

FOR PUBLICATION

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

TWITTER, INC., <i>Plaintiff-Appellant,</i> v. KEN PAXTON, in his official capacity as Attorney General of Texas, <i>Defendant-Appellee.</i>
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No. 21-15869

D.C. No.
3:21-cv-01644-
MMC

OPINION

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted January 10, 2022
San Francisco, California

Filed March 2, 2022

Before: Mark J. Bennett, Ryan D. Nelson, and
Patrick J. Bumatay, Circuit Judges.

Opinion by Judge R. Nelson

SUMMARY*

Civil Rights

The panel affirmed the district court's order dismissing, on ripeness grounds, an action brought by Twitter against Ken Paxton, the Attorney General of Texas, in his official capacity, alleging First Amendment retaliation.

After the events at the U.S. Capitol on January 6, 2021, Twitter banned President Donald Trump for life. Soon after Twitter announced the ban, the Texas Office of the Attorney General (OAG) served Twitter with a Civil Investigative Demand (CID) asking it to produce various documents relating to its content moderation decisions. Twitter sued Paxton, in his official capacity, in the Northern District of California, arguing that the CID was government retaliation for speech protected by the First Amendment. Twitter asked the district court to enjoin Paxton from enforcing the CID and from continuing his investigation, and to declare the investigation unconstitutional.

The panel held that this case was not prudentially ripe. The issues were not yet fit for judicial decision because OAG has not yet made an allegation against Twitter, because the facts were not yet developed, and because Twitter need not comply with the CID, could challenge it if it was enforced, and could have challenged the CID in Texas state court, Tex. Bus. & Com. Code § 17.61(g). While Twitter could suffer hardship from withholding court consideration, adjudicating this case now would require determining whether Twitter

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

has violated Texas's unfair trade practices law before OAG has a chance to complete its investigation. Any hardship to Twitter from the alleged chill of its First Amendment rights was insufficient to overcome the uncertainty of the legal issue presented in the case in its current posture.

COUNSEL

Peter G. Neiman (argued), Alex W. Miller, and Rishita Apsani, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York; Mark D. Flanagan, Wilmer Cutler Pickering Hale and Dorr LLP, Palo Alto, California; Patrick J. Carome, Ari Holtzblatt, Anuradha Sivaram, and Susan Pelletier, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C.; for Plaintiff-Appellant.

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Lanora C. Pettit (argued), Principal Deputy Solicitor General; Benjamin D. Wilson, Deputy Solicitor General; Judd E. Stone II, Solicitor General; William T. Thompson, Deputy Chief, Special Litigation Unit; Patrick Sweeten, Chief, Special Litigation Unit; Brent Webster, First Assistant Attorney General; Ken Paxton, Attorney General; Office of the Attorney General, Austin, Texas; for Defendant-Appellee.

Katie Townsend, Bruce D. Brown, Gabe Rottman, and Maily Fidler, Reporters Committee for Freedom of the Press, Washington, D.C., for Amici Curiae Reporters Committee for Freedom of the Press and Media Law Resource Center.

Caitlin Vogus, Samir Jain, and Emma Llansó, Center for Democracy & Technology, Washington, D.C., for Amici Curiae Center for Democracy & Technology, Electronic Frontier Foundation, Media Coalition Foundation Inc., National Coalition Against Censorship, Pen America, and R Street Institute.

OPINION

R. NELSON, Circuit Judge:

After the events at the U.S. Capitol on January 6, 2021, Twitter banned President Donald Trump for life. Soon after Twitter announced the ban, the Texas Office of the Attorney General (OAG) served Twitter with a Civil Investigative Demand (CID) asking it to produce various documents relating to its content moderation decisions. Twitter sued Ken Paxton, the Attorney General of Texas, in his official capacity, arguing that the CID was government retaliation for speech protected by the First Amendment. The district court dismissed the case as not ripe. We affirm.

I

A

OAG says that it has been investigating Twitter’s content-moderation decisions in response to citizen complaints since 2018. Twitter executives have said publicly that Twitter does not moderate content based on political viewpoint. After Twitter banned President Trump for life, Paxton tweeted that Twitter (along with Facebook) was “closing conservative accounts,” and that it and other companies stood “ready/willing to be the left’s Chinese-style

thought police.” He vowed that “[a]s AG, I will fight them with all I’ve got.”

A few days later OAG served Twitter with a CID, requiring it to produce various documents related to its content moderation decisions. Paxton says that OAG “does not seek to investigate the content-moderation decisions that Twitter makes—and could not do so under [Texas’s unfair and deceptive trade practices law]—but rather is conducting an investigation into whether Twitter truthfully represents its moderation policies to Texas consumers.” But Twitter paints this rationale as a pretext for Paxton’s unlawful retaliation.

B

After some negotiation, rather than respond to the CID or wait for OAG to move to enforce it in Texas state court, Twitter instead sued Paxton in the Northern District of California. It alleged that both the act of sending the CID and the entire investigation were unlawful retaliation for its protected speech. Claiming under 42 U.S.C. § 1983 that Paxton violated its First Amendment rights, Twitter asked the district court to enjoin Paxton from enforcing the CID and from continuing his investigation, and to declare the investigation unconstitutional. In Twitter’s view, its content moderation decisions are protected speech because it is a publisher, and it has a First Amendment right to choose what content to publish. Pointing to Paxton’s public comments, Twitter argues that the CID was served in retaliation for its protected speech and that it chills Twitter’s exercise of its First Amendment rights.

In response, Paxton contested personal jurisdiction, venue, ripeness, and whether Twitter had stated a claim. On ripeness, he argued that under *Reisman v. Caplin*, 375 U.S.

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