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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14

15 **TWITTER, INC.**

16 **Plaintiff,**

17
18 **v.**

19 **KEN PAXTON,**
20 **in his official capacity as Attorney**
21 **General of Texas,**

22 **Defendant.**

Case No. 3:21-CV-01644

**BRIEF OF THE REPORTERS
COMMITTEE FOR FREEDOM OF
THE PRESS, CENTER FOR
DEMOCRACY AND
TECHNOLOGY, ELECTRONIC
FRONTIER FOUNDATION, MEDIA
LAW RESOURCE CENTER, INC.,
AND PEN AMERICA AS AMICI
CURIAE IN SUPPORT OF
PLAINTIFF**

Judge: Maxine Chesney

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3 **Cases**

4 *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987)..... 15

5 *Autohaus, Inc. v. Aguilar*, 794 S.W.2d 459 (Tex. App. 1990)..... 14

6 *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963)..... 15

7 *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988) 4

8 *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973)..... 5

9 *Connick v. Myers*, 461 U.S. 138 (1983)..... 4

10 *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646, 2017 WL 2210029

11 (M.D. Fla. Feb. 8, 2017) 9

12 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) .9, 10

13 *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433 (S.D.N.Y. 2014)..... 5, 8, 9, 10

14 *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) 9

15 *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622 (D. Del. 2007) 10

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

17 *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575 (1983)

18 15

19 *Murphy v. Twitter, Inc.*, 274 Cal. Rptr. 3d 360 (Cal. Ct. App. 2021) 14

20 *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963)..... 10

21 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)..... 10

22 *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971)..... 7

23 *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017)..... 8

24 *Prager Univ. v. Google LLC*, 951 F.3d 991 (9th Cir. 2020)..... 14

25 *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)..... 9

26 *Reno v. ACLU*, 521 U.S. 844 (1997)..... 8

27 *Search King, Inc. v. Google Tech., Inc.*, No. CIV-02-1457, 2003 WL 21464568

28 (W.D. Okla. May 27, 2003) 9

Snyder v. Phelps, 562 U.S. 443 (2011) 4

Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994) 8

1 *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748
 2 (1976)..... 11

3 **Statutes**

4 15 U.S.C. § 1125 14

5 15 U.S.C. § 45 13

6 47 U.S.C. § 230 6

7 **Other Authorities**

8 Anthony Lewis, *Nixon and a Right of Reply*, N.Y. Times, Mar. 24, 1974,
 9 <https://perma.cc/2W2J-AJ65> 7

10 Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020) 13

11 Leah Nysten et al., *Trump Pressures Head of Consumer Agency to Bend on Social
 Media Crackdown*, Politico (Aug. 21, 2020), <https://perma.cc/7FLH-WDYP> 13

12 Lucas A. Powe, Jr., *The Fourth Estate and the Constitution* (1992)..... 6, 7

13 News Release, AG Paxton Issues Civil Investigative Demands to Five Leading Tech
 14 Companies Regarding Discriminatory and Biased Policies and Practices (Jan. 13,
 2021), <https://perma.cc/YWJ2-3DFQ>..... 12

15 News Release, First Assistant AG Jeff Mateer to FTC: Big Tech Companies Must
 16 Comply with State Deceptive Trade Practices Law (June 12, 2019),
 17 <https://perma.cc/D83P-QF68> 12

18 Office of the Att’y Gen., Consumer Prot. Div., Civil Investigative Demand (Jan. 13,
 19 2021), [https://perma.cc/
 4FNL-Z47B](https://perma.cc/4FNL-Z47B)..... 13

20 Zechariah Chafee, *Government and Mass Communications* (1947) 8

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INTEREST OF THE AMICI CURIAE

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2 The Reporters Committee for Freedom of the Press (the “Reporters
3 Committee”) is an unincorporated non-profit association. The Reporters Committee
4 was founded by leading journalists and media lawyers in 1970 when the nation’s
5 news media faced an unprecedented wave of government subpoenas forcing reporters
6 to name confidential sources. Today, its attorneys provide *pro bono* legal
7 representation, amicus curiae support, and other legal resources to protect First
8 Amendment freedoms and the newsgathering rights of journalists.
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10

11
12 Center for Democracy & Technology (“CDT”) is a non-profit public interest
13 organization. For more than 25 years, CDT has represented the public’s interest in an
14 open, decentralized internet and worked to ensure that the constitutional and
15 democratic values of free expression and privacy are protected in the digital age.
16 CDT regularly advocates in support of the First Amendment and protections for
17 online speech before legislatures, regulatory agencies, and courts.
18
19

20 The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported
21 civil liberties organization working to protect digital rights. Founded in 1990 and
22 based in San Francisco, California, EFF has more than 37,000 active donors and
23 dues-paying members. EFF represents the interests of technology users in both court
24 cases and broader policy debates surrounding the application of law in the digital age.
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