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*.

SUMMARY OF ARGUMENT

The lower court correctly ruled that the University of Mary Washington (UMW) was not deliberately indifferent to appellantsô 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 appellantsô political advocacy on campus. Nor did the posts in evidence rise to the level of true threats, which are only ñthose 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.ò *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 Kï12 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 appellantsô 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 Hurleyôs 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 courtôs decision.

liable for its indifference where it lacks the authority to take remedial actionò ð such as when a disciplinary response to the alleged harassment would violate other inalterable legal commitments, such as a public institutionôs duty to uphold the First Amendment. *Id*

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

Hurleyôs 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 ñentirely reasonable for a school to refrain from a form of disciplinary action that would

it likewise ñhas many constitutionally permissible means to protect female and minority students,ò and it must ñaccomplish[] its goals in some fashion other than silencing speech on the basis of its viewpoint.ò *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 UMWôs campus would pose,[4] the Yik Yak posts characterized by appellants as sexual harassment are themselves protected expression. None of the posts submitted with appellantsô 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 ñso 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.ò 526 U.S. at 645. This refers to extreme behavior ð conduct so serious that it would

[4] *See* Letter from Joan Bertin, Executive Director, Natôl Coalition Against Censorship, et al., to John B. King and Catherine Lhamon, U.S. Depôt of Educ. (April 4, 2016) (on file with author) (ñPublic 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.ò)

prevent a reasonable person from receiving his or her education ð and a public

vaginas,ò ñWe donôt want no feminazis,ò and ñIn all seriousness, can we revoke FUCôs charter on the grounds that they are a hate group?,ò each of which is cited as harassing by appellants in their federal complaint, express opposition to appellantsô political advocacy on campus. The posts may be uncivil, but the authors

an intent to commit an act of unlawful violence to a particular individual or group of individuals.ò *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court further elaborated that speech may lose protection as ñintimidation,ò a form of ñtrue threat,ò when ña 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.ò *Id*. at 360.

The posts cited by appellants do not meet this standard. Specifically, the three posts that the lower court described as containing ñthreatening languageò ð ñGonna tie these feminists to the radiator and grape them in the mouth,ò ñDandyôs about to kill a bitch é or two,ò and ñCan we euthanize whoever caused this bullshit?ò ð are not ñserious expression[s] of an intent to commit an act of unlawful violence.ò

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

[5] *See* WKUKofficial, Whitest Kids Uô Know ï Grapist, Y

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 ña paraphrase of dialogue by a character on the television show ówAmerican Horror Story: Freak Show.ôò[6] Finally, the ñeuthanasiaò 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 Courtôs objective test, ñan ordinary reasonable recipient who is familiar with the[] context é would interpret [those statements] as a threat of injury.ò *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 Kï12 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*,

children in their charge.[7] While these Kï12 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 Kï12 schools is to

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

Appellantsô advocacy angered others and moved them to respond. In the

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

The lower court correctly denied appellantsô Title IX claim, concluding that UMWôs actions did not violate Title IX because the alleged harassment

for deliberate indifference under Title IX, a University must have had control over the situation in which the harassment or rape occurs.ò *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 ñdid not own, possess, or controlò 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 ñand her Assailants all lived off-campus in housing not controlled by JMU,ò and that plaintiff only encountered the other individuals ñoff-campusò). 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.

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

> I have had more than one in-person meeting with FUCôs leadership to discuss their concerns. We have consulted with legal counsel on permissible actions we might take to limit Yik Yakôs 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 ï including a campus escort ï 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 UMWôs legal obligation under Title IX. Under *Davis*, a recipient institution can be liable under Title IX for student-on-student harassment ñonly where the recipientôs response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.ò *Davis*, 526 U.S. at 648. UMWôs response was reasonable, particularly given that the alleged harassment took place in a context beyond UMWôs control and consisted of speech protected by the First Amendment.

[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.

UMWôs 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.*

Not only were appellees not deliberately indifferent, they were not motivated by discriminatory animus, as appellantsô equal protection claim requires.

Amendment ñdemands substantial deference to the collegeôs decision not to take action,ò the Ninth Circuit found no discriminatory intent in the public collegeôs 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 UMWôs 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 F12 0 612 792 3(n

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 ñcould 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).ò *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 ñannounced to the student body that cyber harassment violated UMW policy and would subject offenders to appropriate punishment.ò *Id.* But as the Yik Yak posts were protected by the First Amendment, there was no ñappropriate punishmentò to foreshadow.

The third remedy proposed by appellants is that UMW ñcould have

law enforcement, they must determine that an ñarticulable and significant threatò under the ñtotality of the circumstancesò 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]

Appellantsô fourth suggestion is that ñ[a]t the verm 6Qd0 0geb law e.00000912 0 612 792

would allow Title IXôs 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 universityôs 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. é 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

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

One portion of appellantsô 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 Mannôs 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 administrationôs inaction in the face of threats to Ms. Mann and other members of their group:

[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/2017/05/11/58cbd916-35W*W* nBT/F4 14.04 T

“What will it take for the administration to take its students seriously? The murder of one of the most

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.

Kipnisôs ordeal began in February 2015, when she published an article in *The Chronicle of Higher Education* entitled ñSexual Paranoia Strikes Academe.ò[20] Two students filed Title IX complaints with the university alleging that Kipnisôs essay, and a subsequent tweet, discussing already-public details about sexual harassment proceedings at Northwestern constituted ñretaliationò and ñchilledò studentsô

leading up to Kipnisôs 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 ð 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 ð 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 (ñThe committee, however, did find that Connell had violated code prohibitions against óretaliationô for emailing his students to explain why [Dean Linda] Ammons had banned him from the campus and for his attorney Thomas Neubergerôs issuing a press statement explaining his efforts to identify Connellôs accusers and to protect his clientôs reputation.ò). *See also* Alan Charles Kors & Harvey A. Silverglate, *The Shadow University* 125ï127 (1998)

CONCLUSION

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

Respectfully Submitted,

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I further certify that on this 18th day of January, 2018, I caused the required copy of the Brief of *Amici Curiae* to be hand filed with the Clerk of the Clerk.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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