

BEFORE THE FEDERAL ELECTION COMMISSION

CONGRESSMAN MATT GAETZ

1721 Longworth HOB
Washington, DC 20003

Complainant,

v.

MUR No. _____

TWITTER, INC.

1355 Market Street, Suite 900
San Francisco, California 94103

Respondent.

COMPLAINT

1. This Complaint is filed pursuant to 52 U.S.C. §§ 30118(a) and 30109(a)(1) and is based on information providing reason to believe that Twitter, Inc. ("Twitter") violated the corporate contribution and/or expenditure prohibitions established by the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101, et seq., and has actively interfered in federal elections by affixing a dubious "fact-check" link to certain statements of President Donald J. Trump, and thus making an in-kind contribution to his political opponents.

2. Twitter has taken upon itself to free ride on one of the President's Tweets as a campaigning activity.¹ The social media platform is overstepping boundaries and setting aside its privileged role as a mere "interactive computer service," and instead acting as a "shadow contributor" to the Democratic National Committee. By trespassing its role as a § 230 protected forum, Twitter has acted as a campaign contributor, and not as a mere interactive computer service.

¹ @realDonaldTrump, May 26, 2020, 8:17 am.
<https://twitter.com/realDonaldTrump/status/1265255835124539392>

3. By attaching the fact-check feature to the President's tweet, Twitter acts for the purpose of influencing the 2020 presidential elections by making an in-kind contribution to President Trump's political opponents. When clicked, Twitter's "fact-check" takes Twitter users to a Twitter "story" which calls the President's claims "unsubstantiated." By opining on the content of the President's tweets, Twitter is injecting its own editorial opinions in an attempt to lower the credibility of the President.

4. Further, as an interactive-news coverage website, Twitter operates as a debate platform for political candidates running for office, yet Twitter uses subjective criteria, rather than objective criteria (as required by 11 C.F.R. § 110.13(b)(2) and (c)) when it decides to demote or condemn content from certain political candidates on its debate platform.

5. 52 U.S.C. § 30109(a)(2) provides that: "If the Commission, upon receiving a complaint...has reason to believe that a person has committed, or is about to commit, a violation of [FECA]...[t]he Commission shall make an investigation of such alleged violation...."

6. "A "reason to believe" finding followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope." 72 Fed. Re. 12545 (March 16, 2007).

INTRODUCTION AND FACTS

7. Imagine the following: a billboard company wants to get involved in the political process, so it offers all candidates running for office—and all members of the public—free billboards to promote their campaigns.

8. If all candidates were offered free billboards, equally, in randomly assigned locations around their districts, the Commission would have no reason

to investigate because the Company offered the same service to everyone for free.

9. However, if the Company did not randomly assign locations, but rather, offered large billboards in premium locations within the district to Democratic candidates, but only offered billboards stuck behind dumpsters, outside the district, to Republican candidates, it could not credibly argue that it was not giving an "in kind" donation to the Democratic candidates.

10. Or imagine another analogy: A printing press offers free printing of campaign materials for all candidates. But, one day the owner of the press decides that they will only afford 2 copies a day for Republican candidates, but unlimited copies per day for Democrats. Meanwhile, the owner of the printing press claimed that it was not giving anything of value to one side or the other.

11. Despite the somewhat tortured analogies that always come from trying to apply old-technology logic to new, the logic holds. When Twitter was truly an ethical and "neutral" platform, it would have had no cause to be concerned with election regulations. At one time, Twitter considered itself to be the "free speech wing of the free speech party." At that time, Twitter was truly neutral, and offered an even platform to all—and the marketplace of ideas was the governing force. However, Twitter recently decided that it would tinker with the "marketplace of ideas"—by favoring some ideas and some speakers over others. While Twitter may argue to have the legal right to do so—a disputable position at best—when it does so in the context of a political campaign, it must adhere to FEC regulations: the regulations would not abide such a result. By failing to adhere to the true nature of a § 230 protected platform, Twitter then degrades itself and becomes the "*wet-market* of ideas."

12. Twitter is an interactive-news coverage website, and effectively operates as a modern billboard or printing press. It has an average of 330 million

active users per month from all over the world.² Twitter describes itself as “the live public square, the public space — a forum where conversations happen.”³ Twitter's CEO, Jack Dorsey, has characterized Twitter as “a public utility, like water or electricity.”⁴

13. Twitter recognizes its status as a news website: for example, in 2016 Twitter changed how its mobile application (“app”) is categorized in the Apple Store from the “social media” category to the “news” category, and as of April 2016 it has consistently been ranked as the #1 news app in the Apple store.⁵

14. In 2017, Pew Research found that three-quarters of Twitter users reported that they used the platform to read the news⁶.

15. Social media accounts have significant value as a communication tool to reach constituents and amass public support.

16. The United States District Court for the Southern District of New York decided that it was unconstitutional for President Donald Trump to block private citizens from his Twitter profile and feed (see *Knight First Amendment Institute at Columbia Univ. v. Trump*, 2018 U.S. Dist. LEXIS 87432 (S.D.N.Y. May 23, 2018)), finding

² See Twitter, Inc., Annual Report (Form 10-K), at 47 (Feb. 23, 2018).

³ Ronan Costello, Twitter: The Public Square of #GE16, Twitter Blog (Feb. 12, 2016), <https://blog.twitter.com/official/en_us/a/2016/twitter-the-public-square-of-ge16.html> (last visited July 25, 2018); see also Twitter Values, <https://about.twitter.com/en_us/values.html> (pledging that the company will “work with journalists, candidates and civil society to ensure Twitter is what you need it to be: the online public square ...”) (last visited July 25, 2018).

⁴ D.T. Max, “Two Hit Wonder,” THE NEW YORKER (Oct. 21, 2013), <<https://www.newyorker.com/magazine/2013/10/21/two-hit-wonder>> (“[Dorsey] insists that Twitter is neither liberal nor conservative; it’s a public utility, like water or electricity. ‘I like technology that is unbiased,’ he says.”) (last visited July 25, 2018).

⁵ See Sarah Perez, “Twitter aims to boost its visibility by switching from ‘Social Networking’ to ‘News’ on the App Store,” TECHCRUNCH (Apr. 28, 2016) <<https://techcrunch.com/2016/04/28/twitter-aims-to-boost-its-visibility-by-switching-from-social-networking-to-news-on-the-app-store/>> (last visited July 25, 2018).

⁶ See Natasha Lomes, “Even more US adults now getting news from social media, says Pew,” TECHCRUNCH (Sep. 9, 2017), available at <<https://techcrunch.com/2017/09/09/even-more-us-adults-now-getting-news-from-social-media-says-pew/>> (last visited July 25, 2018).

that President Trump's Twitter feed was a public forum, and he could not block users from it based on mere disagreement with the speech of users.

17. The Supreme Court recently declared in *Packingham v. North Carolina* that the social media platform Twitter is “perhaps the most powerful mechanism available to a private citizen to make his or her voice heard” and described social media sites such as Twitter as the “modern public square.” 137 S. Ct. 1730, 1737 (2017). In recent years, Twitter has become a favored medium of communication for public officials to communicate and share ideas with their constituents and the public at large.

18. Twitter is an important communications channel for governments and heads of state. As the U.S. Supreme Court explained:

On Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought.

See *Packingham, supra*.

19. Twitter recognizes the role that it plays in shaping political debates during election season, and recently announced that it would automatically verify candidate's accounts that qualify for the general election.⁷

20. Twitter has been criticized by users for favoring liberal speech on its platform over conservative speech⁸, a bias that is confirmed by current and

⁷ See Nancy Scola, “Twitter to verify election candidates in the midterms,” *POLITICO* (May 23, 2018) <<https://www.politico.com/story/2018/05/23/twitter-verify-candidates-midterms-2018-1282802>>; (last visited July 25, 2018).

⁸ See Jessica Guynn, “Twitter accused of political bias in right-wing crackdown,” *USA TODAY* (Nov. 18, 2016) <<https://www.usatoday.com/story/tech/news/2016/11/18/conservatives-accuse-twitter-of-liberal-bias/94037802/>> (last visited July 25, 2018).

former employees admitting on a hidden camera that Twitter utilizes techniques to “shadow-ban” and otherwise limit the reach of conservative accounts.⁹

21. Conrado Miranda, a former Twitter software engineer, admitted to an undercover journalist for Project Veritas that Twitter routinely bans specific users from the platform at the request of foreign governments:¹⁰

22. As described by another former Twitter employee Abhinav Vadrevu, “The idea of a shadowban is that you ban someone but they don’t know they’ve been banned, because they keep posting, but no one sees their content. So they just think that no one is engaging with their content, when in reality, no one is seeing it...”.¹¹

23. Twitter initially responded to the Project Veritas video by dishonestly denying that it ever shadow-bans accounts¹²; however, Twitter has since backtracked on this position after Vice News confronted Twitter with screenshots that show that the Republican Party chair Ronna McDaniel, several conservative Republican congressmen, and Donald Trump Jr.’s spokesman do not appear in the auto-populated drop-down search box on Twitter, Twitter responded:

“We are aware that some accounts are not automatically populating in our search box and shipping a change to address this.” Asked why only conservative Republicans appear to be affected and not liberal Democrats, the spokesperson wrote: “I’d

⁹ See Valerie Richardson, “Conservatives demand Twitter answers after Project Veritas videos point to political bias” THE WASHINGTON TIMES (Jan. 16, 2018) <<https://www.washingtontimes.com/news/2018/jan/16/twitter-political-bias-seen-project-veritas-video/>> (last visited July 25, 2018).

¹⁰ Project Veritas, “Twitter Bans Users Under Pressure From Their Foreign Governments,” YouTube, <https://www.youtube.com/watch?v=SMU4SZ_Cims> [<http://archive.is/XqQYg>] (last visited July 25, 2018), at 0:57.

¹¹ *Id.* at 7:07, 7:42.

¹² “Twitter does not shadowban accounts,” Twitter told Fox News; see Christopher Carbone, “Twitter responds to Project Veritas allegation that it can share Trump’s direct messages” FOX NEWS (Jan. 11, 2018), available at <<http://www.foxnews.com/tech/2018/01/11/twitter-responds-to-project-veritas-allegation-that-it-can-share-trumps-direct-messages.html>> (last visited July 25, 2018).

emphasize that our technology is based on account *behavior* not the content of Tweets."¹³

24. Based on Vice News' published report, all of the Democratic counterparts to the above-named Republicans, such as Democratic Party chair Tom Perez and Democratic members of Congress such as Maxine Waters, Joe Kennedy III, Keith Ellison, and Mark Pocan, continue to appear in drop down search results.¹⁴

25. Vice News notes that, "[n]ot a single member of the 78-person Progressive Caucus faces the same situation in Twitter's search."¹⁵

26. Vice News also notes that Twitter directed it one of Twitter's May 15, 2018 blog posts that explains how Twitter has created a new approach to combat "troll behavior".¹⁶

27. The blog post says that Twitter has started using, "new tools to address this conduct from a behavioral perspective, [Twitter] is able to improve the health of the conversation..."¹⁷

28. The blog post goes on to say that, "[t]hese signals will now be considered in how we organize and present content in communal areas like conversation and search."¹⁸

¹³ Alex Thompson, "Twitter is "shadow banning" prominent Republicans like the RNC chair and Trump Jr.'s spokesman," Vice News (Jul 25, 2018) <https://news.vice.com/en_us/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chair-and-trump-jrs-spokesman?utm_campaign=sharebutton> (last visited July 25, 2018).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Del Harvey and David Gasca, "Serving healthy conversation," Twitter Blog (May 15, 2018), available at <https://blog.twitter.com/official/en_us/topics/product/2018/Serving_Healthy_Conversation.html> (last visited July 25, 2018).

¹⁸ *Id.*

29. Twitter also admits in the post that Twitter has been testing this new approach to censoring political speech prior to informing its users:

In our early testing in markets around the world, we've already seen this new approach have a positive impact, resulting in a 4% drop in abuse reports from search and 8% fewer abuse reports from conversations. That means fewer people are seeing Tweets that disrupt their experience on Twitter.¹⁹

30. Twitter has likely expended significant costs in implementing this new program on Twitter which effectively shadow bans conservative voices: these costs likely amount to an in-kind contribution to Democratic candidates.

31. Twitter CEO Jack Dorsey has tipped his hand with respect to his intentions. He openly denounced bi-partisanship by promoting an article on Twitter that urges Democrats to eliminate political opposition. What could be more un-American than that? Given that Dorsey often personally involves himself with politically motivated bans from Twitter²⁰, Dorsey's statements and actions show that there is a significant likelihood that Twitter purposefully bans candidates with the intent of influencing the next election and as a way of making in-kind contributions to Democratic candidates.

32. Although Twitter accounts and posts are technically "free", Twitter does recognize that posts on its platform have significant value; for example, Twitter charges users for "promoted tweets" which Twitter defines as, "ordinary Tweets purchased by advertisers *who* want to reach a wider group of users or to spark engagement from their existing followers."²¹

¹⁹ Id.

²⁰ See Austin Carr, "When Jack Dorsey's Fight Against Twitter Trolls Got Personal," FAST COMPANY (April 9, 2018) <<https://www.fastcompany.com/40549979/when-jack-dorseys-fight-against-twitter-trolls-got-personal>> (last visited July 25, 2018).

²¹ Twitter Business, "What are promoted Tweets?", available at <<https://business.twitter.com/en/help/overview/what-are-promoted-tweets.html>> (last visited July 25, 2018).

33. Twitter also charges users for “promoted trends” which places tweets in the Twitter Trends category of Twitter.

34. Twitter does not list an exact price for promoted tweets or promoted trends on its website, but it appears that users can bid on average about \$1.40 per promoted tweet.²²

35. Twitter has essentially created a three-tier model: users who pay get the most exposure on twitter, users who do not pay get less exposure on twitter, while those who have political views that do not align with Twitter get even less exposure than either of these two groups.

36. Thus, despite the fact that Twitter is technically “free”—it is handing Democrats, especially Democrats who are up for re-election in 2020, more credibility on its platform than Republicans by fact-checking or otherwise discrediting Republican candidate platforms—effectively giving its preferred candidates free promotion status.

37. Twitter spokeswoman Katie Rosborough alleged the President's tweets “contain potentially misleading information about voting processes” when justifying the “fact-check” link attached to the tweet, which directs users to a Twitter “story” calling the President's claims “unsubstantiated.” Included in this “story” are articles by CNN and The Washington Post, sources that are notorious for left-wing bias and outrageous criticism of the President and his allies. The “story” links to no articles that support the President's claim, even though the Department of Justice has prosecuted and convicted many cases of election fraud, including fraud involving mail-in ballots. Regardless of the articles presented in the Twitter “story,” Twitter, Inc. has no jurisdiction to determine the merits of the

²² Twitter Business, “Bidding and Auctions”, available at <<https://business.twitter.com/en/help/troubleshooting/bidding-and-auctions-faqs.html>> (last visited July 25, 2018).

case. Election fraud is criminal and its penalties should be determined by the courts, not by @jack. President Trump has every right to speak about the dangers of election fraud, as it is his duty as the leader of the free world to bring awareness to matters surrounding democracy and America's elections.

SUMMARY OF THE LAW

38. 52 U.S.C. § 30118(a) provides

It is unlawful ... for any corporation whatever ... to make a contribution or expenditure in connection with any election at which ... a Senator or Representative in ... Congress are to be voted for, or in connection with any primary election ... held to select candidates for any of the foregoing offices

39. The term "contribution" is defined in FECA as, "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for *the purpose of influencing any election for Federal office.*" 52 U.S.C. § 30101(8)(A)(i) (emphasis added); see also 11 C.F.R. §§ 100.51-100.56.

40. As used in the definition of "contribution," the phrase "anything of value" includes "all in-kind contributions." 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 is a contribution." 11 C.F.R. § 100.52(d)(1).

41. Pursuant to 52 U.S.C. § 30101(11), "The term 'person' includes a[] ... corporation...".

42. FECA's "press exemption" provides that the term "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication" 52 U.S.C. § 30101(9)(B)(i)

43. FECA's "press exemption" provides that "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any...newspaper,

magazine, or other periodical publication, including any Internet or electronic publication, is not" a contribution or expenditure. 11 C.F.R. §§ 100.73 and 100.132.

44. The Commission conducts a two-step analysis to determine whether the "press exemption" applies. First, the Commission asks whether the entity engaging in the activity is a press entity. See, e.g., AO 2010-08 at 4 (*Citizens United*).

45. Second, the Commission applies the two-part analysis presented in *Reader's Digest Ass'n v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y.1981): (1) Whether the press entity is owned or controlled by a political party, political committee or candidate; and (2) Whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its "legitimate press function"). See, e.g., AO 2010-08 at 5 (citing *FEC v. Phillips Publ'g*, 517 F. Supp. 1308, 1312-13 (D.D.C.1981)).

46. Regarding the "legitimate press function" requirement, the district court in *Readers Digest Association* explained:

If, for example, on Election Day a partisan newspaper hired an army of incognito propaganda distributors to stand on street corners denouncing allegedly illegal acts of a candidate and sent sound trucks through the streets blaring the same denunciations, all in a manner unrelated to the sale of its newspapers, **this activity would not come within the press exemption** even though it might comply with a technical reading of the statutory exemption, being a "news story ... distributed through the facilities of . . . (a) newspaper."

509 Supp. at 1214 (emphasis added).

47. Federal law prohibits corporations from making contributions to Federal Candidates. See 52 U.S.C. § 30118(a).

48. The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate. See 11 C.F.R. § 100.16(a) and 52 U.S.C. § 30101(17).

49. Pursuant to 11 C.F.R. § 110.13(a) relating to candidate debates, a staging organization for a candidate debate can be either a nonprofit OR a broadcaster, which includes publications acting as press entities.

50. Pursuant to 11 C.F.R. § 110.13(b), the structure of debates staged in accordance with this section and 11 C.F.R. § 114.4(f) is left to the discretion of the staging organizations(s), provided that:

(b)(2) **Debate Structure.** The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) **Criteria for candidate selection.** For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate.

(Emphasis added).

51. *La Botz v. FEC*, 889 F. Supp. 2d 51 (D.D.C. 2012) is instructive on debate criteria and structure issues:

(a) "Pre-established" and "objective" criteria are two distinct components.

(b) Staging organizations are well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate.

(c) Staging organizations must be able to show their objective criteria were used to pick the participants, and were not designed to result in the selection of certain pre-chosen participants.

CAUSES OF ACTION

COUNT I

Prohibited Contributions by Corporations

52. Complainant restates and realleges the foregoing paragraphs as if fully set forth herein.

53. Given that candidates for Federal office likely cannot win elections in the modern era without having a Twitter account, Twitter accounts are of great value to candidates for Federal office.

54. When Twitter purported to fact-check President Trump's tweets, thereby attempting to diminish his credibility, it gave something of value, and in turn made an in-kind contribution, to the President's opponent. When Twitter fails to fact check claims from the President's opponents, they are receiving the equivalent of a promoted tweet in the eyes of the public. Twitter users may erroneously perceive a candidate with a fact-check linked to his tweets as a scarlet letter, which is wholly unjust and in violation of FEC law.

55. Twitter's erroneous fact-check *de facto* influences the 2020 election and amounts to an in-kind contribution to President Trump's opponents by giving Democratic candidates the false appearance of credibility while doing the exact opposite to the incumbent Republican President. Assigning a "fact-check" to a completely plausible assertion is patently election meddling by Twitter and should be investigated by the FEC.

56. Based on Twitter's pricing structure for its promoted tweets and trends, Twitter admits that tweets on its platform, and the exposure of its tweets on its platform, have an inherent monetary value, to be determined through an investigation by the Commission.

57. Twitter is a corporation and is prohibited from making contributions to candidates for federal office.

58. Twitter is making in-kind campaign contributions by giving preferential and unchecked treatment to those that oppose President Trump and his allies. A court of law could define Twitter's behavior as arbitrary and capricious.

59. Twitter's actions of arbitrarily fact-checking the President's aforementioned tweet was not for any legitimate press function, as contemplated by *Reader's Digest supra*. The press exemption does not apply to Twitter because fact-checking the President's tweet does not amount to a legitimate press function.

60. Accordingly, the costs involved in arbitrarily fact-checking President Trump's tweet are prohibited in-kind contributions and are not protected by the press exemption.

COUNT II

Failure to Disclose Independent Expenditures

61. Complainant restates and realleges the foregoing paragraphs as if fully set forth herein.

62. Based on the publicly available information analyzed above, by arbitrarily and capriciously "fact-checking" Republican President Trump from its news-coverage website, Twitter is "expressly advocating" against the reelection of President Trump and/or "expressly advocating" for the election of President's Trump's political opponents, within the meaning of 11 C.F.R. § 110.22

63. Based on the publicly available information analyzed above, by arbitrarily and capriciously "fact-checking" Republican President Trump from its news-coverage website, Twitter has engaged in express advocacy against President Trump and in favor of his opponents which constitutes independent expenditures under 11 C.F.R. § 100.16.

64. When Twitter arbitrarily and capriciously slaps a scarlet letter on a tweet, it dilutes the message therein contained. Twitter took it upon itself the fallacious onus to degrade the credibility of a neutral message from none other than the President of the United States. By attempting to lower the credibility of President Trump on its news-coverage website, Twitter may have—inadvertently or otherwise—contributed more than \$250 worth of in-kind contributions during 2020.

65. Upon information and belief, there is a sufficient basis for the FEC to investigate whether Twitter spent more than \$10,000 on these independent expenditures during 2020.

66. Respondent Twitter has failed to file any FEC disclosure reports regarding the above cited independent expenditures.

67. Respondent Twitter has violated 11 C.F.R. §§ 109.10(b) and (c) by failing to report independent expenditures.

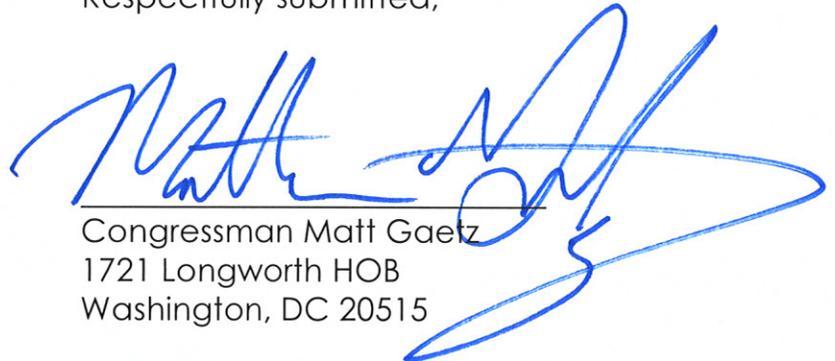
PRAYER FOR RELIEF

68. Wherefore, the Commission should find reason to believe that the Respondent Twitter violated 52 U.S.C. § 301011, *et seq.*, and conduct an immediate investigation under 52 U.S.C. § 30109(a)(2).

69. Further, the Commission should determine and impose appropriate sanctions for any and all violations, should enjoin respondent(s) from any and all violations in the future, and should impose such additional remedies as are necessary and appropriate to ensure compliance with the FECA.

Dated: May 27, 2020.

Respectfully submitted,

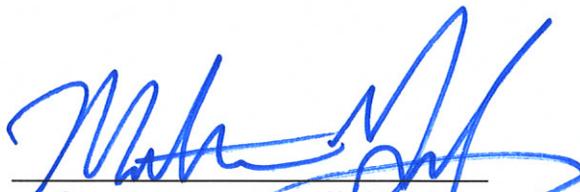


Congressman Matt Gaetz
1721 Longworth HOB
Washington, DC 20515

VERIFICATION

Complainant Congressman Matt Gaetz hereby verifies that the statements made in the attached complaint are, upon information and belief, true.

Sworn pursuant to 18 U.S.C. § 1001.



Congressman Matt Gaetz

Subscribed to and sworn to before me this 29 day of May 2020.

April M. Lyman
Notary Public, District of Columbia
My Commission Expires 6/30/2023



Notary Public

