RECORD 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; ALEXIS LEHMAN,

Plaintiffs – Appellants,

v.

UNIVERSITY OF MARY WASHINGTON; RICHARD HURLEY, Former President of University of Mary Washington; TROY PAINO, Current President of University of Mary Washington,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, CATO INSTITUTE, NATIONAL COALITION AGAINST CENSORSHIP, AND NADINE STROSSEN IN SUPPORT OF DEFENDANTS-APPELLEES

FILED WITH CONSENT OF ALL PARTIES – F.R.A.P. 29(a)

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that (1) *amici* do not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amici*.

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INTEREST OF AMICI CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit civil liberties organization dedicated to defending individual rights at our nation's colleges and universities through legal and public advocacy. Since its founding in 1999, FIRE has defended constitutional liberties including freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience on behalf of students and faculty nationwide.

The Cato Institute ("Cato") was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of

[1] All parties have consented to the filing of this brief. No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief.

expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, teachers, students, librarians, readers, and others around the country. NCAC has a longstanding interest in protecting the free speech rights of members of university communities and is joining in this brief to urge the Court to preserve the distinction between offensive speech that is protected under the First Amendment and unlawful harassment that Title IX proscribes.

Nadine Strossen is Professor of Law at New York Law School. She served as president of the American Civil Liberties Union from 1990 to 2008, and she has served in leadership positions in other organizations that focus on freedom of speech issues. Professor Strossen teaches, writes and lectures extensively on constitutional law issues, with a special focus on freedom of speech, including on public university campuses.

This case is of interest to *amici* because of its impact on the First Amendment rights of college students, faculty, and staff.

SUMMARY OF ARGUMENT

The lower court correctly ruled that the University of Mary Washington (UMW) was not deliberately indifferent to appellants' claim of harassment. The Yik Yak posts did not rise to the level of discriminatory harassment as set forth by the Supreme Court in *Davis v. Monroe County Board of Education*, 529 U.S. 629 (1999). The posts in evidence, though crude and offensive, are protected expressions of opposition to appellants' political advocacy on campus. Nor did the posts in evidence rise to the level of true threats, which are only "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).

To the extent appellants argue that UMW could censor non-harassing, non-threatening, off-campus speech because of its potential to disrupt the educational environment, they rely on cases from the K–12 setting that should not apply to a case involving a response to the political advocacy of adult college students.

In any event, UMW was not deliberately indifferent. The university took numerous steps to address appellants' concerns, and any of the other remedies proposed by appellants would have violated the First Amendment rights of the posters, whose expression was constitutionally protected.

The lower court also correctly ruled that former UMW president Richard Hurley's public letter to appellant Feminist Majority Foundation (FMF), defending the university against equally public allegations of wrongdoing made by FMF, did not constitute retaliation. Any other conclusion would convert Title IX into a gag order that would force accused institutions and individuals to stand silent in the face of damaging and even false accusations, in violation of their right to free speech.

Amici urge this Court to uphold the lower court's decision.

ARGUMENT

I. The university's response to appellants' complaints was appropriate under Title IX and the First Amendment.

Appellants contend that UMW's response to their complaints about offensive posts on Yik Yak constitutes sex discrimination in violation of Title IX. Under well-established precedent governing the First Amendment on public campuses and institutional responses to allegations of sexual harassment under Title IX, their argument must fail.

The Supreme Court has made clear that educational institutions receiving federal funding are liable for private damages under Title IX only when "they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. In crafting this standard, the *Davis* Court recognized a recipient institution's obligation to address allegations of sexual harassment—as well as the practical and constitutional limitations on its ability to do so.

Per *Davis*, an institution's response to sexual harassment complaints must be assessed within the context of its other legal obligations; it is "entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Id.* at 649. An institution "cannot be directly

liable for its indifference where it lacks the authority to take remedial action"—such as when a disciplinary response to the alleged harassment would violate other inalterable legal commitments, such as a public institution's duty to uphold the First Amendment. *Id*. at 644.

Nevertheless, appellants ask this Court to ignore the limitations on institutional liability identified in *Davis*. Were appellants' demands met, public universities would effectively be forced to police and punish protected expression, including the anonymous expression of non-students in online fora beyond university control. Conscripting public universities into this massive effort under threat of liability would irrevocably damage their role as "great bazaars of ideas where the heavy hand of regulation has little place." *Kim v. Coppin State Coll.*, 662 F.2d 1055, 1064 (4th Cir. 1981).

A. The Yik Yak posts were protected speech, not discriminatory harassment or true threats.

The lower court assumes *arguendo* that the Yik Yak posts in evidence were harassing or otherwise unprotected, and moves directly to the question of deliberate indifference. That analysis overlooks a critical distinction between this case and many of the other cases addressing the question of deliberate indifference: This case turns exclusively on the university's response to offensive but constitutionally protected speech. Before reviewing the lower court's deliberate

indifference analysis, therefore, this Court must answer the threshold question of whether there was even any harassment to be deliberately indifferent to.

In responding to appellants' allegations of sexual harassment, former president Hurley noted correctly that UMW was "obligated to comply with all federal laws—not just Title IX."[2] Hurley declined to grant appellants' request that he ban Yik Yak from campus because "[t]he First Amendment prohibits prior restraints on speech, and banning Yik Yak is tantamount to a content-based prohibition on speech."[3]

Hurley's refusal to risk violating the First Amendment in responding to sexual harassment allegations is exactly what the *Davis* Court permitted when it observed that it is "entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims." *Davis*, 526 U.S. at 649. A public university need not—indeed, *must not*—violate the First Amendment in attempting to address sexual harassment. *See*, *e.g.*, *DeJohn v. Temple Univ.*, 537 F.3d 301, 320 (3d Cir. 2008) (striking down university sexual harassment policy for overbreadth). A public university has "a substantial interest in maintaining an educational environment free of discrimination and racism"—but

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[2] *UMW President Richard Hurley's letter to Feminist Majority Foundation*, FREE LANCE-STAR, June 8, 2015, http://www.fredericksburg.com/news/education/umw-president-richard-hurley-s-letter-to-feminist-majority-foundation/article_91ad966c-0e14-11e5-b5b2-e3469289a8dd.html.

[3] *Id.*

it likewise "has many constitutionally permissible means to protect female and minority students," and it must "accomplish[] its goals in some fashion other than silencing speech on the basis of its viewpoint." *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 393 (4th Cir. 1993).

Even setting aside the obvious First Amendment problems a ban of Yik Yak on UMW's campus would pose,[4] the Yik Yak posts characterized by appellants as sexual harassment are themselves protected expression. None of the posts submitted with appellants' federal complaint or their complaint to the Office for Civil Rights rise to the level of discriminatory harassment, as defined by *Davis*, nor do they constitute true threats or intimidation.

1. The posts in evidence do not rise to the level of discriminatory harassment.

Per *Davis*, actionable discriminatory harassment is conduct "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school." 526 U.S. at 645. This refers to extreme behavior—conduct so serious that it would

[4] *See* Letter from Joan Bertin, Executive Director, Nat'l Coalition Against Censorship, et al., to John B. King and Catherine Lhamon, U.S. Dep't of Educ. (April 4, 2016) (on file with author) ("Public institutions may not restrict access to social media for an entire community simply because some users post unacceptable and even illegal messages; otherwise, the government could restrict use of the U.S. Mail and the telephone, both of which can be used in ways that are both permissible and not.")

prevent a reasonable person from receiving his or her education—and a public university may punish student expression as harassment only when it meets this standard.

While the posts at issue may strike many as hostile, offensive, crude, and profane, these qualities alone do not deprive them of First Amendment protection. *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) ("[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'"); *see also Snyder v. Phelps*, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen … to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); *Doe v. George Mason Univ.*, 149 F. Supp. 3d 602, 627 (E.D. Va. 2016) ("[U]niversity students cannot thrive without a certain thickness of skin that allows them to engage with expressions that might cause 'distress' or 'discomfort'").

Even taken in the aggregate, the posts cannot constitute harassment. As appellees note, the posts were heated responses to appellants' political advocacy: "When striking a blow for one's cause, it should be unsurprising that others may seek to answer back, and in terms that are not always civil." Br. for Defs.-Appellees, at 30. For example, "This feminist needs to calm the hell down," "These feminists need to chill their tits," "I fucking hate feminists and sour

vaginas," "We don't want no feminazis," and "In all seriousness, can we revoke FUC's charter on the grounds that they are a hate group?," each of which is cited as harassing by appellants in their federal complaint, express opposition to appellants' political advocacy on campus. The posts may be uncivil, but the authors' choice to be uncivil is constitutionally protected. *See Coll. Republicans at S.F. State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1020 (N.D. Cal. 2007) (striking down university civility policy for "prohibiting the kind of communication that it is necessary to use to convey the full emotional power with which a speaker embraces her ideas or the intensity and richness of the feelings that attach her to her cause.")

Finally, appellants had to take affirmative, purposeful steps to read the posts of which they complained. *Davis* requires that the harassing conduct be not only severe and objectively offensive, but also *pervasive* enough that a reasonable person would no longer be able to obtain an educational benefit. Appellants were not obligated to log on to Yik Yak while on campus to obtain an educational benefit; instead of banning the application, an individual user's decision to simply ignore the posts or delete the application would have substantially the same effect.

2. The posts in question do not constitute true threats.

The Supreme Court has defined constitutionally unprotected "true threats" as "those statements where the speaker means to communicate a serious expression of

an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court further elaborated that speech may lose protection as "intimidation," a form of "true threat," when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*. at 360.

The posts cited by appellants do not meet this standard. Specifically, the three posts that the lower court described as containing "threatening language"—"Gonna tie these feminists to the radiator and grape them in the mouth," "Dandy's about to kill a bitch … or two," and "Can we euthanize whoever caused this bullshit?"—are not "serious expression[s] of an intent to commit an act of unlawful violence."

The first statement is a quote from a comedy sketch about an ill-conceived ad campaign for a children's grape drink featuring a giant bunch of purple grapes who shows up uninvited with the drink to "grape" people.[5] While *amicus* National Women's Law Center cites Urban Dictionary to suggest that "grape" is actually a threatening reference to gang rape (Br. of *Amici Curiae* National Women's Law Center et al., at 2), the identical language used in the Yik Yak post and the well-

[5] *See* WKUKofficial, Whitest Kids U' Know – Grapist, YOUTUBE (Mar. 14, 2012), https://www.youtube.com/watch?v=SZoiJM1vlfc (featuring "Grapist" character saying both "I'm gonna grape you in the mouth" and "I'm gonna tie you to the radiator and grape you.").

known comedy sketch make clear that the comment was, in fact, a flippant reference to the latter.

Former UMW president Hurley explained in his public letter to appellant FMF that the second statement is "a paraphrase of dialogue by a character on the television show 'American Horror Story: Freak Show.'"[6] Finally, the "euthanasia" comment is a hyperbolic reference to violence that was not aimed at a particular individual or group as required by *Black*. Further, given the tenor of the Yik Yak discussion amongst participating users, it is unlikely that under this Court's objective test, "an ordinary reasonable recipient who is familiar with the[] context … would interpret [those statements] as a threat of injury." *United States v. Armel*, 585 F.3d 182, 185 (4th Cir. 2009) (quoting *United States v. Roberts*, 915 F.2d 889, 891 (4th Cir. 1990) (internal quotation marks omitted).

3. In arguing that the speech is unprotected, appellants and their *amici* rely on cases from the K–12 setting, which should not control here.

To the extent appellants and their *amici* argue that UMW could censor non-harassing, non-threatening, off-campus speech because of its potential to disrupt the educational environment, they rely on cases from the K–12 setting that are based on the unique responsibility of educators in that environment to protect the

[6] *UMW President Richard Hurley's letter to Feminist Majority Foundation*, *supra* note 2. *See also American Horror Story Wiki: Dandy Mott*, http://americanhorrorstory.wikia.com/wiki/Dandy_Mott.

children in their charge.[7] While these K–12 cases set a floor for the extent to which speech can be limited in the context of public higher education, they cannot set a ceiling for the free speech rights of adult college students.

The Supreme Court has held that an important function of K–12 schools is to "inculcate the habits and manners of civility" in the children in their care. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). This is dramatically different from what the Supreme Court has said about the role of a university, which it has described as "one of the vital centers for the Nation's intellectual life." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 836 (1995). *See also Healy v. James*, 408 U.S. 169, 180 (1972) (finding "no room for the view that … First Amendment protections should apply with less force on college campuses than in the community at large.")

Appellants are "adults who have intentionally and voluntarily entered into the political arena to weigh in on and advocate for or against issues related to gender." Br. for Defs.-Appellees, at 32. They advocated vigorously against a proposal to recognize fraternities and sororities on campus, something others in the community passionately supported. *Id.* at 4. They also successfully petitioned the

[7] *See*, *e.g.*, *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 571 (4th Cir. 2011) (noting, in upholding discipline of high school student for creating a social media page dedicated to mocking another student at the school: "While students retain significant First Amendment rights in the school context, their rights are not coextensive with those of adults.").

university to punish its rugby team after several team members were recorded participating in a vulgar rugby chant at an off-campus party—a measure others in the community strongly opposed.[8]

Appellants' advocacy angered others and moved them to respond. In the marketplace of ideas, public political advocacy on controversial issues is frequently met with anger and incivility; that speech is angry, uncivil, and even vulgar does not deprive it of constitutional protection in this context. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 24–25 (1971) ("To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength."); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.").

[8] Erin Gloria Ryan, *Entire College Rugby Team Suspended Over Recorded 'Fuck a Whore' Chant*, JEZEBEL (Mar. 23, 2015), https://jezebel.com/entire-college-rugby-team-suspended-over-recorded-fuck-1692488876.

B. The university's response to appellants' complaints was appropriate under Title IX.

The lower court correctly denied appellants' Title IX claim, concluding that UMW's actions did not violate Title IX because the alleged harassment "took place in a context over which UMW had limited, if any, control—anonymous postings on Yik Yak." *Feminist Majority Found. v. Univ. of Mary Wash.*, No. 3:17-cv-00344-JAG, 2017 U.S. Dist. LEXIS 152397, at *8 (E.D. Va. Sep. 19, 2017). The lower court's ruling is consistent with *Davis*' instruction that for liability to attach, "the harassment must take place in a context subject to the school district's control." *Davis*, 526 U.S. at 645.

Other federal appellate courts have closely followed *Davis*' requirement that plaintiffs demonstrate the recipient institution possessed control over the context in which the alleged harassment occurred. For example, in *Roe v. St. Louis University*, 746 F.3d 874, 884 (8th Cir. 2014), the Eighth Circuit held that a university did not possess sufficient control over an off-campus party for purposes of Title IX liability under *Davis*. While recognizing that the sexual assault at issue was "clearly devastating" to the student, the Eighth Circuit explicitly rejected the argument that the university possessed "disciplinary control over the rapist because he was a student and that universities may control certain off campus behavior due to the nature of the relationship between students and the institution." *Id*. Instead, the court noted: "The Supreme Court has made it clear, however, that to be liable

for deliberate indifference under Title IX, a University must have had control over the situation in which the harassment or rape occurs." *Id*.

The facts of this case suggest substantially less university control than that alleged in *Roe* and similar cases in which courts have concluded that the institution lacked sufficient control over the relevant context. *See*, *e.g.*, *Ostrander v. Duggan*, 341 F.3d 745, 750 (8th Cir. 2003) (declining to find sufficient control for Title IX liability because university "did not own, possess, or control" fraternity house on campus); *Butters v. James Madison Univ.*, 208 F. Supp. 3d 745, 761 (W.D. Va. 2016) (declining to find deliberate indifference and observing that Title IX plaintiff "and her Assailants all lived off-campus in housing not controlled by JMU," and that plaintiff only encountered the other individuals "off-campus"). Universities do not exercise control over non-university social media platforms like Yik Yak, and they should not be held legally responsible for private speech on such fora.

C. UMW was not deliberately indifferent to plaintiffs' claims of harassment.

1. UMW took a number of actions in response to appellants' complaints.

UMW was not deliberately indifferent to appellants' complaints. The university took deliberate steps to answer appellants' concerns, including meeting with staff and students, organizing discussions, providing a police officer for security at group meetings, suspending the men's rugby team, and requiring team

members to take sexual assault training. Former president Hurley detailed the steps taken by UMW in his public response to appellants' press conference:[9]

> I have had more than one in-person meeting with FUC's leadership to discuss their concerns. We have consulted with legal counsel on permissible actions we might take to limit Yik Yak's impact on campus. We have worked extensively with our Title IX coordinator to facilitate an open dialogue on campus among students regarding sexual assault and harassment. We provided extra security – including a campus escort – for an FUC member who reported comments that could be considered a true threat. In late March, we sent a campus-wide email reminding all students that the University takes seriously any threats and encouraging even anonymous ones to be reported to Campus Police and to our Title IX officer. We received no reports after this reminder. We also encouraged reporting threats directly to Yik Yak.

These steps more than meet UMW's legal obligation under Title IX. Under *Davis*, a recipient institution can be liable under Title IX for student-on-student harassment "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. UMW's response was reasonable, particularly given that the alleged harassment took place in a context beyond UMW's control and consisted of speech protected by the First Amendment.

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[9] *UMW President Richard Hurley's letter to Feminist Majority Foundation*, FREE LANCE-STAR, June 8, 2015, http://www.fredericksburg.com/news/education/umw-president-richard-hurley-s-letter-to-feminist-majority-foundation/article_91ad966c-0e14-11e5-b5b2-e3469289a8dd.html.

UMW's response is comparable to those mounted by other institutions deemed by federal courts to have met their Title IX obligations in similar circumstances. *See*, *e.g.*, *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 751 (2d Cir. 2003) (university was not deliberately indifferent when it "responded to [plaintiff]'s complaint reasonably, in a timely manner, and in accordance with all applicable procedures"); *Jenkins v. Univ. of Minn.*, 131 F. Supp. 3d 860, 887 (D. Minn. 2015) (university was not deliberately indifferent because of the "number of steps the University took to improve the situation," despite not handling the situation "perfectly" and failing to have "gone even further or done more to assist" plaintiff); *Preusser v. Taconic Hills Cent. Sch. Dist.*, No. 1:10-CV-1347 (MAD/CFH), 2013 U.S. Dist. LEXIS 7057, *29 (N.D.N.Y. Jan. 17, 2013) (school was not deliberately indifferent because administrator held meetings to aid the complainant and response was "immediate, thorough and reasonable.")

The lower court rightly reiterated that per *Davis*, the "plaintiff cannot make [a] particular remedial demand." *Feminist Majority Found*., 2017 U.S. Dist. LEXIS 152397, at *7. To the contrary, the *Davis* Court explicitly clarified that its holding "does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Davis*, 526 U.S. at 648. This holding protects and encourages good-faith, reasonable administrative responses like UMW's.

Not only were appellees not deliberately indifferent, they were not motivated by discriminatory animus, as appellants' equal protection claim requires. *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences" and requires that defendant "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."); *Soper v. Hoben*, 195 F.3d 845, 852 (6th Cir. 1999) (quoting *Doe v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 77 (D.N.H. 1997) (equal protection claim failed because plaintiffs offered no evidence that defendant school principal "treated [sexual harassment] complaints differently 'because of, not merely in spite of, the harmful [disparate] effect that such treatment would have.'") The Fourteenth Amendment does not permit an end-run around the First Amendment; indeed, "the Fourteenth Amendment has consistently been held to incorporate the First Amendment's protection of free speech and academic freedom against the states." *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010). In *Rodriguez*, the Ninth Circuit found that while the Equal Protection Clause may be violated by "a public employer's refusal to enforce existing policies to stop unlawful harassment," a public college's decision not to punish a professor for racially charged emails was not actionable because the professor's speech was protected by the First Amendment. Noting that the First

Amendment "demands substantial deference to the college's decision not to take action," the Ninth Circuit found no discriminatory intent in the public college's response.[10] *Id*. at 709. No discriminatory animus on the part of appellees has been shown here; accordingly, the same deference should be afforded to UMW's reasonable response.

2. The particular remedies suggested by appellants would have been inconsistent with the First Amendment.

Appellants state that their demands did not require UMW to violate the First Amendment because "UMW could have taken multiple actions short of shutting down Yik Yak." Opening Br. for Pls.-Appellants, at 26. Appellants then proceed to outline a series of actions in addition to what UMW already did, each of which would have violated the First Amendment rights of speakers on the Yik Yak platform. That even appellants cannot envision an additional constitutionally sound remedy underscores the wisdom of the lower court's decision.

Any action motivated by a desire to punish or chill lawful speech that has a detrimental effect on the continuation of that speech is an act of unconstitutional

[10] Further, the Fourteenth Amendment requires state action. Here, the alleged harassment was purportedly committed by students, not state actors, and thus former President Hurley was neither motivated by discriminatory intent nor deliberately indifferent to harassment by state actors. This case is therefore distinguishable from *Jennings v. UNC*, 482 F.3d 686 (4th Cir. 2007), which concerned allegations of deliberate indifference to harassment by a state employee.

censorship; the specific action taken is not relevant to the underlying test. As the purpose of every proposal made by appellants is to reduce the availability of speech they find offensive, each one would violate the First Amendment if successful.

Appellants first suggest that UMW "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)." *Id.* But a cyber-based cheating scheme is clearly misconduct punishable by the university that does not involve protected speech. That UMW could lawfully wield this authority in another context does not make its use in this context permissible.

Next, appellants suggest that UMW could have "announced to the student body that cyber harassment violated UMW policy and would subject offenders to appropriate punishment." *Id.* But as the Yik Yak posts were protected by the First Amendment, there was no "appropriate punishment" to foreshadow.

The third remedy proposed by appellants is that UMW "could have forwarded complaints about threatening posts to the police for robust investigation." *Id.* This is incorrect. The institution became aware of these threats because students submitted written complaints. These submissions became part of the submitting students' records as protected by the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. Before a school can turn over FERPA records to

law enforcement, they must determine that an "articulable and significant threat" under the "totality of the circumstances" exists.[11]

While none of the posts in evidence rose to that level, UMW was not blind to the importance of law enforcement. Indeed, UMW suggested that real threats ought to be reported directly to law enforcement.[12]

Appellants' fourth suggestion is that "[a]t the very least, [UMW] could have strongly denounced the harassment." Opening Br. for Pls.-Appellants, at 26. UMW's response described the Yik Yak posts as a "serious matter" and included suggestions on how to raise these issues with social media sites and law enforcement.[13] A reasonable student would understand this advice to reflect UMW's disapproval of the speech in question.

In short, speech that cannot be punished directly under the First Amendment likewise cannot be punished indirectly by any state actors. Every remedy proposed by the appellants that was not already offered by UMW is unconstitutional.

II. Former president Hurley did not engage in retaliation.

If accepted by the Court, appellants' argument that former president Hurley engaged in retaliation by publicly responding to the OCR complaint against UMW

[11] 34 C.F.R. § 99.36.
[12] Email from Anna Billingsley to undisclosed recipients (Mar. 27, 2015, 12:28 PM), Exhibit 10 to Opening Br. for Pls.-Appellants.
[13] *Id*.

would allow Title IX's prohibition on retaliation to function as a gag order that would prevent individuals and institutions accused of serious wrongdoing from defending themselves in response.

In May 2015, appellants held a press conference announcing their filing of an OCR complaint against UMW based on the university's response to the Yik Yak posts.[14] Eleanor Smeal, president of appellant Feminist Majority Foundation (FMF), stated in a press release:[15]

> How many women have to be violated, threatened, harassed, intimidated, or even die before University administrators decide that they have a crisis on their hands. … I am appalled that the University of Mary Washington administrators repeatedly did nothing to stop threats against and to alleviate the experienced-based fears of Feminists United and its members[.]

In the wake of this public denunciation, in June 2015, Hurley published a letter, addressed to Eleanor Smeal at FMF, defending UMW against the accusations made at the press conference and in the OCR complaint.[16] In that

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[14] Justin Jouvenal and T. Rees Shapiro, *Feminists at Mary Washington Say They Were Threatened on Yik Yak*, WASH. POST, May 6, 2015, https://www.washingtonpost.com/local/crime/feminists-at-mary-washington-say-they-were-threatened-on-yik-yak/2015/05/06/3d8d287a-f34a-11e4-b2f3-af5479e6bbdd_story.html.

[15] Press Release, Feminist Majority Foundation, Feminist Groups File Title IX Complaint Against University of Mary Washington (May 7, 2015), http://www.feminist.org/news/pressstory.asp?id=15553.

[16] *UMW President Richard Hurley's letter to Feminist Majority Foundation*, FREE LANCE-STAR, June 8, 2015, http://www.fredericksburg.com/news/education/umw-president-richard-hurley-s-letter-to-feminist-majority-foundation/article_91ad966c-0e14-11e5-b5b2-e3469289a8dd.html.

letter, Hurley detailed the steps the university took in response to the Yik Yak controversy; discussed the university's responsibilities, as a public institution, under the First Amendment; and criticized an outside organization—appellant FMF—for initiating a "highly-publicized media campaign" against the university.[17]

One portion of appellants' OCR complaint concerns the tragic death of Grace Mann, a UMW student and member of appellant Feminists United on Campus, who was murdered by her roommate in her off-campus apartment in April 2015. Paragraph 63 of the complaint details the facts surrounding Mann's murder, and paragraph 64 states:[18]

> In an email to President Hurley and Dr. Cox dated April 18, 2015, a Feminists United member expressed the anger and despair that she and other members of Feminists United had about the administration's inaction in the face of threats to Ms. Mann and other members of their group:

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[17] *See*, *e.g.*, T. Rees Shapiro, *Feminist Group Alleges Sexually Hostile Environment at U of Mary Washington*, WASH. POST, May 11, 2017, https://www.washingtonpost.com/local/education/feminist-group-alleges-hostile-environment-at-university-of-mary-washington/2017/05/11/58cbd916-35b4-11e7-b4ee-434b6d506b37_story.html; Sheila Dewan and Sheryl Gay Stolberg, *University of Mary Washington*, *Where Woman Was Killed*, *Faces Scrutiny*, N.Y. TIMES, May 6, 2015, https://www.nytimes.com/2015/05/07/us/university-of-mary-washington-where-woman-was-killed-faces-scrutiny.html.

[18] Administrative Complaint, *Feminists United on Campus*, *et al. v. Univ. of Mary Washington* (Dep't of Educ. May 2015), *available at* https://www.kmblegal.com/wp-content/uploads/2015/05/Complaint-Press-Feminists-United-et-al-v.-University-of-Mary-Washington.pdf.

> *"What will it take for the administration to take its students seriously? The murder of one of the most passionate people at this school? Why was nothing done to address the threats directed toward Grace and the rest of [Feminists United] BEFORE THIS TRAGEDY? … You turned away when the members of [Feminists United] showed you 700 bullying and threatening posts. …* [*sic*] *My friend was murdered today, and you did nothing to protect her even when you were made aware of death and rape threats directed toward her."*

Hurley's public response to Eleanor Smeal attempted to rebut what he viewed as the appellants' "implication that there is a connection between the concerns raised by members of FUC and the murder of Grace Mann."[19] As appellants' opening brief acknowledges, it was later determined that Mann's tragic death "was unrelated to the campaign of cyber bullying directed at Feminists United members." Opening Br. for Pls.-Appellants, at 8.

Appellants' retaliation claim relies heavily on this portion of Hurley's letter, which they call "demonstrably false" to the point of being "defamatory." *Id.* at 40. While reasonable people may disagree about how directly the complaint draws a connection between Mann's murder and UMW's response to the Yik Yak posts, Hurley's interpretation is hardly unreasonable, let alone "demonstrably false." And a single instance of defending oneself against public accusations of serious wrongdoing cannot alone sustain a claim of retaliation without abridging the First

[19] *UMW President Richard Hurley's letter to Feminist Majority Foundation*, *supra* note 16.

Amendment right to free speech. *See*, *e.g.*, *Bain v. Springfield*, 678 N.E.2d 155, 161 (Mass. 1997) ("What we most emphatically cannot countenance as an instance of retaliation is the mayor's response in the local newspaper to the charges against him. ... The interest in remedying discrimination is weighty but not so weighty as to justify what amounts to a restriction on core political speech."); *see also Dixon v. Int'l Bhd. of Police Officers*, 504 F.3d 73, 84 (1st Cir. 2007) ("There are limits on what speech can be proscribed as retaliatory. ... For example, the person or entity accused of discrimination must be allowed to defend himself or itself."); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) (finding no retaliation, in the context of a First Amendment retaliation claim, "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow"); *Thoma v. Hickel*, 947 P.2d 816, 821 (Alaska 1997) ("We do not believe that imposing section 1983 liability on a public official who responds in kind to protected speech critical of the official would be consistent with the First Amendment.")

If Hurley's open letter to FMF were held to constitute retaliation, then Title IX would function as a gag order under which accused institutions and individuals were forced to remain silent in the face of damaging and even false accusations, in violation of their right to free speech.

This concern is far from theoretical. Indeed, this is precisely how Northwestern University attempted to use Title IX against Northwestern film professor Laura Kipnis, who was twice investigated for retaliation over her writings about what she perceives as a climate of sexual paranoia on campus.

Kipnis's ordeal began in February 2015, when she published an article in *The Chronicle of Higher Education* entitled "Sexual Paranoia Strikes Academe."[20] Two students filed Title IX complaints with the university alleging that Kipnis's essay, and a subsequent tweet, discussing already-public details about sexual harassment proceedings at Northwestern constituted "retaliation" and "chilled" students' willingness to report harassment. The university's investigation of Kipnis continued for 72 days until she published a second essay in the *Chronicle*, this time entitled "My Title IX Inquisition."[21] Hours later, the university announced it had found no wrongdoing by Kipnis.[22]

Following her experience, Kipnis wrote a book entitled "Unwanted Advances: Sexual Paranoia Comes to Campus." The book details the events

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[20] Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC., Feb. 27, 2015, https://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351.
[21] Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC., May 29, 2015, https://www.chronicle.com/article/My-Title-IX-Inquisition/230489.
[22] Brock Read, *Laura Kipnis Is Cleared of Wrongdoing in Title IX Complaints*, CHRON. HIGHER EDUC., May 31, 2015, https://www.chronicle.com/blogs/ticker/laura-kipnis-is-cleared-of-wrongdoing-in-title-ix-complaints/99951.

leading up to Kipnis's first investigation in the spring of 2015 and explores the story of former Northwestern philosophy professor Peter Ludlow, who resigned from Northwestern amid an investigation into his relationships with two students. Several of the key players in that story were upset about their portrayal in the book and filed both a lawsuit against Kipnis and another Title IX retaliation claim with the university. Once again, the university exonerated Kipnis—but only after a protracted, time-consuming investigation.[23]

Similarly, in 2011, Widener University law professor Lawrence Connell was cleared by a university committee of racial harassment charges over language he used in classroom teaching hypotheticals—but was found responsible for retaliation for his efforts to publicly defend himself against those charges.[24]

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[23] Jeannie Suk Gersen, *Laura Kipnis's Endless Trial By Title IX*, NEW YORKER, Sept. 20, 2017, *available at* https://www.newyorker.com/news/news-desk/laura-kipniss-endless-trial-by-title-ix.

[24] The Neuberger Firm, Law Professor Exonerated for His Classroom Teaching (July 21, 2011), https://d28htnjz2elwuj.cloudfront.net/pdfs/bdbde90390b6753e1842cc814e21b33c.pdf ("The committee, however, did find that Connell had violated code prohibitions against 'retaliation' for emailing his students to explain why [Dean Linda] Ammons had banned him from the campus and for his attorney Thomas Neuberger's issuing a press statement explaining his efforts to identify Connell's accusers and to protect his client's reputation."). *See also* Alan Charles Kors & Harvey A. Silverglate, *The Shadow University* 125–127 (1998) (discussing the case of Professor Richard Osborne, who was found not responsible for sexual harassment but was found responsible for "reprisal ... for having spoken in his own defense").

Appellants also assert a retaliation claim "based on the escalating volume of abusive cyber posts following their internal complaints and filing of an administrative complaint with OCR." Opening Br. for Pls.-Appellants, at 30. Whether or not third-party harassment can ever constitute retaliation,[25] this particular claim must fail because, as discussed *supra*, the comments posted on Yik Yak do not rise to the level of unprotected harassment.[26]

[25] *See Young v. Pleasant Valley Sch. Dist.*, No. 3:07-CV-00854, 2012 U.S. Dist. LEXIS 69762, *22 (M.D. Pa. May 8, 2012) ("While the comments were undoubtedly upsetting and at times disturbing, Plaintiff points to no authority for the proposition that the failure of school administrators to police anonymous comments made on a newspaper's website is actionable.").

[26] *See supra* Section I.A.1.

CONCLUSION

For the foregoing reasons, the Court should uphold the decision below.

Respectfully Submitted,

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Dated: January 18, 2018

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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