

CASE No. 23-356

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

EUGENE VOLOKH, RUMBLE CANADA, INC.,
AND LOCALS TECHNOLOGY, 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, No. 23-356
(Hon. Andrew L. Carter, Jr.)

**OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE OF
THE JUDGMENT**

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September 26, 2023

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus NetChoice is a 501(c)(6) District of Columbia organization. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus Chamber of Progress is a 501(c)(6) Virginia organization. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF AMICI CURIAE

NetChoice is a national trade association of online businesses that works to

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Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech

¹ Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in any part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The First Amendment prohibits the government from censoring, compelling, or punishing the right to free speech. The Supreme Court has held that the government cannot regulate speech based on its content, and that the government cannot punish speech that is protected by the First Amendment. The First Amendment also protects the right to receive information and ideas. The Supreme Court has held that the government cannot regulate the content of speech, and that the government cannot punish speech that is protected by the First Amendment. The First Amendment also protects the right to receive information and ideas. The Supreme Court has held that the government cannot regulate the content of speech, and that the government cannot punish speech that is protected by the First Amendment.

To evade constitutional scrutiny, the Online Hate Speech Law purports to regulate speech on social media networks. The law defines "hate speech" as speech that is intended to vilify, humiliate, or incite violence against a group or a class of persons. The law also defines "hate speech" as speech that is intended to incite violence against a group or a class of persons. The law also defines "hate speech" as speech that is intended to incite violence against a group or a class of persons. The law also defines "hate speech" as speech that is intended to incite violence against a group or a class of persons. The law also defines "hate speech" as speech that is intended to incite violence against a group or a class of persons.

Large services that host user-generated content, like NetChoice and Chamber of Commerce, face a constant battle against malicious actors, including spammers, scammers, and users peddling hateful content. To combat this content and maintain a viable communications forum, these companies invest in state-of-the-art content moderation systems. Though well-intentioned, the Online Hate Speech Law is unconstitutional. The Supreme Court has held that the government cannot regulate the content of speech, and that the government cannot punish speech that is protected by the First Amendment. The First Amendment also protects the right to receive information and ideas. The Supreme Court has held that the government cannot regulate the content of speech, and that the government cannot punish speech that is protected by the First Amendment.

u{ uvgo uø' cdkrkv{ " vq" kf gpvkh{ " cpf " tgo qxg" offensive content. At times, they may undermine existing efforts to combat hateful content.

Persistent political efforts to regulate online speech illustrate confusion about vj g"Hktuv'Co gpf o gpwū" application to social media services. Though these efforts differ in form, their shared goal is to grant the state influence over private editorial standards. But expression is protected no matter what medium it appears on, and a finding for New York would lead to absurd consequences. One state might require reporting, responses, and disclosures about lawful content perceived by some users vq"õxkhh{ ö"qt õj wo klcvgÖ And other states might enforce similar statutes against õj cvghwö" criticism of the police or LGBTQ+ advocacy, leading to a 50-state patchwork of editorial requirements based on which messages local politicians disfavor. Without confirmation from this Court that the First Amendment prohibits the Online Hate Speech Law, political efforts to interfere with online expression will continue to proliferate in the Second Circuit.

ARGUMENT

I. NEW YORK CANNOT REGULATE SPEECH BY SIMPLY CALLING IT 'CONDUCT'

The First Amendment prohibits the government from censoring, compelling, or otherwise abridging speech and media. That this fundamental guarantee cannot dg"vquugf "cukf g'lp'yj g'eqpvz v'qh'qprkpg"gzr tguukqp'õy qwf "dg"vqq"qdxkquw"vq'o gpvkqp" kh'k'y gtgpø'uq"qhv'p'mquv'qt"qduewt gf "lp'r rnkkecn'tj gvtleÖ *NetChoice, LLC v. Att'y*

Gen. Fla., 34 F.4th 1196, 1204 (11th Cir. 2022). [gv"lp"r cuukpi "yj g"õuqekn'o gf k"
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NetChoice v. Paxton, 573 F. Supp. 3d 1092, 1108 (N.D.Tex. 2021). Indeed, crafting
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Free Speech L. 97, 116 (2021) (explaining defining contours of speech policies
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community standards specifying the type of content that it will (and won't) allow on
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1204.

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Terminations/Content Removals and the Benefits of Internet Services Enforcing
Their House Rules*, 1 J. Free Speech L. 191, 195 (2021) [*hereinafter* ðl qrf o cp"("
Miers, *House Rules*"].⁴ For gzco r ng." O gvcäu" eqo o wplk\ " i wk gkpgu" r tqxkf g" c"
definition of prohibited hate speech that is *more restrictive* j cp'P gy "[qtmø in one
sense00 gvc"dcpu"ðf kgev'cwcen]u_"ci ckpu'r gqr ngö"based on characteristics included
in the Online Hate Speech Law, as well as based on ðecuvgö"cpf "ðugtqwu'f kugcugö"

³ Available at <https://tinyurl.com/2phr9raa>.

⁴ Available at <https://tinyurl.com/6r3wh7f7>.

ci ckpuv'wugtup'eqpuvkwkqpcmf 'r tqvgevff 'ur ggej 0Volokh v. James, No. 22-cv-10195,
2023 U.S. Dist. LEXIS 25196, *12 (S.D.N.Y. 2023); see also NetChoice, LLC v.
Bonta, No. 22-cv-

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their own services. N.Y. Gen. Bus. Law § 394-ccc(3). But private services have the
right to choose what to say *and* öy j cv'pqv"vq"uc{ .ö"cpf "vj g{ "ecppqv'dg" eqo r gmgf "vq"
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U.S. at 16.

B. Sharing and Receiving Content on Social Media is Speech

When users share and receive speech on social media, they engage in speech,
not conduct. *See generally, NetChoice, LLC v. Griffin*, No. 5:23-CV-05105. 2023
U.S. Dist. LEXIS 154571, *51 (social media age-verification law which restricts
wugtuo'cdkkrv{ "vq"uj ctg"cpf "receive speech on social media likely violates the First
Amendment). People rely on social media to engage with social and political
movements, to share news and art, and to participate in communities. Indeed, among
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Packingham v. North Carolina, 582 U.S. 98,

share or receive information, ideas, interests, and other forms of expression on social media, they engage in speech. *Griffin*, No. 5:23-CV-05105, 2023 U.S. Dist. LEXIS 154571, *51 (social media age-verification law which restricts users from posting and receiving speech on social media likely violates the First Amendment). Likewise, when a user or platform publishes terms of service or community standards . . . adds addenda or disclaimers to certain posts (say, warning of misinformation or omissions) they engage in speech. *AG, Fla.*, 34 F.4th at 1204.

By requiring online services to create a policy and mechanism for users to report certain lawful content, the Online Hate Speech Law compels them to express their disapproval (or disdain or disapproval) for that content. But speech compulsion is as constitutionally suspect as speech *restrictions*, and, as the district court found, the law is as unconstitutional as the speech restrictions it targets. *Volokh*, No. 22-cv-10195, 2023 U.S. Dist. LEXIS 25196; *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). The Court should affirm the judgment.

II. THE ONLINE HATE SPEECH LAW

Though P gy "[qtnu goal to limit the spread of harmful content online is one shared by NetChoice

since 2016, Reuters (Sep. 21, 2021).¹⁶ The Online Hate Speech Law will identify and remove violative content on large social media services. Instead, it will produce unhelpful and redundant data and create significant administrative burdens on existing systems that otherwise frustrate efforts to combat hate speech. Likewise, the law will hamper existing content moderation efforts by pressuring services to abandon nuance in moderation techniques.

systems are not perfect—bad actors always adapt to existing proactive security measures. *See generally*, The Free Press Journal, *Improved AI helps reduce hate speech, supra*. This forces services into an interminable cat and mouse game to identify and respond to innovative new means to evade detection. Sapna Maheshwari, *On YouTube Kids, Startling Videos Slip Past Filters*, N.Y. Times (Nov. 4, 2017) [*gzi rckpki "j qy "dcf "cevqtu" hqwpf "y c{u" vq" õhqqrö" eqpvgpv" o qf gtcvkqp" cni qtkj o u" vq" r quv" f kuwtdkpi " xctkcvkpu" qh" r qr wrct " ej kf tgpø" ectvqns](#)).²³ But identification systems adapt and improve over time, and mandating additional user reporting systems for content a user perceives [vq" õxkh{ .ö"õj wo klcvg.ö"cpf "õkpekgo](#) [ô y j gyj gt"qt"pqv"j cv"eqpvgpv" xkqr vgu"ugt xleguø"eqo o wpk{ "i wk gnpguô](#) will not aid [vj gug"u{ uvgo uø" f gxgnr o gpv0](#)

The Online Hate Speech Law [ø" tgr n{ " tgs wktgo gpv" ko r qugu" uki pkkcpv"](#) administrative burdens on services—large and small— that host user-generated

Luca Pajola, Mika Juuti, Mauro Conti, N. Asokan, *All You Need is "Love": Evading Hate-speech Detection*, arXiv:1808.09115 at 6 (2018),²⁶ see also Anthony Tellez,

'Mascara,' 'Unalive,' 'Corn': What Common Social Media Algospeak Words

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U.S. 786, 790 (2011); *see also Reno* 521 U.S. at 870 (establishing First Amendment protection for online media is coextensive with offline media); *see also Packingham*, 582 U.S. at 105 (affirming that the First Amendment applies equally online). Yet

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Griffin, No. 5:23-CV-05105, 2023 U.S. Dist. LEXIS 154571, *51 (quoting
Packingham).

Allowing the

companies for kids' online addiction, New Jersey Monitor (Feb. 22, 2023)

*c... content).³³ All these bills and dozens of others across the country push social media services to avoid regulatory scrutiny by removing certain lawful speech, cannot do through direct regulation control the available channels for political discussion.” *Washington Post v. McManus*, 944 F.3d 506, 517 (4th Cir. 2019).

But if New York can impose reporting, response, and disclosure requirements on every website that hosts lawful content its politicians disfavor, so too could lawmakers in other states enforce similar statutes against speech that criticizes elected officials, casts law enforcement in a bad light, discusses reproductive healthcare, and supports or opposes gender transitions. *See, e.g.*, Tim Cushing, *NJ Legislator Wants State's Cops To Be The New Beneficiaries Of Hate Crime/Bias Laws*, TechDirt (Oct. 13 2015);

CONCLUSION

For the reasons stated above, and those offered by Plaintiffs-Appellees, the court should affirm the judgment issuing a preliminary injunction.

Respectfully submitted,³⁷

DATED: September 26, 2023

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³⁷ Credit to Soham G. Mehta, PG&E legal intern, Google Public Policy Fellow, for significant research support.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because it contains 5,404 words, excluding the parts 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

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ Nicole Saad Bembridge
September 26, 2023