

No. 23-7577

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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United States of America

*Appellee,*

v.

Douglass Mackey,

*Defendant-Appellant.*

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On Appeal from the United States District Court  
for the Eastern District of New York  
Case No. 21-cr-00089-AMD

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**BRIEF *AMICUS CURIAE* OF THE FOUNDATION FOR MORAL  
LAW IN SUPPORT OF DEFENDANT-APPELLANT AND  
REVERSAL**

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## INTEREST OF THE *AMICUS*<sup>1</sup>

*Amicus curiae* Foundation for Moral Law, Inc. (“the Foundation”) is a nonprofit public interest organization located in Montgomery, Alabama, which is dedicated to the defense of constitutional liberties and to the strict interpretation of the Constitution as intended by its Framers. The Foundation has a direct interest in this case because we believe that the freedom of speech as protected by the First Amendment is a cornerstone of our constitutional republic upon which all our rights and liberties depend.

The Foundation believes that Appellant-Defendant Douglass Mackey’s conviction under 18 U.S.C. § 241 violates Mackey’s constitutional right of freedom of speech and sets a precedent that is an existential danger to the future of free speech and the First Amendment for all Americans. Because the freedom of speech, especially the freedom to criticize the government, is necessary for the existence of America as a constitutional republic governed with consent of the People, the Foundation submits this brief in support of Mackey and reversal.

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<sup>1</sup> All parties have consented to the filing of this brief. No party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief. Under Rule 26.1 and Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the *amicus* Foundation for Moral Law, Inc., certifies that it is not a subsidiary or affiliate of a publicly owned corporation.

## SUMMARY OF ARGUMENT

Douglass Mackey was convicted under § 241 and sentenced to prison for posting joke “memes” that falsely suggested that Hillary Clinton supporters could vote from home by text message instead of going to the polls. There is no evidence that Mackey’s memes actually prevented anyone from exercising their right to vote, and, as far as their status as political misinformation goes, the memes are grains of salt compared to the falsehoods that are a common staple of political candidates’ campaigns. Mackey’s conviction and sentence is an unprecedented infringement on the right of free speech in America that must be reversed.

Three major factors of Mackey’s conviction and sentence combine to create the ultimate chilling effect on free speech in contemporary American history. First, Mackey was convicted after having engaged in one of the great American traditions of free speech: anonymous speech. Second, Mackey’s speech was in the format of “memes” which are a now ubiquitous mode of expression both on and off the internet. Finally, the circumstances around Mackey’s conviction create an unacceptable appearance of political persecution. Each of these factors come together to create an unprecedented chilling effect on free speech in the 21st century era of the internet and instantaneous, worldwide reaching speech.

## ARGUMENT

### I. **The importance of anonymity to the freedom of speech in America, from Publius to Ricky Vaughn.**

Even though Mackey exercised his right to free speech on the internet rather than with a quill pen or printing press, he still engaged in a time-honored American tradition that the Founders appreciated well: publishing under a pseudonym in order to keep his real identity anonymous. Posting under the name “Ricky Vaughn,” Mackey published hundreds of thousands of tweets on the social media platform Twitter (now “X”). A160-61. Despite Mackey’s real identity becoming known before the DOJ brought charges against him, anonymous speech is still a relevant issue that deserves attention in this case.

As the Supreme Court of the United States has said, “Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose of the Bill of Rights and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (internal citations omitted). The First Amendment as originally understood by the Founders protected anonymous speech as evidenced not only by many of the Founders’ personal use of anonymous speech in both the Federalist and Anti-Federalist Papers, but also a long

history leading up to the Revolution that extended beyond ratification of the Constitution to intense debates surrounding the direction of the early American Republic. *Id.* at 360-71 (Thomas, J., concurring).

For example, prior to the Revolution, there is the case of the 1735 Zenger trial in which the printer John Peter Zenger was prosecuted for seditious libel for refusing to divulge the identity of anonymous authors who had published attacks on the Crown Governor of New York. *Id.* (citing J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger 9-19 (S. Katz ed. 1972)). In testament to the importance of anonymous speech to the colonists, the jury refused to convict Zenger. *Id.* at 361.

In 1779, during the Revolution, some members of the Continental Congress sought to discover the identity of an anonymous author named “Leonidas” who had expressed grievances with the Congress for causing inflation throughout the States as well as engaging in embezzlement and fraud. *Id.* Leonidas’ true identity was actually Dr. Benjamin Rush, Founding Father and signatory of the Declaration of Independence. *Id.* (citing 13 Letters of Delegates to Congress 1774-1789, p. 141, n. 1 (G. Gawalt & R. Gephart eds. 1986)). After Massachusetts delegate Elbridge Gerry moved to bring the printer before Congress to answer questions regarding Leonidas’ identity, several members of Congress objected and made arguments that to

do so would be a violation of the freedom of the press. *Id.* After these arguments, no delegate voted for Gerry's motion, and neither the printer nor Dr. Rush ever appeared before Congress regarding the issue. *Id.*

While the use of anonymity by authors of the Federalist Papers during the ratification debates is well known, much less known is that the use of anonymous speech was a contentious issue in its own right at the time. Many Federalists sought to prohibit the use of anonymous speech by Anti-Federalists. Two prominent Federalist newspapers, the Massachusetts Centinel and Massachusetts Gazette, adopted policies prohibiting Anti-Federalist authors from publishing anonymous articles unless the author supplied the paper with their real identity that could be revealed to the public if they so chose. *Id.* at 363 (citing Boston Independent Chronicle, Oct. 4, 1787, in 13 Documentary History of the Ratification of the Constitution 315 (J. Kaminski & G. Saladino eds. 1981)).

Anti-Federalist authors fiercely argued that this was evidence that Federalists had no concern for the freedom of the press and speech and was an indication that the new Constitution would only sanction these restrictions. *Id.* In the face of this criticism, the Massachusetts Centinel and Gazette backed down, no other Federalist newspaper adopted such a policy, and no city or state ever adopted such a policy, either. *Id.* at 367. On the

whole, it is clear that the Founders understood anonymous speech to be a core liberty encompassed in the Freedom of Speech.

Anonymous speech is particularly relevant to Mackey's case because he never willfully revealed his identity. Instead, Mackey was the victim of "doxing" which is the act of publicly revealing private information about someone's identity without their permission, usually with malicious intent.<sup>2</sup> Even if Mackey's identity had not been publicly disclosed against his will, during trial the Government expressed that it intended to prove that the Rickey Vaughn pseudonym belonged to Mackey. A181. In other words, the Government was so determined to press charges for the memes at issue, that it was committed to uncovering the real identity of a pseudonymous Twitter account.

The prosecution of Mackey for his online memes is a clear signal that the Government is willing to seek out the identities of those who engage in anonymous speech online, as long as the speech can be tied to voting. This is an alarming attack on free speech as a whole, with a chilling effect that threatens to freeze the very core of the political conversation and debate in America. Questions about election integrity, candidate eligibility, any form

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<sup>2</sup> A180-81; What is Doxing – Definition and Explanation, Kaspersky, <https://www.kaspersky.com/resource-center/definitions/what-is-doxing>.

of political humor, etc. will all become verboten wrongthink—even if made anonymously—unless one is willing to risk up to 10 years in federal prison.

## **II. Don't tread on memes, a cornerstone of 21st century free speech.**

Another important aspect of Mackey's case is that it deals with one of the most ubiquitous modes of expression in 21st century society: the meme. As defined by Merriam-Webster, a meme is “an idea, behavior, style, or usage that spreads from person to person within a culture.”<sup>3</sup> While the term was coined by Richard Dawkins in 1976 to describe a cultural parallel to the biological gene, the term began to find widespread usage once the internet became a dominant cultural landscape as trends, ideas, and jokes spread rapidly worldwide.<sup>4</sup>

Today, Americans express themselves via the internet and memes in much the same way that the Founders utilized the pamphlet and political cartoons. Americans using memes to express themselves has a long history that reached an unprecedented fever pitch during the presidential election of 2016. The climate of the 2016 election cycle on the internet during which Mackey posted the memes for which he has been sentenced to federal prison was an electric environment that many have asserted was outcome

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<sup>3</sup> Meme, Merriam-Webster, <https://www.merriam-webster.com/dictionary/meme>.

<sup>4</sup> The History of 'Meme', Merriam-Webster, <https://www.merriam-webster.com/wordplay/meme-word-origins-history>.

determinative.<sup>5</sup> The precedent of criminally prosecuting Mackey for posting memes will have an intolerable chilling effect on free speech in America where memes have become the expressive mode of choice for popular political discourse.

**A. Memes in early American history, from the colonial period to the Founding.**

One of the most famous “memes” from American history is Benjamin Franklin’s “Join, or Die.” cartoon from 1754:



Despite Franklin originally creating “Join, or Die.” as commentary on the necessity of unity among the American Colonies during the French and Indian War, the cartoon persisted in the Colonial American psyche and took

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<sup>5</sup> Rodney Taveira & Emma Balfour, How Donald Trump won the 2016 meme wars, The Conversation (Nov. 29, 2016), <https://theconversation.com/how-donald-trump-won-the-2016-meme-wars-68580>.

<sup>6</sup> File:Benjamin Franklin – Join or Die.jpg, Wikipedia, [https://en.wikipedia.org/wiki/File:Benjamin\\_Franklin\\_-\\_Join\\_or\\_Die.jpg](https://en.wikipedia.org/wiki/File:Benjamin_Franklin_-_Join_or_Die.jpg)

on new life during the Revolutionary War period.<sup>7</sup> In December 1775, during the Revolutionary War, Franklin published an essay in the *Pennsylvania Journal*—under the pseudonym “American Guesser”—that likened the timber rattlesnake to a good symbol of America:

I recollected that her eye excelled in brightness, that of any other animal, and that she has no eye-lids. She may therefore be esteemed an emblem of vigilance. She never begins an attack, nor, when once engaged, ever surrenders: She is therefore an emblem of magnanimity and true courage. As if anxious to prevent all pretensions of quarreling with her, the weapons with which nature has furnished her, she conceals in the roof of her mouth, so that, to those who are unacquainted with her, she appears to be a most defenseless animal; and even when those weapons are shown and extended for her defense, they appear weak and contemptible; but their wounds however small, are decisive and fatal. Conscious of this, she never wounds 'till she has generously given notice, even to her enemy, and cautioned him against the danger of treading on her.<sup>8</sup>

The use of the rattlesnake as a symbol for America continued when Christopher Gadsden, brigadier general in the Continental Army, designed the Gadsden Flag to include a coiled rattlesnake above the words “DONT TREAD ON ME” to be used by the Continental Marines:

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<sup>7</sup> Lester C. Olson, *Benjamin Franklin’s vision of American community: a study in rhetorical iconology*, 27-30 (Columbia: University of South Carolina Press 2004).

<sup>8</sup> *The Rattlesnake as a Symbol of America*, The Franklin Institute Online, (Aug. 15, 2000), available at <https://web.archive.org/web/20000815233248/http://www.fi.edu/qa99/musing3/>.



This history shows that memes are an integral part of the rich tradition of free speech in America, beginning during the colonial period, Revolutionary War, and Founding.

### **B. Memes during the 2016 presidential election.**

While in retrospect there are countless other memes throughout American history, the 2016 presidential election is the first time that the modern conception of memes became a serious discussion in its own right. “Meme warfare” and “meme wars” were two common memes themselves to express the proliferation of this form of expression during the 2016 election cycle.<sup>10</sup> For some in the mainstream media and political establishment, this was a negative development. By 2016, political memes had progressed beyond “flashes of uncensored personality” like Howard Dean’s 2004

<sup>9</sup> Short History of the United States Flag, American Battlefield Trust, <https://www.battlefields.org/learn/articles/short-history-united-states-flag> (last visited Jan. 10, 2024).

<sup>10</sup> Douglas Haddow, Meme Warfare: how the power of mass replication has poisoned the US election, The Guardian (Nov. 4 2016), <https://www.theguardian.com/us-news/2016/nov/04/political-memes-2016-election-hillary-clinton-donald-trump>; Taveira, supra note 5.

campaign ending howl and “intensely manicured visual messages” like Barack Obama’s 2008 campaign slogan “Yes We Can.”<sup>11</sup> As The Guardian wrote just before election day in November 2016, memes had developed into “a form of anarchic folk propaganda, ranging from tolerable epigrams to glittering hate-soaked image macros akin to a million little rogue Pravdas” resulting in such “overly toxic ideas” as the “#draftourdaughters” meme.<sup>12</sup>

The #draftourdaughters meme began after Hillary Clinton stated that she supported an amendment to the National Defense Authorization Act of 2016 that would require women to register for the Selective Service System, otherwise known as the draft.<sup>13</sup> Just a few days before Mackey would tweet the memes at issue in this case, the #draftourdaughters meme trended on Twitter with over 50,000 tweets, utilizing the same format of fake Clinton campaign advertisements.<sup>14</sup> The #draftourdaughters memes made use of feminist slogans such as “He died for his country. Now, it’s her turn” and “Men make up 97% of combat deaths. It’s time to end the combat gap.”<sup>15</sup>

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<sup>11</sup> Haddow, *supra* note 9.

<sup>12</sup> *Id.*

<sup>13</sup> Jack Smith IV, *Will Hillary draft women? Inside #DraftOurDaughters, a fake ad campaign from the alt-right*, MIC (Oct. 28, 2016) <https://www.mic.com/articles/157933/will-hillary-draft-women-inside-draft-our-daughters-a-fake-ad-campaign-from-the-alt-right#.WKMo62xuY>.

<sup>14</sup> *Id.*

<sup>15</sup> Haddow, *supra* note 9.

The Government has pointed out that Mackey participated in the #draftourdaughters meme in an effort to prove that Mackey was part of a criminal conspiracy in violation of § 241. A173-4; A205-10. While the Government acknowledged that the #draftourdaughters memes were perfectly legal, A266, the Government argued that, because Mackey discussed the #draftourdaughters meme with other Twitter users, Mackey must be guilty of a “silent” criminal conspiracy for the “text to vote” memes, A263-7, despite the unrebutted fact that Mackey did not participate in any discussion concerning the “text to vote” memes.

Even aside from the fact that Mackey’s memes are protected speech under the First Amendment according to Supreme Court precedent, *United States v. Alvarez*, 567 U.S. 709 (2012), the district court has completely missed the mark on how speech on the internet operates. Much of social media, and Twitter in particular, tends to foster an “echo chamber” effect.<sup>16</sup> This means that users are typically shown content that is shared by other users with similar political perspectives.<sup>17</sup> Mackey found his “vote by text” memes on another social media site after they had already been shared

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<sup>16</sup> Matteo Cinelli, Gianmarco De Francisci Morales, Alessandro Galeazzi, Walter Quattrociocchi & Michele Starnini, [The echo chamber effect on social media](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7936330/), Proc. Natl. Acad. Sci. USA, Mar. 2021, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7936330/>.

<sup>17</sup> Id.

widely, and he simply reposted them to his own followers, the users that intentionally followed Mackey's account because they desired to view his content. A231-2. Mackey's memes are a quintessential example of how speech typically operates on the internet, via an organic spread of ideas and humor that is shared among those who resonate with it. The Government's criminalization of Mackey for posting memes is a direct attack on the fundamental nature of speech on the internet and a true step towards an American Pravda.

**III. The appearance that Mackey's conviction is political persecution is the ultimate chill on speech.**

Beyond the Government's signal that anonymous speech and memes are subject to criminal prosecution, there are a few other factors in Mackey's case that create an appearance of political persecution that stands to be the worst chilling effect on free speech in modern American history. The most glaring of these is the fact that there were ostensibly Biden supporters who also shared similar "text to vote" memes, but only Douglass Mackey, a Trump supporter, was prosecuted.

Kristina Wong is one such individual with over 26,000 followers on Twitter that tweeted just after polls opened on election day November 8, 2016: "Hey Trump Supporters! Skip poll lines at #Election2016 and TEXT in your vote! Text votes are legit. Or vote tomorrow on Super

Wednesday!”<sup>18</sup> Wong’s tweet is still up on Twitter, yet there has apparently been no federal indictment issued against her for her arrest. This is proper under the First Amendment because her speech, even if false and deceptive, should be protected. However, the fact that Mackey now faces seven months in federal prison, two years of probation, and a \$15,000 fine for effectively the same speech should cause any reasonable American to question the Government’s prosecution.

This is the ultimate chill on speech because it signals to the reasonable American that the Government is unconcerned with the appearance of impropriety that results from criminally prosecuting a citizen that has differing political views from the present Government while ostensibly taking no adverse action against citizens that have political views in line with the present Government but nevertheless committed the same offense.

In other words, the reality that the Government has sentenced a Trump supporter to federal prison for posting memes, while apparently taking no steps towards prosecuting Biden supporters for the exact same kind of speech makes the Government’s assertion to the jury during closing

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<sup>18</sup> Kristina Wong, Twitter (Nov. 8, 2016), <https://twitter.com/mskristinawong/status/795999059987173377?s=20>.

arguments that “the defendant isn’t here because of his politics”<sup>19</sup> ring hollow.

### CONCLUSION

The Foundation urges this Court to reverse the decision below and uphold Douglass Mackey’s right to free speech under the First Amendment.

Respectfully submitted,

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<sup>19</sup> A219.

## CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Rule 32(a)(7), Fed. R. App. P., because, excluding the parts of the document exempted by Rule 32(f), Fed. R. App. P., this document contains 2,985 words.
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## CERTIFICATE REGARDING SERVICE

I certify that on January 12th, A.D. 2024, a true copy of this document is being filed electronically (via ACMS) and will thereby be served on all counsel of record.

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