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The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty and free markets. Cato is an indefatigable opponent of laws that unconstitutionally abridge the freedom of speech. Cato is an active participant in political discussions on the nation's most important socioeconomic and legal

"[I]t is not . . . the role of the State or its officials to prescribe what shall be offensive." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018). The State of New York has nevertheless enacted a statute targeting speech that it finds offensive, including speech that can "vilify" or "humiliate" "a group or a class T

precedent uniformly instructing that so-called "hate speech" is entitled to full First Amendment protection. [2] The district court correctly recognized that the Law chills the speech of social media users and facially violates the First Amendment. Indeed, the Law encourages self-censorship on the internet—the modern equivalent of the town square—

[2] *See, e.g.*, *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2317 (2023) (First Amendment "protections belong to all, including to speakers whose motives others may find misinformed or offensive."); *Matal v. Tam*, 582 U.S. 218, 246 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." (quotation marks omitted)); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) ("[S]peech cannot be restricted simply because it is upsetting or arouses contempt."); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 574 (1995) ("[T]he point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."); *Nat. Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 44 (1977) (invalidating prior restraints on a Nazi Party march); *Brandenburg v. Ohio*, 365 U.S. 444, 447, 449 (1969) (Prosecution of those espousing racial and religious hatred unconstitutionally "purports to punish mere advocacy."); *NAACP v. Button*, 371 U.S. 415, 445 (1963) ("The First Amendment is a value-free provision whose protection is not dependent on the truth, popularity, or social utility of the ideas and beliefs which are offered." (quotation marks omitted)).

matters of profound value and concern to the public." (quotation marks omitted)).

The First Amendment prohibits not only direct governmental restrictions on expression but also governmental actions that deter or chill the exercise of First Amendment rights. "[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights." *Laird v. Tatum*, 408 U.S. 1, 11 (1972); *see also Zieper v. Metzinger*, 474 F.3d 60, 65 (2d Cir. 2007) ("It is well-established that First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech." (quotation marks omitted)); *Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002) ("[T]he First Amendment protects the right to free speech so far as to prohibit state action that merely has a chilling effect on speech.").

The Supreme Court explained why the First Amendment prohibits statutes that chill protected speech in the landmark case *NAACP v. Alabama*, 357 U.S. 449 (1958). The Court held that Alabama's efforts to

compel the NAACP to disclose its membership lists "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," thereby chilling the ability of the NAACP and its members "to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *Id.* at 462–63. It made no difference that the chilling effect "follow[ed] not from state action but from private community pressures" because "it is only after the initial exertion of state power represented by the production order that private action takes hold." *Id.* at 463.

In the decades since it decided *NAACP*, the Supreme Court has repeatedly made clear that "the protections of the First Amendment are triggered not only by actual restriction" on expression. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021). "The risk of a chilling effect . . . is enough, [b]ecause First Amendment freedoms need breathing space to survive." *Id.* (quotation marks omitted). For example, even though libelous and defamatory statements are not protected by the First Amendment, states cannot restrict a false statement about a public figure unless the speaker made the statement "with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether

his words as threatening. *Id.* at 2116–17. In sum, the "protections of the First Amendment are triggered" by any state action that creates a "risk of a chilling effect" on protected expression. *AFP*, 141 S. Ct. at 2389.

These principles apply with full force to laws that discourage protected expression. Last year, this Court resuscitated a First Amendment challenge to a Connecticut law that requires a registered sex offender to notify the state "when he creates a new email address, instant messenger address, or other internet communication identifier." *Cornelio v. Connecticut*, 32 F.4th 160, 166, 180 (2d Cir. 2022). The Court explained that the law "burdens a registrant's 'ability and willingness to speak on the Internet'" and "plausibly deters registrants from engaging in protected online speech." *Id.* at 169. Because the law "risks chilling online speech" and was not narrowly tailored to the asserted state interests, it violated the First Amendment. *Id.* at 170.

If allowed to go into effect, the Online Hate Speech Law would chill protected speech on matters of public concern. The Law requires networks to prominently display a hateful-conduct policy and a mechanism for reporting "hateful speech" to the network. It would

discourage users from engaging in protected expression, because users would reasonably fear that the network would publicly condemn their speech as hateful or suspend or ban them from the platform. This chilling effect would be exacerbated by the Law 's vague terms "vilif y" or "humiliate." These terms create a "highly malleable standard with ' an inherent subjectiveness. '" *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). In today's hyperpolarized and hyperpartisan political climat eB21 Tc6agination(c)4.1 (r)

"mechanisms" by which users can report such conduct . This would plainly chill social media users from engaging in protected expression. After reading a network's "mechanism" for reporting "hateful conduct," which must be "clearly" and "easily accessible," or the platform's hateful -

This would eliminate users' fears that their speech could result in suspension or removal from the network.

Governmental actions that chill speech on the internet are particularly concerning because "the most important place[] . . . for the exchange of views . . . is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."

sweeping definition of "social media network" includes not only quintessential social media networks, such as Facebook or Twitter, but *any* online forum s on which users can share information or ideas with other users or the public. It applies to any website s with comment sections, such as most blogs and news websites. The Law also appears to cover websites like SSRN, which is "an open access research platform used to share early -stage research, evolve ideas, measure results, and connect scholars ar ound the world." Elsevier, *What Is SSRN?*, https://tinyurl.com/yd54549k/.

Many of these websites are far afield from what would generally be considered "social media," y et New York's Online Hate Speech Law would stifle the free exchange of ideas on all thes

ordinary citizens would refrain from discussing many of the most controversial and important issues facing our democracy to avoid being reported for engaging in "hateful conduct."

That result is flatly inconsistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270. New York's attempt to enlist social media networks in its campaign to discourage protected speech that it finds offensive is a clear violation of these foundational constitutional commitments.

"American democracy [is] at its best" when those "on both sides" of controversial issues "passionately, but respectfully, attempt[] to persuade their fellow citizens to accept their views." *Obergefell v. Hodges*, 576 U.S. 644, 714 (2015) (Scalia, J., dissenting). Unfortunately, those who advance serious and respectful arguments on the most important public-policy issues of the day are all-too

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things about someone or something ." *Vilify*, Cambridge Dictionary. [5] That doesn't really help, so he looks up "unpleasant," which means "rude and angry." *Unpleasant*, Cambridge Dictionary. [6] Then he looks up "humiliate," which means " to make someone feel ashamed or lose respect for himself or herself." *Humiliate*, Cambridge Dictionary. [7] He realizes there is no objective standard by which his speech can be assessed; even flattery might be perceived as "humiliating." *See, e.g.*, Babylon Bee, *Asian Americans Celebrate Affirmative Action Ruling With 5-Minute Study Break* (June 30, 2023). [8]

The user would probably next attempt to determine who decides whether speech is "vilifying" or "humiliating." Again, the Law has no answers. Do anonymous and unaccountable social-network moderators have the unilateral authority to decide whether speech is "vilifying" or "humiliating?" What if the moderators find the speech acceptable but just one listener is offended? Regardless, the Law has an unconstitutional chilling effect if its application depends on how a new community might

react to protected speech. “An objective standard, turning only on how reasonable observers would construe a statement . . . would discourage the uninhibited, robust, and wide-

manifestation of racism,' Putin said."). Indeed, the world's most evil regimes have long used allegations of racism, sexism, and other forms of bigotry as a means of silencing their critics. *See, e.g.*, Ministry of Foreign Affairs of the People's Republic of China, *Foreign Ministry Spokesperson Zhao Lijian's Regular Press Conference* (April 13, 2022) [11] ("The US government . . . instigates the 'lab leak' theory and allows racism to spawn alongside the coronavirus.") . The Online Hate Speech Law gives these censors another tool in their arsenal.

The user is almost ready to give up and not speak at all, but then he realizes he has one last option—religious speech. Surely *that* must be safe—a conscientious legislature would create a religious exemption in light of the Free Exercise Clause. But the Online Hate Speech Law inflicts a First Amendment one-two punch when it is applied to religious speech that supposedly "vilifies" or "humiliates" on the basis of a protected class, like the retweeting of a Bible verse that condemns nonbelievers or promotes traditional gender roles. *Contra McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)

11

(“The State ’s goal of preventi

Sarappo, *Read the Books that Schools Want to Ban*, The Atlantic (Feb. 1, 2022).[13] The list includes Ta -Nehisi Coates's

offended. He replies to her post by praising affirmative action, and he reports her for making "humiliating" racist speech. *See* University of California Santa Cruz, *Tool: Recognizing Microaggressions and the Messages They Send*[15] ("I believe the most qualified person should get the job" is a racist "microaggression"). The woman then reports the man's defense of affirmative action as "vilifying" on the basis of race. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*

dehumanising and demeaning.”).

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Respectfully submitted,

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