SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

CONSTITUENTS FOR THOUGHTFUL GOVERNANCE,

Petitioner,

v.

TWITTER, INC.,

Respondent.

Case No. CGC-20-583244

ORDER SUSTAINING DEMURRER TO FIRST AMENDED PETITION WITHOUT LEAVE TO AMEND AND GRANTING SPECIAL MOTION TO STRIKE THE PETITION PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 425.16

On July 6, 2020, the Court heard Defendant Twitter, Inc.'s demurrer to the first amended petition for writ of mandate and complaint for declaratory and injunctive relief, and its special motion to strike that petition under the anti-SLAPP law, Code Civ. Proc. § 425.16. Petitioner Constitutents for Thoughtful Governance appeared by its counsel, Peter Borenstein; Twitter appeared by its counsel, Kyle C. Wong and Lilia R. Lopez, Cooley LLP. The court sustains Twitter's demurrer without leave to amend, and grants the special motion to strike.

Factual Allegations of the First Amended Petition

Petitioner Constituents for Thoughtful Governance is a nonprofit unincorporated association based in Los Angeles, California. (Pet. ¶ 10.) Twitter is a private social media platform that allows its users to electronically send messages of limited length, referred to as "tweets," to the public. Twitter has more than 330 million users. (Pet. ¶ 1.) Twitter has established rules for the use of its platform to "ensure all people can participate in the public conversation freely and safely." (*Id.* ¶ 4.) Petitioner acknowledges that Twitter "has broad discretion to determine how and when to enforce" its rules. (*Id.* ¶5.) It alleges that Twitter has declined to enforce those rules against the @realDonaldTrump account, the personal Twitter account of President Donald J. Trump (the Account), "the official communications platform for the Office of the President of the United States," because it deems statements by the President "newsworthy." (*Id.* ¶¶ 6, 16, 21.)[1] It alleges that since the beginning of 2020, the Account has "repeatedly violated various sections of the Twitter Rules, including rules against violent threats, hateful conduct, abusive behavior, and Twitter's Civic Integrity Policy." (*Id.* ¶¶ 7, 30-74.) Petitioner alleges that the Account has been characterized by a "constant spew of racism, misogyny, harassment, and entirely discredited conspiracy theories." (*Id.* ¶ 22.)[2]

[1] See generally *Knight First Amendment Institute at Columbia University v. Trump* (2d Cir. 2019) 928 F.3d 226, 230-231, *reh'g en banc denied*, (2d Cir. 2020) 953 F.3d 216 [describing Twitter and @realDonaldTrump account].)

[2] Despite its allegation that Twitter has adopted a blanket "policy of non-enforcement" of its content rules against the Account, Petitioner acknowledges that on May 27, 2020, Twitter "fact-checked" one tweet attacking mail-in ballots as facilitating voter fraud, attaching a notice urging

The first amended petition seeks to state a single cause of action against Twitter. (*Id.* ¶¶ 75-88.) It seeks a writ of mandate and declaratory judgment, and prays for two forms of relief: (1) "a declaration that the @realDonaldTrump account has violated the Twitter rules and that Respondent acted arbitrarily and capriciously by refusing to enforce the Twitter Rules against the account"; and (2) "an injunction compelling Respondent to enforce the Twitter Rules against the @realDonaldTrump account as it would for any other user to prohibit further violations by suspending the account." (Pet. at 11.)

I. Demurrer to First Amended Petition

Although Twitter demurs to the first amended petition on multiple grounds, one is dispositive: the petition is barred by Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230 (CDA).[3] The Court therefore sustains the demurrer without leave to amend.

Section 230(c), subparagraph (1), provides in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of information provided by another information content provider." (47 U.S.C. § 230(c)(1).) An "interactive computer service" is "any information service, system . . . that provides or enables computer access by multiple users to a computer server." (*Id.* § 230(f)(2).) An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information

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readers to "Get the facts about mail-in ballots." (Pet. ¶ 72; see *Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting*, The New York Times (May 26, 2020).) Likewise, in its opposition to Twitter's anti-SLAPP motion, Petitioner acknowledges that on May 29, 2020, one day after President Trump posted a tweet regarding the Black Lives Matter protests in Minneapolis which stated, among other things, "when the looting starts, the shooting starts," Twitter placed a warning label on the tweet, advising that the tweet violates its policy about "glorifying violence." (See *Twitter Adds Warnings to Trump and White House Tweets, Fueling Tensions*, The New York Times (May 29, 2020).)

[3] Twitter also contends that the First Amendment bars Petitioner's claim; that Petitioner lacks standing to seek declaratory relief; and that Petitioner's claim that Twitter is a "common carrier" or public utility whose decisions may be reviewed by traditional mandate pursuant to Section 1085 of the Code of Civil Procedure lacks merit. Each of these arguments appears to be well-founded. In view of the Court's holding that the amended petition is barred by Section 230, however, it need not reach these additional issues. (See *Hassell v. Bird* (2018) 5 Cal.5th 522, 534 ["Because the statutory argument [under Section 230] is dispositive, there is no need to address the due process question."].)

provided through the Internet or any other interactive computer service." (*Id.* § 230(f)(3).) Finally, the CDA provides, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." (*Id.* § 230(e)(3).)

"Taking the relevant statutory definitions and case law in account, it becomes clear that, in general, Section 230(c)(1) 'protects websites from liability [under state or law law] for material posted on the[ir] website[s] by someone else.'" (*Dyroff v. Ultimate Software Group, Inc.* (9th Cir. 2019) 934 F.3d 1093, 1097.) "Immunity from liability exists for '(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.' [Citation.] When a plaintiff cannot allege enough facts to overcome Section 230 immunity, a plaintiff's claims should be dismissed." (*Id.*) Here, Twitter satisfies all three prongs of the test.

First, there is no dispute that Twitter is a "provider . . . of an interactive computer service" within the meaning of Section 230(c)(1). Indeed, courts have so found. (See *Pennie v. Twitter, Inc.* (N.D. Cal. 2017) 281 F.Supp.3d 874, 888; *Fields v. Twitter, Inc.* (N.D. Cal. 2016) 217 F.Supp.3d 1116, 1121, *aff'd*, 881 F.3d 739 (9th Cir. 2018); see also *Hassell v. Bird* (2018) 5 Cal.5th 522, 540 [holding that Yelp is a provider or user of an interactive computer service], citing *Barnes v. Yahoo!, Inc.* (9th Cir. 2009) 570 F.3d 1096, 1101.) Second, there is no serious dispute that President Trump's tweets are "information provided by another information content provider." (47 U.S.C. § 230(c)(1), (f)(3); see *Hassell*, 5 Cal.5th at 540.) Third, the amended petition seeks to impose liability on Twitter for its actions in enforcing (or failing to enforce) its own policies governing the permissible scope of content in the Account, and thus seeks to treat Twitter as a publisher.

"'[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.'" (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 43;

see also *Hassell*, 5 Cal.4th at 544 [Section 230 was intended to shield service providers "from compelled compliance with demands for relief that, when viewed in the context of a plaintiff's allegations, . . . similarly assign them the legal role and responsibilities of a publisher qua publisher."].) An "editor's job [is], essentially, to determine whether or not to prevent [material tendered for] posting—precisely the kind of activity for which section 230 was meant to provide immunity. And any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." (*Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (9th Cir. 2008) (en banc) 521 F.3d 1157, 1170-1171 (footnote omitted).)[4]

In light of this overarching principle, California and federal courts agree that actions that, like the instant case, seek relief based on an internet service provider's decisions whether to publish, edit, or withdraw particular postings are barred by Section 230. (See, e.g., *Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 206-207 [CDA barred claim against Facebook based on failure to remove page that allegedly incited violence and generated death threats against plaintiffs, rap artist and affiliated entities]; *Doe II v. MySpace, Inc.* (2009) 175 Cal.App.4th 561, 573 [CDA barred claims against MySpace for failure to ensure that sexual predators do not communicate with minors on its website, a "type of activity—"to restrict or make available certain material—[that] is expressly covered by section 230"]; *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.* (N.D. Cal. 2015) 144 F.Supp.3d 1088, 1094-1095 [CDA barred claim under title II of the Civil Rights Act of 1964 (42 U.S.C. § 2000a) by blocking access to plaintiff's Facebook page in India, which sought "to hold Defendant liable for Defendant's decision 'whether to publish' third-party content."].) Likewise, federal courts have squarely held that a service provider's decisions to provide, deny, suspend or delete user accounts are immunized by Section 230. (See, e.g., *Fields*, 217 F.Supp.3d

[4] At the hearing, Petitioner's counsel repeatedly emphasized that Petitioner is seeking a declaratory judgment. However, the form of relief sought does not alter the analysis. Section 230 immunity extends to claims for injunctive and declaratory relief, such as those presented here. (*Hassell*, 5 Cal.5th at 537-538, discussing *Kathleen R. v. City of Livermore* (2001) 87 Cal.App.4th 684.)

at 1124 ["the decision to furnish an account, or prohibit a particular user from obtaining an account, is itself publishing activity."]; see also *Riggs v. MySpace, Inc.* (9th Cir. 2011) 444 Fed.Appx. 986, 987 [claims "arising from MySpace's decisions to delete . . . user profiles on its social networking website yet not delete other profiles . . . were precluded by section 230(c)(1) of the Communications Decency Act."]; *Cohen v. Facebook, Inc.* (E.D.N.Y. 2017) 252 F.Supp.3d 140, 157 ["Facebook's choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users would equally 'derive[] from [Facebook's] status or conduct as a 'publisher or speaker.'"]; *Mezey v. Twitter, Inc.* (S.D. Fla. 2018) 2018 WL 5306769 at *1 [CDA barred plaintiff's claims challenging Twitter's decision to suspend his Twitter account].) Conversely, as Petitioner's counsel conceded at the hearing, there is no reported decision in which a court ordered an internet service provider to enforce its rules against a third-party user or to remove that user's account.

Cross is particularly pertinent here in light of Petitioner's allegations that a number of President Trump's tweets have violated Twitter's rules prohibiting threats of violence or glorification of violence. (See Pet. ¶¶ 30-46.)[5] In *Cross*, plaintiff, a rap artist, complained that Facebook had refused to disable a page which he claimed had incited violence and generated death threats against him. There, as here, plaintiff complained of the defendant's alleged failure to enforce its own terms and community standards, which prohibited harassing and violent speech against Facebook users, stated that " '[w]e remove credible threats of physical harm to individuals'" and that " '[w]e want people to feel safe when using Facebook,'" and set forth Facebook's agreement to " 'remove content, disable accounts, and work with law enforcement when we believe there is a genuine risk of physical harm or direct threats to public safety.'" (14 Cal.App.5th at 201.) The court held that "even if statements in Facebook's terms could be construed as obligating Facebook to remove the pages—which plaintiffs have not demonstrated—it

[5] Those alleged "violent threats" include tweets warning the Islamic Republic of Iran of retaliation in the event it launches military strikes on U.S. troops or assets in Iraq. (Pet. ¶¶ 33, 38, 41.)

would not alter the reality that the source of [plaintiff's] alleged injuries, the basis for his claim, is the content of the pages and Facebook's decision not to remove them, an act 'in furtherance of . . . the right of petition or free speech.' (§ 425.16, subd. (b)(1).)" (*Id.* at 202.) And it went on to find that plaintiff's claims were barred by the CDA, observing that "numerous courts have held the CDA bars claims based on a failure to remove content posted by others." (*Id.* at 207 [collecting authorities].) The same conclusion follows inescapably here: Petitioner's claim, which is based on Twitter's editorial judgments regarding enforcement and application of its rules to one user's account and seeks to compel Twitter to suspend that account, is barred by the CDA.

Petitioner has two related responses, neither of which is persuasive. First, Petitioner points out that the CDA does not confer immunity on internet service providers for their *own* speech, as distinct from that of third parties. (Opp. at 8.) In the abstract, that statement is correct. (See, e.g., *Fair Housing Council of San Fernando Valley*, 521 F.3d at 1162-1163 ["A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is 'responsible, in whole or in part' for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content." (footnote omitted)]; *Anthony v. Yahoo! Inc.* (N.D. Cal. 2006) 421 F.Supp.2d 1257, 1262-1263 [finding an online dating service not immune under section 230 from claims that it "manufactured false profiles" in order to trick new members into joining and stop current members from leaving].) However, that principle does not help Petitioner, because there is no allegation or showing that Twitter created or materially contributed to the content of the tweets in the Account; rather, so far as the record reveals, it published them unaltered. (See also, e.g., *Jones v. Dirty World Entertainment Recordings LLC* (6th Cir. 2014) 755 F.3d 398, 415-416 [operators of online tabloid were immune from defamation and related tort claims by cheerleader for professional football team where, although operators selected

the statements for publication, they did not author the statements or materially contribute to their alleged illegality].)[6]

Petitioner's second argument is no more convincing. Petitioner alleges that by refusing to enforce its own policies against the Account, Twitter "encourages further and more violative behavior on behalf of Mr. Trump by signaling that the Twitter Rules will never be enforced against him." (Opp. at 8-9; Pet. ¶ 10.) As a result, Petitioner argues, "[Twitter] is responsible for Mr. Trump's increasingly flagrant violations of the Twitter Rules . . . ." (*Id.* at 9.) However, Petitioner's argument that, by failing to enforce its rules against a user, Twitter somehow "encourages" further objectionable speech by that user and thereby becomes a content provider, forfeiting immunity under the CDA, is unsupported by any authority or logic. To be sure, an internet service provider may lose its CDA immunity if it is also an "information content provider," which is defined as someone who is "responsible, in whole or in part, for the creation or development of" the offending content. (47 U.S.C. § 230(f)(3).) Thus, "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." (*Fair Housing Council of San Fernando Valley*, 521 F.3d at 1168.) But merely passively publishing content provided by a third party, even if that content arguably is unlawful or violates the service provider's stated policies or guidelines, cannot meaningfully be said to constitute such a "material contribution."

In *Fair Housing Council*, the Ninth Circuit sitting *en banc* held that an online roommate-matching website that required subscribers to provide information about sex, family status and sexual orientation as a condition of accessing its service, thereby enabling subscribers to violate the Fair Housing Act, became "much more than a passive transmitter of information provided by

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[6] The single case Petitioner cites does not advance its position. In *Universal Communication Systems, Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, the court held that an internet message board operator was immune from liability under the CDA for allegedly false and defamatory postings made by third party subscribers, holding that "Section 230 immunity applies even after notice of the potentially unlawful nature of the third-party content." (*Id.* at 420.) "It is, by now, "well established that notice of the unlawful nature of the information provided is not enough to make it the service provider's own speech." (*Id.*)

others; it be[came] the developer, at least in part, of that information." (*Id.* at 1166; see also *id.* at 1172.) Here, in stark contrast, "the website operator was merely a passive conduit and thus could not be held liable for failing to detect and remove it." (*Id.*) "[Defendant] is not responsible, in whole or in part, for the development of this content, which comes entirely from subscribers and is passively displayed by [defendant]." (*Id.* at 1174.) Merely "encouraging" a subscriber to make statements "cannot strip a website of its section 230 immunity, lest that immunity be rendered meaningless as a practical matter." (*Id.* (footnote omitted); see also *Dyroff*, 934 F.3d at 1097 ["No binding legal authority supports Plaintiff's contention that [defendant website operator] became an information content provider, losing its Section 230 immunity, by facilitating communication" on website].)

As the Ninth Circuit cautioned in language that is equally applicable here, Petitioner's vague "encouragement" theory would "cut the heart out of" the Section 230 statutory immunity:

> We must keep firmly in mind that this is an immunity statute we are expounding, a provision enacted to protect websites against the evil of liability for failure to remove offensive content. [Citation.] Websites are complicated enterprises, and there will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

(*Id.* at 1174; see also *Jones*, 755 F.3d at 414-415 [rejecting "encouragement" test of immunity under the CDA, which "would inflate the meaning of 'development' to the point of eclipsing the immunity from publisher-liability that Congress established"].)

In the court's view, this is not a close case: Twitter did not author the statements at issue; it did not edit them or otherwise materially contribute to their content; nor did it select them for publication. Even if Twitter adopted an unwritten "policy of non-enforcement" of its rules against

the Account, as Petitioner alleges, that cannot render Twitter responsible for its content. Twitter is immune under section 230 for its exercise of a publisher's traditional editorial functions, including deciding whether to publish, withdraw, postpone or alter content supplied by a third party.

II. Anti-SLAPP Special Motion to Strike

Code of Civil Procedure section 425.16(b)(1) provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of free petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." The analysis of an anti-SLAPP motion proceeds in a familiar two-step approach. (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321.) Before engaging in this analysis, however, a court must consider any claims by the plaintiff that a statutory exemption contained in section 425.17 applies. (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 622.)

In 2003, the Legislature enacted section 425.17 to curb the "disturbing abuse" of the anti-SLAPP statute. (Code Civ. Proc. § 425.17(a).) This exception statute covers both public interest lawsuits, under subdivision (b), and "commercial speech," under subdivision (c). (*Id.*; see *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316.) Petitioner, relying on both exemptions, contends that the anti-SLAPP law does not apply here. The court is unpersuaded. In any event, even if either exemption arguably could apply, both are subject to a statutory exception for actions based upon the dissemination of political work, which applies squarely here. (Code Civ. Proc. § 425.17(d)(2).)

A. The Commercial Speech Exemption Does Not Apply.

Petitioner relies first on the commercial speech exemption. That exemption provides,

> Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statements or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(Code Civ. Proc. § 425.17(c).) The statutory conditions require a court to focus on the content of the speech, "the identity of the speaker, the intended audience, and the purpose of the statement." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 147.) The language of section 425.17 and subsequent case law indicates that "the provision exempts 'only a subset of commercial speech'—specifically, comparative advertising." (*Id.* (footnote omitted).)

Here, the commercial speech exemption does not apply by its plain language. Petitioner's claims do not "aris[e] from any statement or conduct" by Twitter that "consists of representations of fact" about Twitter's own business operations, goods, or services, or that was made for the purpose of promoting those services. (Code Civ. Proc. § 425.17(c)(1).) Nor is there any credible argument that the intended audience for the Trump tweets is "an actual or potential buyer or customer" of Twitter's services (which may be utilized by Twitter users and others). (*Id.* § 425.17(c)(2).)[7] Rather, the action arises from statements by President Trump, a Twitter account-holder, that have nothing to do with Twitter's business operations, goods, or services, but rather consist of the President's own political speech on unrelated topics, including foreign relations, the media, Black Lives Matter demonstrations, and the like. Petitioner's contention that the

[7] "The President's tweets from the Account can be viewed by any member of the public without being signed into a Twitter account." (*Knight First Amendment Institute*, 928 F.3d at 231.)

commercial speech exemption applies merely because Twitter, like many internet companies, also sells advertising on its platform, or because it has allegedly adopted a hands-off policy toward the Trump account to advance its own financial interests, is inconsistent with the plain statutory language. (See, e.g., *Simpson Strong-Tie Company, Inc. v. Gore* (2010) 49 Cal.4th 12, 31-32 [manufacturer's trade libel and other claims against attorney based on advertisement soliciting clients for a contemplated lawsuit implying that manufacturer's products were defective was not within commercial speech exemption because advertisement was not a representation of fact about attorney's own "business operations, goods or services"].)

B. **The Public Interest Exemption Does Not Apply.**

Section 425.17(b) provides that the anti-SLAPP law "does not apply to any action brought solely in the public interest or on behalf of the general public," if all of the following conditions exist: "(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member"; "(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons"; "(3) Private enforcement is necessary and places a disproportionate burden on the plaintiff in relation to the plaintiff's stake in the matter." A plaintiff has the burden to establish the applicability of this exemption. (*San Diegans for Open Government*, 240 Cal.App.4th at 622, citing *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 25-26.)

The court looks to the allegations of the complaint and the scope of relief sought in order to determine whether the public interest exception applies. (*Cruz v. City of Culver City* (2016) 2 Cal.App.5th 239, 249, citing *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460; see also *People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 499 ["we rely on the allegations of the complaint because the public interest exception is a threshold issue based on the nature of the allegations and scope of relief sought in the prayer"].) The

question is whether the plaintiff has "an individual stake in the outcome that defeats application of the public interest exception." (*Cruz*, 2 Cal.App.5th at 249-250.)

The exception applies "only when the entire action is brought in the public interest. If any part of the complaint seeks relief to directly benefit the plaintiff, by securing relief greater than or different from that sought on behalf of the general public, the section 425.17 exception does not apply." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 312 (*Sierra Club*); see also *id.* at 317 ["Use of the term 'solely' expressly conveys the Legislative intent that section 425.17(b) not apply to an action that seeks a more narrow advantage for a particular plaintiff. Such an action would not be brought 'solely' in the public's interest. The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception."].)

Here, the first of the statutory factors is met. The Complaint does not seek damages or other relief for Petitioner or its members, but instead seeks solely declaratory and injunctive relief that, if granted, would equally affect Twitter's other users and members of the general public who may be exposed to or affected by the President's tweets. (See Pet. ¶ 83 [alleging that violations of Twitter's rules "cause harm to millions of people on a daily basis"]; *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1460-1461 [borrower's putative class and representative action was brought solely in the public interest where plaintiff did not seek damages or restitution on behalf of himself or the class or the general public, but sought only injunctive relief].) In contrast, in *Sierra Club*, upon which Twitter relies, the prayer for relief in the complaint sought a personal advantage for the plaintiffs by advancing their own interests in Club elections, including by asking the court to install five candidates on the board of directors and disseminate an election notice written by plaintiffs along with ballots for the contested election, as well to bar certain directors from running in the Club's election. (45 Cal.4th at 317; see also, e.g., *Takhar v. People ex rel. Feather River Air Quality Management Dist.* (2018) 27 Cal.App.5th 15, 25-26 [landowner's cross-complaint did not fall within public interest exemption where it sought individualized

injunctive and declaratory relief preventing air quality management district from maintaining enforcement action against him personally]; *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242, 1250 [action brought by two members of city council to curtail council's practice of holding meetings beyond 11:00 p.m. was not brought solely in the public interest, because it concerned plaintiff council members' preferences for particular working hours].) Here, while it is obvious that Petitioner does not share, and indeed is highly critical of, the political, racial, and other views expressed by the President over the Account, it seeks no such personal advantage or differential relief.

The third factor—that private enforcement is necessary and places a disproportionate burden on the Petitioner in relation to the Petitioner's stake in the matter—is also readily satisfied, and for similar reasons. Private enforcement arguably is necessary because no legislative body or governmental agency (thus far) has undertaken directly to regulate speech on social media platforms such as Twitter.[8] Moreover, as discussed above, this is not a case in which the Petitioner has a personal financial stake in the outcome of the litigation, and it therefore follows that prosecuting litigation would place a disproportionate burden on it.

The second factor—whether the action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit on the general public or a large class of persons—is far more problematic for Petitioner. Petitioner argues that the relief it seeks would merely require Twitter to enforce its own rules, and thereby "prevent any further harm caused to the general public by Mr. Trump's overt racism, misogyny, and incitements to violence."

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[8] President Trump recently issued an executive order purporting to state the policy of the United States with respect to "clarifying" the scope of the Section 230 immunity, directing the Secretary of Commerce to file a rulemaking petition with the Federal Communications Commission requesting it to propose regulations on that subject, and directing the Federal Trade Commission to "consider taking action" to prohibit unfair or deceptive acts or practices "by entities covered by section 230 that restrict speech in ways that do not align with those entities' public representations about those practices." (Executive Order on Preventing Online Censorship (May 28, 2020), https://www.whitehouse.gov/presidential-actions/executive-order-preventing-online-censorship/.) That Executive Order seeks to restrict Twitter's and other internet platforms' ability to "fact-check" and otherwise comment upon or limit speech by their users, including the President himself.

(Opp. at 5.) But it is difficult to see how an order directing a social media platform to restrict an individual's speech, much less to entirely suspend or ban that person's account, could be said to confer any "significant benefit" on the general public consistent with the First Amendment.[9] "Speech on matters of public concern . . . is at the heart of the First Amendment's protection." (*Snyder v. Phelps* (2011) 562 U.S. 443, 451-452 (internal quotations omitted.) "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." (*Id.* at 453 (citation and internal citations omitted).) "The arguably 'inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.' " (*Id.*) Speech at a public place on a matter of public concern "cannot be restricted simply because it is upsetting or arouses contempt." (*Id.* at 458.) The Constitution dictates that "in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (*Id.* (internal quotations omitted).) The anti-SLAPP statute itself was enacted in order to *protect* "the valid exercise of the constitutional right[] of freedom of speech," not to enable parties to censor or suppress speech with which they disagree. (Code Civ. Proc. § 425.16(a).) For these reasons, the prior restraint doctrine generally prohibits injunctions against speech in all but the narrowest circumstances. (See *In re Dan Farr Productions* (9th Cir. 2018) 874 F.3d 590, 593-597 [district court orders prohibiting internet social media postings constituted unconstitutional prior restraints on speech]; compare, e.g., *Balboa Island Village Inn, Inc. v. Lemen* (2007) 40 Cal.4th 1141, 1148-1156 [injunction preventing the repetition of statements found at trial to be defamatory].)

In view of these principles, the relief Petitioner seeks would not confer a significant benefit on the public. As should be self-evident, the public interest inquiry is not a subjective one that

[9] "As a general matter, social media is entitled to the same First Amendment protections as other forms of media." (*Knight First Amendment Institute*, 928 F.3d at 237, citing *Packingham v. North Carolina* (2017) 137 S.Ct. 1730, 1735-1736.)

turns on whether the parties, or the court, believe that the views disseminated by the Account are "in the public interest" or disserve it. While Petitioner and many other Twitter users undoubtedly object in the strongest terms to many of those views, there are millions of others who agree with them and, even more to the point, wish to have continued access to them over Twitter's platform.[10] As the Second Circuit recently observed in a case holding that President Trump's Twitter account is a public forum,

> The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to wide-open, robust debate. This debate encompasses an extraordinarily broad range of ideas and viewpoints and generates a level of passion and intensity the likes of which have rarely been seen. This debate, as uncomfortable and unpleasant as it frequently may be, is nonetheless a good thing. . . . [W]e remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.

(*Knight First Amendment Institute*, 928 F.3d at 240.) Because Petitioner's lawsuit, if successful, would result in less speech rather than more, it would not confer a "significant benefit" on the general public, and therefore falls outside the public interest exemption to the anti-SLAPP statute.

C. This Action Is Based Upon The Dissemination Of Political Work.

Finally, even if Petitioner's lawsuit arguably fell within either the public interest or the commercial speech exemption, those exemptions are subject to a statutory exception that applies squarely here. Neither exemption applies to "[a]ny action against any person or entity based upon the . . . dissemination . . . or similar promotion of any . . . political work." (Code Civ. Proc. § 425.17(d)(2).)[11] This subdivision "creates an exception to the exemption from anti-SLAPP coverage." (*Sandlin v. McLaughlin* (2020) – Cal.App.5th ---, 2020 WL 3265135, at *8.)

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[10] The @realDonaldTrump account currently has 83.2 million followers. (Twitter app, visited July 11, 2020). "The President's tweets produce an extraordinarily high level of public engagement, typically generating thousands of replies, some of which, in turn, generate hundreds of thousands of additional replies." (*Knight First Amendment Institute*, 928 F.3d at 231.)

[11] Although Twitter raised this statutory exception in its motion, Petitioner ignores it.

Subdivision (d)(2) "preserves the application of the anti-SLAPP law to actions against individuals that implicate important forms of protected speech"; "[t]he right to speak on political matters . . . is the quintessential subject of our constitutional protections of the right of free speech." (*Major v. Silna* (2005) 134 Cal.App.4th 1485, 1490, 1496-1497 (internal quotations omitted).)

There can be no serious dispute that this action is based upon Twitter's dissemination of the Account, nor that the Account constitutes a "political work." That term is defined broadly to include political writings, whether in the form of campaign literature for candidates, articles or editorials in newspapers or magazines or, as here, tweets on a social media platform. (See *Major*, 134 Cal.App.4th at 1494-1495 [action against supporter of city council candidates arising from his letters to residents soliciting support for candidates fell within subdivision (d)(2)]; *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1067-1068 [action against radio show producer and host for purported refusal to allow plaintiff to participate in call-in radio show fell within subdivision (d)(2), where radio show was "designed and produced to elicit viewpoints from members of the public on issues of public interest which are contemporaneously aired to the public at large"].) As Petitioner itself alleges, the Account constitutes "the official communications platform for the Office of the President of the United States." (Pet. ¶ 6; see *Knight First Amendment Institute*, 928 F.3d at 231 ["The President and multiple members of his administration have described his use of the Account as official. The President has stipulated that he . . . uses the Account frequently 'to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair.'"]; see also *id.* at 235-236 [noting that President "uses the Account to announce 'matters related to official government business,' including high-level White House and cabinet-level staff changes as well as changes to major national policies," "to engage with foreign leaders and to announce foreign policy decisions and initiatives."].)

Thus, because this exception applies squarely here, Petitioner's lawsuit is not exempt from the anti-SLAPP statute. The Court has already found that Petitioner cannot show a probability of prevailing on its claim in light of the statutory immunity conferred by Section 230 of the CDA. It follows that Twitter's special motion to strike the amended petition must be granted.

CONCLUSION

For the foregoing reasons, Twitter's demurrer to the first amended petition is sustained without leave to amend, and its special motion to strike the petition under Code of Civil Procedure section 425.16 is granted. Pursuant to section 425.16(c)(1), Twitter is entitled to recover its attorney's fees and costs, and may file an appropriate motion seeking such relief.

IT IS SO ORDERED.

Dated: July 13, 2020

HON. ETHAN P. SCHULMAN