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 for the Northern District of California, No. 3:21-cv-1644-MMC
District Judge Maxine M. Chesney

BRIEF OF NETCHOICE, LLC, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CHAMBER OF PROGRESS, AND TECHNET AS *AMICI CURIAE* IN SUPPORT OF TWITTER'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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April 11, 2022

RULE 26.1 DISCLOSURE STATEMENT

NetChoice LLC ("NetChoice") is a trade association operating as a 501(c)(6) nonprofit, nonstock corporation organized under the laws of Washington, D.C. NetChoice has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Computer & Communications Industry Association ("CCIA") is a trade association operating as a 501(c)(6) nonprofit, nonstock corporation organized under the laws of Virginia. CCIA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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TechNet is a nonprofit, nonstock organization incorporated in the District of Columbia. TechNet has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICI CURIAE* [1]

Amici are leading organizations that represent a broad range of online service providers, including e-commerce businesses, social media platforms, and digital marketplaces. They share the goal of promoting and protecting free speech and free enterprise on the Internet. They have an interest in this appeal, which arises out of a retaliatory investigation into Twitter's "content moderation" practices.

Content moderation is crucially important to *amici*'s members. Although it can take many forms, distilled to its essence, content moderation enables online service providers to express their values and policy judgments by making decisions about what sorts of user-generated content they choose to host, including screening inappropriate third-party content inconsistent with the user experience they have cultivated. It involves the exercise of editorial judgment and is thus protected by the First Amendment. And it confers significant benefits on Internet users and the public at large, as *amici* have witnessed firsthand.

Participating *amici* are as follows:

[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel have made monetary contributions intended to fund the preparation or submission of this brief. Petitioner Twitter (among numerous other online service providers) is a member of each of NetChoice and CCIA and is a corporate partner of Chamber of Progress.

NetChoice, LLC ("NetChoice"). NetChoice is a national trade association of e-commerce and online businesses that share the goal of promoting convenience, consumer choice, and commerce on the Internet. Furthering these goals, NetChoice is actively involved in litigation to vindicate the First Amendment rights of online services to moderate content posted on their platforms free from unwarranted government interference. *See, e.g.*, *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082 (N.D. Fla. 2021), *appeal pending*, No. 21-12355 (11th Cir.); *NetChoice, LLC v. Paxton*, No. 1:21-cv-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021), *appeal pending*, No. 21-51178 (5th Cir.).

Computer & Communications Industry Association ("CCIA"). CCIA is an international, not-for-profit membership association representing a broad cross-section of companies in the computer, Internet, information technology, and telecommunications industries. For fifty years, CCIA has promoted open markets, open systems, and open networks. CCIA has joined NetChoice in bringing the cases described above. A list of CCIA members is available at https://www.ccianet.org/members.

Chamber of Progress. Chamber of Progress is a technology industry coalition devoted to a progressive society, economy, workforce, and consumer climate. It backs public policies that will build a fairer, more inclusive country in which all people benefit from technological leaps. It seeks to protect Internet

freedom and free speech, promote innovation and economic growth, and empower customers and users.

TechNet. TechNet is a national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and state levels. TechNet's diverse membership includes dynamic American companies ranging from startups to the most iconic companies, and represents over four million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance. TechNet's full membership is available at http://technet.org/membership/members.

INTRODUCTION AND SUMMARY OF ARGUMENT

If allowed to stand, the Panel Opinion will undermine constitutional protections for the vital functions that online services perform every day when they moderate hundreds of millions of user-generated postings. A retaliatory investigation into content-moderation practices targets editorial judgment and core expressive activity protected by the First Amendment. The resulting, ongoing constitutional harm calls for immediate correction under well-established law, including Supreme Court and Ninth Circuit precedent, which the Panel Opinion flouts. The Panel erroneously concluded that Twitter's challenge to the Texas Attorney General's retaliatory investigation should be dismissed on "prudential

ripeness" grounds, but the Panel mischaracterized the relevant First Amendment concerns.

Amici begin by explaining how content moderation is highly beneficial to consumers and also fully protected by the First Amendment. Next, *amici* identify ways in which the Panel Opinion conflicts with relevant precedent and undermines crucial First Amendment protections for content moderation. Finally, *amici* explain that the Panel Opinion and the Texas Attorney General's retaliatory investigation will have chilling effects on constitutionally protected editorial judgments, which ultimately will harm Internet users and the public at large.

ARGUMENT

I. Content Moderation Serves Vital Functions and Is a Constitutionally Protected Expression of Editorial Judgment

Amici represent a broad range of online service providers, including e-commerce businesses, website hosts, and social media platforms. Those service providers in turn disseminate according to their policies a wide assortment of user-generated content (*e.g.*, Tweets sent by Twitter's users). These providers enable their users to upload material that is creative, humorous, informative, commercial, educational, or politically engaging. Unfortunately, some of that material also can be dangerous, harmful, or illegal. Because the openness of the Internet is a magnet for some of the best and worst aspects of humanity, any online service that allows

users to upload material will find some of its users attempting to post highly offensive, dangerous, illegal, or simply unwanted content.

That is why *amici*'s members—almost all of which are online service providers that host user-generated content—have standards and policies setting out what content and activities are permitted and prohibited on their services. These editorial policies and choices are valuable exercises of rights guaranteed by the First Amendment.

A. Content Moderation Is an Exercise of Editorial Discretion that Reflects Online Service Providers' Values and Conveys Messages About the Platforms and the Communities They Seek to Foster

Amici's members devote enormous amounts of time, resources, and personnel to engaging in content moderation aimed at "exercis[ing] editorial control over speech and speakers on their properties or platforms." *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1932 (2019). This expressive conduct is no less deserving of First Amendment protection because it involves the Internet, *Reno v. Am. Civ. Liberties Union*, 521 U.S. 844, 870 (1997), or includes moderating third-party content, *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974). Content moderation is a vital tool for service providers to address content that is inconsistent with the standards the providers set to express their own values and to meet the needs of their community of users. Online service providers engage in protected editorial activity when they disseminate, curate, select, organize, remove, or otherwise

moderate content. These editorial judgments convey a message from the provider itself. Content moderation is thus not only an expression of editorial judgment, but also the means by which an online service expresses *itself*.

In deciding what content to present and how to present it, providers exercise editorial discretion that serves to communicate their values and community standards and to improve users' experience. This editorial discretion takes many forms, including but not limited to:

- screening for spam, malware, and viruses; images of child sexual abuse; terrorist and foreign government propaganda; and other policy violations;
- responding to reports from the public about hate speech; online harassment and cyberbullying; impersonation; posting non-consensual intimate images ("revenge pornography"); doxxing; and promotion of suicide and self-harm;
- labeling, restricting, or rating content that may not be appropriate for certain audiences, including "age-gating" to enable parental control over children's viewing (such as certain Tweets or videos on YouTube); and
- removing, demoting, or limiting the spread of content that disrupts or degrades the online experience, including disinformation, abusive language, and content that may be simply irrelevant to the service's function.

Content moderation is not only about restricting offensive or unwanted content: it is often essential to the utility and basic functionality of the services that online businesses provide. For instance, the ability of online marketplaces to prioritize and arrange content based on what users want to see has enabled online

marketplaces to thrive; conversely, the display of randomly selected user-generated content (*e.g.*, Airbnb listings that aren't responsive to what the user is looking for) would be unhelpful to consumers. Similarly, search engines and social media platforms rely heavily on their ability to curate, sequence, and prioritize information so that users are provided the information and content that they are seeking. The alternative is presenting users with an undifferentiated barrage of content that is not tailored to each (or any) user's needs.

Content moderation also is essential to the online service provider's ability to establish its community norms, including not only a safe and useful online environment, but also a distinctive user experience. *See, e.g.*, How Twitter Handles Abusive Behavior, Twitter, Inc., https://help.twitter.com/en/rules-and-policies/abusive-behavior.[2] These, too, are value judgments. For instance, choices about whether to allow pornography and user postings depicting violence reflect judgments about the type of online community each service cultivates for its users, as well as judgments about the types of content that run afoul of those community standards. Without content moderation, many online services would be flooded with

[2] *Compare* LinkedIn, *Professional Community Policies* (last visited Apr. 11, 2022), https://www.linkedin.com/legal/professional-community-policies (prohibiting use of "LinkedIn to pursue romantic connections" or "ask for romantic dates"), *with* Match.Com, *Community Guidelines* (last visited Apr. 11, 2022), https://bit.ly/35Ey0xK (welcoming "single adults seeking one-on-one relationships").

objectionable material that makes their services unsafe and unappealing to their users—as well as to advertisers and others that make their business models viable. So online service providers must be able to adopt (and adapt) policies that allow them to provide useful services that are responsive to users' interests and cultivate a safe and accessible community for those users.

B. Courts Recognize that Editorial Judgment Exercised Through Content Moderation Is Protected by the First Amendment

A core aspect of the services that *amici*'s members provide involves exercising editorial judgment that is protected from government interference by the First Amendment. That conclusion is confirmed both by recent case law addressing content moderation by online services and longstanding precedent addressing editorial judgment. The Panel Opinion is at odds with both.

Last year, federal district courts in Florida and Texas preliminarily enjoined state laws that violate the First Amendment by interfering with content-moderation practices—a constitutionally protected expression of editorial judgment. *NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1084 (N.D. Fla. 2021), *appeal pending*, No. 21-12355 (11th Cir.); *NetChoice, LLC v. Paxton*, No. 1:21-cv-840-RP, 2021 WL 5755120, at *1 (W.D. Tex. Dec. 1, 2021), *appeal pending*, No. 21-51178 (5th Cir.). As those courts recognized, "[s]ocial media platforms have a First Amendment right to moderate content disseminated on their platforms." *Paxton*, 2021 WL 5755120, at *7; *see Moody*, 546 F. Supp. 3d at 1093 (holding that laws that intrude on the

editorial judgment of social media platforms "are subject to First Amendment scrutiny").[3]

These decisions are also consistent with U.S. Supreme Court precedent addressing the First Amendment's application to the Internet and to editorial activity. First, the Court has recognized that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet. *Reno*, 521 U.S. at 870. Because the "vast democratic forums of the Internet" are one of the "most important places … for the exchange of views," *Packingham v. North Carolina,* 137 S. Ct. 1730, 1735 (2017), online services that engage in expressive conduct—and "[s]ocial media in particular," *id.*—are entitled to First Amendment protections afforded to other forms of media.

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[3] *See also, e.g.*, *O'Handley v. Padilla*, No. 21-cv-07063, 2022 WL 93625, at *14 (N.D. Cal. Jan. 10, 2022) ("Like a newspaper or a news network, Twitter makes decisions about what content to include, exclude, moderate, filter, label, restrict, or promote, and those decisions are protected by the First Amendment."); *Davison v. Facebook, Inc.*, 370 F. Supp. 3d 621, 629 (E.D. Va. 2019) ("Facebook has, as a private entity, the right to regulate the content of its platforms as it sees fit."), *aff'd*, 774 F. App'x 162 (4th Cir. 2019); *e-Ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017) ("Google's actions in formulating rankings for its search engine and in determining whether certain websites are contrary to Google's guidelines and thereby subject to removal are the same as decisions by a newspaper editor regarding which content to publish…. The First Amendment protects these decisions[.]"); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 437, 440 (S.D.N.Y. 2014) ("[T]he Government may not interfere with the editorial judgments of private speakers on issues of public concern" and "there can be no disagreement" that an Internet search engine "is engaged in and transmits speech" and may "'exercise editorial discretion' over its search results"); *La'Tiejira v. Facebook*, 272 F. Supp. 3d 981, 991-92 (S.D. Tex. 2017) (similar).

Moreover, the Supreme Court has long recognized that First Amendment freedom of speech encompasses the freedom to select, edit, present, and disseminate speech. Writing in the context of a newspaper editorial page, the Court explained that "[t]he choice of material …, the decisions made as to limitations on the size and content …, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258; *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 569 (1995) ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices"). These same protections necessarily apply to the editorial judgments made by online service providers, because First Amendment protections "do not vary when a new and different medium for communication appears." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 790 (2011); *see also Moody*, 546 F. Supp. 3d at 1091 ("[T]he First Amendment applies to speech over the internet, just as it applies to more traditional forms of communication.").

Nor do these protections lose any force by the blend of human elements and automated elements that content moderation requires: the massive volume of user postings on certain platforms requires many providers to use human review coupled with artificial intelligence and algorithms to effectuate these policy and value

judgments.[4] As courts have found, the technology necessary to manage content and exercise editorial judgment requires the same protection as the newspaper editor: the constitutional guarantees (and limits) must fit modern communication. *See, e.g.*, *Paxton*, 2021 WL 5755120, at *8; *see supra* n.3.

II. The Panel Opinion Undermines First Amendment Protection for Content Moderation

Turning to the facts here, this case began as a simple exercise of content moderation—albeit one involving an unusually prominent user. After January 6, 2021, Twitter posted an explicit warning that violations of its rules against glorifying violence could result in permanent suspension. When one user disregarded that policy, Twitter terminated the user's ability to post. But since the user in question was former President Trump, the Texas Attorney General promptly vowed revenge and issued a broad government subpoena. The purported basis for this investigation was to inquire into Twitter's fidelity to its content-moderation policies, but Attorney General Paxton made clear his desire to "regulate" the provider's content-moderation decisions. *See, e.g.*, Office of AG Paxton, Press Release, *AG Paxton Issues Civil Investigative Demands to Five Leading Tech Companies Regarding*

[4] For instance, in 2020, Twitter hosted nearly 400 million Tweets that use the hashtag #COVID19, more than 700 million Tweets about elections, and more than 2 billion Tweets about sports. *See Spending 2020 Together on Twitter, Insights*, Twitter, Inc. (Dec. 7, 2020), https://blog.twitter.com/en_us/topics/insights/2020/spending-2020-together-on-twitter.

Discriminatory and Biased Policies and Practices (Jan. 13, 2021), https://perma.cc/YWJ2-3DFQ ("[J]ust last week, this discriminatory action [by "Big Tech companies"] included the unprecedented step of removing and blocking President Donald Trump from online media platforms."); ER 267-274. It is difficult to imagine a stronger example of retaliatory animus and but-for causation for a First Amendment violation. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 917 (9th Cir. 2012) (plaintiff adequately alleged a First Amendment retaliation claim, which requires retaliatory animus and but-for causation, based on the issuance of "broad, invalid subpoenas" that were "sufficient to chill [plaintiff's] protected speech").

The Panel here recognized that a retaliatory investigation into content-moderation practices would violate online services' free speech rights, Op. at 10-11, but then erred in two critical respects. First, it predicated the ripeness of Twitter's claim seeking a preliminary injunction on whether the state investigation would ultimately establish a violation of the law on the merits; that is not the standard for establishing an infringement of First Amendment rights. *See* Twitter Rehearing Petition, Dkt. 57, at 6-8. Second, the Panel mischaracterized the scope of First Amendment protection for content moderation by recasting the investigation as focusing on Twitter's *descriptions* about its content-moderation policies, rather than the more obvious problem of investigating Twitter's content-moderation *decision* implementing those policies. *See* Op. at 17 ("Twitter's claim involves determining

whether it has misrepresented its content moderation policies."); *id.* at 13 (Twitter's statements can be investigated as misleading *just like the statements of any other business*.") (emphasis added).

This mischaracterization of the speech at issue creates a dangerous loophole that circumvents constitutional limitations on retaliatory government investigations and misperceives the nature of the activity being investigated. The Panel erred by finding that *descriptions* of moderation practices—such as general commitments to "fairness," "neutrality," or apolitical decision making—deserve less First Amendment protection as a form of commercial speech. And that decision runs headlong into *Prager University v. Google LLC*, 951 F.3d 991, 999-1000 (9th Cir. 2020), where another panel of this Court recognized that a service provider's statements concerning its content-moderation policies were neither commercial advertising nor promotion, but instead are non-actionable opinion.

Prager is thus consistent with Supreme Court and other precedent holding that statements of opinion are constitutionally protected, as they reflect value judgments that are not for government officials (such as Attorney General Paxton here) to second guess.[5] Subjective statements about moderation practices are not at all

[5] *See, e.g.*, *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986) ("Opinion is absolutely protected under the First Amendment.") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (non-falsifiable statements of opinion cannot form the basis for civil liability under the First

equivalent to run-of-the-mill commercial statements about the quality or performance of consumer goods, like widgets or automobiles. "What the Constitution says is that these judgments are for the individual to make"—or, in this case, private businesses—"not for the Government to decree." *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 818 (2000).

As discussed above, content-moderation policies are not merely about the business of delivering content to users; they are also the means by which the service provider communicates its values to the community and attracts (or repels) consumers. Just as it would be antithetical to First Amendment values for a state law enforcement officer to commence an intrusive investigation into whether Fox News has "misled" consumers by describing itself as "Most Trusted" or (previously) as "Fair and Balanced"—both subjective value judgments—the same applies to online services. *Reno*, 521 U.S. at 870 (there is "no basis for qualifying the level of First Amendment scrutiny that should be applied" to online communications services).

Recasting a retaliatory investigation as merely inquiring into the way an online service provider "describes" its constitutionally protected editorial judgments

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Amendment); *see also Smith & Wesson Brands, Inc. v. Att'y Gen. of New Jersey*, 27 F.4th 886, 896, 897 n.4 (3d Cir. 2022) (Matey, J., concurring) (statements that "M & P pistols are an experience you have to feel to believe" is "more aspirational than factual, premised on "precision" manufacturing, not broad claims of safety").

ignores the key constitutional concerns here. *See Houston Cmty. Coll. Sys. v. Wilson*, 2022 WL 867307, at *3 (U.S. Mar. 24, 2022) ("[T]he First Amendment prohibits government officials from subjecting individuals to 'retaliatory actions' after the fact for having engaged in protected speech") (citation omitted); *Lacey*, 693 F.3d at 917 (concluding plaintiff adequately alleged that an investigation into protected speech was retaliatory under the First Amendment). The Panel Opinion cannot escape the practical reality that investigating how online services describe their content-moderation practices necessarily entails government officials second-guessing how the services use their constitutionally protected editorial discretion to apply their own policies. The en banc Court should correct the Panel's attempt to sidestep First Amendment protections for content moderation based on that untenable and unconstitutional dichotomy.

III. The Investigation and the Panel Opinion Would Have Chilling Effects on Constitutionally Protected Editorial Judgments and Thereby Harm Internet Users

Both the Panel Opinion and the Texas Attorney General's investigation threaten to chill constitutionally protected expression by online service providers and stymie their efforts to protect their customers from objectionable third-party content.

The effect of the Panel Opinion is to green-light any (or all) of the 50 state attorneys general to conduct harassing investigations into *descriptions* of moderation

practices, even though the First Amendment would prohibit government intrusion into the constitutionally protected editorial practices themselves. This is particularly concerning in light of the threatening comments that the Texas Attorney General allegedly made in this case, including announcing his undisguised goal of chilling the provider's editorial judgment. *See supra* at 11-12.

Free speech rights "are protected not only against heavy-handed frontal attack, but also from … more subtle governmental interference." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963) (cleaned up). Thus, "governmental action [that] 'would have the *practical effect* 'of discouraging' the exercise of constitutionally protected'" speech raises First Amendment concerns. *Dole v. Serv. Emps. Union, AFL-CIO, Loc. 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (emphasis in original) (quoting *NAACP v. Alabama*, 357 U.S. 449, 461 (1958)).

The Panel Opinion does not comport with these principles. Twitter engaged in constitutionally protected speech when it suspended a user's ability to post due to violations of its policies, and allowing the Texas Attorney General to perform an end-run around that First Amendment exercise "would chill or silence a person of ordinary firmness from future First Amendment activities." *Lacey*, 693 F.3d at 916. Twitter has thus shown an actual and ongoing violation of First Amendment rights that it is entitled to vindicate in a federal forum. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (rejecting request to

avoid reaching merits of claim on "prudential" grounds and noting "our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging.") (citation and internal quotation marks omitted).[6] For these reasons, the Panel erred in brushing aside these concerns based on the theories that Twitter could simply ignore the subpoena without worrying about the consequences or that it could forgo its right to a federal forum and instead challenge the subpoena in state court (or raise First Amendment defenses to a state-court enforcement action). *See* Op. at 9-10.

The Panel Opinion will have broader adverse consequences—thus raising issues of exceptional importance—if it is allowed to stand. Unchecked by Article III courts, the threat of retaliatory investigations will have a chilling effect on online service providers. Some may self-censor by ceasing the content-moderation practices that a state attorney general disfavors (for example, the revocation of the ability to post for politicians who violate the service's policies and community standards). Others may decide to curtail their voluntary practices of describing how they moderate content, never sure how state law enforcement may interpret a stated content-moderation policy. And yet others may think twice about engaging in any

[6] "First Amendment rights … are particularly apt to be found ripe for immediate protection, because of the fear of irretrievable loss. In a wide variety of settings, courts have found First Amendment claims ripe, often commenting directly on the special need to protect against any inhibiting chill." *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) (citation omitted).

content moderation at all. *Cf. Smith & Wesson*, 27 F.4th 886 (declining to abstain from hearing constitutional retaliation claim challenging state attorney general's subpoena); *see id.* at 896 (Matey, J., concurring) ("Future firearms instructors, fearing the arrival of subpoenas, might decide it is not worth advertising their services for 'safety' training.… Perhaps publishers will be punished too, with outdoor magazines thinking twice before speaking about the content of a product.").

Any such self-censorship would harm consumers, who (as discussed above) benefit significantly from content moderation. The Texas Attorney General's retaliatory investigation, while under the guise of protecting consumers, thus would have the perverse effect of making online services more dangerous for vulnerable populations (such as victims of scams, revenge pornography, and racist harassment).

Finally, the Panel Opinion is particularly concerning because many of *amici*'s members are located within the Ninth Circuit and the Panel Opinion effectively creates a rule with national—and international—effects. Unless rehearing en banc is granted and the Panel Opinion is vacated, the adverse effects of the Opinion will expand well beyond the particular service provider involved in this case and well beyond the states covered by this Circuit. Given the high stakes and broad ramifications of the Panel's ruling, en banc review is warranted.

CONCLUSION

This Court should grant en banc review and vacate the Panel Opinion.

Dated: April 11, 2022

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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