

NO. 17-2220

---

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

---

FEMINIST MAJORITY FOUNDATION, FEMINISTS UNITED ON CAMPUS,  
PAIGE MCKINSEY, JULIA MICHELS, KELLI MUSICK, JORDAN WILLIAMS,  
AND ALEXIS LEHMAN,

PLAINTIFFS-APPELLANTS,

v.

UNIVERSITY OF MARY WASHINGTON, TROY PAINO, AND RICHARD HURLEY,

DEFENDANTS-APPELLEES.

---

On Appeal from the United States District Court  
for the Eastern District of Virginia  
Case No. 17-cv-00344-JAG

The Honorable John A. Gibney, Jr., United States District Court Judge

---

**BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION  
IN SUPPORT OF DEFENDANTS-APPELLEES**

---

Sophia Cope  
Corynne McSherry  
David Greene  
Adam Schwartz  
Aaron Mackey  
ELECTRONIC FRONTIER FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
Email: [sophia@eff.org](mailto:sophia@eff.org)  
Telephone: (415) 436-9333

*Counsel for Amicus Curiae*

**DISCLOSURE OF CORPORATE AFFILIATIONS AND  
OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN  
LITIGATION**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellant Procedure Rule 29(a)(4)(E), Amicus Curiae certifies that no person or entity, other than Amicus, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

**TABLE OF CONTENTS**

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION .....i

TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST OF AMICUS CURIAE ..... 1

INTRODUCTION .....3

ARGUMENT.....5

    I.    Anonymous Speech Is An Honorable Tradition That Has Long Enjoyed Robust First Amendment Protection. ....5

    II.   Many University Students Speak Anonymously To Effectively Advocate For Equality On Campus. .... 10

        A.  Soliciting Anonymous Complaints. .... 11

        B.  Anonymous Denunciations of Sexual Violence..... 12

        C.  Anonymous Organizing to Avoid Surveillance. .... 15

        D.  Other Anonymous Campus Speakers..... 16

    III.  Many Anonymous Online Speech Platforms Facilitate Socially Valuable News And Views, And Thus Promote University Values. .17

CONCLUSION.....22

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)..... 23

CERTIFICATE OF SERVICE .....24

## TABLE OF AUTHORITIES

### Cases

<i>Acorn Investments, Inc., v. City of Seattle</i> , 887 F.2d 219 (9th Cir. 1989).....	9
<i>Buckley v. American Constitutional Law Foundation</i> , 525 U.S. 182 (1999) .....	7
<i>Buckley v. Valeo</i> , 421 U.S. 1 (1975).....	9
<i>Justice For All v. Faulkner</i> , 410 F.3d 760 (5th Cir. 2005).....	7, 8, 9
<i>Lefkoe v Jos. A. Bank</i> , 577 F.3d 240 (4th Cir. 2009).....	7, 9
<i>McIntyre v. Ohio Elections Comm’n</i> , 514 U.S. 334 (1995) .....	6, 7, 8, 9
<i>NAACP v. Alabama ex rel. Patterson</i> , 357 U.S. 449 (1958) .....	7
<i>Reed v. Town of Gilbert</i> , 135 S. Ct. 2218 (2015) .....	8, 9
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) .....	9
<i>Talley v. California</i> , 362 U.S. 60 (1960) .....	5, 7
<i>United States v. Cassidy</i> , 814 F Supp. 2d 574 (D. Md. 2011) .....	7
<i>United States v. Playboy Entm’t Grp., Inc.</i> , 529 U.S. 803 (2000) .....	9
<i>Watchtower Bible &amp; Tract Soc. v. Village of Stratton</i> , 536 U.S. 150 (2002) .....	7

## Statutes

20 U.S.C § 1681.....	10
----------------------	----

## Constitutional Provisions

U.S. Const. amend. I.....	<i>passim</i>
---------------------------	---------------

## Other Authorities

ACLU of Northern California, <i>This Surveillance Software is Probably Spying on #BlackLivesMatter</i> (Dec. 15, 2015) .....	15
Alleged Assault Victim Sues UNC for Expulsion Threat, Associated Press (March 25, 2013).....	14
Angie Crouch, <i>Anonymous College Group Fights Against Sexual Assault on Campus</i> , NBC4 News (Apr. 10, 2015).....	14
Boston College Students Walk Out To Protest Racist Incidents, Associated Press (Oct. 18, 2017) .....	16
Carrie Johnson, <i>Comey Fesses Up, Claims Ownership of Suspected Twitter Account</i> , NPR (Oct. 23, 2017).....	19
Chelsea Rose Marcius, <i>Lists of Alleged Columbia University “Rapists” Scrawled on Bathroom Walls Across Campus</i> , N.Y. Daily News (May 15, 2014).....	12
Chris Bodenner, <i>The Surprising Revolt at the Most Liberal College in the Country</i> , The Atlantic (Nov. 2, 2017) .....	17
Craig Timberg, <i>Facebook, Twitter and Instagram Sent Feeds That Helped Police Track Minorities in Ferguson and Baltimore, Report Says</i> , Wash. Post (Oct. 11, 2016) .....	15
Elahe Izadi, <i>Spelman, Morehouse Investigate Gang-Rape Allegations Posted By Anonymous Twitter Account</i> , Wash. Post (May 5, 2016).....	13
Eliana Dockterman, <i>Names of Alleged Sexual Predators Written on Columbia University Wall</i> , Time (May 13, 2014) .....	12

<i>FBI Report on “Black Identity Extremists” Raises Fears of Targeting,</i> CBS News (Nov. 20, 2017).....	16
Feminist Majority Foundation et al., <i>Letter to DOE</i> (Oct. 20, 2015) .....	4
George Joseph, <i>Behind Columbia’s “Rape List,”</i> The Guardian (June 26, 2014) .	12
George Joseph, <i>NYPD Officers Accessed Black Lives Matter Activists’ Texts,</i> <i>Documents Show,</i> The Guardian (Apr. 4, 2017) .....	15
George Joseph, <i>NYPD Sent Undercover Officers to Black Lives Matter Protest,</i> <i>Records Reveal,</i> The Guardian (Sept. 29, 2016) .....	15
George Joseph, <i>NYPD Sent Video Teams to Record Occupy and BLM Protests</i> <i>Over 400 Times, Documents Reveal,</i> The Verge (Mar. 22, 2017) .....	15
George Joseph, <i>Undercover Police Have Regularly Spied On Black Lives Matter</i> <i>Activists In New York,</i> The Intercept (Aug. 18, 2015) .....	15
Gwen Everett, <i>List Alleging Names of Sexual Assaulters Appears in Campus</i> <i>Bathrooms,</i> Brown Daily Herald (Apr. 27, 2017).....	12
Hamza Shaban, <i>What is TBH, Facebook’s Newly Acquired Anonymous Teen</i> <i>Compliment App? Wash. Post</i> (Oct 17, 2017) .....	21
Internet Live Stats, <i>Twitter Usage Statistics,</i> .....	18
JDoe, <i>About JDoe</i> .....	19
Jessica Moulite, <i>Inside the Mind of the USC Girl Mafia,</i> Annenberg Media Center (Apr. 3, 2015) .....	14
John Newsom, <i>Black Guilford College Students Demand Better Treatment,</i> Winston-Salem Journal (Nov. 13, 2015).....	11
Karen Sloan, <i>Ripping a Critic’s Mask Off,</i> National Law Journal (Oct. 17, 2011) .....	17
Kevin Dolak, <i>UNC Student Risks Expulsion by Going Public With Alleged Rape,</i> ABC News (Feb. 27, 2013) .....	13
Kurt Wagner, <i>Twitter Fights to Protect Anonymous Users More Often Than</i> <i>You’d Think,</i> Recode (Apr. 10, 2017) .....	19

Lawrence Crook III, <i>Alleged “Rapist List” Appears Around Columbia University</i> , CNN (May 15, 2014) .....	12
Leanne Suter, <i>#USCGirlMafia Warns Students of Serial Groper Near Campus</i> , ABC (Apr. 10, 2015).....	14
<i>Mall of America Used Fake Facebook Account to Spy on Activists</i> , Fox9 (Apr. 12, 2015).....	16
Matt Buchanan, <i>Why Twitter Parody Accounts Should Stay Anonymous</i> , The New Yorker (July 22, 2013).....	19
Max Knoblauch, <i>18 Fake Twitter Accounts Still Proving Phony is Funny</i> , Mashable (June 3, 2014) .....	18
Max Rann, <i>A Mysterious Twitter Whistleblower is Trying to Take Down the President of Turkey</i> , Vice News (Jan. 17, 2015).....	18
New York Times, <i>Comments</i> .....	20
New York Times, <i>Verified Commenters</i> .....	20
Nicole Zelniker, <i>Student Leaders Create Anonymous Reporting Form</i> , The Guilfordian (Nov. 20, 2015) .....	11
ReachOut, <i>Frequently Asked Questions</i> .....	20
Sandhya Somashekhar, <i>How Black Lives Matter, Born On The Streets, Is Rising To Power On Campus</i> , Wash. Post (Nov. 17, 2015).....	16
Sarah Begley, <i>There’s Now an Unofficial National Parks Account Tweeting Against President Trump</i> , Time (Jan. 25, 2017) .....	18
Sarah Kessler, <i>Meet the Anti-Tinder: A Social Network That Puts Appearances Last</i> , Fast Company (Nov. 18, 2013) .....	21
SecureDrop, <i>Frequently Asked Questions</i> .....	20
SecureDrop, <i>Official Directory</i> .....	20
Twitter, <i>About Your Twitter Timeline</i> .....	18
Twitter, <i>Parody, Commentary, and Fan Account Policy</i> .....	19

Twitter, <i>Privacy Policy</i> .....	18
Twitter, <i>Q3 2017 Earnings Report</i> .....	18
Twitter, <i>Tweeting Made Easier</i> (Nov. 7, 2017).....	18
Wikipedia, <i>Wikipedia is Anonymous</i> .....	20
William Celis, <i>Date Rape and a List at Brown</i> , N.Y. Times (Nov. 18, 1990).....	12
Zvi Bar'el, <i>The Twitter-jitters: 140 Characters That Shake a Kingdom</i> , Haaretz (Apr. 1, 2014) .....	18



## STATEMENT OF INTEREST OF AMICUS CURIAE<sup>1</sup>

The Electronic Frontier Foundation is concerned that Appellants' well-intentioned efforts to protect college students from harassment and threats will jeopardize their ability to advocate for equality on campuses by prohibiting them and others from using anonymous online speech platforms as a tool for broader social change. This would be counterproductive, as many speakers in disempowered communities need such protection to avoid harassment. It would also violate the First Amendment.

EFF has an acute interest in anonymous speech broadly and in this case in particular. In 2015, EFF responded to the request by a coalition led by Appellant Feminist Majority Foundation to the U.S. Department of Education (DOE) that it create rules requiring campuses to restrict access to online anonymous speech platforms. EFF opposed the request, emphasizing the importance of anonymous speech and the robust First Amendment protection afforded to it.<sup>2</sup> In the present case, Appellants' theory of liability similarly would curtail the availability of anonymous online speech platforms on campus.

Recognizing the Internet's power as a tool of democratization, the Electronic Frontier Foundation (EFF) has, for over 25 years, worked to protect the rights of

---

<sup>1</sup> This brief is filed pursuant to Fed. R. App. Proc. 29(a) with the consent of all parties.

<sup>2</sup> EFF, *Letter to DOE* (Jan. 13, 2016), <https://www.eff.org/files/2016/01/13/efflettertoocrfinal.pdf>.

technology users to transmit and receive information online. EFF is a non-profit civil liberties organization with more than 44,000 dues-paying members, bound together by a mutual strong interest in helping the courts ensure that such rights remain protected as technologies change, new digital platforms for speech emerge, and the Internet continues to re-shape governments' interactions with their citizens.

EFF frequently files amicus briefs in courts across the country in favor of the First Amendment right to anonymous online speech. *See, e.g., Signature Management Team v. Doe*, 876 F.3d 831 (6th Cir. 2017).<sup>3</sup> EFF also represents anonymous speakers who are the target of vexatious litigation designed to harass or silence them. *See, e.g., Doe v. 2TheMart.com*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001). Further, EFF files amicus briefs that highlight the pervasive use of the Internet and social media platforms. Among many other landmark cases, EFF submitted an amicus brief in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), which the Court cited numerous times in its opinion.<sup>4</sup>

---

<sup>3</sup> EFF, *Amicus Curiae Brief in Signature Management Team v. Doe* (Jan. 17, 2017), [https://www.eff.org/files/2017/01/17/smt\\_v\\_doe\\_amicus.pdf](https://www.eff.org/files/2017/01/17/smt_v_doe_amicus.pdf). *See generally* EFF, *Anonymity*, <https://www.eff.org/issues/anonymity>.

<sup>4</sup> EFF et al., *Amicus Curiae Brief in Packingham v. North Carolina* (Dec. 22, 2016), [https://www.eff.org/files/2016/12/22/2016-12-22\\_-\\_packingham\\_v\\_nc\\_-\\_amicus\\_brief\\_of\\_eff\\_pk\\_and\\_cdt.pdf](https://www.eff.org/files/2016/12/22/2016-12-22_-_packingham_v_nc_-_amicus_brief_of_eff_pk_and_cdt.pdf).

## INTRODUCTION

From the founding of our nation to the present, advocates of social change fearing retribution from the powerful have used anonymous speech to mobilize their supporters, persuade the general public, and blow the whistle on official misconduct. Absent anonymity, many would-be speakers would remain silent out of fear of violence, prosecution, civil litigation, job loss, social ostracism, and other unjustified retaliation. This self-censorship would diminish the breadth and depth of our public discourse on all manner of issues.

College campuses are an especially fertile ground for anonymous speech, as young adults learn the habits of civic life, and often join together to advance a shared vision of a better world. This includes student activists working to overcome centuries of invidious discrimination against women, racial minorities, and other protected groups of people. Anonymous online speech platforms offer a critical space for students to promote equal opportunity on university campuses and the wider community. Students rely on both anonymity and online anonymous platforms to fight discrimination, document sexual violence, and demand change on their campuses.

Honoring the important role of anonymous speech in our nation's history and current discourse, courts have long and consistently held that the First Amendment protects the right to anonymous speech.

The issue of anonymous speech pervades this appeal. Even though Appellants now contend that this case is about the “multiple actions short of shutting down [the online anonymous speech platform] Yik Yak” that the university should have taken,<sup>5</sup> this Court must remain cognizant that restricting access to Yik Yak, or any similar anonymous online speech platform, would violate the First Amendment, and would be bad policy as well. EFF thus files this amicus brief to assist the Court in understanding the First Amendment limitations on the university’s ability to block anonymous speech platforms, as well as why such blanket censorship would potentially be counterproductive to Appellants’ goals of combatting harassment and promoting equality.

---

<sup>5</sup> See Pl. Br. (App. Dkt. 15) at p. 26. See also *id.* at p. 28 (asserting Appellant only argued that “disabling Yik Yak [was] one among many possible actions” that UMW should have taken). In fact, the student plaintiffs repeatedly asked defendant University of Mary Washington (“UMW”) to (i) ask Yik Yak to disable the app on campus, and (ii) ban the app from UMW’s Wi-Fi. See Amended Compl. (D. Dkt. 13) at pars. 50, 55, 58, 59, 61. Also, the national organizational plaintiff asked the DOE to promulgate nationwide “guidance” that these are two “appropriate” ways for universities and colleges to address anonymous online speech platforms. Feminist Majority Foundation et al., *Letter to DOE* (Oct. 20, 2015), <http://feminist.org/blog/wp-content/uploads/2015/10/OCR-Letter-re-Anonymous-Social-Media-Oct-2015.pdf>. In their complaint, plaintiffs allege that UMW could have avoided Title IX liability by taking these two steps. See Compl. at pars. 1, 86, 89. The district court accurately observed that plaintiffs had “requested that UMW, among other things, disable Yik Yak on campus and ban Yik Yak from UMW’s wireless network.” See Opinion at 3 (Dkt. 29). Amici supporting Appellants similarly argue that UMW could have taken these steps to satisfy its obligations under federal anti-discrimination law. See NWLC Br. (Dkt. 19-1) at p. 16 & n.45; NEA Br. (Dkt. 20-1) at p. 20.

## ARGUMENT

### I. ANONYMOUS SPEECH IS AN HONORABLE TRADITION THAT HAS LONG ENJOYED ROBUST FIRST AMENDMENT PROTECTION.

As the Supreme Court recognized almost sixty years ago,

Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes.

*Talley v. California*, 362 U.S. 60, 64-65 (1960). The Court thus struck down a California law that banned the distribution of handbills that did not include the name and address of the author. *Id.*

Some thirty-five years later, the Court affirmed the continued vitality of anonymous speech as a First Amendment value:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, at least in the field of literary endeavor, the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

The freedom to publish anonymously extends beyond the literary realm. . . . On occasion, quite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity. Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent. Thus, even in the field of political rhetoric, where "the identity of the speaker is an important component of many attempts to persuade," *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994) (footnote omitted), the most effective advocates have sometimes opted for anonymity.

*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-43 (1995).<sup>6</sup> The Court thus struck down an Ohio law penalizing the distribution of insufficiently attributed

---

<sup>6</sup> Indeed, the critical importance of anonymous speech is evident from the fact the Supreme Court granted certiorari in *McIntyre*, even though Ms. McIntyre died during the litigation and the penalty assessed against her for not putting her name on a leaflet was only \$100. *McIntyre*, 514 U.S. at 340-41. Justice Thomas, concurring in the Court's judgment, elaborated even further on the importance of anonymous pamphleteering to the Founders of our nation. *Id.* at 360-70 ("[T]he historical evidence indicates that Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'").

election materials. *Id.* at 357. *See also Lefkoe v Jos. A. Bank*, 577 F.3d 240, 248 (4th Cir. 2009) (acknowledging First Amendment protection of speaking anonymously); *United States v. Cassidy*, 814 F Supp. 2d 574, 581 (D. Md. 2011) (recounting the history of anonymous speech protections set forth in *Talley*, *McIntyre*, and other cases).

The Court has since held that the First Amendment right to speak anonymously is implicated in a variety of contexts, for example, by a requirement that door-to-door pamphleteers pre-register, *Watchtower Bible & Tract Soc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002), and by a requirement that those circulating initiative petitions wear identification badges, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 199-200 (1999).<sup>7</sup> In each case, the Court struck down a law that conditioned the right to speak on the provision of identifying information.

The First Amendment right to anonymous speech applies in full force on public university campuses. *See Justice For All v. Faulkner*, 410 F.3d 760, 765, 771 (5th Cir. 2005) (“[W]e have no trouble concluding that the anonymous

---

<sup>7</sup> Since anonymous online speech platforms also facilitate collective expressive activity, a separate line of First Amendment protection is also implicated: the right to anonymous association. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (holding that the compelled disclosure of the membership list of a political advocacy group is likely to have a chilling effect on their activities).

leafleting prohibited by the Literature Policy is a form of speech protected under the First Amendment.”). In *Justice For All*, the Fifth Circuit, applying First Amendment scrutiny, struck down a University of Texas policy that required that all printed materials distributed on campus bear the name of a university-affiliated person or organization responsible for its distribution. *Id.* at 763. The court so held even though it acknowledged that on-campus speech may never be completely anonymous since campus forums are commonly limited to students and speakers may need to prove that they are current students. But even in such case,

[w]hat remains of a student’s anonymity after he has identified himself to university officials . . . is significant. He may, if he chooses, remain anonymous in relation to other students, as well as most faculty and staff. This residual anonymity is no less critical to the expression of controversial ideas on university campuses than the right to more complete anonymity is to such expression in traditional public spheres.

*Id.* at 765.

A restriction on anonymous speech is a content-based restriction, and as a result, must survive strict scrutiny. The restriction would be content based because it treats speech revealing the author’s name more favorably than speech omitting it. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (finding a law content-based, and applying strict scrutiny, because it treated signs bearing the date and time of an event less favorably than those not containing that information). As the Supreme Court explained in *McIntyre*, “even though this provision applies



evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of speech. Every written document covered by the statute must contain ‘the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor.’” *McIntyre*, 514 U.S. at 345 (quoting Ohio Rev. Code Ann. § 3599.09(A) (1988)).<sup>8</sup>

Under strict scrutiny, the government must show that its restriction on anonymous speech is “narrowly tailored to serve compelling state interests.” *Reed*, 135 S. Ct. at 2226. Narrow tailoring requires that the restriction directly advance a compelling governmental interest, that the restriction be neither overinclusive nor underinclusive with respect to that interest, and that there are no less speech-restrictive alternatives to advancing the governmental interest. *Reno v. ACLU*, 521 U.S. 844, 874-79 (1997); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

---

<sup>8</sup> The Fifth Circuit in *Justice For All* held that the disputed identification requirement failed First Amendment scrutiny under any applicable standard, and in dicta assumed without deciding that it was content-neutral. 410 F.3d at 769 n.14. The Fourth Circuit in *Lefkoe* applied a less rigorous form of scrutiny because it was considering anonymous commercial speech. 577 F.3d at 248. *See also Acorn Investments, Inc., v. City of Seattle*, 887 F.2d 219, 225 (9th Cir. 1989) (characterizing an identity disclosure requirement as content-neutral, but striking it down under the enhanced scrutiny standard from *Buckley v. Valeo*, 421 U.S. 1, 64 (1975)).

Any restriction on anonymous speech in general, or ban on the use of an anonymous speech app in particular, would be inescapably overinclusive because it would burden all anonymous speech, and not just that speech that was abusive or harassing.

Restrictions on the use of anonymous online speech apps would also fail strict scrutiny because, as the Petitioners readily acknowledge in their opening brief, there are numerous less speech-restrictive alternatives the university could have pursued, and in the petitioners' view should have pursued:

As discussed above, *supra* at 15-18, UMW could have taken multiple actions short of shutting down Yik Yak. It could have conducted an investigation in an attempt to identify the harassers (as it no doubt would have done had it discovered a cyber-based scheme for cheating on exams). It could have announced to the student body that cyber harassment violated UMW policy and would subject offenders to appropriate punishment. It could have forwarded complaints about threatening posts to the police for robust investigation. At the very least, it could have strongly denounced the harassment.

ECF No. 15 at p. 26.

The University thus could not, consistent with the First Amendment, have blocked students from communicating anonymously, whether through Yik Yak or otherwise, in order to fulfill their Title IX requirements.

## **II. MANY UNIVERSITY STUDENTS SPEAK ANONYMOUSLY TO EFFECTIVELY ADVOCATE FOR EQUALITY ON CAMPUS.**

When advocating for equality on the basis of gender, race, and other protected statuses, both on campus and throughout the world, many university

students choose to speak anonymously. This is especially true when these student activists perceive that their views are controversial with fellow students, university officials, or even local police. Students relying on anonymity to effect change on campus often use online platforms to broadcast their advocacy to the larger campus community.

Any restrictions on anonymous speech thus, rather than advancing the cause of student equality, would undermine it instead.

#### **A. Soliciting Anonymous Complaints.**

Student advocates for equality may solicit anonymous complaints from their peers regarding inequality on campus. For example, African-American students at Guilford College in 2015 created a website to facilitate anonymous reports of race-related violence and other discrimination on campus, for students who felt unsafe revealing their identities through official channels.<sup>9</sup> This anonymous online complaint portal was part of a larger movement for racial justice on that campus.<sup>10</sup>

---

<sup>9</sup> Nicole Zelniker, *Student Leaders Create Anonymous Reporting Form*, The Guilfordian (Nov. 20, 2015), <https://www.guilfordian.com/news/2015/11/20/student-leaders-create-anonymous-reporting-form/>.

<sup>10</sup> John Newsom, *Black Guilford College Students Demand Better Treatment*, Winston-Salem Journal (Nov. 13, 2015), [http://www.journalnow.com/news/local/black-guilford-college-students-demand-better-treatment/article\\_6831c3f9-03ad-5ea2-8752-b42f0f195cf8.html](http://www.journalnow.com/news/local/black-guilford-college-students-demand-better-treatment/article_6831c3f9-03ad-5ea2-8752-b42f0f195cf8.html).

## **B. Anonymous Denunciations of Sexual Violence.**

Student survivors of sexual violence may want anonymity when they denounce their alleged attackers.

For example, at Columbia University in 2014, anonymous anti-rape activists posted in bathroom stalls and other locations the names of male students who allegedly raped female students.<sup>11</sup> Members of the group feared retaliation in the form of defamation suits, administrative sanctions, and student backlash.<sup>12</sup> The students used this tactic because they believed the university was not doing enough to stop rape on campus.<sup>13</sup>

Anonymous anti-rape advocates at Brown University undertook similar efforts in 1990<sup>14</sup> and 2017.<sup>15</sup>

---

<sup>11</sup> Eliana Dockterman, *Names of Alleged Sexual Predators Written on Columbia University Wall*, Time (May 13, 2014), <http://time.com/97764/columbia-bathroom-sexual-assault-names/>; Lawrence Crook III, *Alleged "Rapist List" Appears Around Columbia University*, CNN (May 15, 2014), <https://www.cnn.com/2014/05/14/us/columbia-university-flier-rapes/index.html>.

<sup>12</sup> George Joseph, *Behind Columbia's "Rape List,"* The Guardian (June 26, 2014), <https://www.theguardian.com/education/2014/jun/26/columbia-university-students-rape-list-mishandle-sexual-assault>.

<sup>13</sup> Chelsea Rose Marcius, *Lists of Alleged Columbia University "Rapists" Scrawled on Bathroom Walls Across Campus*, N.Y. Daily News (May 15, 2014), <http://www.nydailynews.com/new-york/lists-alleged-columbia-university-rapists-scrawled-bathroom-walls-article-1.1793986>.

<sup>14</sup> William Celis, *Date Rape and a List at Brown*, N.Y. Times (Nov. 18, 1990), <http://www.nytimes.com/1990/11/18/us/date-rape-and-a-list-at-brown.html>.

<sup>15</sup> Gwen Everett, *List Alleging Names of Sexual Assaulters Appears in Campus Bathrooms*, Brown Daily Herald (Apr. 27, 2017),

Likewise, an anonymous student at Spelman College used Twitter to publish her report, under the handle @RapedAtSpelman, of being sexually assaulted in 2016 by four students from Morehouse College.<sup>16</sup> Her Twitter page explains: “This page is anonymous because I want to be able to express myself without being attacked by AUC [*i.e.*, Atlanta University Center] students for what happened to me.”<sup>17</sup> Her anonymous Twitter account also reports her disappointment with the quality of Spelman’s response to her complaint.

It is easy to understand why student rape survivors might want anonymity when they publicly denounce a fellow student who allegedly raped them. They may fear physical violence, or frivolous retaliatory litigation. Another threat, unfortunately, is university disciplinary proceedings. University of North Carolina student Landen Gambill accused her ex-boyfriend, a fellow student, of raping her, and the university’s Honor Court cleared him.<sup>18</sup> When she publicly denounced her ex-boyfriend and the university’s handling of her accusations (without naming her

---

<http://www.browndailyherald.com/2017/04/27/list-alleging-names-sexual-assaulters-appears-campus-bathrooms/>.

<sup>16</sup> Elahe Izadi, *Spelman, Morehouse Investigate Gang-Rape Allegations Posted By Anonymous Twitter Account*, Wash. Post (May 5, 2016),

<https://www.washingtonpost.com/news/grade-point/wp/2016/05/05/spelman-morehouse-investigate-gang-rape-allegations-posted-by-anonymous-twitter-account/>.

<sup>17</sup> <https://twitter.com/rapedatspelman>.

<sup>18</sup> Kevin Dolak, *UNC Student Risks Expulsion by Going Public With Alleged Rape*, ABC News (Feb. 27, 2013), <http://abcnews.go.com/US/unc-student-risks-expulsion-public-alleged-rape/story?id=18609150>.

ex-boyfriend), the Honor Court initiated proceedings *against her*—for creating an intimidating environment for her ex-boyfriend.<sup>19</sup>

Student advocates against gender-based violence may also want anonymity when they warn their communities about at-large assailants. For example, at the University of Southern California in 2015, a group of anonymous students called USC Girl Mafia worked to protect female members of the university community from a serial groper.<sup>20</sup> The student who founded the group chose anonymity to keep the focus on the sexual predator.<sup>21</sup> Using a pseudonymous twitter handle (@USCGirlMafia<sup>22</sup>), they published a map showing the location of assaults on and near campus.<sup>23</sup> They also posted unsigned fliers throughout the community warning women to watch out for the predator.<sup>24</sup>

---

<sup>19</sup> *Alleged Assault Victim Sues UNC for Expulsion Threat*, Associated Press (March 25, 2013), <https://www.usatoday.com/story/news/nation/2013/03/25/victim-sues-unc-expulsion/2018261/>.

<sup>20</sup> Jessica Moulite, *Inside the Mind of the USC Girl Mafia*, Annenberg Media Center (Apr. 3, 2015), <http://www.neontommy.com/news/2015/04/inside-mind-usc-girl-mafia>.

<sup>21</sup> Leanne Suter, *#USCGirlMafia Warns Students of Serial Groper Near Campus*, ABC (Apr. 10, 2015), <http://abc7.com/news/uscgirlmafia-warns-students-of-serial-groper-near-campus/649833/>.

<sup>22</sup> <https://twitter.com/uscgirlmafia>.

<sup>23</sup> <https://batchgeo.com/map/cff996aec0e82b3f986282402938f51a>.

<sup>24</sup> Angie Crouch, *Anonymous College Group Fights Against Sexual Assault on Campus*, NBC4 News (Apr. 10, 2015), <https://www.nbclosangeles.com/news/local/USC-Girl-Mafia-Group-Raise-Sexual-Assault-Awareness-299423751.html>.

### C. Anonymous Organizing to Avoid Surveillance.

Students seeking to organize a movement for campus equality may fear surveillance by university officials or local police and thus seek anonymity to shield themselves from such unwarranted scrutiny.

To cite just one contemporary example, law enforcement agencies have unfairly spied on the political activity of the Black Lives Matter movement. This includes sending undercover officers to attend protests,<sup>25</sup> filming protests,<sup>26</sup> infiltrating small groups of activists to gain access to their text messages,<sup>27</sup> and deploying software to automatically screen vast quantities of social media postings.<sup>28</sup> Also, private security professionals used fake Facebook accounts to spy

---

<sup>25</sup> George Joseph, *Undercover Police Have Regularly Spied On Black Lives Matter Activists In New York*, *The Intercept* (Aug. 18, 2015), <https://theintercept.com/2015/08/18/undercover-police-spied-on-ny-black-lives-matter/>; George Joseph, *NYPD Sent Undercover Officers to Black Lives Matter Protest, Records Reveal*, *The Guardian* (Sept. 29, 2016), <https://www.theguardian.com/us-news/2016/sep/29/nypd-black-lives-matter-undercover-protests>.

<sup>26</sup> George Joseph, *NYPD Sent Video Teams to Record Occupy and BLM Protests Over 400 Times, Documents Reveal*, *The Verge* (Mar. 22, 2017), <https://www.theverge.com/2017/3/22/15016984/nypd-video-surveillance-protests-occupy-black-lives-matter>.

<sup>27</sup> George Joseph, *NYPD Officers Accessed Black Lives Matter Activists' Texts, Documents Show*, *The Guardian* (Apr. 4, 2017), <https://www.theguardian.com/us-news/2017/apr/04/nypd-police-black-lives-matter-surveillance-undercover>.

<sup>28</sup> ACLU of Northern California, *This Surveillance Software is Probably Spying on #BlackLivesMatter* (Dec. 15, 2015), <https://www.aclunc.org/blog/surveillance-software-probably-spying-blacklivesmatter>; Craig Timberg, *Facebook, Twitter and Instagram Sent Feeds That Helped Police Track Minorities in Ferguson and Baltimore, Report Says*, *Wash. Post* (Oct. 11, 2016),

on the movement's activists.<sup>29</sup> The FBI has even coined a dubious new category of domestic crime, apparently to justify even more snooping on racial justice and police reform activists: so-called "Black Identity Extremists."<sup>30</sup>

The Black Lives Matter movement is active today on many university and college campuses.<sup>31</sup> Student organizers may legitimately fear unwanted scrutiny from university administrators or local police agencies, possibly to be followed by disciplinary proceedings and other disruption of their cause. As many activists have done before them, some of these student activists may turn to anonymous speech as a critical means to organize their movement.

#### **D. Other Anonymous Campus Speakers.**

Of course, students expressing all manner of controversial messages about their university communities (not just those seeking greater equality) may have

---

<https://www.washingtonpost.com/news/the-switch/wp/2016/10/11/facebook-twitter-and-instagram-sent-feeds-that-helped-police-track-minorities-in-ferguson-and-baltimore-aclu-says/>.

<sup>29</sup> *Mall of America Used Fake Facebook Account to Spy on Activists*, Fox9 (Apr. 12, 2015), <http://www.fox9.com/news/mall-of-america-used-fake-facebook-account-to-spy-on-activists>.

<sup>30</sup> *FBI Report on "Black Identity Extremists" Raises Fears of Targeting*, CBS News (Nov. 20, 2017), <https://www.cbsnews.com/news/fbi-report-black-extremists-fears-of-targeting-police/>.

<sup>31</sup> Sandhya Somashekhar, *How Black Lives Matter, Born On The Streets, Is Rising To Power On Campus*, Wash. Post (Nov. 17, 2015), [https://www.washingtonpost.com/national/how-black-lives-matter-born-on-the-streets-is-rising-to-power-on-campus/2015/11/17/3c113e96-8959-11e5-be8b-1ae2e4f50f76\\_story.html](https://www.washingtonpost.com/national/how-black-lives-matter-born-on-the-streets-is-rising-to-power-on-campus/2015/11/17/3c113e96-8959-11e5-be8b-1ae2e4f50f76_story.html); *Boston College Students Walk Out To Protest Racist Incidents*, Associated Press (Oct. 18, 2017), <https://nypost.com/2017/10/18/boston-college-students-walk-out-to-protest-racist-incidents/>.



good reasons to do so anonymously. When a student at Cooley Law School published a website in 2011 warning prospective students of his school's low post-graduation employment rate, he did so anonymously, out of fear that his warning would hurt his employment prospects.<sup>32</sup> When some students at Reed College in 2017 wrote letters to the editor criticizing some of the tactics of that campus' racial justice movement, they did so anonymously, too.<sup>33</sup>

### **III. MANY ANONYMOUS ONLINE SPEECH PLATFORMS FACILITATE SOCIALLY VALUABLE NEWS AND VIEWS, AND THUS PROMOTE UNIVERSITY VALUES.**

Anonymous online speech platforms are a valuable tool to advance a critical mission of higher education: the free flow of varied information on all manner of subjects. Numerous apps, websites, and other online platforms allow anonymous communication. These tools enrich our public discourse by disseminating important voices that might not otherwise be heard if individuals had to attach their names to them.

---

<sup>32</sup> Karen Sloan, *Ripping a Critic's Mask Off*, National Law Journal (Oct. 17, 2011), <https://www.law.com/nationallawjournal/almID/1202518943064/?slreturn=20171108012741>.

<sup>33</sup> Chris Bodenner, *The Surprising Revolt at the Most Liberal College in the Country*, The Atlantic (Nov. 2, 2017), <https://www.theatlantic.com/education/archive/2017/11/the-surprising-revolt-at-reed/544682/>.

Twitter tells its users: “you can use either your real name or a pseudonym.”<sup>34</sup>

Twitter is a social media app that allows users to read and write “tweets,” which are messages no longer than 280 characters.<sup>35</sup> Users may “follow” others and thereby receive tweets in their “timelines.”<sup>36</sup> Twitter has 330 million monthly active users,<sup>37</sup> who send 500 million tweets every day.<sup>38</sup> Many people use Twitter to anonymously condemn government policies or blow the whistle on government wrongdoing.<sup>39</sup> Other people operate parody Twitter accounts that anonymously spoof or criticize elected officials, actors, and businesses.<sup>40</sup> Until he unmasked

---

<sup>34</sup> Twitter, *Privacy Policy*, <https://twitter.com/privacy?lang=en>.

<sup>35</sup> Twitter, *Tweeting Made Easier* (Nov. 7, 2017), [https://blog.twitter.com/official/en\\_us/topics/product/2017/tweetingmadeeasier.html](https://blog.twitter.com/official/en_us/topics/product/2017/tweetingmadeeasier.html).

<sup>36</sup> Twitter, *About Your Twitter Timeline*, <https://support.twitter.com/articles/164083#>.

<sup>37</sup> Twitter, *Q3 2017 Earnings Report*, p. 4, [http://files.shareholder.com/downloads/AMDA-2F526X/5632531209x0x961125/EB20419D-CCD5-4A07-9F2A-236605AE1C3C/2017\\_Q3\\_Earnings\\_Slides.pdf](http://files.shareholder.com/downloads/AMDA-2F526X/5632531209x0x961125/EB20419D-CCD5-4A07-9F2A-236605AE1C3C/2017_Q3_Earnings_Slides.pdf).

<sup>38</sup> Internet Live Stats, *Twitter Usage Statistics*, <http://www.internetlivestats.com/twitter-statistics/>.

<sup>39</sup> Sarah Begley, *There's Now an Unofficial National Parks Account Tweeting Against President Trump*, Time (Jan. 25, 2017), <http://time.com/4648607/nps-national-park-service-twitter-donald-trump/>; Max Rann, *A Mysterious Twitter Whistleblower is Trying to Take Down the President of Turkey*, Vice News (Jan. 17, 2015), <https://news.vice.com/article/a-mysterious-twitter-whistleblower-is-trying-to-take-down-the-president-of-turkey>; Zvi Bar'el, *The Twitter-jitters: 140 Characters That Shake a Kingdom*, Haaretz (Apr. 1, 2014), <https://www.haaretz.com/middle-east-news/.premium-1.583089>;

<sup>40</sup> Max Knoblauch, *18 Fake Twitter Accounts Still Proving Phony is Funny*, Mashable (June 3, 2014), <http://mashable.com/2014/06/03/best-fake-twitter-accounts/#7va0QT4G9gqM>; Matt Buchanan, *Why Twitter Parody Accounts Should*

himself, former FBI Director James Comey tweeted under a pseudonym.<sup>41</sup> Twitter goes to court to protect its users' anonymity.<sup>42</sup>

One online platform, JDoe, allows users to anonymously report sexual assaults and seek legal and other services while maintaining their anonymity.<sup>43</sup> The platform was specifically designed to allow its users to maintain their anonymity, including encrypting user communications and data. One purpose of JDoe is to identify individuals who victimized more than one person, with the goal of encouraging those victims to communicate with each other and consider bringing legal claims against the perpetrator. By giving users control over the stories and data they provide to JDoe, the platform empowers victims of sexual violence to decide for themselves how best to respond to their trauma.

---

*Stay Anonymous*, The New Yorker (July 22, 2013), <https://www.newyorker.com/tech/elements/why-twitter-parody-accounts-should-stay-anonymous>; Twitter, *Parody, Commentary, and Fan Account Policy*, <https://support.twitter.com/articles/106373#>.

<sup>41</sup> Carrie Johnson, *Comey Fesses Up, Claims Ownership of Suspected Twitter Account*, NPR (Oct. 23, 2017), <https://www.npr.org/2017/10/23/559545666/comey-fesses-up-claims-ownership-of-suspected-twitter-account>.

<sup>42</sup> Kurt Wagner, *Twitter Fights to Protect Anonymous Users More Often Than You'd Think*, Recode (Apr. 10, 2017), <https://www.recode.net/2017/4/10/15244754/twitter-lawsuit-government-anonymous-users>.

<sup>43</sup> JDoe, *About JDoe*, <http://jdoe.io/html/about.html>.

Another platform, ReachOut, is designed to give parents and teenagers the ability to anonymously discuss issues such as bullying, depression, and stress.<sup>44</sup> One of the platform's key features is the ability for parents and teens to post questions to various message boards, or to respond to other's posts, without revealing their identities. This allows both groups to be honest and candid as they try to help each other.

Many news and information websites also allow their users to communicate with each other anonymously.

The *New York Times* allows its readers to use pseudonyms when they comment on articles and other comments.<sup>45</sup> Likewise, Wikipedia allows its editors to write and revise entries under a pseudonym.<sup>46</sup>

SecureDrop is a communication tool that allows whistleblowers to anonymously send documents to journalists.<sup>47</sup> Its many users include the *Associates Press*, *Forbes*, the *Washington Post*, and *USA Today*.<sup>48</sup> This anonymous

---

<sup>44</sup> ReachOut, *Frequently Asked Questions*, <https://au.reachout.com/faqs>

<sup>45</sup> New York Times, *Comments*, #10, <https://www.nytimes.com/content/help/site/usercontent/usercontent.html#usercontent-name>; New York Times, *Verified Commenters*, #1, <https://www.nytimes.com/content/help/site/usercontent/verified/verified-commenters.html>.

<sup>46</sup> Wikipedia, *Wikipedia is Anonymous*, [https://en.wikipedia.org/wiki/Wikipedia:Wikipedia\\_is\\_anonymous](https://en.wikipedia.org/wiki/Wikipedia:Wikipedia_is_anonymous).

<sup>47</sup> SecureDrop, *Frequently Asked Questions*, [https://securedrop.org/faq#what\\_is](https://securedrop.org/faq#what_is).

<sup>48</sup> SecureDrop, *Official Directory*, <https://securedrop.org/directory>.

communication tool helps the news media to inform the public about what their government is doing behind closed doors.

Finally, anonymous online speech platforms have value beyond the dissemination of news. TBH allows its five million users, who are mostly youth, to praise their friends by anonymously participating in complimentary online polls (e.g., “who has the best smile?”).<sup>49</sup> Likewise, Anomo is an online dating service that allows its users, some of whom are introverts, to get to know each other anonymously through chat and games, before exchanging identifying information like names and photos.<sup>50</sup>

---

<sup>49</sup> Hamza Shaban, *What is TBH, Facebook’s Newly Acquired Anonymous Teen Compliment App?* Wash. Post (Oct 17, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/10/17/tbh-facebooks-new-anonymous-teen-compliment-app-explained/>.

<sup>50</sup> Sarah Kessler, *Meet the Anti-Tinder: A Social Network That Puts Appearances Last*, Fast Company (Nov. 18, 2013), <https://www.fastcompany.com/3021767/meet-the-anti-tinder-a-social-network-that-puts-appearances-last>.

## CONCLUSION

Amicus curiae EFF respectfully requests that this Court hold that the First Amendment forbids public universities and colleges from blocking anonymous online speech platforms from their campuses.

Dated: January 18, 2018

Respectfully submitted:

By: /s/ Sophia Cope  
Sophia Cope  
Corynne McSherry  
David Greene  
Adam Schwartz  
Aaron Mackey  
ELECTRONIC FRONTIER  
FOUNDATION  
815 Eddy Street  
San Francisco, CA 94109  
Telephone: (415) 436-9333  
sophia@eff.org

*Counsel for Amicus Curiae  
Electronic Frontier Foundation*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE  
REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)**

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Curiae Electronic Frontier Foundation In Support of Defendants-Appellees complies with the type-volume limitation, because this brief contains 4,678 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2011, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: January 18, 2018

By: /s/ Sophia Cope  
Sophia Cope

*Counsel for Amicus Curiae  
Electronic Frontier Foundation*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on January 18, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 18, 2018

By: /s/ Sophia Cope  
Sophia Cope

*Counsel for Amicus Curiae*  
*Electronic Frontier Foundation*