

No. 21-15869

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

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TWITTER, INC.  
Plaintiff-Appellant,

v.

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

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

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**BRIEF OF AMICI CURIAE CENTER FOR DEMOCRACY &  
TECHNOLOGY, ELECTRONIC FRONTIER FOUNDATION, MEDIA  
COALITION FOUNDATION, INC., NATIONAL COALITION AGAINST  
CENSORSHIP, PEN AMERICA, AND R STREET INSTITUTE  
IN SUPPORT OF PLAINTIFF-APPELLANT TWITTER, INC.  
URGING REVERSAL**

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## **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 Media Coalition Foundation has no parent corporation and issues no stock.

The National Coalition Against Censorship does not have a parent organization and issues no stock.

PEN America certifies that it has no parent corporation and no publicly held company owns 10% of its stock.

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

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## **STATEMENT OF IDENTITY AND INTEREST OF AMICI CURIAE**

Amici curiae are the Center for Democracy & Technology (“CDT”), the Electronic Frontier Foundation (“EFF”), Media Coalition Foundation, Inc., the National Coalition Against Censorship (“NCAC”), PEN America, 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 Media Coalition Foundation, Inc. monitors potential threats to free expression, and engages in litigation and education to protect free speech rights, as guaranteed by the First Amendment.

NCAC is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in assuring the continuance of robust First Amendment protections for those who express unpopular views and those who support those speakers. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

PEN American Center, Inc. (“PEN America” or “PEN”) is a nonprofit organization that represents and advocates for the interests of writers, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its membership includes more than 7,300 journalists, novelists, poets, essayists, and other professionals. PEN America has a particular interest in opposing censorship

schemes in all forms, including government retaliation against speech or expression protected by the First Amendment.

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.

Amici file this brief in support of Plaintiff-Appellant Twitter, Inc. Amici have a strong interest in ensuring that Twitter and other online hosts of user-generated content are free to exercise their First Amendment right to engage in content moderation in a way that protects free expression and other human rights in the interests of their users. Government investigations of hosts initiated to retaliate against them for disfavored content moderation decisions chill the exercise of those rights from the moment hosts become aware of the investigation. Amici support reversal of the district court's holding that a host must wait to challenge a retaliatory civil investigatory demand ("CID") from a state attorney general seeking documents about the host's content moderation decisions until the CID is enforced, because that result would significantly chill hosts' exercise of First Amendment rights, to the detriment of internet users and the public.

**SOURCE OF AUTHORITY TO FILE**

Counsel for Plaintiff-Appellant consents to the filing of this brief. Counsel for Defendant-Appellee does not object to the timely filing of this brief. *See* Fed. R. App. P. 29(a)(2).

**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

Defendant-Appellee Ken Paxton's retaliatory investigation of Twitter's content moderation decisions inflicted injury from the moment it was announced. Online hosts of user-generated content like Twitter and other technology companies moderate the content posted by users by making judgments about what content to allow or forbid, highlight or deprioritize, label, or otherwise act upon. These editorial judgments help shape both the types of speech in which users can engage and the information they receive when using these services. The First Amendment prohibits the government from interfering with those judgments, even—or especially—when they are controversial and government officials disagree with them. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

AG Paxton's investigation was spurred by just such a disagreement. Once that investigation was announced, Twitter's exercise of its First Amendment rights was inevitably chilled, as it understood that similar content moderation 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.

In light of this immediate and ongoing injury, the district court erred in holding that Twitter’s First Amendment challenge was unripe until after the CID was enforced. This Court has held that standing and ripeness requirements are applied “less stringently in the context of First Amendment claims” because of the risk of chilling effects. *Wolfson v. Brammer*, 616 F.3d 1045, 1058 (9th Cir. 2010). Indeed, in pre-enforcement actions implicating First Amendment rights, the Ninth Circuit has specified that “the inquiry tilts dramatically toward a finding” of injury because of the risks to freedom of expression. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). The Supreme Court has also recognized the harm from the “informal censorship” imposed by government threats and intimidation, even before any government enforcement action. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *see also Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383 (1988); *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

A retaliatory investigation and CID by a state attorney general inquiring into a host’s content moderation policies and practices injures the host even before any enforcement action. In addition to immediately deterring a host from continuing to engage in the disfavored content moderation practices for which it was targeted, the investigation and CID will raise concerns by the host that sensitive information about its content moderation policies and decisions—including internal discussions

and debate—will be exposed to the scrutiny of hostile government officials. This concern may chill hosts from engaging in thorough and frank internal discussions that, ideally, help to ensure their content moderation policies and decisions respect free expression and other human rights. A retaliatory investigation and CID can especially impact smaller and startup companies by imposing burdensome costs on them and threatening their ability to obtain funding. These chilling effects ultimately harm the public, which relies on hosts to make important and timely content moderation decisions regarding disinformation, hate speech, harassment, and other such content, and which benefits from competition and diversity in the market of providers of user-generated content.

Finally, governments around the world increasingly are using investigations and threats of other penalties to engage in censorship by pressuring or punishing hosts for making content moderation decisions with which they disagree. AG Paxton’s retaliatory investigation of technology companies echoes these strategies. Courts must protect against the emergence of this tactic, and the consequent harms to free expression, in the United States.

## ARGUMENT

### **I. Precedent Permits Pre-Enforcement Challenges in the First Amendment Context To Prevent the Chilling of Protected Speech.**

The Ninth Circuit has held that standing and ripeness requirements are applied “less stringently in the context of First Amendment claims.”<sup>1</sup> *Wolfson*, 616 F.3d at 1058. Specifically, the Court has endorsed “a ‘hold your tongue and challenge now’ approach rather than requiring litigants to speak first and take their chances with the consequences.” *Ariz. Right to Life PAC v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). Thus, in numerous instances, the Court has permitted pre-enforcement challenges to threatened punishment of speech. *See Wolfson*, 616 F.3d at 1062; *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003), *abrogation on other grounds recognized by Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010); *Bayless*, 320 F.3d at 1007; *LSO, Ltd.*, 205 F.3d at 1156. “[W]hen the threatened enforcement effort implicates First

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<sup>1</sup> The Ninth Circuit has explained that the constitutional component of ripeness “overlaps with the ‘injury in fact’ analysis for Article III standing,” *Wolfson*, 616 F.3d at 1058, and, as such the Court often treats the constitutional component of ripeness “under the rubric of standing,” *Thomas v. Anchorage Equal Rights Comm’n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (*en banc*).



Amendment rights,” the Court has explained, “the inquiry tilts dramatically toward a finding of standing.” *LSO, Ltd.*, 205 F.3d at 1155.

This dramatic tilt in favor of pre-enforcement ripeness and standing in the First Amendment context arises from this Court’s and the Supreme Court’s recognition that, even pre-enforcement, threatened punishment of speech has a chilling effect. For example, in *Bayless*, the Ninth Circuit held that the plaintiff, a political action committee, had standing to challenge an Arizona law that required advanced notice to political candidates before certain political literature and advertising could be distributed, even though the plaintiff had “neither violated the statute nor been subject to penalties for doing so.” 320 F.3d at 1004, 1006. The Court held that the danger of the statute was one of “self-censorship,” and that the plaintiff had been harmed even before enforcement of the law against it because it was “forced to modify its speech and behavior.” *Id.* at 1006.

The Supreme Court, too, has “repeatedly pointed out the necessity of allowing pre-enforcement challenges to avoid the chilling of speech.” *Wolfson*, 616 F.3d at 1060 (citing *Am. Booksellers Ass’n*, 484 U.S. at 393; *Dombrowski*, 380 U.S. at 486). In *Dombrowski*, the Supreme Court noted that “a substantial loss or impairment of freedoms of expression” can occur if those threatened with prosecution for their speech must await actual enforcement against them to

vindicate their First Amendment rights. 380 U.S. at 486. Recognizing that free expression is “of transcendent value to all society, and not merely to those exercising their rights,” the Court did not require the appellants, a civil rights organization and activists, to await actual prosecution before challenging state laws that chilled their speech. *Id.* As the Court explained:

For ‘the threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . . .’ *NAACP v. Button*, 371 U.S. 415, 433 [(1963)]. Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights.

*Id.* Based on the chilling effect of the potential prosecution of the appellants, the Court permitted their pre-enforcement action challenging the laws. *Id.* at 487–89.

In *American Booksellers Association*, the Court again acknowledged that the danger of self-censorship is “a harm that can be realized even without an actual prosecution.” 484 U.S. at 393. In that case, the Court held that the plaintiffs, book stores and book store membership organizations, had standing to challenge a Virginia law prohibiting knowingly displaying visual or written material “harmful to juveniles” in a manner where juveniles may “examine and peruse” those materials. *Id.* at 387, 392–93. The Court found that the plaintiffs had suffered an injury in fact because “the law is aimed directly at plaintiffs, who, if their

interpretation of the statute is correct, will have to take significant and costly compliance measures or risk criminal prosecution.” *Id.* at 392. “We are not troubled by the pre-enforcement nature of this suit,” the Court wrote, as “plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them.” *Id.* at 393.

In *Bantam Books, Inc.*, the Supreme Court also described the chilling effect that “the *threat* of invoking legal sanctions and other means of coercion, persuasion, and intimidation” can have on freedom of speech. 372 U.S. at 67 (emphasis added). In holding that a Rhode Island Commission, tasked with notifying book distributors that certain books were improper to sell, distribute, or display to minors, abridged the First Amendment, *id.* at 64, the Court recognized that “informal censorship” through “public officers’ thinly veiled threats to institute criminal proceedings against [book distributors] if they do not come around,” have the effect of inhibiting the circulation of books and silencing speech. *Id.* at 67–68.

Thus, longstanding precedent from both the Supreme Court and this Court acknowledges the chilling effect caused by the threat of government punishment of speech and accordingly allows pre-enforcement challenges in the face of such threats. Permitting pre-enforcement challenges of state action that chills speech

benefits the public, for when a speaker refrains from speaking rather than risk punishment, “all society . . . [is] the loser.” *Dombrowski*, 380 U.S. at 486.

The same rationale applies here with even greater force. In this case, the threat of punishment does not arise simply from the existence of general statute that might be applied to a particular party. Rather, AG Paxton has already initiated a retaliatory investigation and issued a CID that specifically targets Twitter and threatens to punish it for its editorial decisions. Thus, the chilling effect on Twitter’s exercise of First Amendment rights is all the more concrete. It need not await enforcement of the CID before seeking redress for that ongoing harm.

**II. The District Court’s Holding Will Allow Government Officials To Use Retaliatory Investigations To Chill Content Moderation, to the Detriment of the Public.**

A. Content moderation requires hosts to exercise editorial judgment in setting and enforcing their content policies.

“Content moderation” is the set of policies, systems, and tools that online hosts of user-generated content use to decide what user-generated content or accounts to publish, remove, amplify, or otherwise manage. *See* Hannah Bloch-Wehba, *Automation in Moderation*, 53 Cornell Int’l L.J. 41, 42, 48 (2020). Content moderation requires innumerable exercises of editorial discretion that shape what users can say and what information they receive. Accordingly, online companies’

decisions about what user-generated content to host is protected by the First Amendment. *See Amici Curiae Br. of Reporters Comm. for Freedom of the Press et al.; Miami Herald Publ'g Co.*, 418 U.S. at 258.

In practice, content moderation can differ from host to host. Hosts may strictly control the user-generated content that is published on their platforms, 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);<sup>2</sup> Will Duffield, *Two Cheers For Unfiltered Information*, Techdirt (May 29, 2020).<sup>3</sup> They may enforce their content policies centrally, often using teams of professional moderators, or take a decentralized approach that “tasks users themselves with enforcing content policies.” Spandana Singh, *Everything in Moderation*, Open Tech. Inst. (July 22, 2019).<sup>4</sup> Hosts may screen content for moderation before it is uploaded or after, and they may manually review and moderate content using human beings, rely on

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<sup>2</sup> <https://www.nytimes.com/2020/06/05/technology/twitter-trump-facebook-moderation.html>.

<sup>3</sup> <https://www.techdirt.com/articles/20200527/11282644589/two-cheers-unfiltered-information.shtml>.

<sup>4</sup> <https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/introduction>

automated tools to filter and screen content, or use a combination of both methods.

*Id.*

Many hosts develop a “content policy,” *i.e.*, a set of rules about what content is and is not allowed on their platforms. *Id.* While the earliest content policies were relatively simplistic and lacking in detail, some—though not all—now consist of an “intricate system of rules.” Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 Harv. L. Rev. 1598, 1631–35 (2018) [hereafter *The New Governors*] (describing the development of content policies by YouTube and Facebook).

Hosts may update their content policies over time. Timely updates to content policies help protect users and the public by ensuring that a host’s policies are responsive to current events and to problems that arise or are newly identified on a service. For example, before the 2020 presidential election, some social media platforms changed their content policies and took other measures to attempt to curb election misinformation. *See* Catherine Sanz & Catherine Thorbecke, *What Social Media Giants are Doing to Counter Misinformation This Election*, ABC News

(Oct. 18, 2020)<sup>5</sup> (reporting measures by Facebook, Instagram, Twitter, Reddit, TikTok, and YouTube). In another example, the live-streaming service Twitch updated its content policy to attempt to address abusive behavior that occurs off its service following “reports of abusive behavior and sexual harassment, both on the platform and within the company itself.” Taylor Hatmaker, *Twitch Expands its Rules Against Hate and Abuse to Include Behavior Off the Platform*, TechCrunch (Apr. 7, 2021).<sup>6</sup>

A host’s exercise of editorial judgment does not end with the formulation of its content moderation policies. It also extends to the enforcement of those policies. Enforcement is not just a binary decision to either take down content or allow it to remain on a service. Hosts can take a wide variety actions against violative content, many of which involve the host’s own affirmative speech. *See* Eric Goldman, *Content Moderation Remedies*, Mich. Tech. L. Rev. (Forthcoming 2021).<sup>7</sup> For example, hosts can engage in counter-speech by adding a fact-check or a warning before users may access the content; disable user comments or other features for a

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<sup>5</sup> <https://abcnews.go.com/Technology/social-media-giants-counter-misinformation-election/story?id=73563997>.

<sup>6</sup> <https://techcrunch.com/2021/04/07/twitch-off-platform-harassment-policy/>.

<sup>7</sup> <https://ssrn.com/abstract=3810580>.

post; decrease the availability of some or all of a user’s posts, such as by downgrading content’s visibility in search results or restricting forwarding or sharing of posts; or suspend or deactivate a user’s account. *Id.*; Mike Masnick, *Platforms, Speech and Truth: Policy, Policing and Impossible Choices*, Techdirt (Aug. 9, 2018).<sup>8</sup>

Enforcement decisions can require hosts to exercise editorial judgment, particularly when user-generated content falls into a “gray area” that defies easy categorization. *See Nuts & Bolts of Content Moderation: A Primer for Policymakers on Content Moderation*, Engine & Charles Koch Inst. at 5, 7–8 (Sept. 2019).<sup>9</sup> For example, a host that prohibits users from posting forged or altered information has to decide how to apply this policy to a news outlet that posts a clip of a “deepfake” video of a political candidate as part of a story about how this technology can spread misinformation. *Id.* at 8.

Popular user-generated content hosts often face significant criticism for their specific content moderation decisions, much as traditional media outlets face

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<sup>8</sup> <https://www.techdirt.com/articles/20180808/17090940397/platforms-speech-truth-policy-policing-impossible-choices.shtml>.

<sup>9</sup> <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5d9629c7a8e74b6a817a9116/1570122188740/Aug+2019+Nuts+and+Bolts+REPORT.pdf>.



criticism for their editorial decisions. For example, politicians from both major political parties in the United States have criticized social media companies for decisions regarding content posted by or about politicians. *See, e.g.*, Eugene Scott, *Trump, Republicans Express Outrage Over Extension of Facebook Ban*, Wash. Post (May 5, 2021);<sup>10</sup> Connor Perrett, *Trump Shared a Doctored Video of Pelosi Ripping His Speech That's Been Viewed Millions of Times, and Democrats are Outraged Facebook and Twitter Still Won't Remove It*, Bus. Insider (Feb. 9, 2020).<sup>11</sup> Strong public disagreement with, and criticism of, services' content moderation decisions regarding foreign affairs,<sup>12</sup> disinformation,<sup>13</sup> and other topics are common.

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<sup>10</sup> [https://www.washingtonpost.com/politics/trump-facebook-social-media-republicans/2021/05/05/919cb430-adb1-11eb-acd3-24b44a57093a\\_story.html](https://www.washingtonpost.com/politics/trump-facebook-social-media-republicans/2021/05/05/919cb430-adb1-11eb-acd3-24b44a57093a_story.html).

<sup>11</sup> <https://www.businessinsider.com/pelosi-ripping-speech-video-democrats-facebook-twitter-wont-remove-2020-2>.

<sup>12</sup> *See, e.g.*, Mathew Ingram, *Social Networks Accused Of Censoring Palestinian Content*, Columbia J. Rev. (May 19, 2021), [https://www.cjr.org/the\\_media\\_today/social-networks-accused-of-censoring-palestinian-content.php](https://www.cjr.org/the_media_today/social-networks-accused-of-censoring-palestinian-content.php); Jack Gillum & Justin Elliott, *Sheryl Sandberg and Top Facebook Execs Silenced an Enemy of Turkey to Prevent a Hit to the Company's Business*, ProPublica (Feb. 24, 2021), <https://www.propublica.org/article/sheryl-sandberg-and-top-facebook-exec-silenced-an-enemy-of-turkey-to-prevent-a-hit-to-their-business>.

<sup>13</sup> *Social Media Firms Fail to Act on Covid-19 Fake News*, BBC News (June 4, 2020), <https://www.bbc.com/news/technology-52903680>; Rachel E. Greenspan

The public benefits from the availability of services that engage in content moderation. Content moderation allows hosts to control and shape the particular topics, environment, and user experience available on their service. A host may decide to permit only user-generated content that discusses particular subject matter on its service, such as knitting and other fiber arts, *see About Ravelry*, Ravelry (last visited July 23, 2021)<sup>14</sup> or books, *see About Goodreads*, Goodreads (last visited July 23, 2021).<sup>15</sup> Some hosts use content moderation 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),<sup>16</sup> while others engage in less moderation to allow more freewheeling user conversations. *See Duffield, supra*. The availability of a range of services, from those that undertake significant content moderation to those that moderate less content, benefits users by providing them with diverse options from

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& Kat Tenbarge, *Youtubers' Channels and Videos are Being Mistakenly Deleted for Debunking COVID-19 Conspiracy Theories*, *Bus. Insider* (Sept. 26, 2020), <https://www.insider.com/youtube-demonetized-covid-19-disinformation-moderation-automation-bots-strikes-2020-9>.

<sup>14</sup> <https://www.ravelry.com/about>.

<sup>15</sup> <https://www.goodreads.com/about/us>.

<sup>16</sup> <https://www.wired.com/2015/04/social-network-designed-combat-depression/>.

which to choose the service that meets their needs for speaking and gathering information.

Content moderation also allows hosts to remove content from their platforms that the host determines is detrimental to users or that users do not wish to see.

Many popular social media companies prohibit hate speech,<sup>17</sup> disinformation,<sup>18</sup> harassment,<sup>19</sup> promotion of suicide and self-injury,<sup>20</sup> and other content that the host

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<sup>17</sup> See, e.g., 12. *Hate Speech*, Facebook (last visited July 23, 2021), [https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech); *Hateful Conduct Policy*, Twitter (last visited July 23, 2021), <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>; *Hate Speech Policy*, YouTube (last visited July 23, 2021), [https://support.google.com/youtube/answer/2801939?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/2801939?hl=en&ref_topic=9282436).

<sup>18</sup> See, e.g., *Integrity and Authenticity*, Facebook (last visited July 23, 2021), [https://www.facebook.com/communitystandards/integrity\\_authenticity](https://www.facebook.com/communitystandards/integrity_authenticity); *Synthetic and Manipulated Media Policy*, Twitter (last visited July 23, 2021), <https://help.twitter.com/en/rules-and-policies/manipulated-media>; *Misinformation Policies*, YouTube (last visited July 23, 2021), [https://support.google.com/youtube/answer/10834785?hl=en&ref\\_topic=10833358](https://support.google.com/youtube/answer/10834785?hl=en&ref_topic=10833358)

<sup>19</sup> See, e.g., 9. *Bullying and Harassment*, Facebook (last visited July 23, 2021), <https://www.facebook.com/communitystandards/bullying>; *Abusive Behavior*, Twitter (last visited July 23, 2021), <https://help.twitter.com/en/rules-and-policies/abusive-behavior>; *Harassment & Cyberbullying Policies*, YouTube (last visited July 23, 2021), [https://support.google.com/youtube/answer/2802268?hl=en&ref\\_topic=9282436](https://support.google.com/youtube/answer/2802268?hl=en&ref_topic=9282436).

<sup>20</sup> See, e.g., 6. *Suicide and Self-Injury*, Facebook (last visited July 23, 2021), [https://www.facebook.com/communitystandards/suicide\\_self\\_injury\\_violence](https://www.facebook.com/communitystandards/suicide_self_injury_violence); *Suicide and Self-Harm Policy*, Twitter (last visited July 23, 2021), <https://help.twitter.com/en/rules-and-policies/glorifying-self-harm>; *Suicide & Self-*

believes are not in users' best interests or that users do not want. A host of a service aimed at particular audiences, such as children, may moderate specific content that the host determines is not appropriate for them.<sup>21</sup> Again, this benefits users by allowing them to choose services where they will not be exposed to content that they find undesirable.

Hosts that engage in content moderation sometimes have significant internal discussion and debate about content moderation policies and decisions. Hosts that are creating or updating a content policy may discuss the policy with staff internally to seek feedback, conduct internal and external research,<sup>22</sup> and draft

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*Injury Policy*, YouTube (last visited July 23, 2021), [https://support.google.com/youtube/answer/2802245?hl=en&ref\\_topic=9282679](https://support.google.com/youtube/answer/2802245?hl=en&ref_topic=9282679).

<sup>21</sup> See, e.g., *Community Guidelines*, Kinzoo (last visited July 23, 2021), <https://kinzoo.com/community-guidelines/> (prohibiting the sharing of “anything that’s not appropriate for children” including “bad words or external links” on a private messaging app for kids and parents); The YouTube Team, *Better Protecting Kids’ Privacy on YouTube*, YouTube (Jan. 6, 2020), <https://blog.youtube/news-and-events/better-protecting-kids-privacy-on-YouTube> (announcing that YouTube would disable comments on content made for children).

<sup>22</sup> Some hosts have formed councils of 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/>; *Trust and Safety Council*, Twitter (last visited July 23, 2021), <https://about.twitter.com/en/our-priorities/healthy-conversations/trust-and-safety-council>.

multiple potential policies. *See, e.g., The New Governors, supra*, at 1631–35; *Introducing Our New Hateful Conduct & Harassment Policy*, Twitch (Dec. 9, 2020)<sup>23</sup> (describing the “months-long process” of revising its content policy, which “incorporate[ed] extensive research within our community and consultation with industry experts across fields” as well as “review of past cases”). Hosts may also discuss specific content moderation decisions internally, particularly when they are difficult or involve high-profile individuals or events. For example, *The New York Times* recently reported about the debate within Facebook in the days after a doctored video of House Speaker Nancy Pelosi that made it seem as if Rep. Pelosi were slurring her words went viral on the platform. Sheera Frenkel & Cecilia Kang, *Mark Zuckerberg and Sheryl Sandberg’s Partnership Did Not Survive Trump*, N.Y. Times (July 8, 2021).<sup>24</sup> Facebook executives and employees considered and debated whether to remove the video—including “tortured exercises in ‘what-if’ arguments” such as whether the video could be considered a parody—before ultimately deciding to allow it to remain. *Id.*

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<sup>23</sup> <https://blog.twitch.tv/en/2020/12/09/introducing-our-new-hateful-conduct-harassment-policy/>.

<sup>24</sup> <https://www.nytimes.com/2021/07/08/business/mark-zuckerberg-sheryl-sandberg-facebook.html>.

Thoughtful development and application of content moderation policies are essential to freedom of expression online because content moderation can have substantial consequences for individual speakers and the public's ability to access information. Civil society organizations, including amici, have criticized hosts when they engage in content moderation in ways that harm online free expression and other human rights. *See, e.g.*, Emma Llansó & Mallory Knodel, *CDT Joins Article 19, Other Human Rights Orgs in Urging Instagram for Transparency About Content Moderation Changes in India*, Ctr. for Democracy & Tech. (May 21, 2021);<sup>25</sup> Vera Eidelman, Adeline Lee, & Fikayo Walter-Johnson, *Time and Again, Social Media Giants Get Content Moderation Wrong: Silencing Speech about Al-Aqsa Mosque is Just the Latest Example*, ACLU (May 17, 2021);<sup>26</sup> Zoom, *Facebook and YouTube Threaten Academic Freedom*, Nat'l Coalition Against Censorship (Updated Apr. 14, 2021);<sup>27</sup> Daisy Soderberg-Rivkin, *When it Comes to Content Moderation, We've Been Focusing on the Wrong Type of Bias*, R Street

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<sup>25</sup> <https://cdt.org/insights/cdt-joins-article-19-other-human-rights-orgs-in-urging-instagram-for-transparency-about-content-moderation-changes-in-india/>.

<sup>26</sup> <https://www.aclu.org/news/free-speech/time-and-again-social-media-giants-get-content-moderation-wrong-silencing-speech-about-al-aqsa-mosque-is-just-the-latest-example/>.

<sup>27</sup> <https://ncac.org/news/zoom-facebook-youtube-censorship>.

Institute (Dec. 5, 2019);<sup>28</sup> Jillian C. York & Elliot Harmon, *Innocent Users Have the Most to Lose in the Rush to Address Extremist Speech Online*, Elec. Frontier Found. (Sept. 20, 2019).<sup>29</sup> Ideally, hosts engage in careful, thorough, and frank internal discussions of content moderation decisions in order to develop content policies and enforce them in a manner that promotes free expression and respects human rights. With many hosts already struggling to live up to this ideal, it is critical that chilling government investigations not deter hosts from engaging in thoughtful internal deliberations about content moderation.

- B. Retaliatory government investigations like the one at issue here chill content moderation, particularly by smaller providers, from the moment they are initiated, to the detriment of the public.

A 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—sends a strong message of disapproval and threat of legal consequences for the host if it continues its disfavored content moderation actions. This message chills a host

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<sup>28</sup> <https://www.rstreet.org/2019/12/05/when-it-comes-to-content-moderation-weve-been-focusing-on-the-wrong-type-of-bias/>.

<sup>29</sup> <https://www.eff.org/deeplinks/2019/09/innocent-users-have-most-lose-rush-address-extremist-speech-online>.

from continuing to make content moderation decisions, which are protected by the First Amendment, from the moment the investigation is announced and the CID is issued. Accordingly, a pre-enforcement challenge to such a CID is ripe. The district court's holding to the contrary was wrong as a matter of law and, if permitted to stand, will be to the detriment of internet users and the public.

State attorneys general have exceptional civil investigatory and enforcement powers. *See, e.g.*, Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 Calif. L. Rev. 885, 890 (2007) (explaining that “litigation as a method to advance policy interests is a tool that rests almost exclusively in the hands of the [state] attorney general”); Paul Nolette, *State Attorneys General are More and More Powerful. Is That a Problem?*, Wash. Post (Mar. 5, 2015).<sup>30</sup> For example, the Texas Deceptive Trade Practices-Consumer Protection Act (“DTPA”)—the statute under which the CID at issue in this case was issued—empowers the Consumer Protection Division of the Texas Attorney General’s Office to seek a civil penalty of up to \$10,000 per violation for acts declared unlawful under the subchapter, Tex. Bus. & Com. Code

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<sup>30</sup> <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/05/state-attorneys-general-are-more-and-more-powerful-is-that-a-problem/>.



§ 17.47(c)(1), as well as reasonable attorney’s fees and costs incurred in actions enforcing the law in which penalties are imposed, Tex. Gov’t Code § 402.006(c). When considering the thousands or even millions of content moderation decisions that hosts may make in a single day, *see, e.g.*, Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 Yale L.J. 2418, 2492 (2020)—each of which the Consumer Protection Division may argue can be an individual violation of the DTPA—even the most well-resourced host targeted by a CID under the DTPA may fear crippling civil penalties as a result of an enforcement action.

Hosts targeted by a CID as part of a state attorney general’s retaliatory investigation will fear harsh legal consequences like these 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. Thus, even before the CID is enforced, a host will be chilled from continuing to engage in those practices and 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. As a result, the host may forego making certain content moderation decisions or updates to its content policies entirely after the CID is issued but before it is enforced.

That result can harm users of hosts' services and the public. Users and the general public rely on hosts to regularly update their content policies and moderate content that may negatively impact society at large. 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.,* Vijaya Gadde & Matt Derella, *An Update On Our Continuity Strategy During COVID-19*, Twitter (Mar. 16, 2020);<sup>31</sup> Craig Silverman, *Pinterest*

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<sup>31</sup> [https://blog.twitter.com/en\\_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19](https://blog.twitter.com/en_us/topics/company/2020/An-update-on-our-continuity-strategy-during-COVID-19).

*is Blocking Coronavirus Searches, and People are Very Happy About It*, BuzzFeed (Mar. 13, 2020).<sup>32</sup> 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, *Our Response to the Violence in Washington*, Facebook (Jan. 6, 2021);<sup>33</sup> Twitter Safety, *An Update Following the Riots in Washington, DC*, Twitter (Jan. 12, 2021).<sup>34</sup>

These decisions, which are 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. 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 clear that government officials should 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.*

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<sup>32</sup> <https://www.buzzfeednews.com/article/craigsilverman/pinterest-is-blocking-coronavirus-searches-and-people-are>.

<sup>33</sup> <https://about.fb.com/news/2021/01/responding-to-the-violence-in-washington-dc/>.

<sup>34</sup> [https://blog.twitter.com/en\\_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--](https://blog.twitter.com/en_us/topics/company/2021/protecting--the-conversation-following-the-riots-in-washington--).

*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”).

Moreover, retaliatory CIDs may have particularly strong chilling effects on smaller hosts and startup companies even pre-enforcement, because of CIDs’ immediate and burdensome financial impact. A 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.* Dkt. No. 5-1 (“Williams Decl.”) ¶¶ 8, 10. 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)<sup>35</sup> (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 July

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<sup>35</sup> <https://www.vanityfair.com/news/2018/09/how-steve-huffman-and-alexis-ohanian-built-reddit>.

23, 2021)<sup>36</sup> (explaining that potential investors will consider a startup’s “outstanding legal issues” when conducting due diligence reviews). Requiring these hosts to wait for a potentially lengthy enforcement action to resolve a challenge to a retaliatory investigation may bankrupt or otherwise drive them out of the market. That a retaliatory CID may prove particularly burdensome to smaller or newer services may make these companies especially tempting targets to a government official who disagrees with their content moderation decisions. At the same time, the ruinous impact of a retaliatory CID on smaller and startup companies would ultimately harm the public by decreasing competition and the diversity of hosts of user-generated content.

In short, the chilling effect of a CID issued as part of a retaliatory investigation by a state attorney general into a host’s content moderation practices arises even before the CID is enforced. The ripeness inquiry asks whether an “injury is speculative and may never occur.” *Wolfson*, 616 F.3d at 1057. When, as here, the injury is a chilling effect from a retaliatory investigation and CID, the

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<sup>36</sup> <https://www.uschamber.com/co/run/business-financing/venture-capital-due-diligence-checklist>.

injury—and the attendant harm to users and the public interest—occurs when the investigation is announced and the CID is issued.

**III. The Investigation Here Is Part of a Growing Global Trend of Governments Using Police 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 global threat to online free expression posed by governments’ increasing use of investigations, threats of criminal and civil penalties, and blocking of hosts in response to content moderation decisions with which they disagree. Foreign regimes use these tactics to strong-arm hosts into censoring user-generated content, contrary to free expression principles. The Court must protect against the spread of this tactic to the United States.

Retaliatory investigations into hosts are not uncommon abroad. Recently, for example, Twitter labeled a tweet by a member of the ruling party in India as “manipulated media,” after an Indian fact-checking organization debunked some of the information in the tweet. Kim Lyons, *Police in India Raid Twitter Offices in Probe of Tweets With ‘Manipulated Media’ Label*, Verge (May 24, 2021).<sup>37</sup> In

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<sup>37</sup> <https://www.theverge.com/2021/5/24/22451271/police-india-raid-twitter-tweets-government-manipulated-media>.

response, police in India raided two of Twitter's offices in the country as part of an investigation into Twitter's decision to apply the label. *Id.* The previous month, the Indian government had threatened to jail employees of Twitter and other social media and messaging companies unless they removed content about protests by farmers in the country. *Id.* The threat was effective; Twitter "permanently blocked over 500 accounts and moved an unspecified number of others from view within India." Karan Deep Singh, *Twitter Blocks Accounts in India as Modi Pressures Social Media*, N.Y. Times (Feb. 10, 2021).<sup>38</sup>

In Russia, the internet regulator Roskomnadzor "recently ramped up its demands for the Silicon Valley companies to remove online content that it deems illegal or restore pro-Kremlin material that had been blocked." Adam Satariano & Oleg Matsnev, *Russia Raises Heat on Twitter, Google and Facebook in Online Crackdown*, N.Y. Times (May 26, 2021).<sup>39</sup> "Russia's antitrust regulator is also investigating Google over YouTube's policies for blocking videos." *Id.* The crackdown followed the use of social media platforms to mobilize protestors during the January demonstrations in support of Russian opposition leader Alexei

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<sup>38</sup> <https://www.nytimes.com/2021/02/10/technology/india-twitter.html>.

<sup>39</sup> <https://www.nytimes.com/2021/05/26/technology/russia-twitter-google-facebook-censorship.html>.

Navalny. *Id.* Roskomnadzor has warned companies that if they do not comply with removal demands, “they face fines or access to their products may be throttled.” *Id.*

Similarly, governments in China, Nigeria, Turkey, and Vietnam have all recently blocked or punished hosts for making content moderation decisions with which they disagree. See Paige Leskin, *Here are All the Major US Tech Companies Blocked Behind China’s ‘Great Firewall’*, Bus. Insider (Oct. 10, 2019);<sup>40</sup> Ruth Maclean, *Nigeria Bans Twitter After President’s Tweet is Deleted*, N.Y. Times (June 5, 2021);<sup>41</sup> Omer Benjakob, *Revealed: The Four Articles That Got Wikipedia Banned in Turkey*, Haaretz (Apr. 26, 2018);<sup>42</sup> James Pearson, *Exclusive: Vietnam Threatens to Shut Down Facebook Over Censorship Requests – Source*, Reuters (Nov. 19, 2020).<sup>43</sup>

In the United States, both Republican and Democratic state lawmakers have adopted or proposed laws that would either prohibit or require hosts to make

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<sup>40</sup> <https://www.businessinsider.com/major-us-tech-companies-blocked-from-operating-in-china-2019-5>.

<sup>41</sup> <https://www.nytimes.com/2021/06/05/world/africa/nigeria-twitter-president.html>.

<sup>42</sup> <https://www.haaretz.com/middle-east-news/turkey/revealed-the-four-articles-that-got-wikipedia-banned-in-turkey-1.6032214>.

<sup>43</sup> <https://www.reuters.com/article/vietnam-facebook-shutdown/exclusive-vietnam-threatens-to-shut-down-facebook-over-censorship-requests-source-idUSKBN28007K>.



certain content moderation decisions, both of which the First Amendment forbids. *See, e.g.,* Dara Kam, *Federal Judge Blocks Florida’s New Social Media Law Targeting ‘Big Tech’ Companies*, Miami Herald (June 30, 2021);<sup>44</sup> 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).<sup>45</sup> AG Paxton’s retaliatory investigation of Twitter, while not as severe as the methods employed by repressive regimes around the world to pressure and intimidate hosts, is yet another step down the path of government interference with online free expression. The Court must ensure such interference does not find a foothold in the United States.

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<sup>44</sup> <https://www.miamiherald.com/news/politics-government/state-politics/article252492548.html>.

<sup>45</sup> <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/>.

## CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to reverse the district court's order.

Respectfully submitted,

*/s/ Caitlin Vogus*

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Washington, D.C.

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FOR THE NINTH CIRCUIT

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