

NEW YORK COURT OF APPEALS ROUNDUP

IN '*VOLOKH V. JAMES*', A NARROW READING SAVES NEW YORK'S HATEFUL CONDUCT LAW

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In *Volokh v. James*, the Court of Appeals construed New York's Hateful Conduct Law (HCL) in a way that will likely uphold its constitutionality against a First Amendment challenge.

The United States Court of Appeals for the Second Circuit certified three questions to the New York Court of Appeals concerning the interpretation of the HCL and prescribed that if answered one way, the statute would likely pass constitutional muster, but if answered another, the statute would be an unconstitutional restriction on free speech.

A divided Court of Appeals chose the former, indicating that the HCL will stand. Judge Cannataro authored the majority opinion, joined by Chief Judge Wilson and Judges Rivera and Troutman.

Judge Garcia dissented in part, joined by Judges Singas and Halligan. The case provides insight into how both the courts and Legislature balance the regulation of social media, on the one hand, with First Amendment protections, on the other.

In response to violence fomented by social media postings, including the 2022 shooting of African American shoppers in Buffalo, the legislature passed the HCL, GBL §394-ccc.

The HCL contains two substantive requirements. The "Report Mechanism Requirement" requires a social media network to "maintain a clear and easily accessible mechanism" for users to report "incidents of hateful conduct" and "allow the social media network to provide a direct response" to the user making the report.

The "Policy Disclosure Requirement" requires a social media network to publicly post "a clear and concise policy" which "includes how such social media network will respond and address the reports of incidents of hateful conduct on their platform."

The HCL defines hateful conduct as "the use of a social media network to vilify, humiliate, or incite violence against a group or a class of persons on the basis of race, color, religion, ethnicity, national origin, disability, sex, sexual orientation, gender identity or gender expression."

The HCL authorizes the attorney general to assess civil penalties of up to \$1,000 per day on social media networks that knowingly fail to comply with the statute.

Plaintiffs include Eugene Volokh, a law professor and operator of a legal blog "dedicated to maintaining a free and open marketplace of ideas."

Shortly before the HCL went into effect, plaintiffs brought a federal court action against the attorney general pursuant to 42 U.S.C. §1983 and moved to preliminarily enjoin the enforcement of the HCL as violating the First Amendment of the U.S. Constitution.

The United States District Court for the Southern District of New York granted the injunction, finding that plaintiffs had shown a substantial likelihood of success on the merits of their First Amendment challenges.

The District Court concluded that the HCL would compel speech from social media networks by requiring them to post policies about “hateful conduct” as defined by the Legislature.

On appeal, the Second Circuit concluded that the constitutionality of the HCL depends on its interpretation, a matter on which the Court of Appeals is “best positioned” to opine. The Second Circuit therefore certified three questions:

1. “Does a social media network comply with [the Policy Disclosure Requirement] if its policy does not explicitly reference or address the content encompassed by the statute’s definition of ‘hateful conduct’ and does not otherwise address content that encompasses this defined category?”
2. “Does a social media network comply with [the Report Mechanism Requirement] if that mechanism does not explicitly reference or address the content encompassed by the statute’s definition of ‘hateful conduct’ and does not specifically state that content meeting the statute’s definition of ‘hateful conduct’ may be reported using that mechanism?”; and
3. “Does [the Report Mechanism Requirement] require a social media network to provide a direct response to any individual reporting hateful conduct informing them of how the matter is being handled?”

The Second Circuit indicated that if either of the first two questions were answered in the negative or if the third question were answered in the affirmative, the HCL could not survive the heightened scrutiny that applies to legislation that regulates speech.

Conversely, if the first two questions were answered in the affirmative and the last question in the negative, the Second Circuit indicated that the statute would survive the lesser scrutiny that applies to statutes requiring disclosure of purely factual information about the terms under which services will be available.

This more relaxed “*Zauderer*” scrutiny has been applied, for instance, to uphold the New York City regulation requiring chain restaurants to post calorie information on their menus. See *N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health*, 556 F.3d 114 (2d Cir. 2009).

The Court of Appeals answered the first two questions in the affirmative and the third question in the negative. The majority found the Report Mechanism Requirement could be satisfied so long as the social media network permitted users to make reports that include reports of “hateful conduct.”

The statute does not require that the Report Mechanism make any reference to “hateful conduct” as defined by the Legislature. For instance, a button providing users a means to report “any complaint, whatever its nature” would comply.

Further, the majority found the statute did not require social media networks to respond to users regarding how hateful conduct reports were handled, but simply mandated that the reporting systems implemented by social media networks “allow” them to make such a response.

Similarly, the majority found the Policy Disclosure Requirement did not require any reference to the statutory definition of “hateful conduct” but rather must be broad enough to encompass “hateful conduct” within its bounds.

Indeed, the Court of Appeals found that a social media network could comply with the HCL by disclosing a policy that it will not regulate or remove any content posed on its platform.

Such a disclosure would inform users as to how the social media network addresses all content, and therefore necessarily also informs users how “hateful conduct” is addressed.

The dissent found the majority’s interpretation of the statute contrary to the language and purpose of the HCL. The dissenters found that the majority had effectively read the concept and definition of “hateful conduct” out of the Hateful Conduct Law.

The case now returns to the Second Circuit, to apply the answers to the certified questions provided by the Court of Appeals.

While the Second Circuit has ordered supplemental briefing from the parties, given the Second Circuit’s earlier rulings, it would seem that it will reverse the Southern District and deny the preliminary injunction of the HCL, permitting the statute to come into effect.

Even if the HCL’s constitutionality is upheld, given the Court of Appeals’ ruling, a social media network could seemingly comply with the HCL with a generic content-reporting function and a published policy of not responding to reports of offending conduct.

It would seem unlikely that this is what many of the legislators had in mind when they enacted the HCL. On the other hand, had the dissenting opinion in the Court of Appeals carried the day, the HCL would likely have been enjoined as unconstitutional by the Second Circuit.

More will surely be written in both the federal and state courts as the courts and Legislature continue to grapple with the objective of stopping social-media influenced violence while safeguarding free speech. Since the enactment of the HCL, the legislature has passed further legislation expanding social media network disclosure and reporting requirements. The

Stop Hiding Hate Act, GBL Art. 42, effective October 2025, requires that large social media companies publish clear terms of service, describe how users can report violations of those terms, and provide information to the attorney general on reported postings and actions taken in response.

That statute is currently being challenged in federal court as violating the First Amendment. *X Corp. v. James*, No. 1:25-cv-05068-JPC (S.D.N.Y. June 17, 2025).

The Court of Appeals decision in *Volokh* will provide guidance both to the legislature as it continues to regulate social media networks and to the courts that consider the constitutionality of that legislation.

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