

MUR 7858

Federal Election Commission
Washington, D.C.

RECEIVED
FEDERAL ELECTION COMMISSION
NOVEMBER 17, 2020 2:49 PM
OFFICE OF GENERAL COUNSEL

In re:
American Principles Project/American Principles Project PAC
Complainant,

and

Facebook, Inc.
Respondent

Via US Mail to:
Federal Election Commission
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

And electronically transmitted to:
EnfComplaint@fec.gov.

This Complaint is brought before the Federal Election Commission (“FEC”) pursuant to 52 U.S.C. § 30109(a)(1) of the Federal Election Campaign Act (“FECA”) on behalf of the Complainant, American Principles Project and its American Principles Project PAC (“APP PAC”), and against Respondent Facebook, Inc. (“Facebook”). Unless otherwise noted to be upon personal knowledge by obvious context or specific assertion, the statements in this Complaint are made upon information and belief, with the sources and basis for that information and belief identified in the text and in footnotes.

I. The Parties

Complainant American Principles Project (“APP”) is a conservative, non-profit advocacy organization with offices at 2800 Shirlington Road, STE 1201, Arlington, VA 22206, and operates the APP Political Action Committee (“APP PAC”). Respondent Facebook Inc. (“Facebook”) is a global company that operates, among its other social media entities, its Facebook digital social platform that has users across American and around the world. According to its website, at <https://about.fb.com/company-info> Facebook’s “products empower more than 3 billion people around the world to share ideas, offer support and make a difference,” and has its headquarters at 1 Hacker Way, Menlo Park, California, 94025.

II. Factual Background

As we submit below, Facebook’s deliberate suppression of APP PAC’s election-related advertisement during this most recent national election of 2020 constituted the unlawful furnishing of a corporate in-kind contribution in the form of services and other things of value to Democrat Gary Peters, candidate for U.S. Senate from the state of Michigan, and to the national Democrat Party and its candidate for President, Joe Biden. Or, in the alternative, that Respondent Facebook, Inc. has violated its duties of disclosure and reporting, inter alia, under 2 U.S.C. §§ 432, 433, and 434(a) regarding activities set forth below.

A. Facebook’s Violated its Own Policies and Violated FECA Provisions Barring In-Kind Contribution of Political Campaign Services by a Corporation

1. Facebook, in violation of its own policies and thereby not acting “in the ordinary course of business,” suppressed APP PAC’s content contrary to Facebook’s self-described status as a digital platform for the “sharing of ideas ... [where] users have unlimited ways to express their ideas to a wide audience.”¹ Instead, Facebook acted in clandestine conformity with a demonstrated pattern of staff and institutional support for Democrat Party candidates and issues. Through its use of a subjective and dubious opinion from its fact-checking “partner” PolitiFact regarding the APP PAC ad in question, one that Facebook knew or should have known was a baseless opinion that would result in wrongfully suppressing the APP PAC ad, Facebook acted as a political campaign surrogate for Democrat candidate Gary Peters and the Democrat Party and its presidential candidate Joe Biden. It did so by deliberately and wrongfully suppressing from its Facebook platform, at a critical juncture in the election, APP PAC’s advertisement that criticized Gary Peters, the Democrat candidate for U.S. Senate in Michigan and Democrat presidential candidate Joe Biden on an issue of particular importance to the voters of Michigan.

The APP PAC advertisement at issue here was posted on September 3, 2020 at 4:26 pm on the APP Facebook page. It contained an embedded video produced by APP PAC with the heading, “Sen. Gary Peters and Joe Biden support legislation that would destroy women’s sports. They call it Equality.” The video portrays a girls’ race and during the video the words “Equality Act” appear. The voice-over in the background criticizes, as unfair to women, the legal mandate that biological males who identify as transgender females should be entitled to participate against biological females in competitive sports, thus suggesting a damaging effect on women’s sports. Peters and Biden are described as supporting “legislation” that would create that result, and in the video the mention of that “legislation” was linked with the words “Equality Act” visible to those accessing the ad.²

¹ Source: Facebook Mission and Vision statement Analysis, at <https://mission-statement.com/facebook/>.

² Source: <https://m.facebook.com/watch/?v=761179321327845&rdr>.

At the foot of the Facebook post that contained the video, these words appear: “Biden and Peters would destroy girls’ sports.”

2. On September 19, 2020, Facebook, in concert with the wrongful and supposed “fact-check” by its fact-checking partner and agent PolitiFact which acted through its reporter Clara Hendrickson and its editorial staff, severely restricted the reach of the APP PAC ad, and thereby deprived more than 300,000 Michigan voters the opportunity to view it in the waning weeks leading up to the 2020 national elections.³ That adverse action taken by Facebook followed on the heels of the “fury” expressed by LGBTQ advocates whose outcry against the APP PAC Facebook political ad appeared in articles and posts on the same day the ad was released.⁴

However, that massive restriction by Facebook of the ad’s Facebook user reach was not on the basis that the advertisement contained “false” or “misleading” information. That much is clear from the September 15, 2020 article published by PolitiFact/ Hendrickson that analyzed the APP PAC ad,⁵ an article brandishing their identification with the “Poynter Institute,” the group that runs the International Fact-Checking Network (IFCN).⁶ Facebook relies on the IFCN for fact-checking standards and to certify which fact-checking media groups it uses, a process that results in Facebook severely down-ranking and/or blocking ads deemed to be false or misleading.⁷ The PolitiFact/ Hendrickson piece clearly stated that in fact they did not fact-check the core proposition in the APP PAC ad because it could not be fact-checked. Regarding Peters’ support for the Equality Act and APP PAC’s opposition to him in that ad on that basis, Hendrickson wrote:

[APP PAC’s] “specific criticism is that allowing transgender girls and women to compete on the basis of their gender identity would create an uneven playing field for student athletes and ultimately *end* girls’ and women’s sports. *That’s a prediction we can’t fact-check.*”⁸

There are two very serious journalistic mistakes here. The first one is so strangely anomalous that it can only be explained by laying it at the doorstep of Facebook, the entity paying PolitiFact to act as its Facebook fact-checker.

³ See par. 29-31 below where we explain the data supporting this.

⁴ Source: Trudy Ring, “Anti-Trans Ads Against Biden Incite Fury,” Advocate, September 3, 2020, at: <https://www.advocate.com/politics/2020/9/03/anti-trans-ads-against-biden-incite-fury>.

⁵ Source:

<https://www.politifact.com/article/2020/sep/15/ad-watch-peters-supports-ending-discrimination-bas/>.

⁶ Source: <https://www.poynter.org/ifcn/>.

⁷ See par. 17, n. 28, and par. 18 as to Facebook’s reliance on the Poynter Intsttute/IFCN and how Facebook supposedly subscribes to their norms; or, at least publicly.

⁸ Source:

<https://www.politifact.com/article/2020/sep/15/ad-watch-peters-supports-ending-discrimination-bas/> (emphasis added).

That first mistake is a strange anomaly because, as noted above, Facebook’s “fact-checking” partner PolitiFact/Hendrickson clearly stated in their article that the central core of the ad’s position on the transgender athletics/Equality Act campaign issue in opposition to Senator Peters in Michigan could not be fact-checked. Yet, on September 19, when Facebook began to block the content of the ad on its platform, it did so on the supposed basis of the PolitiFact/ Hendrickson “fact-check” of the ad, with Facebook placing the words “PolitiFact Fact-Check” across the bottom of the post with a link to the PolitiFact/ Hendrickson article.⁹ So, was 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?

Second, PolitiFact/Hendrickson erred by characterizing APP PAC’s criticism as positing the absolute “end” of girls/womens’ sports in *any form*; but in fact, APP PAC’s ad never said that. It said that the Equality Act, supported by Peters and Biden would “destroy” female sports, and that is distinctly different from putting an “end” to them. The primary dictionary usage of the verb “end” means “to bring to an end;” and a primary definition of the noun “end” means “the point where something *ceases to exist*;” whereas *only the secondary meaning* includes “destruction.”¹⁰ “Destroy,” on the other hand, has the primary definition of “to *ruin* the structure, organic existence, or *condition* of.”¹¹ In the context of women’s sports, APP PAC was clearly arguing that the Peters-backed Equality Act would *ruin* the competitive *condition* of women’s sports. As journalists, the PolitiFact staff should have known better, and as the company that was more than happy to use them as fact-checking agents and to participate in the political ruse, Facebook was ultimately responsible.

3. There is no dispute that PolitiFact/Hendrickson (and thereby Facebook as well) conceded two points: first, that APP PAC opposed Senator Peters for his support for the broadly sweeping Equality Act because of its negative effect on women’s athletics, and second, that the Equality Act, if passed, would require that biological males who as transgender persons identified as women be permitted to compete in women’s sports. Under the banner of **If Your Time is Short**, PolitiFact/Hendrickson summarized in a quick-read that first point in its first bullet point this way:

- “Conservative [APP] PAC is attacking Michigan Senator Gary Peters for supporting the Equality Act, a sweeping LGBTQ civil rights bill.”¹²

⁹ Source: screen shot emailed from APP’s social media consultant John Drogin to attorney Craig Parshall, November 11, 2020.

¹⁰ Source: <https://www.merriam-webster.com/dictionary/end> (emphasis added).

¹¹ Source: <https://www.merriam-webster.com/dictionary/destroy> (emphasis added).

¹² Source:

<https://www.politifact.com/article/2020/sep/15/ad-watch-peters-supports-ending-discrimination-bas/>.

In the second bullet point summary the author explicitly agreed with the central factual point being made in the APP PAC ad that the bill, if passed, would result in the mandated entry of biological male transgender persons into women's sports:

- “The legislation would allow transgender student athletes to compete in sports teams based on their gender identity rather than their sex assignment at birth.”¹³

The only dispute remaining, then, between the content of APP PAC's ad and the PolitiFact/Hendrickson so-called “fact-checkers” was a distinctly *non-fact-checkable prediction* about the nature or extent of the impact on women's sport; something PolitiFact/Hendrickson declared openly, as we noted in paragraph 2, page 3 above: “*That's a prediction we can't fact-check.*”

4. Undeterred, the PolitiFact/Hendrickson piece supplied factors in the article apparently designed to soften (though not substantively rebutting) the APP PAC arguments about the obvious unfairness to biological females in women's athletic competition. For instance, they cited that the National Collegiate Athletics Association decision to permit biological males identifying as women to compete in women's sports after they receive testosterone suppressing drugs for at least a year; yet they also conceded that a study done by a leading Swedish medical institute showed that after a full years dosage, testosterone suppressing drugs had a “negligible” effect in lessening the sports-impacting features of male muscle mass and strength, although longitudinal studies to substantiate that point are still needed.¹⁴ Remarkably, however, PolitiFact/Hendrickson end their article by admitting the central fact that buttresses the validity of the APP PAC ad, commenting that “research” shows that “hormonal changes that occur in puberty generally lead males to outperform females.”

What is *totally missing in the public PolitiFact/Hendrickson piece* however is *any indication from the author that the APP PAC campaign ad against Senator Peters warranted punishment or adverse labeling because it lacked essential “context,”* or that the ad was misleading. In paragraph 7 below, we show how in the initial contact between APP PAC's executive director Terry Schilling and PolitiFact/Hendrickson regarding the ad, *nothing was said at all regarding the ad's supposed lack of support or lack of necessary context.*

This is crucial to understanding the depth of Facebook's wrongful decision to strangle APP PAC's campaign ad. In fact the only allegation in the article accusing the ad of being misleading came – not from PolitiFact/Hendrickson – but from the Gary Peters campaign itself from which the article's author extracted this comment: “C.J. Warnke, the press secretary for Peters' reelection campaign, called the ad ‘a blatant attempt to mislead

¹³ Source: Id.

¹⁴ Source: Id.

voters and distort the truth about the Equality Act.”¹⁵ Given the facts conceded by PolitiFact/Hendrickson in the article that remove any doubt about whether at a minimum the ad was a fair, supported, debatable opinion against candidate Peters, Facebook’s suppression of this ad is bewildering; unless of course the real purpose was to “influence” the election in Michigan of Senator Gary Peters, which is exactly what we propose occurred here.

5. As will be explained below, Facebook has publicly stated that it delegates to its fact-checking “partners” full authority to levy strikes against posts on the Facebook platform determined to be misleading or false by fact-checkers, which then results in Facebook automatically punishing the outreach of such content up to 80%.¹⁶ In reality, however, Facebook arbitrarily uses its own judgment to selectively override the determinations of its agent fact-checkers whenever it desires to do so.¹⁷

6. On September 10, 2020, Terry Schilling, Executive Director of the APP PAC, had one phone call personally with PolitiFact’s author of the article, Clara Hendrickson. Then, from September 10th to September 16th, he personally corresponded by email with her and with Angie Holan, its Editor-in-Chief, and Katie Sanders, its managing editor, in an effort to respond to questions raised in their review of the subject APP PAC ad.

7. In the September 10th telephone call with Terry Schilling, Schilling knows of his own personal knowledge that in that call, Clara Hendrickson, who works as a reporter with Detroit Free Press never mentioned working as a fact-checker for PolitiFact or for Facebook. Schilling was led to believe that this was just a conversation arising from her work for the newspaper covering a news story regarding the issues raised in APP PAC’s ad. It was only later that it became clear to Schilling that the review of the ad might lead to adverse action from Facebook based on supposed *missing context*, and then only when the issue was kicked up to the managing editor and editor-in-chief who handle the “Facebook side of things,” as we point out in paragraph 10 below.

8. In an email of September 15th from Hendrickson to Schilling, she gave an overview of some opinions that were contrary to those in the APP PAC campaign advertisement, and then raised, for the first time, her desire to bring “context” to the issues raised in the APP PAC ad, adding that she was “giving him a chance to respond.”

Two hours later, Schilling sent her a lengthy email citing scientific data on the negligible effect of testosterone suppressive drugs on biological males who identify as females. He

¹⁵ Source: Id.

¹⁶ Source: “Julia Bain at Facebook in the US says Facebook’s algorithm sends content to fact-checkers based on metrics such as users flagging a post and *disbelief expressed its comments*. After content is rated as false by fact-checkers, its reach on Facebook decreases by more 80 per cent, says Bain.” New Scientist.com July 30, 2019 - <https://www.newscientist.com/article/2211634-facebooks-fact-checking-process-is-too-opaque-to-know-if-its-working/#ixzz6ORUBQ21V> (emphasis added).

¹⁷ See: par. 17, n. 29 below.

also cited the work of a report released by Duke Law School, co-authored by law professor Doriane Lambelet Coleman on the immutable differences in overall performance between biological males and biological females. In fact, Coleman is an expert on the policy aspects of the subject issue, and also co-authored a 2020 law review article in the Duke Journal of Gender Law & Policy along with Michael Joyner, professor at Mayo Clinic of Medicine and Donna Lopiano, adjunct professor of Sports Management at South Connecticut State University – a work easily accessible on a Google search of Coleman’s name and expertise – that concludes that the debate about the unchangeable performance gap between biological males and biological females “has long since been resolved;” that the sizable sports performance advantage that biological males have over females has been proven “across the board, at both elite and non-elite levels of almost all standard sports and events,” and that:

... for both biological and legal reasons, unless society is prepared to forego the benefits that flow from girls’ and women’s sport, the classification [between male and female athletes] must continue to be based on sex, or at least on reproductive sex-linked traits.¹⁸

Neither of these Coleman scholarly works were cited in the body of the PolitiFact/Hendrickson piece. But an op-ed co-authored by Coleman published in the Washington Post was cited in the article’s bibliography (“Our Sources”) that appears at the bottom of the article after the text. Ultimately, PolitiFact/Hendrickson could not refute the fact that, as they write in the article itself, “hormonal changes that occur in puberty generally lead males to outperform females” in athletics. Their real objection appears to be the non-fact-checkable judgment that the opinions of APP PAC, medical science, and sports experts on the unfairness resulting from biological males competing with biological females must be rejected *prima facie* in favor of a new universe of “gender identity” politics.

9. Starting on September 19, 2020 APP PAC’s ad was blocked on Facebook’s platform and continued to be “dark” through September 21, 2020, resulting in more than 300,000 Michigan voters being unable to view the ad according to calculations of John Drogin of the Drogin Group, the social media consulting group hired by APP PAC to design and implement its social media campaign in the U.S. Senate race in Michigan.¹⁹

10. On September 15th, at the start of Facebook’s *blackout* against the ad, Terry Schilling personally emailed Clara Hendrickson and indicated that APP PAC wished to continue running more campaign ads and inquired what he could do “to avoid downranking and censorship that we are now experiencing.” Twenty minutes later Hendrickson replied back in an email. Her response is an indication that the *ultimate*

¹⁸ Pages 82 and 100, at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1348&context=djglp>.

¹⁹ The lapse of time between the *strike* against the ad by PolitiFact/Hendrickson on September 15 and its suppression by Facebook on September 19 is a customary delay between fact-check and penalty action by Facebook according to APP PAC’s social media consultant, John Drogin.

arbiter was in fact Facebook. She wrote: “I don’t handle the Facebook side of things at PolitiFact,” (emphasis added) and therefore referred him to Katie Sanders, the “managing editor at PolitiFact.” Schilling then personally sent a similar email to editor Sanders. In sharp contrast to the actual text of the PolitiFact/Hendrickson piece that was published that day, on September 15, in Sanders’ reply email she raised issues of the ad’s conclusions being “unsupported” regarding the unfair advantage to biological males identifying as females when competing against biological females, writing:

I can't tell you what to say for ads going forward. For our purposes, future ads need to be better rooted in evidence than this one. The prediction about cisgender girls and women being dominated by transgender athletes is unsupported in the places where this policy is already the case, and the ad gives a different impression.

11. That same day, September 15, Terry Schilling personally emailed a response to editor Sanders and Editor-in-Chief Angie Holan, stating, among other things:

I can name at least 18 cases in the United States where transgender women are dominating women's sports and at least another 13 from other parts of the world where "gender identity" is a protected class.

In her email response the next day, September 16, Holan wrote a vague and opaque reply:

Dear Terry, we've reviewed the ad again as well as our reporting. Our story is accurate and complete, and the ad fits the definition of missing context. Your appeal is rejected.

As Katie noted, we can't tell you how to phrase your ads, but I believe that any competent public relations professional you consulted could give specific advice on improving the ad's rhetoric.

12. In a reply email on September 16, Terry Schilling wrote to Editor-in-Chief Holan, pointing out that (1) PolitiFact et al. had failed to describe exactly what “context” was missing in the ad; (2) pointing out 13 sports cases where transgender men identifying as women prevailed against women, and (3) advising Holan that federal campaign laws might be implicated in the ad’s suppression—

I believe that your organization is in violation of the "Code of Principles" for the International Fact Check Network as this "missing context" standard is only being applied to our ads. But even more so, it seems that your organization and Facebook are possibly in violation of Campaign Finance Law as you are clearly discriminating against us based on viewpoint, not missing context. You are giving an unfair advantage to our political opponents by only enforcing this on one side of these debates.

I'd appreciate a quick response as this is a time-sensitive matter with only 49 days left until election day

In a reply email on that same day, Holan continued to refuse to explain the “missing context” of the ad, writing:

Terry, maybe you didn't understand me the first time, so I'll repeat it: Our story is accurate and complete, and your ad fits the definition of missing context. Your appeal is rejected.

Any objective fact-checker who reviewed your ad and our report, or did their own independent reporting on your ad, would agree your ad is "missing context."

B. Facebook's Arbitrary Violation of its Own Policies.
Coupled with its Bias in Favor of Democrats
and Democrat Issues Shows the Ad Suppression
was for Purposes of Influencing an Election

13. Facebook has a pattern and practice of arbitrarily violating its own publicized policies so as to favor Democrats and Democrat issues, and did so in this case. As a result, its suppression of the APP PAC ad here cannot be “in ordinary course of business,”²⁰ and as a result, violated FEC regulations on corporate “in-kind” services to a political campaign.

14. In 2019, in a speech at Georgetown, Facebook's CEO and founder Mark Zuckerberg “personally defended the policy [of Facebook supposedly not censoring political expression] ... saying that he doesn't ‘think it's right for a private company to censor politicians or the news in a democracy.’”²¹ The Facebook CEO's statement suggests that Facebook should never pick sides in political controversies. At the same time he has admitted that bias exists within Facebook that is adverse to conservative social and political positions.²² Obviously, Facebook does pick sides, as we will show below.

²⁰ See Section III. below regarding the requirement that services must be “in the ordinary course of business” to be excluded from prohibited in-kind contributions.

²¹ Source:

<https://thehill.com/policy/technology/466551-zuckerberg-launches-public-defense-of-facebook-as-attacks-mount>.

²² Source: <https://nlpc.org/2019/09/24/facebook-zuckerberg-admits-bias/>.

15. Facebook’s new “missing context” category first arose in August 2020 in the midst of the national election cycle.²³ According to Facebook’s expert fact-checking overseer, Poynter Institute, Facebook’s rule was designed to apply to content in which statements or facts are obviously taken out of context in a misleading fashion:

“Missing context” is the second new rating, which the announcement suggests should be used when fact-checkers encounter content that would be misleading without additional information. Facebook’s announcement gave the example of a video clip that has been *selectively edited* to change a political official’s statement from, “I would support this initiative if ...” to ‘I support this initiative.’²⁴

16. Though the “missing context” argument seems clearly used against the APP PAC ad as an excuse to throttle the ad’s outreach in the lead up to the national election, the PolitiFact staff, all the way up to the Editor-in-Chief, refused to point out exactly what “context” was missing. In fact, the “missing context” argument never arose until the editors who “handle the Facebook side of things” became involved.²⁵ This would imply that the PolitiFact-Facebook connection in this case – a financial and professional codependency²⁶ – could well have resulted in the Facebook suppression of the ad, rather than solely objective journalism.

17. PolitiFact author Hendrickson rightly observed in her article that the central opinion at issue in the disputed APP PAC ad was not susceptible of fact-checking; but then in a 180 degree about-face, PolitiFact, acting as agent for Facebook, still “fact-checked” it and ruled that it lacked “context,” resulting in its being blocked by Facebook, *but only after* it was kicked up to the editors on the “*Facebook side of things.*” In addition to this highly suspicious reversal, there are two more reasons why this was not in the “ordinary course of business” for Facebook. First, opinions, as opposed to facts, are customarily determined by Facebook policy to be out-of-bounds for fact-checking.²⁷

²³ Source:

<https://www.poynter.org/fact-checking/2020/op-eds-and-editorials-may-be-fact-checked-says-facebook/>.

²⁴ Source: Id. (emphasis added).

²⁵ See: par. 10 above regarding this comment about the “Facebook side of things” in reporter Hendrickson’s email to Terry Schilling.

²⁶ Source: <https://www.americanpressinstitute.org/need-to-know/need-to-know-june-23-2020/> (“In the midst of a major media downturn, *fact-checking organizations are thriving ... 43% of the [media] organizations surveyed said that their main income comes from Facebook’s Third Party Fact-Checking Program ...*” (emphasis added).

²⁷ Sources: <https://www.facebook.com/business/help/182222309230722>. In an article dated October 3, 2019, on the journalism fact-checking section of Poynter’s website, the authors note that Facebook would not fact-check statements of “opinion.” stating, “This distinction took on greater relevance this week when the Wall Street Journal reported that Facebook would exempt opinion pieces and satire from the fact-checking program. Facebook made the move after complaints about fact-checkers labeling opinion articles from conservative outlets as false.” <https://www.poynter.org/fact-checking/2019/amid-trumps-impeachment-inquiry-journalists-must-distinguish-fact-from-opinion/>

While Facebook has declared publicly that it defers entirely to its professional fact-checkers,²⁸ in fact, Facebook has privately reversed fact-checkers when they wrongly “fact-check” something that is opinion, rather than fact.²⁹ The un-fact-checkable prediction by APP PAC on the negative effect on women’s sports was clearly opinion, though based on ample facts as we have outlined above. A “fact-check” here should have been deemed a violation of Facebook policy.

Yet, Facebook has been shown to pressure its professional fact-checkers into changing their fact-check determinations.³⁰ There is a strong indication that is exactly what happened here, under the invented guise of “missing context.” The fact that this occurred in the offices of those at PolitiFact “handling the Facebook side of things,” and in the context of a national election involving a Democrat Senator in the battleground state of Michigan, resulted in the suppression of an anti-Democrat ad on an issue where polling shows voters would have strongly agreed with the ad, as shown in section C. below, is highly telling. Even more telling is a virtual *flunking grade given to Facebook* from the very fact-check certification organization that Facebook partners with, and relies on, as we demonstrate in paragraph 18, next.

18. Poynter Institute’s International Fact-Checking Network (IFCN) is the organization that certifies the media fact-checkers that are used by Facebook.³¹ In November 2019 Facebook’s “Journalism Project” partnered with Poynter and the IFCN in creating a new “initiative” in fact-checking, where Facebook committed to support innovational advances to aid the fact-checking industry; even more relevant, the launch was announced by Baybars Örsek, the Director of the International Fact-Checking Network³², a name that surfaced a year later in the bitter criticism from Poynter and the IFCN against Facebook’s irresponsible suppression of news; news that was likely to negatively affect the Democrat race in 2020.

²⁸ Source: “When asked about auditing its fact-checkers] Facebook deflected responsibility, *implying the audit process wouldn’t be necessary because all of its fact-checking partners have been certified through the non-partisan International Fact-Checking Network*. This group publishes ethics guidelines that include an accuracy standard that requires checkers ‘maintain high standards of reporting, writing, and editing in order to produce work that is as error-free as possible.’ Checkers are also supposed to follow criteria for determining story accuracy, and can apply mid-point labels like ‘Partly False’ or ‘False Headline’ ... *Facebook tells me that because it doesn’t think it’s appropriate for it to be the arbiter of truth, it relies on the IFCN to set guidelines.*” (emphasis added).

<https://techcrunch.com/2020/03/03/trump-coronavirus-hoax-fact-check/>

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<https://arstechnica.com/tech-policy/2020/07/facebook-overrides-fact-checks-when-climate-science-is-opinion/> (Facebook reverses fact-check on climate science statement as opinion, not fact).

Poynter Institute has recognized Facebook’s rule that pure opinion was not to be fact-checked. Facebook uses only Poynter-certified media companies as its fact-checkers.

³⁰ Source:

<https://www.fastcompany.com/90538655/facebook-is-quietly-pressuring-its-independent-fact-checkers-to-change-their-rulings>.

³¹ Source:

<https://www.facebook.com/journalismproject/programs/third-party-fact-checking/selecting-partners>.

³² Source: <https://www.poynter.org/fact-checking/2019/innovation-initiative/>.

19. On October 15, 2020, the associate director of Poynter Institute’s IFCN authored a scathing rebuke of Facebook, labeling its suppression of news during the election cycle as “dangerous,” and sarcastically described Facebook as posing, along with Twitter, as “arbiters of truth,” while at the same time, behind the curtain, they lacked “methodology or transparency” for content suppression decisions that raise the question whether Facebook employees “are really non-partisan.”³³

Noting that Facebook requires ... [its fact-checking] organizations to be verified signatories of the International Fact-Checking Network’s Code of Principles,” the deputy director of the IFCN wrote how blatantly Facebook violated those principles in blocking the URL to a story carried by the New York Post,³⁴ (one, obvious to everyone, as having negative election implications for the Democrat Party), then quoted IFCN’s director, Baybars Örsek astonishing admission about the suspicious election-timing of Facebook’s suppressive activity:

[IFCN director] Orkek added: “It’s apparently more appealing to be ‘arbitrators of truth’ *when the elections are around the corner* and everyone has a stronger confidence level for the outcomes.”³⁵

The column pointed out Facebook’s highly suspect response to the manner in which it blocked the New York Post article:

Facebook said it had always had this policy against doubtful content and that it was just applying it once more. The fact-checking community, however, wasn’t aware of it until today – which is a bit strange, considering they work together to tackle misinformation.³⁶

The bottom line according to Facebook’s own fact-checking authority, while obviously applying a measure of delicacy, was that the “decision to reduce or prevent the distribution of the New York Post’s article based on some mysterious, non-transparent criteria and an unknown methodology is a serious mistake ... that brings these companies closer to the slippery slope of censorship.”³⁷

³³ Source:

<https://www.poynter.org/fact-checking/2020/without-methodology-or-transparency-facebook-and-twitter-be-come-the-arbiters-of-the-truth/>.

³⁴ As the world now knows, the New York Post story raised the specter of Joe Biden’s son reaping big money for promises to foreign interests that they would have access to V.P. Joe Biden, with suggestions that Joe Biden lied about not having any knowledge of his son’s international dealings.

³⁵ Source:

<https://www.poynter.org/fact-checking/2020/without-methodology-or-transparency-facebook-and-twitter-be-come-the-arbiters-of-the-truth/> (emphasis added).

³⁶ Source: Id.

³⁷ Source: Id.

Less delicately, we submit that Facebook is already on that downward slippery slide, and is actively engaged in politically biased censorship, and that it occurred in this election in the case of APP PAC's ad. More evidence in this regard follows below.

20. The "missing context" excuse orchestrated here by Facebook and its PolitiFact partner to block an ad criticizing a Democrat senator running for re-election and Democrat candidate Joe Biden, is even more outrageous and more politically suspicious when we see how Facebook left *untouched and unhindered* one of the most brutally manipulative political ads ever to run on the Facebook platform against President Trump's Administration. Using the Facebook/PolitiFact that was applied to APP PAC ad, the post created by the viciously anti-Trump Lincoln Project is the paragon of "missing context," laying at the doorstep of President Trump, the lonely, isolated, struggling deaths of COVID-19 patients in America who died in a hospital.³⁸ Though cleverly omitting the Trump name, the ad was clearly making a wholesale, visceral assault against the President.³⁹ This kind of COVID issue was a major political plank in the 2020 Democratic playbook,⁴⁰ one manipulated by much of the mainstream media and capitalized-on by the Democrat Party.⁴¹

If Facebook had fairly used, across-the board, and *in a politically neutral way*, the same micromanaging, hyper-critical "missing context" metric that Facebook used against the APP PAC ad, the Lincoln Project's post should never have been allowed. What "missing context" existed there? How about the Lincoln Project's allegations (1) that Trump was responsible for the "isolation" of dying COVID patients, refuted by the fact that, according to USA-Today, individual medical providers (not the President) decide hospital isolation regulations because "there is no sweeping regulation that prohibits visitors," and it is "hospitals [that] implemented a no-visitor policy;"⁴² or (2) in stark contrast to the Lincoln Project's allegations of callousness and ineffectiveness of President Trump toward fighting the disease, that true "context" shows that his project Warp Speed is expected to save huge numbers of lives⁴³ and that his administration's actions have likely

³⁸ Source: "A death from COVID is the loneliest death imaginable;" [President Trump's] "lying is killing us ..." "We have to stop it ..." "VOTE HIM OUT."

https://m.facebook.com/story.php?story_fbid=212280796936605&id=105756057589080

³⁹ Source:

<https://adage.com/article/campaign-trail/watch-lincoln-projects-searing-hospital-ad-attacking-trumps-COVID-record/2286136#>

⁴⁰ Source: New York Times headline: "Slamming Trump's coronavirus response, Biden asks: 'If this is a success, what's a failure look like?'" accessed at

<https://www.nytimes.com/live/2020/10/23/us/debate-trump-biden>.

⁴¹ Source:

<https://thehill.com/blogs/congress-blog/healthcare/516662-medias-anti-trump-coronavirus-spin-has-real-consequences>

⁴² Source:

<https://www.usatoday.com/story/news/factcheck/2020/04/09/fact-check-coronavirus-patients-dying-alone-hospitals/5114282002/>.

⁴³ Source: <https://nypost.com/2020/10/13/great-news-on-COVID-19-in-the-times-even-if-they-buried-it/>.

already saved between “1.5 and 2.2 million” lives;⁴⁴ or (3) Lincoln Project’s attributing *causation* of COVID deaths to the President, let alone *isolation* deaths occurring in hospitals, is one of the most politically slanted speculations imaginable, where the only sure and certain causal culprit is not a Republican president, but a Communist regime that intentionally kept the disease under wraps, an act equivalent on the moral scale perhaps to a war crime, yet rarely headlined in the mainstream news.⁴⁵

C. Facebook’s Violation of FECA was a Suppression of
Campaign Information on an Issue of Importance to
Michigan Voters and Likely Impacted the Election in Michigan

21. APP PAC’s subject advertisement objected to candidate Peters’ support of the Equality Act in Congress that would grant transgender rights resulting in transgender/biological males gaining mandated entry into competition against biological females in competitive sports.

22. APP PAC commissioned a survey of likely voters in Michigan performed by SPRY Strategies from July 11 – July 16, 2020.⁴⁶ The survey conclusively showed Michigan voters to be overwhelmingly opposed to the idea of transgender rights in athletics: 77.84% responded that “boys and men who say they identify as transgender [should not] be allowed to compete in girls and women’s athletics; only 22.16% responded that they should be allowed to compete in girls and women’s athletics.”⁴⁷

23. Michigan Senator Gary Peters possesses a well-documented position of support for LGBTQ rights, and particularly transgender rights under the rubric of “gender identity.”⁴⁸ Senator Peters is on record ardently supporting passage of the Equality Act.⁴⁹ Yet, at the same time, even mainstream media publications have raised the ironically

⁴⁴ Source:

<https://thehill.com/blogs/congress-blog/healthcare/516662-medias-anti-trump-coronavirus-spin-has-real-consequences>

⁴⁵ Source: Eva Fu, “China Had COVID-like Patients Months Before Official Timeline,” The Epoch Times, Oct. 14-20, 2020, pages 1 & 10 - Though COVID surfaced in China in September 2019, “the [Wuhan] health commission only publicly announced an outbreak of a novel form of pneumonia on Dec. 31, 2019 – after social media posts by whistleblower doctors had gone viral,” and China “excluded” the World Health Organization’s “experts from the country’s virus probe” as well as “experts from the United States.”

⁴⁶ The APP PAC PAC/ SPRY Strategies survey was conducted among a random sampling of 700 likely voters (more than 97% “very likely,” and slightly more than 2% “somewhat likely”) with a margin of error of +/- 3.7%). Source: <https://americanprinciplesproject.org/wp-content/uploads/2020/07/APP-PAC.Michigan.GeneralElection.pdf>

⁴⁷ Source: Id., at page 17 of the survey.

⁴⁸ Sources:

<https://www.peters.senate.gov/about/issues/fighting-for-civil-rights-and-the-administration-of-justice> (support for expanding LGBTQ/ “gender identity” rights);

⁴⁹ Source:

<https://www.peters.senate.gov/newsroom/press-releases/peters-statement-on-supreme-court-ruling-federal-employment-discrimination-law-protects-lgbtq-employees>

negative effect that the Equality Act and its protections of transgender athletes would have on women's sports. For instance, shortly before the November 2020 national election, an article in *The Economist* noted the Equality Act's detrimental impact on sports competition, and its potential, as its sub-headline indicates, for "discriminating against female Americans":

The Equality Act would require female sports teams to include transgender players, even if their transition from male to female was not obvious: if, for example, they had not taken testosterone-suppressing drugs.

Transgender activists tend not to accept that this is unfair. When asked what she thought about transgender girls with undiminished levels of testosterone racing against female runners and trouncing them (as has happened in at least one state with such a policy) Ms Byard of glsen said, "But they are girls! They are girls. Men don't compete in women's sports."

Let's talk about sex

This denial of the meaning of "sex", which is reflected in the language of the Equality Act, is a poor ground on which to build policy. The implications could extend well beyond spaces once reserved for women. Doriane Coleman, a law professor at Duke University, points out that if policymakers are not allowed to 'see' sex, "all the centres of excellence at research hospitals that currently exist to collect data on and then study sex differences in immunology, cancer, you name it, would be defunded and, indeed, become *verboden*".⁵⁰

The *Economist* article ended by observing that, "ending discrimination against one group of people should not depend on discriminating against another."⁵¹ BloombergLaw.com noted in an October 8, 2020 article how this issue was sweeping the nation; that one state had already banned transgender athletes from competing against biological females, and similar bills in more than a dozen states were pending in state legislatures.⁵²

The issue raised in the suppressed APP PAC ad was no conspiracy theory; it was a legitimate attempt to direct attention to the Senator Peters – Equality Act – womens' sports linkage, a legitimate political issue that was gaining momentum in the 2020 election.

⁵⁰ Source: <https://www.economist.com/united-states/2020/10/22/who-could-object-to-the-equality-act>

⁵¹ Source: Id.

⁵² Source: <https://news.bloomberglaw.com/us-law-week/transgender-athlete-fight-to-heat-up-as-legislatures-return>

24. In Michigan, the issue of transgender participation in biologically gender-assigned sports had been a highly debated issue in the years leading up to the 2020 election. For instance, in 2016 the Detroit News reported:

While girls competing on wrestling teams or football teams has been allowed in Michigan, the Michigan High School Athletic Association will not allow biological males to play girls' sports, said Jack Roberts, executive director of MHSAA, a private nonprofit that regulates interscholastic athletics in the state.

Biological males playing girls' sports means girls would "lose meaningful opportunities" to participate, as they are displaced on teams by boys who are on the whole bigger, stronger and faster, Roberts said.

Roberts said the MHSAA will not look to the state board for guidance, but to "a long line of court cases" that protect girls' sports. Even the state board's guidance, which says students should be able to play on teams according to their gender identity, notes that the MHSAA has the authority on such matters.

"Bathroom access is not a matter of competition," Roberts said. "Scoring a basket is."

While a school district like Ann Arbor would be free to let biological males who identify as girls compete in girls sports, Roberts said, it would run into two issues: finding competition at the local level, and not having the services of that player in postseason play, which is governed by the MHSAA.

"If the boy has just declared 'I'm a girl,' schools will protest, and the school may not have competition," Roberts said. And in the postseason, if a player's gender identity is "disputed by facts," such as school records, government documents and medical documents, and there's been no gender reassignment and no hormone therapy, the player would be barred by the MHSAA from competing.

"We've had boys who've wanted to play on competitive cheer and volleyball for years and years," Roberts said, "but it's never been allowed at the tournament level. Because of that, schools don't allow it at the local level."⁵³

⁵³ Source:

<https://www.detroitnews.com/story/news/local/michigan/2016/05/08/michigan-schools-ahead-state-gender-identity/84113012/>

In that same year, the Lansing State Journal reported on the decision of the Michigan Education Board to approve guidelines to create an “inclusive environment” for LGBTQ students, including transgender students.⁵⁴

In 2018, news broke on a transgender swimmer who helped Michigan to capture a Big 10 title in women’s swimming.⁵⁵

This issue was not only a distinctly Michigan issue; it was also becoming a national issue. In April 2019, the Washington Post featured an opinion piece authored by three elite athletes, including a female member of the International Tennis Hall of Fame, and a four-time Olympic gold medalist, who wrote in opposition to the gender impact that the Equality Act, co-sponsored by Senator Gary Peters, would have on competitive sports if biological male/transgender women were permitted to compete in women’s sports:

The evidence is unequivocal that starting in puberty, in every sport except sailing, shooting and riding, there will always be significant numbers of boys and men who would beat the best girls and women in head-to-head competition. Claims to the contrary are simply a denial of science.⁵⁶

In 2019, the Detroit Free Press reported on the case of a Michigan transgender employee of a funeral home whose case was before the U.S. Supreme Court.⁵⁷

In June 2020, news broke in Michigan of the U.S. Supreme Court’s decision in favor of the employment rights of Michigan transgender funeral home employee Aimee Stephens.⁵⁸

On June 29, 2020 an article profiled Michigan’s Secretary of State’s participation on the Michigan Task Force on Women in Sports, and her support for LGBTQ rights, including transgender rights in particular.⁵⁹

⁵⁴ Source:

<https://www.lansingstatejournal.com/story/news/local/michigan/2016/09/14/michigan-education-board-AP-PACroves-lgbt-guidance-schools/90378830/>

⁵⁵ Source:

<https://www.outsports.com/2018/2/27/17052860/transgender-swimmer-g-ryan-michigan-big-ten>

⁵⁶ Source:

https://www.washingtonpost.com/opinions/pass-the-equality-act-but-dont-abandon-title-ix/2019/04/29/2dae7e58-65ed-11e9-a1b6-b29b90efa879_story.html

⁵⁷ Source:

<https://www.freep.com/story/news/politics/2019/10/07/aimee-stephens-transgender-case-supreme-court/3851942002/>

⁵⁸ Source:

<https://www.freep.com/story/news/local/michigan/2020/06/15/supreme-court-transgender-people-lgbtq-protected-aimee-stephens-case/3190573001/>

⁵⁹ Source:

<https://www.outsports.com/2020/6/29/21306869/jocelyn-benson-michigan-women-sports-task-force>

Throughout the 2020 campaign, Senator Gary Peter’s strong support of LGBTQ rights in general, and his support of the Equality Act in Congress specifically, made the transgender athletics issue an obvious one in the campaign. ⁶⁰

On September 20, 2020, the Detroit Free Press released a generally negative overview of the APP PAC ad in question on the issue of Senator Peters support of transgender rights, the Equality Act and competitive sports, but also acknowledged that, in the context of the election issue of whether biological males/transgender females should have the legal right to compete in female sports, they could not “fact-check” that issue:

Their specific criticism is that allowing transgender girls and women to compete on the basis of their gender identity would create an uneven playing field for student athletes and ultimately end girls' and women's sports. That's a prediction that we can't fact-check. ⁶¹

Shortly before the 2020 election, a small Michigan newspaper featured an opinion/reader piece citing a poll on whether biological males who identify as females should be allowed to compete in women sports in Michigan. The results strongly suggested a bi-partisan rejection for that proposal:

These numbers do break the responses down by party, and we learn that 95% of Republicans, 78% of independents, and even 62% of Democrats said they opposed letting male transgender athletes unfairly compete against girls and potentially rob them of a chance to win medals and scholarships. ⁶²

D. Facebook’s Actions were an In-Kind “Thing of Value” to the Michigan Candidate for U.S. Senate

⁶⁰ Source: Michigan Democratic Party, June 26, 2020:

<https://michigandems.com/icymi-gary-peters-on-fighting-for-lgbtq-michiganders/> See also: <https://www.isidewith.com/candidates/gary-peters-2/policies/social/transgender-athletes> (summarizing the perception of Gary Peters voters that he was supportive of transgender-female/biological-male entry into female sports); and <https://www.hrc.org/resources/veo/us-senate-mis02> (pro-LGBTQ advocacy group noting Peters co-sponsorship of the Equality Act, a bill that would strengthen transgender rights).

⁶¹ Source: <https://www.freep.com/story/news/local/michigan/detroit/2020/09/15/conservative-pac-APP-PAC-sen-peters-lgbtq-equality-act/5794306002/>

⁶² Source:

<https://www.ourmidland.com/opinion/letters/article/Reader-questions-where-Schulz-stands-regarding-15666808.php>

25. Unfortunately for Michigan voters, because of Facebook’s unlawful throttling of APP PAC’s ad, hundreds of thousands of Michigan voters⁶³ were deprived of APP PAC’s information on that timely election issue that could have cast serious doubt on Senator Peters’ declared status as a defender of American “equality.” The result was a direct thing of “value” – suppression of accurate issue-advocacy detrimental to the Gary Peters campaign – that therefore benefited the Democrat candidate for U.S. Senate in Michigan.

26. These suppressive actions of Facebook were performed in the context of an extremely close political contest for U.S. Senate in Michigan that, according to the Associated Press, was a “tight, expensive *race that was the state’s most competitive in two decades*,”⁶⁴ where in the U.S. Senate race in Michigan, the subject matter addressed in the suppressed APP PAC ad, according to the APP PAC/Spry Strategies polling data, struck at the heart of an important issue in the campaign.⁶⁵

27. According to the Associated Press, as of November 6, 2020, with 99% of the precincts reporting, Peters was declared to be the winner, having defeated his Republican opponent John James, by a *thin margin* of only 1.3 percentage points, a contest in which James, had he won, would have become the first African-American U.S. Senator from Michigan.⁶⁶

28. The political *campaign-suppressive effect* of Facebook’s unlawful in-kind donation of services of value to the Democratic Party and to Democrat Gary Peters through its deliberate censorship of APP PAC’s election advertisement at issue in the Michigan race for U.S. Senate was *particularly valuable* to the Democrat Party and Democrat Gary Peters because *its affect was amplified even more by the unsuppressed voice of the national media*.

NBC News harshly criticized APP PAC’s national and Michigan election issue-advocacy while at the same time withholding details on the substance of, or basis for, APP PAC’s position on the *unfairness* of transgender demands for entry into women’s sports. Nor did NBC News share the reasoning for APP PAC’s opposition to Senator Peters’ support for such rights. APP PAC’s election-related, Facebook-suppressed advertisement was reviewed negatively weeks before Election Day by NBCNews.com which dismissed out of hand the APP PAC ad as mere “transphobic” “targeting” of Senator Peters:

⁶³ Source: see the data supporting this conservative projection of voters *not reached* by APP PAC at par. 31.

⁶⁴ Source:

<https://apnews.com/article/kalamazoo-senate-elections-gary-peters-michigan-detroit-371d4d57e315fc1e311f3da975642b3b> (emphasis added).

⁶⁵ Source: in addition to the polling data cited above, see also par. 31 below regarding the relevance to, and likely affect on the Senate race in Michigan.

⁶⁶ Source: Id.

Targets of homophobic or transphobic ads may not even be LGBTQ. For example, the American Principles Project, a conservative think tank and PAC, released an ad [targeting presidential candidate Joe Biden and Sen. Gary Peters, D-Mich.](#), alleging that they support “policies which would allow biological males to compete in women’s sports and push children into dangerous, life-altering sex-change” procedures.⁶⁷

A recent scientific study also demonstrates an additional *amplifying effect* to the impact of Facebook’s negative “fact-check” and public labeling of APP PAC’s ad as “missing context” and then suppressing it: i.e. that Michigan voters and social media viewers according to the study would presume (wrongly) that other ads (i.e. promoting Gary Peters and Joe Biden) that were not fact-checked were therefore accurate, true, or not missing necessary context. This is because fact-check -

... labels generate what researchers have named an “implied truth effect.” That is, when certain posts are labeled fact-checked and false, users also believe that content without the label has been fact-checked and is true.⁶⁸

29. There was a great financial value granted to Democrat Gary Peters and to his campaign by Facebook’s suppression of the APP PAC’s ad. APP PAC’s social media consultant John Drogan is personally familiar with the APP PAC social media advertising campaign in Michigan. APP PAC had planned to spend \$168,658 on the subject ad that was eventually blocked by Facebook.

30. APP PAC’s Drogan has calculated that with that Facebook budget the ad would have reached approximately 600,000 voters in Michigan, with an estimated 5,692,136 impressions.⁶⁹ Before the ad was blocked by Facebook APP PAC had spent \$23,541.26 on the ad and reached 211,392 Michigan voters. This type of social media advertising, with a cost/unique voter contact rate of \$0.11, has a distinct monetary advantage over “connected television” (CTV) platform cost/unique voter contact rate of \$0.36.

⁶⁷ Source: Julie Moreau, “Political candidates face uptick in anti-LGBTQ attack ads – The ‘homophobic and transphobic attacks are more frequent and more direct than we have seen in at least a decade,’ LGBTQ Victory Fund CEO Annise Parker said,” NBCNews.com, October 20, 2020.

<https://www.nbcnews.com/feature/nbc-out/political-candidates-face-uptick-anti-lgbtq-attack-ads-n1244032#anchor-NonLGBT-targets>

⁶⁸ Source:

<https://nymag.com/intelligencer/2020/03/study-shows-possible-downside-of-fact-checking-on-facebook.html>

⁶⁹ “Impressions” are the total number of social media viewers to whom the content is viewable. Source: <https://blog.hubspot.com/marketing/impressions-vs-reach>.

31. Accordingly, when Facebook blocked the APP PAC ad, it was *unable to reach* the additional 388,608 voters in Michigan with that particular message.⁷⁰ The necessary corollary is that the campaign of U.S. Senator Gary Peters was gifted the financial value of the APP PAC ad that would have reached those remaining 388,608 voter with the contra-Peters ad, but never did because of Facebook's actions; thus, at \$0.11 per voter contact x 388,608 voters not reached, this amounts to a \$47,746.88 in-kind contribution through Facebook services to the campaign of Democrat Gary Peters.

E. Facebook is Closely Aligned with the Democratic Party and Its Suppression of APP PAC's Ad was "for the Purpose of Influencing an Election" by its Contribution of Services

32. Big Tech platforms, and particularly Facebook, have become a major advertising force in political campaigns Facebook, "which reaches over a quarter-billion users in North American every month," has "become the dominant advertising platform for political campaigns;" in part due to the fact that "many other ad-supported sites have retreated from politics, leaving Facebook as the only game in town."⁷¹ Facebook's ubiquity and dominance during election cycles makes its "in-kind" advertising support of the Democrat Party through political viewpoint suppression even more troublesome.

33. Facebook as an institution and through its staff, has predominantly favored support for the Democrat Party rather than the Republican Party. A Wired report, based on FEC figures, notes that as of the end of August 2020 Facebook staff had contributed a whopping \$560,493 to the campaign of Joe Biden, while donating only a trifling \$7,005 to the re-election campaign of Donald Trump.⁷² This disparity is in keeping with the trend among the top big technology giants. 95% of election contributions from the workers at top Silicon Valley tech companies have gone to the campaign of Joe Biden.⁷³

34. There are close staffing ties between Facebook, Silicon Valley, and the Democrat Party. In October, 2020, Jessica Hertz, Facebook's associate general counsel for regulatory matters, was hired by candidate Joe Biden's campaign transition team.⁷⁴ Hertz, will reportedly serve as the Biden transition team's general counsel in charge of ethics and lobbying issues.⁷⁵ Ms. Hertz has had substantial prior political ties to Joe Biden. Prior to her work with Facebook, Hertz served as principal deputy counsel to Joe Biden

⁷⁰ Source: the information in par. 13 and 14 was verified in a September 20, 2020 email from John Drogan to attorney Craig Parshall.

⁷¹

<https://progressivepartyusa.com/progressive-news/why-political-campaigns-are-flooding-facebook-with-ad-dollars/>

⁷² <https://datawrapper.dwcdn.net/gipG5/3/>

⁷³ <https://www.wired.com/story/silicon-valley-opens-wallet-joe-biden/>. See also: <https://www.theblaze.com/news/fec-facebook-2020-election-donations-democrats>

⁷⁴

<https://nypost.com/2020/10/01/joe-biden-hires-facebooks-jessica-hertz-for-transition-team/amp/>

⁷⁵ Id.

during his tenure as Vice-President.⁷⁶ However, this is not just an isolated connection between a single Facebook executive and the Joe Biden campaign. It is part of a larger trend among the nation's largest technology companies that is too obvious to ignore.

35. Twitter's Washington-based director of public policy Carolos Monje joined the Biden team within weeks of Ms. Hertz's departure from Facebook.⁷⁷ In fact, the big tech platforms as a whole have been supplying abundant leadership to the Democrat Party. Just as the staff of Silicon Valley giants have disproportionately, even monolithically, contributed to the campaign of Democrat Joe Biden, so also the largest technology companies, Facebook and others, have exclusively offered-up its executives and advisors to the Biden campaign. As the New York Times has reported, the Biden transition team's Innovation Policy Committee,

... includes at least eight people who work for *Facebook*, Amazon, Google and Apple, according to documents reviewed by The New York Times. Other committee members have close ties to the companies, including economists and lawyers who have advised them, and officials at think tanks funded by them.⁷⁸

36. The employee base of Facebook favors liberal political candidates. Facebook's CEO Mark Zuckerberg, when questioned in an October 2020 Senate committee hearing about the political leanings of his Facebook work force, testified:

Senator, I don't know the exact number, but I would guess that our employee base skews left-leaning.⁷⁹

37. Former Facebook content moderator Ryan Hartwig has become a "whistle-blower" regarding Facebook's politically biased content decisions regarding what content should be allowed, and what should be blocked, including Facebook ads.⁸⁰ Hartwig was employed by Cognizant, a contractor of Facebook hired to make content decisions pursuant to Facebook content directives, and according to Facebook's interpretation of its own policies. In a series of conversations and emails with APP PAC's legal counsel in this matter, attorney Craig Parshall, Hartwig has confirmed that Facebook

⁷⁶ Source: <https://www.democracyinaction.us/2020/chrntran/bidentransition.html>

⁷⁷ Source:

<https://www.politico.com/news/2020/09/17/twitter-public-policy-director-decamps-for-biden-transition-team-417293>

⁷⁸ Source: <https://www.nytimes.com/2020/08/10/technology/big-tech-biden-campaign.html> (emphasis added).

⁷⁹ Source: hearing transcript at 03:08:26 -

<https://www.rev.com/blog/transcripts/tech-ceos-senate-testimony-transcript-october-28>.

⁸⁰ Source: <https://ryanhartwig.org>.

carved special exceptions for Democrats, and Democrat political positions, including pro-transgender political issues.

38. According to Hartwig, Facebook had evidenced a clear bias in closely scrutinizing potential criticisms of Democrats and their issues and also favoring LGBTQ positions; illustrations include how Facebook (1) prioritized the need to review all content by Facebook itself, whether or not violating Facebook rules, if it concerned political content relating to the 2019 Democratic debates, with Hartwig's supervisor in a guidance post to Hartwig and all other content moderators at the Phoenix location on August 1, 2019 stating that "Facebook urgently needs visibility into any content that is coming through related to the [Democratic] debates" so he could then "surface to Facebook;" (2) in that same time frame that supervisor also notified Hartwig and all other content moderators that "FB [Facebook] has asked us to *identify trends* that are going on in the social and political space ... examples of these would include – elections ..." (emphasis added); (3) MAGA (Make America Great Again) Trump supporters could be compared to the KKK without restriction; (4) Facebook required that content reviewers pay special attention to content stemming from Trump speeches on the subjects of MS-13, Honduras Caravan, and Jerusalem as the capital of Israel in order that Facebook's hate speech restrictions could be applied; (5) in the 2018 mid-term elections, content containing information about voting and candidates was to be sent directly to Facebook for special handling; (6) in June 2018, relating to Gay-Pride Month, Hartwig was informed that Facebook was directing that all photos of fully bare female breasts "in the context of pride marches/parades are to be considered protest," and therefore exempted from applicable restrictions; (7) Facebook, in violation of its own rules, demanded that a post be deleted/blocked because it showed 50 different *inanimate and non-human symbols* for genders but included one that was circled with the comment that it represented mental illness.

III. Regulatory and Legal Analysis

39. As we discuss in this section, the actions of Facebook in deliberately suppressing APP PAC's ad illustrate how Facebook acted "more akin to [a] voluntary political association[] than [a] business firm[]" although publicly structured as a for-profit, publicly traded corporation. Its actions constituted an unlawful and substantial "in-kind" donation to the Democratic Party and to Democrat candidate Gary Peters under FEC rules as interpreted by the U.S. Court of Appeals of the District of Columbia. Further, Facebook's unlawful actions helped to unfairly assure the resulting re-election of Democrat Gary Peters to the U.S. Senate from the state of Michigan.

40. As the Commission made clear in its July 12, 2020 Area 1 advisory opinion, where corporate entity Area 1 proposed to provide anti-phishing services to political campaigns, according to FEC established rules Area 1 would be lawfully permitted to make in-kind service assistance to political campaigns if, and only if: (1) that assistance was provided in its "ordinary course of business," and (2) was provided on the same

terms and conditions that it offers to non-political clients, and (3) at the same rate as its non-political clients.⁸¹ We submit that Facebook cannot meet either elements (1) or (2).

41. The FEC's above rule, reaffirmed recently in the Area 1 advisory opinion, was reviewed and applied by the U.S. Court of Appeals for the District of Columbia in 2001 in *F.E.C. v. National Rifle Association of America*.⁸²

42. In that case, the court held that the NRA had violated the "in-kind" contribution regulation by lending employees to a political campaign. The court reasoned that "... because NRA does not engage in the business of contracting out its employees ... for campaign work," that activity therefore was not "in the ordinary course of business" of the NRA.⁸³ Thus, election or campaign-related activities of a corporation outside the core functions of that company trigger FEC violations because in those circumstances they are not in the "ordinary course of business."

43. Added clarification in the NRA case on the meaning of acting outside "the ordinary course of business" and on the focus of FECA, was added in the concurring decision of Judge Ginsburg; namely, by noting the distinction between advocacy organizations that act "more akin to voluntary political associations than business firms,"⁸⁴ which results in an increase of First Amendment protection given to the former rather than the latter. However, as the majority opinion in NRA recognized, this is so because ideological groups are "formed to disseminate political ideas, not to amass capital... [and therefore are] not the type of traditional corporation organized for economic gain that has been the focus of regulation of corporate political activity."⁸⁵ As a corporate business, Facebook functions in order to "amass capital," and it has been wildly successful in doing so. However, what it *may not do* is to quietly function behind its formal business structure as a political appendage to the Democrat Party by blocking paid ads that might compromise Democrat candidates.

44. We submit that Facebook, by the strangely incongruous way in which it specifically throttled the APP PAC ad based on a supposed "fact-check" by PolitiFact when in fact the PolitiFact reviewer publicly admitted that the core issue could not be fact-checked, operated brazenly outside its "ordinary course of business." Even if we accept as "ordinary course of business" Facebook's decision to add a vague new rule to justify restricting ads in 2020, just in time for the national election cycle; that is not enough to satisfy the FEC regulations. Facebook's application of its new election-timed

⁸¹ Sources: <https://www.fec.gov/updates/ao-2019-12/>. See also advisory opinion at: https://www.fec.gov/resources/cms-content/documents/mtdoc_19-28-A.pdf.

⁸² *FEC v. National Rifle Association of America*, 254 F.3d 173 (D.C. Cir. 2001).

⁸³ *FEC v. National Rifle Association of America* at 254 F.3d 187.

⁸⁴ *Id.* at 194, Ginsburg, J. concurring, citing *F.E.C. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

⁸⁵ *FEC*, *supra* at 254 F.3d 188, citing *F.E.C. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986).

rule to the ad here violated Facebook’s own description of how that new rule was to be used: namely, as the Poynter Institute/IFCN pointed out in its review of Facebook’s “missing context” rule, Facebook was to apply it where an ad or other content clearly took statements or facts out of their true context. There is no evidence that the APP PAC ad did that. Rather, it simply gave an opinion regarding the damage that would be done to traditional female athletics if biological men who identify as women are allowed to compete in women’s sports – something PolitiFact’s article agreed would be the outcome if the Act passed. The issue was also fair game as an election issue because Michigan Democrat candidate Peters (and candidate Joe Biden) both supported the Equality Act. The only disagreement between PolitiFact’s reporter and APP PAC’s ad rested in the extent to which women’s sports might change if that occurred. But the real gist here was not the review of the actual content of the ad. Only when the issue reached the PolitiFact editors, those who “handle the Facebook side of things,” did the “missing context” excuse become the articulated reason for a decision to suppress the ad. And even then, those editors refused to point out exactly what “context” was supposedly missing.

45. In other legal contexts beyond FEC regulations, the “ordinary course of business” concept has been defined in ways that also support our charge that Facebook acted *outside of the ordinary course of its actual “business,”* in pursuing its unofficial, but obvious liberal/Democrat-leaning political goals. In *U.S. v. Miller*, the U.S. Supreme Court looked at the customary and perfunctory functions of a corporate entity – in that case a banking institution – and found that the process of receiving and depositing checks and deposit slips, as an example, constituted an activity “in the ordinary course of business.”⁸⁶ Here, by contrast, there was nothing customary, usual, or perfunctory about the *unusual* way in which Facebook used PolitFact as its agent to twist a new Facebook rule created during the national election cycle to justify a strike against the APP PAC ad which addressed an important election issue in a very close race in the state of Michigan, where polling showed great voter sympathy to the APP PAC ad’s position.

46. Lastly, these facts are corroborated by a highly suspicious pattern: the pattern of Facebook bias in favor of Democrats and Democrat issues, to the extent that even the Poynter Institute and its IFCN had to publicly reprimand Facebook’s suppression of news in the New York Post matter, a suppression that obviously benefited the Democrat Party, with Poynter/IFCN openly questioning the “non-partisan” nature of Facebook’s staff in an election year. The specific action of Facebook here was just one more part of a pattern of moderating content on a *partisan*, rather than on an *equal, fair, non-political* basis.

Request for Relief

Complainant American Principles Project, APP PAC, respectfully requests that the Federal Election Commission:

⁸⁶ *U.S. v. Miller*, 425 U.S. 435, 442 (1976).

- (1) Conduct an immediate investigation into the in-kind contributions made by Respondent Facebook, Inc. to the campaign of Democrat U.S. Senator Gary Peters from Michigan, to the campaign of Joe Biden and to the Democrat Party, by reason of its fact-checking services and its content suppressive adverse action taken against Complainant in this instance, described above, or in the alternative its violation of duties of disclosure and reporting;
- (2) Determine that there is reason to believe that Respondent has violated 52 U.S.C. § 30118(a); 11 CFR § 114.2(b); or in the alternative that Respondent violated its duty of disclosure and reporting, inter alia, under 2 U.S.C. §§ 432, 433, and 434(a); and
- (3) Impose the maximum penalty and sanction allowed under law.

Respectfully submitted this 17th day of November, 2020,

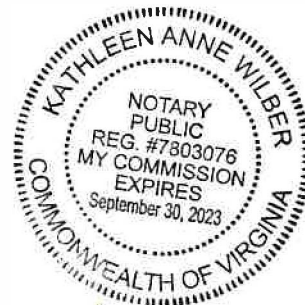
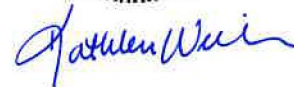
I HEREBY DECLARE and AFFIRM, under the penalties of perjury, that the matters and facts contained herein on personal knowledge are true and correct to the best of my knowledge, and to all other matters, that they are true and correct upon information and belief.



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