, for example, is less likely to appear in Search results.

In addition to content, Google's Search algorithm analyzes signals from pages regarding whether, for example, the site appears correctly in different browsers, whether it is designed for all device types and sizes, and the page's load speed. These technical factors also can impact a page's rank in Search.

Google also seeks to ensure that Search results are providing the most authoritative and responsive results by using external quality raters who are recruited from across the United States without regard to political orientation. The publicly available Search quality rater guidelines⁸ ask raters to flag, among other issues, blatantly misleading, low quality, offensive or downright false information, hoaxes, and unsupported conspiracy theories. The quality rater guidelines⁹ make it clear that ratings should never be based on personal opinions, preferences, religious beliefs, or political views. No individual rater can influence the ranking of a page. Instead, Google uses human raters to evaluate the effectiveness of its algorithms.

Content on the internet constantly changes, and Google continuously improves its systems to ensure that it always provides relevant and helpful information. Because of this, the position of any given website or webpage in Search results can change at any time.

Google also releases core updates to Search several times per year. These updates are designed to ensure that, overall, Google is delivering on its mission to present relevant and authoritative content to searchers. Core updates do not target specific pages or sites. After a core update, some pages may perform less well, while others may do better. Any changes are not site-specific, nor do they reflect any type of specific action against sites or pages.

In short, there are many factors that impact the ranking of webpages in Google Search. There is a whole discipline known as "search engine optimization" ("SEO") that focuses on

⁶ Google's efforts to protect users from bad ads are described in more detail at: <https://blog.google/products/ads/stopping-bad-ads-to-protect-users>.

⁷ Efforts to enforce YouTube's Community Guidelines are described in more detail at: <https://transparencyreport.google.com/youtube-policy/removals>.

⁸ <https://static.googleusercontent.com/media/guidelines.raterhub.com/en//searchqualityevaluatorguidelines.pdf>

⁹ <https://static.googleusercontent.com/media/guidelines.raterhub.com/en//searchqualityevaluatorguidelines.pdf>

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improving webpage rankings. However, political affiliation, viewpoint, and ideology simply are not factors in determining how pages rank in Google Search.

Google does not manually intervene in any particular Search result. Content is removed from organic Search results only in very limited circumstances, such as a court order, valid Digital Millennium Copyright Act takedown notice, or violation of Google's webspam policies.

Google Search also displays "fact checks" in connection with certain search results. These fact checks are summaries created by third-party website publishers, similar to the summaries of websites and pages that are displayed for any search. Google does not create, endorse, or influence any of these fact checks. If a fact check made by a third-party website publisher meets certain requirements (including being from a trusted source of information as determined by an algorithm), Google Search automatically shows a summary of that fact check.

B) YouTube

YouTube is Google's video streaming website/digital device app that allows users to upload and view videos. Users may search for content and also receive content recommendations.

YouTube prioritizes three main elements to provide the best results for user content searches: relevance, engagement, and quality. To estimate relevance, YouTube looks into many factors, such as how well a video's title, tags, description, and content match a user's search query. Search results also incorporate aggregate engagement signals from users, such as the watch time of a particular video for a particular query, to determine if the video is considered relevant to the query by other users.

For quality, YouTube's systems also identify signals that can help determine which channels demonstrate expertise, authoritativeness, and trustworthiness on a given topic. Sources that are determined to be authoritative are elevated in content recommendations.¹⁰ Relatedly, content that comes close to violating YouTube's Community Guidelines ("borderline content") or that contains harmful misinformation is demoted in recommendations.

YouTube relies on algorithms to determine authoritative, borderline, and harmful content. External content evaluators located around the world provide input that is incorporated into those algorithms. Those content evaluators use the same guidelines as the Search quality evaluators discussed above, which make it clear that ratings should never be based on personal opinions, preferences, religious beliefs, or political views. YouTube's content evaluators also cannot influence the prominence of any particular YouTube content. Political considerations and viewpoints do not factor into determinations of authoritativeness at all. For example, both CNN and Fox News are promoted as authoritative news sources on YouTube.

YouTube also provides content recommendations by taking into account many signals, including a user's watch and search history (if enabled), the channels (i.e., aggregations of particular users' uploaded content) they have subscribed to, and whether videos have been watched to completion by other viewers. Random surveys asking users directly about their experience with individual videos also factor into YouTube's recommendation systems.

¹⁰ YouTube's efforts at raising authoritative content are described in more detail at: <https://blog.youtube/inside-youtube/the-four-rs-of-responsibility-raise-and-reduce>.

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YouTube’s search results and content recommendations consider many factors, but political affiliation, viewpoint, and ideology simply are not factored into these processes.

All “Creators” that upload content to YouTube must adhere to YouTube’s generally applicable Community Guidelines¹¹ and terms of service.¹² Creators also may choose to earn income (known as “monetization”) by having paid advertising appear at the beginning of, at points in between, or after their videos. Creators that choose to monetize their content must further adhere to YouTube’s generally applicable monetization policies.¹³ Violations of those monetization policies will lead to so-called “demonetization”—i.e., the inability of Creators to earn income through paid ads in their videos.

Restricted Mode is an optional feature that individual YouTube users may choose to enable to help screen out potentially mature content. Restricted Mode is turned off by default and in practice is used only by a small subset of users, such as libraries, schools, and public institutions. Restricted Mode uses many signals—such as video title, description, metadata, Community Guidelines reviews, and age-restrictions—to identify and filter potentially mature content. Political affiliation is not factored into the Restricted Mode filter.

C) Google’s policies as applied to election-related content

As part of Google’s general policies against misinformation, YouTube prohibits content misleading users about where and how to vote. In addition, following state certification of the 2020 election results on December 9, 2020, YouTube’s policies also prohibit content that misleads people by alleging that widespread fraud or errors changed the outcome of the 2020 U.S. Presidential election. This policy is in line with Google’s approach towards historical U.S. Presidential elections. Nonetheless, YouTube still permits news coverage and commentary on these issues if there is sufficient educational, documentary, scientific, or artistic context.

III. Summary of the Law

The Act defines a “contribution” as “anything of value made by any person for the purpose of influencing any election for Federal office.”¹⁴ Contributions can be both monetary or in-kind. “In-kind contributions” are defined as “the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services.”¹⁵

As the U.S. Supreme Court noted in *Buckley v. Valeo*, the “the ambiguity of th[e] phrase [“for the purpose of influencing”] poses constitutional problems.”¹⁶ To satisfy “the constitutional requirement of definiteness,”¹⁷ the Court construed the term “contribution” narrowly to mean “contributions made directly or indirectly to a candidate, political party, or campaign committee,

¹¹ <https://support.google.com/youtube/answer/9288567>

¹² <https://www.youtube.com/t/terms>

¹³ <https://support.google.com/youtube/answer/1311392>

¹⁴ 52 U.S.C. § 30101(8)(A).

¹⁵ 11 C.F.R. § 100.52(d)(1).

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

¹⁷ *Id.*

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and contributions made to other organizations or individuals but earmarked for political purposes, [and] also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.”¹⁸

With respect to contributions made “indirectly,” the Court was not articulating some amorphous theory under which any tangential, indirect benefit to a candidate or political party could be considered a “contribution.” Rather, the Court recognized that, within “the limiting connotation created by the general understanding of what constitutes a political contribution[,] [f]unds provided to a candidate or political party or campaign committee either directly or *indirectly through an intermediary* constitute a contribution.”¹⁹

Accordingly, there are three types of “contributions” that the Supreme Court and the Commission have recognized: (1) contributions given directly; (2) contributions given indirectly through an intermediary; and (3) coordinated expenditures—activity that is not conducted independently of a candidate or political party committee.²⁰ Consistent with this narrow construction of a “contribution,” activity that does not fall within these categories is not a contribution. Hence, “bona fide commercial activity”²¹ and the provision of services “based on commercial and not political considerations, in the ordinary course of [] business”²² do not result in a contribution.

DISCUSSION

I. The Complaint Fails to Describe a Violation of the Act

The Commission cannot find RTB where the “Complaint fails to describe a violation of the Act.”²³ The Complaint alleges Google made prohibited corporate contributions to Biden for President. Specifically, the Complaint contends that Google’s “search algorithms, search recommendations, ‘fact checks,’ and ways it administers its monetization rules . . . provide active support for Joe Biden’s campaign.” As explained above, Google’s products and policies are apolitical and operate without political bias. Moreover, the allegation fails to describe a “contribution” under the law.

¹⁸ *Id.* at 78.

¹⁹ *Id.* at 23 n.24 (emphasis added). The Commission’s earmarking rules address the issue of conduits and intermediaries. See 11 C.F.R. § 110.6.

²⁰ Coordinated expenditures are categorized as “in-kind contributions” for reporting purposes. See 11 C.F.R. §§ 109.20, 109.21. The dissemination, distribution, or republication of a candidate’s campaign materials is another specific type of contribution that is not at issue here. See *id.* § 109.23.

²¹ MUR 5485 (Conversagent), First General Counsel’s Report at 7-8 and Vote Certification dated Nov. 1, 2005 (4-0 vote accepting General Counsel’s recommendation to find No RTB).

²² Adv. Op. No. 2018-11 (Microsoft); see also FEC Adv. Op. Nos. 2012-31 (AT&T) (no in-kind contribution results where rates charged were based on “commercial considerations”), 2012-26 (m-Qube) (no in-kind contribution results where discounts provided were based on “commercial considerations”).

²³ FEC, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007) (*hereinafter*, “FEC RTB Policy Statement”).

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A) The Complaint describes commercial activity, not a contribution.

The Complaint's allegations relate to core features of Google's commercial products—specifically, Google Search and YouTube—and its generally applicable terms of service and policies that protect and enhance users' experience. The Commission has long concluded that this type of “bona fide commercial activity”²⁴ and the provision of services “based on commercial and not political considerations, in the ordinary course of [] business”²⁵ do not result in a contribution.

For example, in MUR 5485 (Conversagent), the Commission concluded that an automated interactive online chat program (commonly known as a “chatbot”) was not a prohibited contribution or expenditure by virtue of the program's display of political content. Instead, the Commission accepted the General Counsel's reasoning that the program, which generated commercial revenues from ads and user fees, was “bona fide commercial activity . . . designed for genuinely commercial purposes rather than to influence a federal election.”²⁶ Relevant to the Complaint in this matter, allegations of political bias simply were immaterial in applying the commercial activity doctrine.²⁷

Google's products and services are bona fide commercial activity. As explained at the outset of this response, Google provides its commercial products and services to more than one billion users across the world of all affiliations and beliefs and displays all online content on equal terms. Political advertising and content represent only a small portion of the content on Google's platforms. Google Search and YouTube operate solely on the basis of commercial factors in a manner designed to provide world-class products and services to its entire user base. Just like the respondent in MUR 5485 (Conversagent), Google receives commercial revenues from these products and services through paid advertising and other sponsored content. Accordingly, the Complaint alleges acts that are part of Google's bona fide commercial activity.

Relatedly, the Commission has recognized that a company does not provide a “contribution” when, for the purpose of “protect[ing] its brand reputation,” it acts to prevent its products from being misused by bad actors in connection with an election.²⁸ Google's corporate

²⁴ MUR 5485 (Conversagent), First General Counsel's Report at 7-8 and Vote Certification dated Nov. 1, 2005 (4-0 vote accepting General Counsel's recommendation to find No RTB); see *also* FEC Adv. Op. No. 1994-30 (Conservative Concepts) (“entrepreneurial or commercial activity [is] unlimited by the Act”); MUR 5474/5539 (Dog Eat Dog Films, Inc.), First General Counsel's Report at 8 (“the film, movie trailers, and the film's official website represent bona fide commercial activity, which the Commission has previously declined to regulate in appropriate cases”) and Vote Certification dated Jun. 7, 2005 (6-0 vote accepting General Counsel's recommendation to find No RTB).

²⁵ Adv. Op. No. 2018-11 (Microsoft); see *also* FEC Adv. Op. Nos. 2012-31 (AT&T) (no in-kind contribution results where rates charged were based on “commercial considerations”), 2012-26 (m-Qube) (no in-kind contribution results where discounts provided were based on “commercial considerations”).

²⁶ MUR 5485 (Conversagent), First General Counsel's Report at 8-10 and Vote Certification dated Nov. 1, 2005 (4-0 vote accepting General Counsel's recommendation to find No RTB).

²⁷ See *id.* (concluding that the chatbot program in question was “bona fide commercial activity” notwithstanding that the program appeared to convey messages favoring presidential candidate John Kerry over George W. Bush).

²⁸ Adv. Op. No. 2018-11 (Microsoft).

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mission is to organize the world's information and make it universally accessible and useful. Prohibiting content that misleads users, including misinformation about election processes or results, directly supports that mission, which is core to Google's brand and reputation.

The Complaint fails to demonstrate that any of Google's acts were undertaken for any purpose other than legitimate commercial considerations and, therefore, fails to describe a violation of the Act.

B) Enforcement of a company's terms of service is not a contribution.

It logically follows from the Commission's bona fide commercial activity doctrine that no contribution results from a company's enforcement of its terms of service in the course of providing a commercial product or service. For example, in Advisory Opinion Request No. 2004-6 (Meetup), the operator of a website that provided basic services at no charge to the general public represented that users of the website must "accept[] the [company's] terms of service."²⁹ The Commission concluded that the provision of the website's services to political committees and candidates would not result in a contribution where the services were provided "on the same terms and conditions to all individuals or entities who are similarly situated in accordance with Meetup's fixed criteria, whether or not the entities are Federal candidates, political committees, businesses, or other entities in the general public."³⁰

The Complaint alleges that "Google has used its tool[] of demonetization" and removed misinformation about the 2020 presidential election in order to influence the election. The alleged acts—removal of videos, demonetization, etc.—are the types of actions that Google takes in the ordinary course of business to enforce its terms of service and policies. As explained above, Google's terms of service and policies are apolitical and apply to all users.

Relatedly, the Commission also more generally has recognized that "[a] vendor may establish and apply eligibility criteria to political committees in order to protect the commercial viability of the vendor's program" without making a contribution.³¹ In order to be eligible to use Google's products and services, a user must—among other things—agree to Google's standard terms of service. Therefore, the Complaint's allegations related to Google's terms of service and policy enforcement again fail to describe a violation of the Act.

C) The Complaint fails to allege Google provided any goods or services at no charge or less than the usual and normal charge.

The Complaint alleges Google made in-kind contributions to Biden for President. "In-kind contributions" are defined as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."³² The Complaint fails to describe any goods or services provided that amount to an in-kind contribution.

²⁹ Adv. Op. Request No. 2004-6 (Meetup).

³⁰ Adv. Op. No. 2004-6 (Meetup).

³¹ Adv. Op. No. 2012-28 (CTIA).

³² 11 C.F.R. § 100.52(d)(1).

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As explained above, Google provides its Search and YouTube products for free to the general public and receives commercial revenues from paid advertising on those product platforms. The Complaint does not allege that Google's provision of these products amounts to a contribution³³ or that Google has provided advertising to candidates or political committees at no charge or less than the usual and normal charge.

In short, the Complaint describes features and policies that are inherent to Google's commercial products and services (i.e., bona fide commercial activity), rather than the provision of goods and services to any candidates or political committees at no charge or less than the usual and normal charge (i.e., an in-kind contribution). For this reason, the Complaint again fails to describe a violation of the Act.

D) The Complaint fails to describe any activity that constitutes coordination.

The Complaint implicitly acknowledges that none of the alleged acts, even if true, could constitute a contribution under the Act unless coordinated with a candidate, candidate's committee, or political party committee. To that end, the Complaint lodges a conclusory allegation that "Google's activities . . . have been done in coordination with the Biden for President Campaign." The Complaint's only support for its coordination claim is that a few Google employees volunteered for the Biden campaign's "Innovation Policy Committee" in their personal capacity. As the *New York Times* article cited by the Complaint notes, *more than 700* people served as volunteers on the Committee, *eight* of whom worked for one of *four* technology companies (including Google).³⁴ As Google noted at the time, per longstanding company policy, its employees "worked with campaigns in their personal capacities and not as representatives of the company."³⁵

The Commission's coordinated communications rule consists of a payment prong, a content prong, and a conduct prong.³⁶ All three prongs must be satisfied in order for a communication to be treated as an in-kind contribution.³⁷ As the Commission has explained, the mere fact that someone has volunteered for a candidate's campaign generally does not trigger the coordination rule's conduct prong with two exceptions.³⁸

First, the conduct prong could be satisfied if, "[f]or example, [] a candidate requests that a volunteer pay for a communication, and the volunteer does so, [and] the . . . content of the

³³ Such an allegation would be erroneous. See Adv. Op. No. 2004-6 (Meetup) ("the provision of a service that is always provided without charge to every person" is not a contribution).

³⁴ David McCabe and Kenneth P. Vogel, *Big Tech Makes Inroads With the Biden Campaign*, NEW YORK TIMES (Aug. 10, 2020), available at <https://www.nytimes.com/2020/08/10/technology/big-tech-biden-campaign.html>. As the article further reported, "The tech policy committee . . . is part of a vast network of *thousands of policy advisers* assembled by the campaign. The policy teams do not have ultimate authority over the campaign's proposals or advise Mr. Biden directly." (emphasis added)

³⁵ *Id.*

³⁶ 11 C.F.R. § 109.21.

³⁷ *Id.*

³⁸ FEC, Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 439 (Jan. 3, 2003).

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communication satisfies one or more of the content standards.”³⁹ Second, “in some cases a volunteer may qualify as an agent of a candidate or a political party” under the Commission’s “agent” definition and therefore be a potential vector for coordination.⁴⁰ The Complaint fails to allege any facts to support coordination under either scenario—there is no suggestion, for example, that volunteers paid for communications or somehow acted as agents of the campaign. Nor does the Complaint identify any other theory under which the volunteers engaged in prohibited coordination with the Biden campaign.

Indeed, the Complaint fails to cite the Commission’s coordination rules at all or even attempt to apply those rules to its allegations against Google.⁴¹ The Commission cannot find RTB on a coordination claim where, as here, “the complainant[] neither identified which particular conduct standard [in the Commission’s coordination rule] would apply nor connected the [alleged conduct] to any alleged coordinated communications.”⁴²

For these reasons, the Complaint again fails to describe a violation of the Act.

E) Post-election activity is not a contribution.

Many of the Complaint’s allegations concern actions allegedly taken by Google *after* the November 2020 election. Google’s post-election activity, to the extent it occurred as alleged, cannot constitute a contribution under the Act.

As the Complaint correctly points out, the Act and Commission regulations define a “contribution” as “anything of value made by any person for the purpose of influencing any *election* for Federal office.”⁴³ However, the Complaint crucially fails to note that an “election” is further defined at the very beginning of the Act as:

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ The complainant, an attorney, otherwise cites the Commission’s regulations several times throughout the Complaint and obviously is aware of the regulations.

⁴² MUR 7155/7157 (Hillary for America), Factual & Legal Analysis issued to Americans United for Change at 11.

The Complaint also fails to cite the Commission’s broader rule for coordinated expenditures, 11 C.F.R. § 109.20, or to explain how Google’s conduct violates that rule. Nor does the Complaint allege or explain how, under that rule, Google’s conduct (even if coordinated) constitutes an “expenditure.” The *Buckley* Court defined that term “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” *Buckley*, 424 U.S. at 80; *see also id.* at 46 n.53 (discussing example in legislative history of how “billboard advertisements *endorsing a candidate*” purchased by a supporter “would constitute a gift by the supporter” “if the advertisement was placed in coordination with the candidate’s campaign organization”) (quoting S. Rep. No. 93-689 at 18 (1974) (emphasis added)).

⁴³ 52 U.S.C. § 30101(8)(A) (emphasis added); 11 C.F.R. § 100.52 (emphasis added).

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- (A) a general, special, primary, or runoff election;
- (B) a convention or caucus of a political party, which has authority to nominate a candidate;
- (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
- (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.⁴⁴

For purposes of contribution law, an “election” does not include activity that occurs after the election has concluded including, for example, post-election litigation, the Electoral College vote, or the Electoral College vote certification by Congress. Therefore, the Complaint’s theory that efforts to influence these post-election processes “constituted a contribution to the Biden campaign” is erroneous.

Further, although the Commission’s regulations and advisory opinions restrict donations to recount and election contest funds established by federal candidates, such donations are specifically exempted from the “contribution” and “expenditure” definitions.⁴⁵ The Complaint does not allege that Google made a donation to any recount fund of the Biden campaign. Rather, it alleges Google’s post-election activities “provid[ed] overwhelming media cover” to “influenc[e]” those post-election processes. Therefore, even to the limited extent that the Commission’s regulations restrict payments in connection with post-election recount proceedings, the activity the Complaint alleges does not fall within the ambit of those regulations.

- F) The Complaint does not allege any activity that the Supreme Court or Commission has held qualifies as a contribution.

The Complaint does not allege that Google took any action that falls within the three categories of a contribution. It does not allege that Google gave a contribution directly to the Biden campaign or indirectly through an intermediary. And, for the reasons discussed above, the Complaint fails to establish that Google engaged in prohibited coordination.

What we are left with, then, is the Complaint’s general theory that the way in which Google ranks websites, displays fact checks, directs users to YouTube videos, allows YouTube users to filter content with Restricted Mode, and enforces its terms of service and policies result in contributions. As explained previously, this is the type of vague and amorphous understanding of a “contribution” foreclosed by *Buckley* and the Court’s insistence that this term be cabined by “the constitutional requirement of definiteness.”⁴⁶ We are not aware of any Commission precedent, and the Complaint cites no Commission precedent, for such a vague and expansive application of the term “contributions” that would encompass an infinite number of activities, no matter how indirectly related they are to elections.

For this reason, the Complaint again fails to describe a violation of the Act.

⁴⁴ 52 U.S.C. § 30101(1); see also 11 C.F.R. § 100.2.

⁴⁵ See 11 C.F.R. §§ 100.91, .151; FEC Adv. Op. No. 2006-24 (NRSC/DSCC).

⁴⁶ *Buckley*, 424 U.S. at 77-78.

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II. The Complaint Lacks Any Evidence to Support its Speculative Claims

The Complaint alleges Google took various actions with respect to its Search and YouTube products and policies for political reasons. However, political bias plays no part in how Google's products function and how it enforces its policies. Given that, it is unsurprising that the Complaint acknowledges in its first paragraph and throughout that all of its allegations are speculative—"[b]ased upon information and belief." This is known as "notice pleading." Although notice pleading may be sufficient for filing a complaint in civil litigation, in this context, a complainant's subjective "belief[s]" are insufficient for the Commission to find actual "reason to believe" that a violation of the Act has occurred.⁴⁷ As the Commission has stated, "mere speculation . . . will not be accepted as true" in the agency's enforcement process and cannot support an RTB finding.⁴⁸

More importantly, the Complaint's allegations of political bias simply are not true.

First, the Complaint alleges Google "has used its influence insidiously by altering their [*sic*] algorithms to suppress conservative and pro-Trump podcasts, YouTube channels, and videos." It also alleges that Google has "alter[ed] its search results" in such a way as "to constitute a campaign contribution to Biden for President," and that Google has "determined whether a news source is credible or hate speech in order to further Democratic aims and elect Joe Biden." As explained above, the algorithms used to rank websites on Google Search and to display and recommend content to YouTube users are based on a whole host of factors, none of which have any relation to political bias. As Google's CEO Sundar Pichai testified to Congress, "to do otherwise would be against our core principles and our business interests."⁴⁹

Second, the Complaint alleges "Google has engaged in an effort to influence the election by censoring those who cast doubt on the election results or argue there was fraud in the 2020 President [*sic*] election." Google's generally applicable policies prohibit its products from being used to spread misleading or false information, including—but not limited to—false claims about elections. These policies are enforced in an impartial manner across Google's products countless times per day. Political bias plays no part in these policies or how they are enforced.

Third, the Complaint alleges that Google "used its tools of demonetization . . . to influence the November election" but does not explain further or offer specific examples. Demonetization is an action that YouTube may take in the ordinary course of business when enforcing its terms of service and policies. YouTube's enforcement procedure is apolitical, and

⁴⁷ See FEC RTB Policy Statement at 12,545; see also MUR 5878 (Arizona State Democratic Central Committee) (Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen) at 5-6 and n.14 (discussing RTB standard and how it is more rigorous than mere "notice pleading").

⁴⁸ MUR 4960 (Hillary Clinton) (Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas) (internal citations omitted). Nor will the Commission find RTB where the Complaint presents allegations that are "not credible." FEC RTB Policy Statement at 12,546.

⁴⁹ See Ghaffary and Wagner, *supra*, note 1.

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the same terms of service, policies, and procedures apply to all users, regardless of affiliation or belief. As explained before, Google removes billions of pieces of online content and takes millions of other enforcement actions for policy violations each year. These actions have nothing to do with politics and everything to do with Google's business objective to deliver more useful, relevant, and reliable content to users and to protect users against objectively harmful content (e.g., scams, hate speech, violence, etc.).

Fourth, the Complaint alleges that Google used Restricted Mode "to influence the November election" but again does not explain further or offer specific examples. Restricted Mode is a feature that a small subset of YouTube users have enabled to filter out potentially mature content they prefer not to see. Political affiliation is not a factor in determining whether content is filtered.

Fifth, the Complaint alleges that Google has "altered" its fact checks in such a way as to have "provided more value to the Biden campaign than any outright ads ever could." Fact checks are summaries created by third-party website publishers that are automatically displayed in Google Search results in connection with certain searches. Political affiliation, ideology, or viewpoints are not factors in determining the display of fact checks on Google Search.

CONCLUSION

For the reasons discussed above, the Complaint is without any merit and the Commission should find no reason to believe that Google violated the Act.

Sincerely,

D. Mark Renaud

D. Mark Renaud
Eric Wang