

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-356

EUGENE VOLOKH, LOCALS TECHNOLOGY INC., RUMBLE CANADA
INC.,
Plaintiffs Appellees,

v.

LETITIA JAMES, in her official capacity as Attorney General of New York,
Defendant Appellant.

On Appeal from the United States District Court
for the Southern District of New York
Case No. 22-cv-10195
Honorable Andrew L. Carter, Jr., District Court Judge

**BRIEF OF AMICUS CURIAE THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS IN SUPPORT OF PLAINTIFFS-APPELLEES**

[Caption continued on next page]

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REPORTERS COMMITTEE FOR
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virtually absolute.4

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by compelling speakers to disclose or alter their editorial standards.7

A. Compelling a speaker to disclose or alter their editorial standards
burdens expression entitled to full First Amendment protection.8

B. 5HTXLULQJ GLVFORVXUH RI D SULYDWH SXEO
H[SUHVVLRQ WKDW LV QHLWKHU...³I.D.F.W XDO´ Q

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William O. Douglas, *The Bill of Rights Is Not Enough, in The Great Rights*
(Edmond Cahn ed., 1963)6

INTEREST OF AMICUS CURIAE

The Reporters Committee for Freedom of the Press (³⁵ H S R U W H U V & R P P L
R U A P L F XisVań unincorporated nonprofit association of reporters and editors
that works to safeguard the rights of journalists.

SOURCE OF AUTHORITY TO FILE

Counsel for Plaintiffs-Appellees and Defendant-Appellant have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Jian Zhang v. Baidu.com Inc., 10 F. Supp. 3d 433,

commercial disclosures within the meaning of the Supreme & R X U W ¶ V G H F L V L R C

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S.

626, 651 (1985). But editorial-transparency mandates burden fully protected

expression, not commercial speech, and there is nothing factual or uncontroversial

about

Consider first the chilling effect on substantive editorial decisions.

Tornillo, 437 U.S. 241, 248 (1978); *Columbia*

Broad. Sys., 412 U.S. 94, 144-145 (1973)

(Stewart, J., concurring) (noting that *Dun & Bradstreet*, 431 U.S. 309 (1977);

Sullivan, 377 U.S. 170 (1964); *Time*, 384 U.S. 391 (1966);

newspapers), and there should be little question that a website or social media

platforms that disseminate third-party-created content to the public are editorial judgments

protected by the First Amendment, *NetChoice, LLC v. Iancu*, 34 F.4th

1196, 1212 (11th Cir. 2022); *see also Zhang*, 10 F. Supp. 3d at 435. There can be

little doubt, too, that such protection extends to speech that others may consider

hateful, because *KeyBank v. American Express*, 562 U.S. 410 (2011).

KeyBank v. American Express, 562 U.S. 410 (2011).

KeyBank v. American Express, 562 U.S. 410 (2011).

KeyBank v. American Express, 562 U.S. 410 (2011).

burdens on editorial decisionmaking in that context, by making expression that the

state *KeyBank v. American Express*, 562 U.S. 410 (2011).

costs attach to the former *KeyBank v. American Express*, 562 U.S. 410 (2011).

As a result, even if the statute stops short of expressly penalizing news

organizations and other websites for hosting *KeyBank v. American Express*, 562 U.S. 410 (2011).

KeyBank v. American Express, 562 U.S. 410 (2011).

V W D L N H I Q W Sorrell v. IMS Health Inc., 564 U.S. 552, 565 (2011) (citation

omitted). Otherwise, any I D L O X U H W R U H P R Y H F R Q W H Q W W K D V

arguably prohibits ² a gap that will inevitably exist in the eye of the beholder,

E H F D X V H G H F L G L Q J W K D W V S H H F K L V ³ R I I H Q V L Y H F

M X G J P H I Q W v. Hunt County, 921 F.3d 440, 447 (5th Cir. 2019) ² could

prompt a costly Attorney General investigation R I W K H S X E O L V K H U ¶ V H G L

practices to determine if the website has accurately disclosed L W V μ W U X H ¶ S R O L

N.Y. Gen. Bus. Law § 394-ccc(5).⁵ This risk is hardly hypothetical. In Texas, for

instance, Attorney General Ken Paxton launched an investigation of Twitter (now

F D O O H G ¶ the platform banned former President Trump, on the theory that

the ban revealed the company had falsely claimed to be fair to competing

viewpoints. Press Release, . H Q 3 D [W R Q \$ W W ¶ \ * H Q R I 7 H [\$ *

Civil Investigative Demands to Five Leading Tech Companies Regarding

Discriminatory and Biased Policies and Practices (Jan. 13, 2021),

⁵ To say that speakers could avoid that result by declaring that they have *no* policy against hateful conduct is no answer, because

<https://perma.cc/BZ7A-GEHA>

1HZ <RUN¶V VWDWXWH OD\ V WKH

fishing expeditions. Licensing them, as the

and it should be plain that there is no fact of the matter when deciding which news is fit to print, which speech is worth distributing to an audience, and whether particular expression is hateful, *see Robinson*, 921 F.3d at 447. Nor can New York evade that conclusion by suggesting that whether or not speakers have particular editorial

approach would eviscerate the constraint of *Zauderer* disclosures be factual, licensing states to force news organizations and other

Zauderer, 740 F.3d 233, 250 (2d Cir. 2014), or requiring that a speaker

FRQWHVWHG *id.* at 250 (citation omitted)

D QHZV RUJDQLJDWLRQ RU RWKHU VSHDNHU KDV ³D

, 469 F.3d at 652.

On each front, a state mandate that a publisher disclose its editorial standards bears no reasonable resemblance to a product label or a calorie count. In this context, as much so as in *Tornillo* itself

CONCLUSION

For the foregoing reasons, the Reporters Committee respectfully urges the Court to affirm the preliminary injunction.

Dated: September 26, 2023

Respectfully submitted,

/s/ Bruce D. Brown

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), Local Rule 29.1(c), and Local Rule 32.1(a)(4)(A) because it contains 3,643 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: September 26, 2023

/s/ Bruce D. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2023, I caused the foregoing Brief of Amicus Curiae the Reporters Committee for Freedom of the Press to be electronically filed with the Clerk of the Court using CM/ECF, which will automatically send notice of such filing to all counsel of record.

Dated: September 26, 2023

/s/ Bruce D. Brown

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