# Twitter, Inc. v. Paxton

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26 F.4TH 1119 (9TH CIR. 2022)

In 2021, after Twitter announced its decision to permanently ban former President Donald Trump, the Texas Office of the Attorney General ("OAG") served Twitter with a Civil Investigative Demand ("CID") asking the company to hand over documents concerning its content moderation decisions.[1] Twitter sued Ken Paxton in his official capacity as the Attorney General of Texas, maintaining that the CID was government retaliation against speech protected by the First Amendment.[2] The Northern District of California dismissed the case as unripe.[3] In response, Twitter filed an injunction pending appeal, which the District Court rejected, and a divided motions panel on the Ninth Circuit upheld the finding.[4] The Ninth Circuit then affirmed the motion to dismiss, finding that the case was prudentially unripe.[5]

## I. BACKGROUND

Following the events at the United States Capitol on January 6, 2021, Twitter permanently banned former President Donald Trump from its platform.[6] In response, the Texas OAG asked Twitter to produce documents related to "its content moderation decisions" through a CID.[7] OAG said that it had been looking into Twitter's content moderation decisions for years because of citizen complaints.[8]

Consequently, Twitter sued Texas Attorney General Ken Paxton in the Northern District of California, arguing that "the act of sending the CID and the entire investigation were unlawful retaliation for its protected speech."[9] This was partly due to Paxton tweeting that Twitter was "closing conservative accounts" and promising that "[a]s AG, I will fight them with all I've got."[10] However, Twitter executives had previously claimed its content moderation policies were apolitical.[11] Twitter maintained that Paxton violated the

1. Twitter, Inc. v. Paxton (*Twitter I*), 26 F.4th 1119, 1121 (9th Cir.), *reh'g denied*, *amended & superseded en banc by* 56 F.4th 1170 (9th Cir. 2022).
2. *Id.*
3. *Id.* at 1122; *see also* Defendant's Motion to Dismiss at 2, Twitter, Inc. v. Paxton, No. 21-cv-01664-MMC (N.D. Cal. May 11, 2021), 2021 WL 5742108.
4. *Twitter I*, 26 F.4th at 1222.
5. *Id.*
6. *Id.* at 1221.
7. *Id.*
8. *Id.* at 1221-22.
9. *Id.* at 1122.
10. *Twitter I*, 26 F.4th at 1222..
11. *Id.*

company's First Amendment rights as a publisher because content moderation decisions were protected speech.[12] Further, it directed the District Court's attention to Paxton's tweets, claiming they showed his intent that serving Twitter with the CID was retaliation for banning President Trump.[13] Twitter asked the Northern District of California to prevent Paxton from enforcing the CID and find that the investigation violated the First Amendment.[14] Paxton challenged the case's ripeness, arguing that "pre-enforcement challenges to non-self-executing document requests are not ripe."[15] The District Court agreed and dismissed the case.[16] Twitter maintained that the case was ripe because it had suffered an injury through "chilled" speech and filed an injunction pending appeal.[17] A divided motions panel affirmed.[18] Twitter appealed to the United States Court of Appeals for the Ninth Circuit.[19]

## II. ANALYSIS

"[R]ipeness is one of three justiciability requirements" courts use to determine whether a case can be decided.[20] Constitutional ripeness is defined as "whether the issues presented are definite and concrete, not hypothetical or abstract."[21] Prudential ripeness, on the other hand, requires courts "to 'evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'"[22] The court focused on prudential ripeness in this case because it found it would be more difficult to determine constitutional ripeness.[23]

The "fit for decision" prong of the prudential ripeness doctrine requires courts to determine "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final."[24] Twitter argued that it based its case on an act that had already occurred—that Paxton's intent in serving the CID was retaliatory.[25] However, the court thought the case turned on other questions, including whether Twitter's statements about its content moderation decisions were misleading.[26] Further, OAG had not alleged Twitter violated any law; it was merely investigating. Because this

12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Twitter I*, 26 F.4th at 1222.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 1123 (quoting Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1094 n.2 (9th Cir. 2003)).
22. *Twitter I*, 26 F.4th at 1223 (quoting Ass'n of Irritated Residents v. EPA, 10 F.4th 937, 944 (9th Cir. 2021)).
23. *Id.* at 1124.
24. *Id.* at 1123 (quoting Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care, 968 F.3d 738, 752 (9th Cir. 2020)).
25. *Id.* at 1124.
26. *Id.* at 1125.

question was not solely legal but rested on "further factual amplification," the court held it was unfit for decision.[27]

The hardship prong requires courts to consider if the action demands an immediate and meaningful "change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance."[28] The Ninth Circuit found that Twitter did not have to comply with the CID, as OAG did not take any action that necessitated immediate compliance.[29] The Court held that if the action proceeded, OAG would have to present its argument in California federal court without the opportunity to research its own claims, undermining Texas's state sovereignty.[30]

Twitter next attempted to argue that the investigation was illegitimate because "editorial judgments" cannot be investigated.[31] To support its argument, Twitter relied on cases emphasizing the risks of government editorial oversight, such as *Miami Herald Publishing Company v. Tornillo*[32] and *Bullfrog Films, Inc. v. Wick*.[33] However, the court rejected applying those cases, as both relied on government regulations or statutes "which themselves required balance."[34] Here, Twitter made outright statements about balance, so the issue from those cases was absent.[35] Thus, Twitter's statements could be investigated like any other business'.[36]

Finally, Twitter asked the court to rely on four prior First Amendment cases—*Bantam Books v. Sullivan*, *White v. Lee*, *Wolfson v. Brammer*, and *Brodheim v. Cry*.[37] The Ninth Circuit first concluded that *Bantam Books* differed from the case at hand because (1) "it dealt with obscenity; (2) it addressed a state regulatory scheme that 'provide[d] no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter;'[38] and (3) it did not address ripeness."[39] Next, the court found that Twitter incorrectly relied on *White* because there, "the plaintiffs had no opportunity to challenge any aspect of [an] investigation until formal charges were brought[.]"[40] Twitter could bring up a First Amendment defense if OAG tried to enforce the CID.[41] Further, *Wolfson*, was also not on point

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27. *Id.* (quoting United States v. Lazarenko, 476 F.3d 642, 652 (9th Cir. 2007)).
28. *Twitter I*, 26 F.4th at 1123 (quoting Stormans, Inc. v. Selecky, 586 F.3d 1109, 1126 (9th Cir. 2009)).
29. *Id.* at 1125.
30. *Id.* at 1126.
31. *Id.*
32. Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (holding that a statute forcing newspapers attacking the character of a political candidate to allow free space to a candidate to reply was an unconstitutional violation of the First Amendment).
33. *Twitter I*, 26 F.4th at 1126 (citing Bullfrog Films, Inc. v. Wick, 847 F.2d 502, 510 (9th Cir. 1988) (finding unconstitutional regulations establishing specific criteria for evaluating eligibility for a certificate of international educational character)).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 1126-28.
38. *Id.* at 1126 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).
39. *Twitter I*, at 1126-27.
40. *Id.* at 1128 (citing White v. Lee, 227 F.3d 1214, 1228 (9th Cir. 2000)).
41. *Id.*

because there was no investigation in that case, unlike here.[42] Finally, the court refused to apply *Brodheim* because it concerned "the disparity in power and control between prison officials and inmates, and such disparity is not present here."[43] Additionally, *Brodheim* did not address ripeness.[44]

Paxton maintained that the Ninth Circuit should apply *Reisman v. Caplin*, a case dealing with whether an accountant had to turn over documents requested by the IRS.[45] But in *Reisman*, "there had not yet been an injury," and the case did not mention ripeness.[46] On the contrary, Twitter, though insufficiently, alleged that it did suffer a constitutional injury.[47] Unlike in *Reisman*, Twitter could not avoid said "injury by challenging the document request later."[48]

Following this decision, Twitter filed a motion for reconsideration, which the Ninth Circuit denied en banc.[49]

## III. CONCLUSION

The Ninth Circuit affirmed the District Court's order dismissing the case because the issues presented were not ripe for adjudication.[50] Twitter's claims neither showed that the CID chilled its speech by impeding its capacity to make content moderation decisions nor caused any other cognizable injury that an injunction would redress.[51]

42. *Id.* (citing Wolfson v. Brammer, 616 F.3d 1045, 1058 (9th Cir. 2010)).
43. *Id.* (citing Brodheim v. Cry, 584 F.3d 1262, 1266 (9th Cir. 2009)).
44. *Id.*
45. *Twitter I*, 26 F.4th at 1128 (citing Reisman v. Caplin, 375 U.S. 440, 443 (1964)).
46. *Id.* at 1129.
47. *Id.*
48. *Id.*
49. Twitter, Inc. v. Paxton (*Twitter II*), 56 F.4th 1170, 1172 (9th Cir. 2022) (en banc).
50. *Twitter I*, 26 F.4th at 1129.
51. *Id.*