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2 pro se

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

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9 TWITTER INC.,

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11 Plaintiff,

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14 v.

Case **3:21-cv-01644-MMC**

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***AMICUS CURIAE* BRIEF IN
SUPPORT OF DEFENDANT KEN
PAXTON, TX AG**

18

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Hon. Maxine M. Chesney

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23 KEN PAXTON, in his official
24 capacity as Attorney General
25 of TEXAS

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27 Defendant

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1 INTEREST OF THE AMICUS CURIAE

2 I am a US citizen and a resident of Texas¹. My professional career comprises
3 more than 20 years of technical and business experience in computer software
4 and networks, in a wide range of positions, from engineer to Chief Technology
5 Officer. For a short time, I worked for a social media company in California.

6 Currently, I am an editor of *defyccc.com*, publishing research and commentary
7 on the intersection of science and technology with public policy.

8 Over the last five years, I have been a victim of Twitter’s misconduct, including
9 bans and other restrictions, based on my scientific, medical, and political
10 disagreements with Twitter’s views. I believe that Twitter’s conduct is in
11 violation of the Texas Deceptive Trade Practices Act and other federal and
12 Texas laws. My interest lies in Texas Attorney General Ken Paxton being able
13 to enforce this and other laws applicable to Twitter, to protect me and other
14 Texans.

15
16 SUMMARY OF ARGUMENT

17 Twitter filed its complaint against the Texas Attorney General Ken Paxton,
18 claiming violation of its free speech rights. Twitter does not exercise its free
19 speech rights when it provides and/or operates its service. It is not Twitter’s
20 speech, but telecommunications utility or network for the speech of its users. It

¹ No counsel for a party authored this brief in whole or in part. No party, no party’s counsel, and no person other than Amicus made a monetary contribution intended to fund the preparation or submission of this brief.

1 is neither a media product, nor religious faith, nor political assembly, as is
2 shown below.

3 Twitter has marketed its service as a telecommunication utility, not an editorial
4 publication. Twitter explicitly disclaimed any possible role as a speaker, editor,
5 or publisher by maintaining publicly that it is operating under Section 230 of the
6 Telecommunications Act. If Twitter were held as a speaker, publisher, or media
7 outlet, it would have been liable for all illegal content on twitter, from defamation
8 to child sexual exploitation, to incitement to genocide. It is impossible to believe
9 that 70 million US Twitter users² consented to give Twitter virtually unlimited
10 rights to moderate their communications with each other. Obviously, most twitter
11 users created accounts and invested in them, under the belief that Twitter
12 operates and would continue to operate its service as a telecommunications
13 utility. The same applies to thousands of federal, state, and local governments,
14 which also could not give Twitter such rights under the Constitution and the
15 laws.

16 Twitter is occasionally called a social media company. This is because the
17 “media” (i.e., the content, or expressive speech) is created by its customers.
18 Twitter provides hosting and technical services for their expression.

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ARGUMENT

21 Introduction

22 Twitter, Inc. owns, markets, and operates a telecommunication and/or
23 interactive computer service with the same name (this service will be referred
24 here as “*twitter*” with a lowercase “t”, to distinguish from the company). twitter is

² <https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/>

1 used by approximately 70 million people in the US and hundreds of millions
2 around the world.

3 Twitter, Inc. has the same duties and obligations toward its customers, as any
4 other service provider. Thus, Twitter's customers and state attorneys general
5 responsible for enforcing laws protecting consumers, have the right to bring
6 legal action against Twitter, for its actions and failures to act in the marketing
7 and operation of its service.

8 Twitter Inc. speaks through its executives and public relations specialists
9 appearing on TV, radio, and third-party websites. Twitter also speaks through its
10 *blog.twitter.com* and other recognizable Twitter's accounts on twitter. This
11 speech is protected by the First Amendment (with caveats for commercial
12 speech, when it uses it to promote its services), and Twitter does not allege
13 "chilling" this speech.

14 Passing along short messages (tweets) between third parties does not make
15 Twitter a First Amendment speaker in respect to those messages. As a relevant
16 comparison, FedEx delivers letters, newspapers, books, DVDs, and other media
17 from and to its customers. This does not make it a First Amendment speaker.

18 *twitter is a telecommunications utility, according to Twitter's own promises*

19 Twitter promised its users, potential users, and government regulators that it
20 would operate twitter as a telecommunications utility. This promise remains in
21 force. Jack Dorsey, Twitter's CEO (emphasis here and in other quotes is
22 added):

1 “Twitter succeeds when it’s not talked about so much, blurs into the
2 background, & is used as **a utility. Like electricity.**”^{3,4}

3 An electrical utility cannot shut off service to a customer because the company
4 disagrees with the customer’s politics or writings. In 2018, Twitter publicly
5 disavowed content and opinion-based editorializing:

6 *“We acknowledge the growing concern people have of the power held by
7 companies like Twitter. We **believe it’s dangerous to ask Twitter to
8 regulate opinions or be the arbiter of truth.** We’d rather be judged by
9 the impartiality of outcomes ...”*

10 In 2009, Twitter CEO, Evan Williams, called Twitter’s service a
11 “**communication network**”⁵. Twitter co-founder, Biz Stone, also said on ABC
12 News: “*I think of Twitter first as a **communication network***”⁶.

13 *Promissory Estoppel*

14 Additionally, Twitter’s history of operating its service with almost no content
15 moderation or account suspensions (as in the case of ISIS, described below)
16 led customers to believe that it would continue to operate in that manner, and
17 thus, created a promissory estoppel.

18 CDA Section 230

19 By their own election, Twitter and other huge platforms for social media
20 platforms conduct content moderation under 47 U.S. Code, Section 230 (CDA
21 Section 230).

³ <https://twitter.com/jack/status/1587314254>; remains unchanged since first posted in 2009.

⁴ Also remarkable is someone’s reply to this tweet: “[.@jack the water utility doesn't shut off my water if I stick a #MAGA mug in the dishwasher.](https://twitter.com/fuzzytoad/status/838733293189222400)” (<https://twitter.com/fuzzytoad/status/838733293189222400>)

⁵ https://www.ted.com/talks/evan_williams_the_voices_of_twitter_users/transcript

⁶ ABC News, <https://archive.is/HFoHx>

1 CDA Section 230 specifically puts this operation outside of First Amendment
2 protections of speech and press, as the subsection (c)(1) states:

3 *“No provider or user of an interactive computer service shall be treated as*
4 *the publisher or speaker of any information provided by*
5 *another information content provider.”*

6 For Twitter, Section 230 is not a shield but a choice. Twitter is neither a
7 publisher, nor a speaker, both regarding liability and to First Amendment
8 protections. (In this respect, there might be difference between Twitter and most
9 websites on the Internet. Most websites act as publishers of their own content.
10 Thus, when they moderate content in the comments, for example, they could
11 claim protection under either or both Section 230 and the First Amendment.)

12 Twitter announced its choice to operate under Section 230 many times, in its
13 public statements and in legal actions. Twitter used this choice as a defense in
14 multiple lawsuits, alleging that twitter bears no responsibility for aiding and
15 abetting terrorism, child sexual exploitation, human trafficking⁷, etc.

16 *“Under CDA § 230, internet platforms are immune from suit based on the*
17 *failure to remove offensive third-party content.”*

18 Then FBI Director, James Comey, was quoted⁸ saying: "**Twitter works as a way**
19 **to sell books, as a way to promote movies, and it works as a way to**
20 **crowdsource terrorism - to sell murder**".

21 Twitter was of enormous aid to the terrorist organization ISIS, by allowing it to
22 use its services for recruitment, intimidation, and propaganda⁹. ISIS militants

⁷ Eg., JOHN DOE A MINOR CHILD v. Twitter Inc., 3:21-cv-00485, pending before this Court

⁸ <https://news.sky.com/story/is-using-twitter-to-crowdsource-terrorism-10335769>

⁹ <https://www.theatlantic.com/international/archive/2014/06/isis-iraq-twitter-social-media-strategy/372856/>

1 praised Allah for the gift of Twitter¹⁰. When Twitter suspended a single ISIS
2 account, following the fall of Mosul in June 2014, it was an extraordinary
3 event¹¹. In fact, ISIS militants used twitter so much that, in 2017, ISIS leadership
4 ordered them to use it less¹², due to fears of information collection by
5 governments without Twitter’s consent. Twitter’s actions were tolerated by the
6 law only law because of the expansive interpretations of CDA Section 230 and
7 Twitter claims it does not exercise editorial control on twitter. Neither the legal
8 landscape, nor the legal status of Twitter have changed since then, but now
9 Twitter claims that it does exercise the editorial control.

10 Twitter Demands Nearly Absolute Power

11 Most people use Twitter, and other similar social media, for many aspects of
12 their lives - communication with friends and family, business, meetings
13 scheduling etc. People chit-chat on it with friends, not always recognizing that
14 this “chatting” is public. As such, people make plans, set dates, ask friends for
15 emergency help, provide advice, etc. People also use twitter to seek health care
16 advice from doctors (not from Twitter), sometimes even in life and death
17 situations.

18 Under the First Amendment, editorial powers are nearly absolute. Thus,
19 claiming editorial rights on users’ communications, Twitter demands nearly
20 absolute control over lives of its users, or some of them. Twitter and some other
21 companies appear to act as if they were *Masters of the Universe*.

¹⁰ https://zeenews.india.com/news/world/thank-god-for-twitter-militants-tweet-after-taking-iraqs-mosul_938707.html

¹¹ <https://slate.com/technology/2014/06/isis-twitter-suspended-how-attempts-to-silence-terrorists-online-could-backfire.html>

¹² <https://www.independent.co.uk/news/world/middle-east/isis-ban-facebook-youtube-twitter-instagram-social-media-fighters-spying-dissent-islamic-state-a7803406.html>

1 Twitter's UA and TOS are Abusive, Illegal, and Invalid

2 Twitter's claim that the tens of millions of its users, who have spent years
3 establishing relationships ("Following" and "Followers"), and, in many cases,
4 invested thousands of hours of work creating content (articles, videos, podcasts
5 etc.), have all consented to its putative User Agreement / Terms of Service
6 ("UA/ToS"), is an offensive and dangerous delusion.

7 Twitter's US/ToS are abusive, invalid, and illegal in the United States, and are
8 not likely to be accepted by many of its users. Almost all the content is created
9 by twitter users. Thus, Twitter users (at least, some of them) are also Twitter's
10 labor. Given Twitter's size and power, Twitter actions against its users, under
11 the pretext of its UA/ToS, might violate 18 U.S. Code §1589 (*Forced labor*) and
12 §1593A (*Benefitting financially from peonage, slavery, and trafficking in*
13 *persons*).

14 Twitter is a Government Contractor and Concession Holder

15 Twitter induced multiple government agencies (federal, state, and local
16 governments) to create twitter accounts, to publish there their content, and to
17 communicate with the public. These accounts helped Twitter attract additional
18 users and to retain existing ones. Twitter directly profits from these visitors to
19 the governmental accounts, by showing them targeted ads. On its end, the
20 government has incurred significant expenses to maintain, develop, and
21 manage those accounts, without obvious benefits for the government or public.
22 The governments already have their websites and other communication means.

23 The governments' relationships with Twitter are regulated by federal and states'
24 laws, including the laws of Texas, not by Twitter's EA. In these relationships
25 Twitter provides governments with hosting and related IT services, while

1 receiving the equivalent of a concession contract from those governments - the
2 ability to benefit from the public traffic to the electronic equivalent of these
3 governmental offices. Without concession fees, this is very unfair deal for the
4 government.

5 I was not able to find any contracts governing these relations between Twitter
6 and federal or Texas governments. Whether they were made in writing or need
7 to be constructed by courts, these contracts must contain standard obligations
8 of Twitter:

- 9 - continuity of services to the government (including personal accounts
10 partially used in an official capacity)
- 11 - continuity of citizens' access to the governmental accounts
- 12 - non-discrimination against citizens by political views
- 13 - concession or partnership fees, paid by Twitter to the government
- 14 - adjudication of the disagreements between Twitter and the government of
15 Texas, in Texas.

16 Apparently, Twitter corruptly induced federal, state, and local governments to
17 enter these commercial or non-commercial relationships, without a proper
18 bidding process, without paying required concession fees, and in violation of
19 relevant laws. If these actions by Twitter are outside of the current investigation
20 by TX AG, they should be investigated separately.

21 Twitter acknowledges that government organizations like *FEMA* and the
22 *National Weather Service* disseminate live updates on severe weather and
23 natural disasters through twitter¹³. I doubt that the federal government has

¹³ <https://ecfsapi.fcc.gov/file/108311191102871/REPLY%20COMMENTS%20OF%20TWITTER%20INC.%20-%20WC%20Docket%20No.%2017-108%20.pdf>

1 consented to Twitter being able to de-platform these essential services or their
2 users, unilaterally and arbitrary, as Twitter claims in its filings. Most likely, the
3 government believed Twitter's claims that it is a telecommunication utility, a
4 common carrier, or something similar to that.

5 Note that Twitter provides little or no benefits to these agencies. They can
6 publish relevant updates on their websites. There are multiple standard-based
7 protocols (like RSS), allowing aggregation of updates. There are other
8 messaging services, more suitable for the purposes of these agencies than
9 twitter. Many companies would create and offer new services if a proper tender
10 were announced.

11 For all these and other reasons, Twitter has no legal right to arbitrarily suspend
12 even ordinary users. Disrupting the communications of the President of the
13 United States, during a pandemic emergency and a national security crisis,
14 caused by an attack in the Capitol Building, is a federal criminal matter, and
15 thereby outside of the scope of this Brief.

16 Additionally, in the court filing, Twitter seems to threaten Attorney General Ken
17 Paxton with the suspension of his personal or governmental accounts in
18 retaliation for this investigation. This seems to be a classic case of obstruction
19 of justice.

20 [Industry Sponsored "legal scholarship" Sowed Confusion](#)

21 There is a confusion in the legal profession regarding the nature of Twitter and
22 other Big Tech services, and ungrounded belief that many of them are
23 expressive speech protected under the First Amendment. It seems to be caused
24 by a misinformation campaign run by Google in 2011-2014, specifically
25 targeting legislators, judiciary, and law enforcement. High level legal scholars
26 were paid to argue, in scholarly papers, in favor of Google on several legal

1 questions, from anti-trust to liability¹⁴. This campaign produced a belief that web
2 search results are necessarily protected under the First Amendment. The *Zhang*
3 *v. Baidu* decision, profusely cited by Twitter in this lawsuit, quotes several such
4 papers, while noting lack of precedents. Especially influential in *Zhang v. Baidu*
5 was Volokh & Falk, *Google First Amendment Protection for Search Engine*
6 *Search Results*. In any case, even if Baidu search results are protected speech,
7 Twitter's failure to deliver short messages from one account to other accounts is
8 not.

9 Urgency

10 Twitter moves at the "Internet speed," too fast for courts. Every time it makes a
11 filing like this, it sets law enforcement back for at least a few weeks. Meanwhile,
12 it damages its users and the whole society. Frequently, what it calls
13 misinformation is truthful or helpful information, which contradicts the interests
14 of Twitter and/or its allies.

15 The medical information, including treatment and prophylaxis of COVID-19, is
16 an example. Almost a thousand Americans die from COVID-19 daily. Most of
17 these lives could have been saved, if treated early with Hydroxychloroquine-
18 based treatment¹⁵. Unfortunately, Twitter decided to eliminate or hide this
19 information on its service, to de-platform doctors and scientists that support

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https://www.salon.com/2015/11/24/googles_insidious_shadow_lobbying_how_the_internet_giant_is_bankrolling_friend_ly_academics_and_skirting_federal_investigations/

¹⁵ Examples:

<https://academic.oup.com/aje/article/189/11/1218/5847586>,

<https://c19hcq.com>,

<https://hcqmeta.com>,

<https://jacksoncoker.com/about/in-the-news/physician-poll-on-covid-19-chloroquine-and-hydroxychloroquine/>,

<https://www.sermo.com/press-releases/sermo-reports-week-3-results-globally-17-point-increase-in-covid-treaters-who-have-used-hydroxychloroquine-33-50-and-azithromycin-41-58/>,

<https://public-cdn.sermo.com/covid19/72/2314/1447ce/47ce8d4abd94b5da7124cb64fe/wave-2-sermo-covid-19-global-analysis.pdf>

1 such treatment, and to artificially promote the conspiracy theories to the
2 opposite. Additionally, Twitter promoted smear campaigns and threats against
3 doctors and hospitals, using this treatment. This is just one example of how
4 Twitter uses the pandemic to increase its wealth and power and uses its wealth
5 and power to aggravate and extend the pandemic. As of March 30, 2021,
6 Twitter's valuation is \$50 Billion - nearly twice what it was on January 1, 2020.

7 **CONCLUSION**

8 For the foregoing reasons, the Court should deny Twitter's motion for a
9 preliminary injunction and all other motions.

10

11

12 Dated: April 9, 2021

13 *[footer removed]*