

No. 21-15869

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

TWITTER, INC.,
Plaintiff-Appellant,

v.

KEN PAXTON, in his official capacity as Attorney General of Texas,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:21-cv-01644-MMC,
Hon. Maxine M. Chesney

**BRIEF OF AMICI CURIAE
CENTER FOR DEMOCRACY & TECHNOLOGY,
ELECTRONIC FRONTIER FOUNDATION, AND R STREET INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLANT TWITTER, INC.'S
PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

Caitlin Vogus
Counsel of Record for Amici Curiae
Samir Jain
Emma Llansó*
CENTER FOR DEMOCRACY &
TECHNOLOGY
1401 K St. NW, Suite 200
Washington, D.C. 20005
Telephone: (202) 637-9800
Facsimile: (202) 637-0968
**Of counsel*

CORPORATE DISCLOSURE STATEMENTS

Center for Democracy & Technology has no parent corporation and, because it is a non-stock corporation, no publicly held corporation owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

The R Street Institute has no parent corporation and issues no stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE	1
SOURCE OF AUTHORITY TO FILE.....	2
FED. R. APP. P. 29(a)(4)(E) STATEMENT	2
INTRODUCTION & SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. Whether a host of user-generated content can challenge a retaliatory investigation that chills its content moderation decisions before the investigation is concluded is a question of exceptional importance to the public.....	5
A. The public benefits from the availability of online services that take different approaches to hosting user-generated speech and moderating content.....	5
B. A retaliatory government investigation into a host’s content moderation decisions chills content moderation from the moment it begins.....	11
C. The Panel decision, if permitted to stand, will harm the public.....	14
D. The Panel decision gives inadequate weight to hosts’ First Amendment rights.....	17
E. The Panel decision will encourage the trend of government officials using investigatory powers to retaliate against and censor content moderation decisions with which they disagree.....	19
CONCLUSION.....	23

TABLE OF AUTHORITIES

CASES

AP v. Otter, 682 F.3d 821, 826 (9th Cir. 2012), *amended by AP v. Otter*, 2012 U.S. App. LEXIS 11746 (9th Cir. June 8, 2012).....18

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).....12

Dombrowski v. Pfister, 380 U.S. 479 (1965)12

Elrod v. Burns, 427 U.S. 347 (1976).....18

Herbert v. Lando, 441 U.S. 153 (1979).....13

Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.,
515 U.S. 557 (1995)17

Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241 (1974).....6

NAACP v. Button, 371 U.S. 415 (1963)12

NetChoice, LLC v. Moody, 546 F. Supp. 3d 1082 (N.D. Fla. 2021), *appeal docketed*, No. 21-12355 (11th Cir.).....21

NetChoice, LLC v. Paxton, 2021 U.S. Dist. LEXIS 233460 (W.D. Tex. Dec. 1, 2021), *appeal docketed*, No. 21-51178 (5th Cir.)21

Wolfson v. Brammer, 616 F.3d 1045 (9th Cir. 2010).....18

STATUTES

Fla. Stat. § 106.072.....21

Fla. Stat. § 287.137.....21

Fla. Stat. § 501.2041.....21

Tex. Bus. & Com. Code § 120.001 *et seq.*.....21

Tex. Civ. Prac. & Rem. Code § 143A.001 *et seq.*.....21

OTHER AUTHORITIES

About Goodreads, Goodreads (last visited Apr. 8, 2022)10

About Ravelry, Ravelry (last visited Apr. 8, 2022)10

Christine Lagorio-Chafkin, “A ‘Holy Shit’ Moment”: How Steve Huffman and Alexis Ohanian Built Reddit, the “Front Page of the Internet”, Vanity Fair (Sept. 24, 2018)14

Community Guidelines, Kinzoo (last visited Apr. 8, 2022)9

Craig Silverman, *Pinterest is Blocking Coronavirus Searches, and People are Very Happy About It*, BuzzFeed (Mar. 13, 2020) 15

Cristiano Lima, *D.C. AG Subpoenas Facebook in Escalating Probe of Covid-19 Misinformation*, Politico (July 1, 2021) 22

Elizabeth Dwoskin et al., *Major Social Media Platforms Ban Russian State Media in Europe*, Wash. Post (Mar. 1, 2022)..... 11

Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1 (2021) 8

Eugene Volokh, *New Colorado Bill Would Create Commission to Restrict “Hate Speech,” “Fake News,” “Conspiracy Theories” on Social Media Platforms*, Volokh Conspiracy (Mar. 2, 2021) 21

Exec. Order No. 13925, 85 FR 34079 (May 28, 2020) 20

Exec. Order No. 14029, 86 FR 27025 (May 14, 2021) 20

Guy Rosen & Monika Bickert, *Our Response to the Violence in Washington*, Meta (Jan. 6, 2021) 16

Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int’l L.J. 41 (2020) 5

Harassment & Cyberbullying Policies, YouTube (last visited Apr. 8, 2022)..... 10

Hateful Conduct Policy, Twitter (last visited Apr. 8, 2022) 10

Introducing the Twitch Safety Advisory Council, Twitch (May 14, 2020) 7

Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598 (2018) 7

Kyle Vanhemert, *A Social Network Designed to Combat Depression*, Wired (Apr. 1, 2015)..... 9

Lawrence Andrea, *AG Todd Rokita Investigating Big Tech Over What He Says is Conservative ‘Censorship’*, Indianapolis Star (Apr. 7, 2021)..... 21

Matt Binder, *What Social Media Platforms are Doing to Stop Misinformation About Russia’s Invasion Of Ukraine*, Mashable (Mar. 3, 2022) 16

Nellie Bowles, *The Complex Debate Over Silicon Valley’s Embrace of Content Moderation*, N.Y. Times (June 5, 2020) 8

Olivia Solon, *Jeff Sessions Looks into Concerns Social Media Firms ‘Stifle’ Free Speech*, Guardian (Sept. 5, 2018) 20

Russia, Ukraine, and Social Media and Messaging Apps, Human Rights Watch (Mar. 16, 2022).....16

Sean Peek, *3 Examples of Venture Capital Due Diligence Checklists*, U.S. Chamber of Commerce (last visited Apr. 8, 2022)14

Seny Kamara et al., *Outside Looking In: Approaches to Content Moderation in End-to-End Encrypted Systems*, Ctr. for Democracy & Tech. (2021)6

Sheera Frenkel & Cecilia Kang, *Mark Zuckerberg and Sheryl Sandberg’s Partnership Did Not Survive Trump*, N.Y. Times (July 8, 2021)7

Suicide & Self Harm, TikTok (last visited Apr. 8, 2022).....10

Tony Romm, *Trump’s Economic Adviser: ‘We’re Taking a Look’ at Whether Google Searches Should be Regulated*, Wash. Post (Aug. 28, 2018)20

Trust and Safety Council, Twitter (last visited Apr. 8, 2022)7

Twitter Safety, *An Update Following the Riots in Washington, DC*, Twitter (Jan. 12, 2021).....16

Will Duffield, *Two Cheers For Unfiltered Information*, Techdirt (May 29, 2020).....8

RULES

Cir. R. 29-2.....2

Fed. R. App. P. 292

STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Center for Democracy & Technology (CDT), Electronic Frontier Foundation (EFF), and R Street Institute.

CDT is a non-profit public interest organization. For more than 25 years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT regularly advocates in support of individuals' First Amendment rights and protections for online speech before legislatures, regulatory agencies, and courts.

EFF is a San Francisco-based, member-supported, nonprofit civil liberties organization that has worked for over 30 years to protect free speech, privacy, security, and innovation in the digital world. With over 35,000 members, and harnessing the talents of lawyers, activists, and technologists, EFF represents the interests of technology users in court cases and broader policy debates regarding the application of law to the internet and other technologies.

The R Street Institute is a nonprofit, nonpartisan public-policy research organization. R Street's mission is to engage in policy research and educational outreach that promotes free markets as well as limited yet effective government,

including properly calibrated legal and regulatory frameworks that support economic growth and individual liberty.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiff-Appellant consents to the filing of this brief. Counsel for Defendant-Appellee consents to the timely filing of this brief. *See* Cir. R. 29-2(a).

FED. R. APP. P. 29(A)(4)(E) STATEMENT

Amici declare that:

1. no party's counsel authored the brief in whole or in part;
2. no party or party's counsel contributed money intended to fund preparing or submitting the brief; and
3. no person, other than amici, their members, or their counsel, contributed money intended to fund preparing or submitting the brief.

INTRODUCTION & SUMMARY OF ARGUMENT

At issue in this case is a question of exceptional importance to internet users and the public: whether an online host of user-generated content may challenge a publicly-announced government investigation and Civil Investigatory Demand (CID) issued in retaliation for its content moderation decisions, before the investigation is concluded or the CID is enforced.

Online hosts of user-generated content like Appellant Twitter, Inc. make editorial judgments about what content to allow or forbid, highlight or deprioritize, label, or otherwise moderate. These decisions shape both the types of speech in which users can engage and the information they receive when using online services. Users benefit when hosts engage in content moderation to create environments designed for particular audiences, tailor their services to users' specific interests, or moderate content that users do not wish to see. Moreover, users benefit when different hosts can offer a diverse range of services, free from unconstitutional government interference, from which users can choose.

A government official's investigation into a host's content moderation decisions begun because the official disagrees with particular content moderation decisions stands to inhibit the host's content moderation—and indeed is designed to do so. In this case, AG Paxton explicitly connected his investigation to Twitter's

decision to permanently suspend then-President Trump's account. As soon as AG Paxton announced his investigation and issued the CID seeking internal documents concerning Twitter's content moderation decisions, Twitter understood that similar decisions going forward risked adding fuel to the investigatory fire, that ongoing internal deliberations about content moderation rules or decisions would be subject to discovery under the CID and second-guessing by AG Paxton, and that it could minimize its legal, reputational, and financial risks by engaging in self-censorship along the lines indicated by AG Paxton.

If permitted to stand, the decision of the Panel of this Court dismissing Twitter's claim on prudential ripeness grounds will allow AG Paxton and other government officials to wield their investigatory powers to chill hosts' content moderation. The CID chilled Twitter from exercising its First Amendment protected right to engage in content moderation from the moment it was issued. Requiring Twitter to await a possible enforcement action at the conclusion of AG Paxton's investigation or until the CID is enforced to challenge it harms both the public and Twitter's First Amendment rights.

AG Paxton's investigation is not occurring in a vacuum. Rather, it is part of a trend of government officials in the United States using investigations to pressure or punish hosts for making content moderation decisions with which they disagree.

For these reasons, the question of whether a host may bring a pre-enforcement challenge to a retaliatory CID designed to chill its content moderation decisions is one of exceptional importance to the public. The Court should grant Twitter’s petition for panel rehearing and rehearing en banc.

ARGUMENT

I. Whether a host of user-generated content can challenge a retaliatory investigation that chills its content moderation decisions before the investigation is concluded is a question of exceptional importance to the public.

A. The public benefits from the availability of online services that take different approaches to hosting user-generated speech and moderating content.

“Content moderation” is the set of policies, systems, and tools that online hosts use to decide what user-generated content or accounts to publish, remove, amplify, or manage. See Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int’l L.J. 41, 42, 48 (2020). The process of content moderation can be thought of as occurring in phases: defining permissible and impermissible content; detecting content that may violate a host’s policies or law; evaluating that content to determine whether it in fact violates a host’s policies or the law; taking an enforcement action against violative content; allowing users to appeal or otherwise seek review of content moderation decisions that they believe are erroneous; and

educating users about content moderation policies and their enforcement. Seny Kamara et al., *Outside Looking In: Approaches to Content Moderation in End-to-End Encrypted Systems*, Ctr. for Democracy & Tech. 9–11 (2021).¹

Each of these phases require hosts to make judgments about what content they wish to allow or forbid on their services, or how to display or arrange it. Because content moderation requires innumerable exercises of editorial discretion, the First Amendment protects online companies’ decisions about what user-generated content to host. *See* Br. of Amici Curiae Reporters Comm. for Freedom of the Press & Media Law Resource Ctr., Inc. in Support of Pl.-Appellant, No. 21-15869 (9th Cir.), ECF No. 23; *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

For example, during the definitional phase, some hosts develop a content policy, *i.e.*, a set of rules about what content is and is not allowed on their platforms. Kamara et al., *supra*, at 9. Hosts may engage in significant internal

¹ <https://cdt.org/wp-content/uploads/2021/08/CDT-Outside-Looking-In-Approaches-to-Content-Moderation-in-End-to-End-Encrypted-Systems.pdf> [<https://perma.cc/GA99-RR7A>].

discussion and debate, conduct internal and external research,² and write multiple drafts before determining their content policies. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1631–35 (2018). During the evaluation phase, hosts must decide whether particular content violates its policies, which may involve deliberation and debate. *See, e.g.*, Sheera Frenkel & Cecilia Kang, *Mark Zuckerberg and Sheryl Sandberg’s Partnership Did Not Survive Trump*, N.Y. Times (July 8, 2021)³ (describing Facebook employees’ deliberations about whether a doctored video of House Speaker Nancy Pelosi should be removed from the service). And, during the enforcement phase, hosts must decide what action to take, which may involve not just a binary decision of whether to take down content or allow it to remain on a service, but also whether to take other actions to change

² Some hosts have formed councils of independent experts to advise them on their content moderation policies. Amicus CDT is a member of the Twitch Safety Advisory Council and Twitter Trust and Safety Council. *See Introducing the Twitch Safety Advisory Council*, Twitch (May 14, 2020), <https://blog.twitch.tv/en/2020/05/14/introducing-the-twitch-safety-advisory-council/> [<https://perma.cc/43XH-HA8S>]; *Trust and Safety Council*, Twitter (last visited Apr. 8, 2022), <https://about.twitter.com/en/our-priorities/healthy-conversations/trust-and-safety-council> [<https://perma.cc/V9AL-ZPPD>].

³ <https://www.nytimes.com/2021/07/08/business/mark-zuckerberg-sheryl-sandberg-facebook.html> [<https://perma.cc/S83Y-8PN3>].

the manner or place in which content is displayed or add the host's own affirmative speech. See Eric Goldman, *Content Moderation Remedies*, 28 Mich. Tech. L. Rev. 1, 23–39 (2021) (describing enforcement actions such as fact-checks or a warning before users may access the content; decreasing the availability of some or all of a user's posts; or choosing not to recommend the content).

In practice, content moderation differs from host to host. Different hosts permit different types of content on their services, depending on the audiences or interests to which they are targeted and the host's determination of what kinds of content are beneficial or detrimental to its users. In addition, hosts may strictly control the user-generated content that is published on their services, allow relatively unmoderated forums for discussion, or set the dial somewhere in between. See Nellie Bowles, *The Complex Debate Over Silicon Valley's Embrace of Content Moderation*, N.Y. Times (June 5, 2020);⁴ Will Duffield, *Two Cheers For Unfiltered Information*, Techdirt (May 29, 2020).⁵

⁴ <https://www.nytimes.com/2020/06/05/technology/twitter-trump-facebook-moderation.html> [<https://perma.cc/M3CK-QSQG>].

⁵ <https://www.techdirt.com/articles/20200527/11282644589/two-cheers-unfiltered-information.shtml> [<https://perma.cc/B2NF-DV53>].

The availability of a range of services with different content moderation policies and approaches, free from unconstitutional government interference, benefits users by providing them with diverse options from which to choose the service that meets their needs for speaking and gathering information. For example, users may choose a service aimed at children that moderates specific content that the host determines is inappropriate for minors. *See Community Guidelines*, Kinzoo (last visited Apr. 8, 2022)⁶ (prohibiting, on a private messaging app for kids and parents, the sharing of content that is inappropriate for children including “bad words or external links”). Other users may desire a service that moderates content to create an environment suitable for discussions of sensitive issues, such as mental health. *See, e.g., Kyle Vanhemert, A Social Network Designed to Combat Depression*, Wired (Apr. 1, 2015).⁷

Content moderation also allows users to participate in online services targeted towards their interests, by empowering hosts to control the particular topics discussed on their services. For example, a host may permit only user-

⁶ <https://kinzoo.com/community-guidelines/> [<https://perma.cc/W2LL-6TRJ>].

⁷ <https://www.wired.com/2015/04/social-network-designed-combat-depression/> [<https://perma.cc/JC4M-72D4>].

generated content that discusses particular subject matter on its service, such as knitting and other fiber arts, *see About Ravelry*, Ravelry (last visited Apr. 8, 2022)⁸ or books, *see About Goodreads*, Goodreads (last visited Apr. 8, 2022).⁹

In addition, content moderation allows a host to remove content from its service that it determines is detrimental to users or that users do not wish to see. Many popular social media companies prohibit hate speech,¹⁰ harassment,¹¹ promotion of suicide and self-injury,¹² and other content that the host believes are not in users' best interests or that users do not want to encounter. Users benefit because they can choose services where they will not be exposed to content that they find undesirable.

⁸ <https://www.ravelry.com/about> [<https://perma.cc/A9WD-MGTY>].

⁹ <https://www.goodreads.com/about/us> [<https://perma.cc/8XPX-VC2Z>].

¹⁰ *See, e.g., Hateful Conduct Policy*, Twitter (last visited Apr. 8, 2022), <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/D6GU-9P9Y>].

¹¹ *See, e.g., Harassment & Cyberbullying Policies*, YouTube (last visited Apr. 8, 2022), https://support.google.com/youtube/answer/2802268?hl=en&ref_topic=9282436 [<https://perma.cc/3SE7-8HML>].

¹² *See, e.g., Suicide & Self Harm*, TikTok (last visited Apr. 8, 2022), <https://www.tiktok.com/safety/en/suicide-self-harm/> [<https://perma.cc/X69E-383M>].

B. A retaliatory government investigation into a host’s content moderation decisions chills content moderation from the moment it begins.

An investigation and CID from a state attorney general for documents about a host’s content moderation practices—particularly when coupled with the attorney general’s critical public statements about the host’s content moderation decisions—send a strong message of disapproval and threat of legal consequences for the host if it continues its “disfavored” content moderation actions. Hosts targeted by a CID as part of a state attorney general’s retaliatory investigation will fear harsh legal consequences if they continue content moderation practices like those that sparked the investigation. In the face of such retaliation, a host may believe that the state attorney general will treat it more leniently or drop an investigation entirely if it ceases the content moderation practices with which the attorney general disagrees. *See, e.g., Elizabeth Dwoskin et al., Major Social Media Platforms Ban Russian State Media in Europe, Wash. Post (Mar. 1, 2022)*¹³ (reporting that several online services banned RT and Sputnik in Europe despite

¹³ <https://www.washingtonpost.com/technology/2022/03/01/youtube-tiktok-facebook-state-media-ban/> [<https://perma.cc/U98R-B9LB>].

initial resistance to outright bans, because of pressure from European government officials and “fear” of European regulators).

Enforcement of the CID is not necessary for a host to be chilled. *See Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (explaining that “the threat of sanctions may deter [speech]. . . almost as potently as the actual application of sanctions” (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963) (describing the chilling effect that “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” can have on speech). Rather, its chilling effect begins from the moment the investigation is announced and the CID is issued, because from that moment a host is under an ongoing obligation to provide the documents sought in the CID, and its content moderation actions are subject to government scrutiny, all backed up by the threat of enforcement. Even if the host may seek to raise First Amendment and other defenses in a subsequent enforcement proceeding, it cannot be assured those defenses will succeed. Thus, even before the CID is enforced, a host will be pressured to engage in self-censorship.

This pre-enforcement chilling effect is especially strong when, as in this case, a CID is continuing—demanding not only existing documents but also new documents that a host creates concerning content moderation. A continuing

retaliatory CID creates the risk that confidential information about how the host engages in content moderation going forward will be exposed to a hostile government official. A host may fear the exposure of sensitive information—such as internal deliberations—about changes to its content moderation policies or particular content moderation decisions, especially those that politicians or others are likely to criticize. *See Herbert v. Lando*, 441 U.S. 153, 174 (1979) (recognizing that the First Amendment forbids subjecting the editorial process “to private or official examination merely to satisfy curiosity or to serve some general end such as the public interest”). As a result, the host may forgo making certain content moderation decisions or updates to its content policies entirely after the CID is issued but before it is enforced.

Moreover, retaliatory investigations and CIDs may have particularly strong chilling effects on smaller hosts and startup companies even pre-enforcement, because of their immediate and burdensome financial impact. An investigation and CID will require a host to devote staff and potentially hire legal counsel to negotiate the scope of the investigation, compile and review responsive documents, and formulate potential challenges to it. *See, e.g.* Decl. of Matthew Williams in Supp. of Pl. Twitter, Inc.’s Mot. for a TRO, *Twitter v. Paxton*, 3:21-cv-01644 ¶¶ 8, 10 (N.D. Cal.), Dkt. No. 5-1. Smaller and startup services, in particular, may be

unable to afford such costs. *See, e.g.,* Christine Lagorio-Chafkin, “A ‘Holy Shit’ Moment”: How Steve Huffman and Alexis Ohanian Built Reddit, the “Front Page of the Internet”, *Vanity Fair* (Sept. 24, 2018)¹⁴ (reporting that the social media site Reddit was started with a \$12,000 grant). Startup companies with an outstanding CID may also struggle to attract necessary funding while under the cloud of an investigation. *See* Sean Peek, *3 Examples of Venture Capital Due Diligence Checklists*, U.S. Chamber of Commerce (last visited Apr. 8, 2022)¹⁵ (explaining that potential investors will consider a startup’s “outstanding legal issues” when conducting due diligence reviews). That smaller or newer services may be particularly vulnerable to pressure from a retaliatory CID may make these companies especially tempting targets to a government official who disagrees with their content moderation decisions.

C. The Panel decision, if permitted to stand, will harm the public.

The Panel’s holding that Twitter’s claim is not prudentially ripe allows the chilling effects of a retaliatory investigation to continue unabated unless and until

¹⁴ <https://www.vanityfair.com/news/2018/09/how-steve-huffman-and-alexis-ohanian-built-reddit> [<https://perma.cc/4TBA-MH6Q>].

¹⁵ <https://www.uschamber.com/co/run/business-financing/venture-capital-due-diligence-checklist> [<https://perma.cc/A85P-3YFJ>].

the CID is enforced or the investigation results in bringing an enforcement action. As long as a retaliatory investigation and CID remain pending, a host will be pressured to refrain from engaging in content moderation decisions of the kind that are targeted by the CID. The Panel decision harms the public by permitting this ongoing chilling effect.

Chilling hosts' content moderation negatively impacts users and the public because they rely on hosts to regularly update their content policies and moderate content that may negatively impact users' experience on the service and the public interest more broadly. For example, shortly after the start of the novel coronavirus pandemic, multiple prominent social media companies updated their content policies to respond to misinformation about COVID-19. *See, e.g.,* Craig Silverman, *Pinterest is Blocking Coronavirus Searches, and People are Very Happy About It*, BuzzFeed (Mar. 13, 2020).¹⁶ Similarly, following the attack on the U.S. Capitol on January 6, 2021, some social media companies began removing content praising the incident or calling for further violence. *See, e.g.,* Guy Rosen & Monika Bickert,

¹⁶ <https://www.buzzfeednews.com/article/craigsilverman/pinterest-is-blocking-coronavirus-searches-and-people-are> [<https://perma.cc/X5C4-NQUF>].

Our Response to the Violence in Washington, Meta (Jan. 6, 2021);¹⁷ Twitter Safety, *An Update Following the Riots in Washington, DC*, Twitter (Jan. 12, 2021).¹⁸ More recently, several hosts have responded to Russia’s invasion of Ukraine by making changes to their content moderation policies or practices. For example, hosts have blocked, labeled, demonetized, or deprioritized Russian state-sponsored media outlets and made other changes to their content policies or their enforcement to combat disinformation about the war. *See Russia, Ukraine, and Social Media and Messaging Apps*, Human Rights Watch (Mar. 16, 2022);¹⁹ Matt Binder, *What Social Media Platforms are Doing to Stop Misinformation About Russia’s Invasion Of Ukraine*, Mashable (Mar. 3, 2022).²⁰

To be sure, some of these moderation decisions may be controversial and spark disagreement. But it is precisely those types of controversial decisions that are likely to prompt retaliatory investigations. And the First Amendment makes

¹⁷ <https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/> [<https://perma.cc/L3QS-LVPJ>].

¹⁸ https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington-- [<https://perma.cc/BZS8-RD28>].

¹⁹ <https://www.hrw.org/news/2022/03/16/russia-ukraine-and-social-media-and-messaging-apps> [<https://perma.cc/K4J7-383B>].

²⁰ <https://mashable.com/article/social-media-misinformation-ukraine-russia> [<https://perma.cc/CSJ6-LMFB>].

clear that government officials may not use the power of the state to coerce or punish content hosts that make editorial decisions with which those officials disagree. *See Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 574 (1995) (explaining that the purpose of the First Amendment’s protection for speech is “to shield just those choices of content that in someone’s eyes are misguided”).

These editorial decisions, which are often aimed at protecting the public, could be chilled by a CID issued as part of a retaliatory government investigation of a host’s content moderation practices, even before the CID is enforced. And, under the Panel’s decision, a host would be unable to challenge such a retaliatory investigation and CID unless and until the CID were enforced. Moreover, because government investigations can continue indefinitely and CIDs can, like the one at issue here, require continuing production of responsive documents, the Panel’s decision would allow government officials to maintain never-ending retaliatory investigations to chill the host’s content moderation indefinitely.

D. The Panel decision gives inadequate weight to hosts’ First Amendment rights.

This Court has recognized that a chilling effect is a constitutionally-recognized injury that constitutes “hardship” under the second prong of the

prudential ripeness test. *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). The Panel decision acknowledged that withholding consideration of Twitter’s claims could lead to “some hardship for Twitter” because of the alleged chill of its First Amendment rights, but concluded that this hardship was “minimized” because Twitter could bring its First Amendment claim before AG Paxton brings an unfair trade practices suit. Op. 12.

This analysis gave inadequate weight to the irreversible harm inflicted on hosts’ First Amendment interests from the chilling effect caused by a pending retaliatory investigation and CID. As the Supreme Court and this Court have recognized, “The loss of First Amendment freedoms, for even minimal periods of time,” is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *AP v. Otter*, 682 F.3d 821, 826 (9th Cir. 2012) (quoting *Elrod*, 427 U.S. at 373), *amended by AP v. Otter*, 2012 U.S. App. LEXIS 11746 (9th Cir. June 8, 2012). Thus, the fact that Twitter could await enforcement of the CID—all the while being chilled from exercising its First Amendment right to engage in content moderation—does not minimize the hardship inflicted upon it. Indeed, in this case Twitter’s ability to engage in content moderation has been chilled for more than a year, since AG Paxton initiated his investigation and issued the CID in January 2021. The Panel decision, if permitted to stand, will allow courts to improperly

discount the impact on a host's First Amendment rights when it is chilled from engaging in content moderation, for whatever length of time.

E. The Panel decision will encourage the trend of government officials using investigatory powers to retaliate against and censor content moderation decisions with which they disagree.

AG Paxton's retaliatory investigation of Twitter is of a piece with the growing trend of government officials using investigations to threaten and chill content moderation decisions with which they disagree. That makes the question presented in this case of even greater importance, because the Panel decision risks exacerbating this trend by allowing government officials to begin retaliatory investigations and issue investigatory demands to chill content moderation indefinitely.

AG Paxton is not the first to use the threat of a government investigation to retaliate against hosts of user-generated content for disfavored content moderation decisions. In 2018, then-U.S. Attorney General Jeff Sessions convened a meeting with state attorneys general to discuss concerns that technology companies were "intentionally stifling the free exchange of ideas on their platforms." Olivia Solon, *Jeff Sessions Looks into Concerns Social Media Firms 'Stifle' Free Speech*,

Guardian (Sept. 5, 2018).²¹ The announcement of the meeting followed claims from then-President Trump that Google’s news services were “‘rigged’ against him,” *id.*, and his repeated claims of “anti-conservative censorship” by Google, Facebook, and Twitter. Tony Romm, *Trump’s Economic Adviser: ‘We’re Taking a Look’ at Whether Google Searches Should be Regulated*, Wash. Post (Aug. 28, 2018).²² This meeting was one of several blatant attempts by the Trump Administration to pressure hosts into refraining from moderating content. *See also*, e.g., Exec. Order No. 13925, 85 FR 34079 (May 28, 2020), *revoked by* Exec. Order No. 14029, 86 FR 27025 (May 14, 2021).

Following AG Paxton’s investigation, other state attorneys general have also begun similar investigations into social media platforms for allegedly censoring conservative speech, under the guise of state consumer protection law. For example, in April 2021, Indiana Attorney General Todd Rokita announced an investigation into Amazon, Apple, Facebook, Google, and Twitter centered on “conservative content censorship.” Lawrence Andrea, *AG Todd Rokita*

²¹ <https://www.theguardian.com/us-news/2018/sep/05/jeff-sessions-social-media-free-speech-conservative-views>.

²² <https://www.washingtonpost.com/news/morning-mix/wp/2018/08/28/trump-wakes-up-googles-himself-and-doesnt-like-what-he-sees-illegal/> [<https://perma.cc/YZT7-PEJP>].

Investigating Big Tech Over What He Says is Conservative 'Censorship', Indianapolis Star (Apr. 7, 2021).²³ AG Rokita had been harshly critical of social media content moderation decisions just two months before he launched his investigation, after Twitter flagged one of his own Tweets as containing a disputed claim of election fraud and posing a risk of violence.²⁴ *Id.*

Investigations targeting disfavored content moderation decisions are not limited to claims of anti-conservative bias. Washington, DC Attorney General Karl

²³ <https://www.indystar.com/story/news/crime/2021/04/07/todd-rokita-investigating-facebook-google-apple-twitter/7120371002/> [<https://perma.cc/V88V-S2XY>].

²⁴ More broadly, states have generally become more active in trying to control hosts' content moderation decisions, with both Republican and Democratic state lawmakers adopting or proposing laws that would either prohibit or require hosts to make certain content moderation decisions, both of which the First Amendment forbids. *See, e.g.*, Fla. Stat. §§ 106.072, 287.137, 501.2041 (“SB 7072”); Tex. Bus. & Com. Code § 120.001 *et seq.*, Tex. Civ. Prac. & Rem. Code § 143A.001 *et seq.* (“HB 20”); Eugene Volokh, *New Colorado Bill Would Create Commission to Restrict “Hate Speech,” “Fake News,” “Conspiracy Theories” on Social Media Platforms*, Volokh Conspiracy (Mar. 2, 2021), <https://reason.com/volokh/2021/03/02/new-colorado-bill-would-create-commission-to-restrict-hate-speech-fake-news-conspiracy-theories-on-social-media-platforms/> [<https://perma.cc/H9SB-F56X>]. Federal district courts have enjoined the only two such bills enacted into law so far, SB 7072 and HB 20, on First Amendment grounds. *See NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021), *appeal docketed*, No. 21-12355 (11th Cir.); *NetChoice, LLC v. Paxton*, 2021 U.S. Dist. LEXIS 233460 (W.D. Tex. Dec. 1, 2021), *appeal docketed*, No. 21-51178 (5th Cir.).

Racine is investigating Facebook's handling of COVID-19 misinformation.

Cristiano Lima, *D.C. AG Subpoenas Facebook in Escalating Probe of Covid-19 Misinformation*, Politico (July 1, 2021).²⁵ AG Racine's office has explained that the investigation is intended to encourage Facebook to engage in more content moderation of COVID-19 vaccine misinformation on its service. *Id.* (stating that "AG Racine's investigation aims to make sure Facebook is truly taking all steps possible to minimize vaccine misinformation on its site and support public health"). As part of the investigation, AG Racine has subpoenaed Facebook, seeking records "identifying all groups, pages and accounts that have violated its policies against Covid-19 misinformation and documents detailing how many resources the tech giant has devoted to the cause." *Id.*

The Panel decision risks encouraging this unconstitutional trend of government officials investigating hosts for content moderation decisions with which they disagree. So long as officials do not seek to enforce a CID or bring enforcement action, the investigation can remain a sword of Damocles overhead, chilling the targeted host's content moderation. The Panel provides government

²⁵ <https://www.politico.com/news/2021/07/01/dc-ag-subpoenas-facebook-497705> [<https://perma.cc/S3TX-S9YE>].

officials with a powerful tool they can, and surely will, wield to unconstitutionally chill online hosts' First Amendment rights.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to grant Twitter's petition for panel rehearing and rehearing en banc.

Respectfully submitted,

/s/ Caitlin Vogus

Caitlin Vogus

Counsel of Record for Amici Curiae

Samir Jain

Emma Llansó*

Center for Democracy & Technology

1401 K St. NW, Suite 200

Washington, DC 20005

Telephone: (202) 637-9800

Facsimile: (202) 637-0968

* *Of counsel*

Dated: April 11, 2022
Washington, D.C.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 21-15869

I am the attorney for *amici curiae*.

This brief contains 4,198 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

complies with the word limit of Cir. R. 32-1.

is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):

it is a joint brief submitted by separately represented parties;

a party or parties are filing a single brief in response to multiple briefs; or

a party or parties are filing a single brief in response to a longer joint brief.

complies with the length limit designated by court order dated _____.

is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: /s/ Caitlin Vogus

Date: April 11, 2022