

# OKLAHOMA CITY UNIVERSITY LAW REVIEW

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VOLUME 49

SUMMER 2025

NUMBER 3

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## NOTE

### DOES THE FIRST AMENDMENT CONTINUE TO PROTECT ANONYMOUS SPEECH IN THE AGE OF ARTIFICIAL INTELLIGENCE?

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#### Introduction

As society advances into the digital age, the balance between technological progress and constitutional protections becomes increasingly delicate. This intersection between artificial intelligence (AI) and the First Amendment presents new challenges to the rights of individuals. For example, the ability AI has to connect authors back to speech that is intended to be anonymous poses significant risks to First

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I would like to thank my family and friends for their unwavering support throughout this journey—especially my parents, Rachel and Casey Hurt, who have always pushed me to be the best version of myself; my sisters Nataly and Abby Hurt, who never stop cheering me on; and my friend Hannah Reynolds, whose constant encouragement has meant so much. I am also grateful to my mentors for their guidance and to Professor Marc Blitz for his thoughtful supervision during the writing and research of this Note. Finally, I extend my deepest thanks to the members of the Oklahoma City University Law Review for their hard work on this piece. I am especially grateful to our Editor in Chief and my dear friend, Caroline Rowland, for her tireless dedication to this publication.

Amendment protections. This Note explores the constitutional implications of the government's use of AI to identify speakers of anonymous speech and argues that such practices infringe upon the First Amendment.

The purpose of this Note is to address when the government's use of AI to unmask anonymous speakers online constitutes a violation of the First Amendment. This Note will first outline the background of AI, explain AI's use of forensic linguistics to identify authorship, and survey relevant First Amendment law. Next, this Note will establish that when the government uses AI to identify anonymous authors, it is an unlawful compelled disclosure under the First Amendment. Finally, this Note will briefly discuss counteractions individuals can take to conceal authorship.

## I. Background

It has long been established by the United States Supreme Court that the First Amendment protects speakers from government-forced identification in connection with free speech.<sup>1</sup> This fundamental protection shields citizens from governmental intrusions, allowing them to speak without fear of censorship while preserving personal expression. The right to anonymous speech sits at the core of what this nation was built on: promoting individuality, free thought, and the right to speak out against the government when it fails to serve its citizens.<sup>2</sup> The First Amendment has continued to protect speech as society moves into the digital age.<sup>3</sup> Even with modern technology changing how speech occurs, the Supreme Court has upheld the right to speak anonymously, expanding that right to include online expression.<sup>4</sup>

The United States now faces its fourth industrial revolution, and the long-protected right to anonymity is under a new kind of threat. In an age dominated by AI and extensive online activity,<sup>5</sup> First Amendment

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1. *See generally* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995).

2. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. Reno v. ACLU, 521 U.S. 844, 870 (1997).

4. *Id.*

5. Lexie Pelchen, *Internet Usage Statistics in 2025*, FORBES (Mar. 1, 2024, 9:32 pm), <https://www.forbes.com/home-improvement/internet/internet-statistics/#:~:text=On%20average%2C%20internet%20users%20spend,to%20the%20Global%20Web%20Index> [<https://perma.cc/X8M7-KPYZ>].

protections are at a crossroads.<sup>6</sup> As technology that once appeared only in science fiction movies becomes an integral part of daily life, we find ourselves sharing more personal information online than ever before.<sup>7</sup> Society has entered the age of YouTube bloggers and TikTok influencers receiving as much notoriety and fame as movie stars.<sup>8</sup>

The impact of these technological advances on the legal community is substantial. Courts have acknowledged that “[t]he rapid growth of Internet communication and Internet commerce has raised novel and complex legal issues and has challenged existing legal doctrine in many areas.”<sup>9</sup> This ongoing transformation highlights a critical area of concern: the right to anonymity online. X’s (formerly known as Twitter) recent policy update illustrates this concern clearly.<sup>10</sup> Accounts on this platform that are run by anonymous users have attracted millions of followers.<sup>11</sup> In March of 2024, “X updated its privacy policy to ban people [who] expose[] the identity of . . . anonymous user[s]” on its platform.<sup>12</sup> X’s commitment to continuing this tradition of anonymity is clear, but the question remains—will courts follow X’s lead and defend the right to anonymous speech as technology advances?

With increased interaction through the internet comes an increase in governmental access to our personal information.<sup>13</sup> This is amplified by advancements in technology’s ability to sift through digital information at unprecedented speeds. As the courts confront the challenges posed by this new era in society, a central question appears: How will the technological advances of this new age, specifically the growing use of AI, affect the

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6. See KLAUS SCHWAB, *THE FOURTH INDUS. REVOLUTION* 7 (World Economic Forum 2016).

7. See Jennifer Golbeck, *Why We Overshare Online*, *PSYCH. TODAY* (Oct. 15, 2014), <https://www.psychologytoday.com/us/blog/your-online-secrets/201410/why-we-overshare-online>.

8. Iman Balagam, *Why TikTok Stars are More Famous than A-List Celebrities*, *SUNDAY EDIT* (Dec. 21, 2020), <https://edit.sundayriley.com/top-tiktok-stars/> [<https://perma.cc/RCG7-5R5V>].

9. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1091 (W.D. Wash. 2001).

10. Ali Swenson & Melissa Goldin, *Anonymous Users are Dominating Right-Wing Discussions Online. They Also Spread False Information.*, AP (Apr. 6, 2024, 10:37 AM CDT), <https://apnews.com/article/misinformation-anonymous-accounts-social-media-2024-election-8a6b0f8d727734200902d96a59b84bf7>.

11. *Id.*

12. *Id.*

13. Michelle Faverio, *Key Findings About Americans and Data Privacy*, PEW RSCH. CTR. (Oct. 18, 2023), <https://www.pewresearch.org/short-reads/2023/10/18/key-findings-about-americans-and-data-privacy/> [<https://perma.cc/GVW3-GQX4>].

rights Americans have enjoyed since the ratification of the Bill of Rights to anonymous speech?

### A. *The Emergence of AI*

AI is the use of computer systems to replicate human intelligence processes.<sup>14</sup> AI systems are built to mirror human-like thinking, enable them to learn from data, tackle complex problems, and make decisions without human input.<sup>15</sup> In recent years the usage of AI has skyrocketed.<sup>16</sup> Various industries have started incorporating AI into their businesses, leading to improvements in efficiency and increased profits.<sup>17</sup> However, the increased use of AI has also created fear and misinformation regarding its capabilities and functions. To comprehend the implications of AI in the realm of the First Amendment, it is essential to gain an understanding of AI and how it operates.

This Note examines a specific type of AI known as a large language model (LLM). LLMs are systems designed to process vast amounts of data quickly, analyzing it to generate responses tailored to user inquiries.<sup>18</sup> One of the most popular examples of an LLM is ChatGPT, a system created by OpenAI.<sup>19</sup> ChatGPT leverages publicly available data to answer complex questions posed by its users.<sup>20</sup> Despite its advanced capabilities, ChatGPT, like a human, is not infallible and can produce inaccurate information.<sup>21</sup> The adoption of ChatGPT and similar AI technology has surged across

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14. Cole Stryker & Eda Kavlakoglu, *What is Artificial Intelligence (AI)?*, IBM (Aug. 9, 2024), <https://www.ibm.com/think/topics/artificial-intelligence> [<https://perma.cc/4RK4-DD3P>].

15. *Id.*

16. Fabio Duarte, *Number of ChatGPT Users (Dec 2024)*, EXPLODING TOPICS (Dec. 3, 2024), <https://explodingtopics.com/blog/chatgpt-users> [<https://perma.cc/5E7Y-U6NP>].

17. Sam Daley, *85 Artificial Intelligence Examples Shaking Up Business Across Industries*, BUILTIN, <https://builtin.com/artificial-intelligence/examples-ai-in-industry> [<https://perma.cc/J8TK-23KA>].

18. Nayna Jaen, *How AI is Trained: The Critical Role of AI Training Data*, RWS (Mar. 26, 2024), <https://www.rws.com/artificial-intelligence/train-ai-data-services/blog/how-ai-is-trained-the-critical-role-of-ai-training-data/> [<https://perma.cc/3ZNF-TVZE>].

19. Anthony Cardillo, *60 Most Popular AI Tools Ranked (September 2024)*, EXPLODING TOPICS (Feb. 26, 2025), <https://explodingtopics.com/blog/most-popular-ai-tools> [<https://perma.cc/Y5FL-RR9N>].

20. Yogesh K. Dwivedi et al., “So What if ChatGPT Wrote It?” *Multidisciplinary Perspectives on Opportunities, Challenges and Implications of Generative Conversational AI for Research, practice and policy*, 71 INT’L J. INFO. MGMT. 1, 11 (2023).

21. *Id.* at 26.

various sectors, including the legal industry.<sup>22</sup> Major legal research platforms, such as LexisNexis and Westlaw, have integrated AI tools capable of drafting legal memoranda, summarizing cases, and drafting briefs to enhance their services.<sup>23</sup> However, the sophistication of these tools also raises significant concerns about potential misuse. As AI technology progresses, the possibility for the government to train an LLM on an author's past writings and use this data to uncover the identity of an author behind anonymous publications arises.

Recent research conducted by the Illinois Institute of Technology analyzed the accuracy of LLMs in attributing text back to the correct author.<sup>24</sup> The researchers concluded that LLMs are proficient in first identifying authors and second explaining the features of the authors' writing that resulted in the identification.<sup>25</sup> These features included the authors' tone, word choice, punctuation use, and common typing mistakes.<sup>26</sup> ChatGPT 4, which was the newest model at the time, showed 80% accuracy for selecting the correct author of a blog post out of ten candidates and closer to 90% for selecting the correct email author.<sup>27</sup>

When the number of potential authors increased from ten to twenty, the accuracy of ChatGPT 4 in identifying the correct author decreased with around 60% accuracy for blog posts and 80% accuracy for emails.<sup>28</sup> ChatGPT 4 was nearly twice as accurate as the previous model of ChatGPT in identifying authors, which shows the rapid increase in the accuracy of this technology.<sup>29</sup> In their conclusions, the authors of the above study stated that “[t]he findings underscore the potential of LLMs

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22. Suzanne McGee, *Generative AI and the Law*, LEXISNEXIS (May 11, 2023), <https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/generative-ai-and-the-law#:~:text=The%20potential%20applications%20for%20AI,compete%20with%20the%20largest%20groups> [https://perma.cc/3ZGS-V8KD].

23. *Thomson Reuters Introduces New Generative AI Skill in Westlaw Precision with CoCounsel*, THOMSON REUTERS (Jul. 21, 2024), <https://www.thomsonreuters.com/en-us/posts/innovation/thomson-reuters-introduces-new-generative-ai-skill-in-westlaw-precision-with-cocounsel/> [https://perma.cc/3LG8-3C23].

24. Baixiang Huang et al., *Can Large Language Models Identify Authorship?*, FINDINGS OF THE ASS'N FOR COMPUTATIONAL LINGUISTICS: EMNLP 2024 445, 449 (Nov. 2024), <https://aclanthology.org/2024.findings-emnlp.26.pdf>.

25. *Id.* at 453.

26. *Id.* at 448.

27. *Id.* at 449.

28. *Id.*

29. *Id.*

to revolutionize authorship analysis, offering robust solutions for digital forensics, cybersecurity, and combating misinformation.”<sup>30</sup> With these findings in mind, if the government uses an LLM to identify the authors of an anonymous post, there is a strong likelihood that this identification would be accurate. While the research above showed that accuracy decreases with the number of authors, this technology is still emerging and will only become more accurate over time.

AI has taken the world and legal community by storm. People use AI to ask for help with tasks, to photoshop images, and to incorporate automatic operations into their businesses.<sup>31</sup> ChatGPT, an extremely popular AI software system, was the “fastest-growing consumer application in history” in January of 2023, having reached over a million monthly users two months after launching.<sup>32</sup> With the integration of this technology into mainstream usage, it is essential that the courts establish clear laws to protect individuals from their potential misuse.

### *B. Linguistic Fingerprints*

In the process of identifying anonymous authors, understanding linguistics is essential. Linguistics is defined as the study of language.<sup>33</sup> Experts can use linguistics to identify patterns in the way we as a society communicate, and these patterns can create what is called a linguistic fingerprint.<sup>34</sup> Just as someone’s dialect could allow others to discern where they are from, written communication can often reveal more about ourselves than one might think.<sup>35</sup> In the field of forensic science, which is the use of scientific methods in criminal investigations, linguists have been used to help solve crimes.<sup>36</sup> A notable example of this is the Unabomber

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30. *Id.* at 453.

31. Saira Mueller, *4 Unexpected Work Tasks Made Easier by AI*, MASHABLE (Feb. 27, 2024), <https://mashable.com/article/4-unexpected-work-tasks-ai-can-help-with> [<https://erma.cc/YRT2-HPY7>].

32. Krystal Hu, *ChatGPT Sets Record for Fastest-Growing User Base - Analyst Note*, REUTERS (Feb. 2, 2023, 9:33 AM), <https://www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/>.

33. JOHN OLSSON, *WHAT IS FORENSIC LINGUISTICS?* 2 (2014).

34. Roger J. Kreuz, *How the Unabomber’s Unique Linguistic Fingerprints Led to His Capture*, THE CONVERSATION (June 15, 2023, 8:33 am EDT), <https://theconversation.com/how-the-unabombers-unique-linguistic-fingerprints-led-to-his-capture-20768> [<https://perma.cc/E7HD-PHZX>].

35. OLSSON, *supra* note 33, at 3.

36. Kreuz, *supra* note 34.

case.<sup>37</sup> From 1978 to 1995, Ted Kaczynski killed three people using various self-made explosive devices.<sup>38</sup> Investigators were stumped as they looked into who was responsible for these bombings.<sup>39</sup> In 1995, Kaczynski offered to stop these bombings if his manifesto was published in a newspaper, and the Washington Post agreed to publish it.<sup>40</sup> The FBI used this 35,000-word essay to find Kaczynski.<sup>41</sup> Forensic linguistic experts noticed that the Unabomber had a unique writing style, using the spelling of words that a Chicago newspaper used in the 1940s, terms typically used by middle-aged individuals, and words more commonly associated with people from the north.<sup>42</sup> This publication also led Kaczynski's brother to approach the FBI, reporting that he believed some phrases the Unabomber used were similar to those used by his brother, ultimately leading to the end of this reign of terror.<sup>43</sup> Given the wide use forensic linguistics have and the success of decade-old programs in identifying authorship, further advancement in this technology by the government is not only evident but presents a vast number of potential problems.

### *C. History and Legal Framework: The Right to Anonymous Speech*

Individuals choose to engage anonymously online for various reasons. Anonymous speech has been defined, and will be defined in this Note, as a publication in which the author wishes to conceal their identity.<sup>44</sup> People may choose to publish anonymously to protect themselves from social or professional repercussions, to speak out against influential individuals, to prevent being silenced for their thoughts, or to protect their family members from backlash for their opinions.<sup>45</sup> While the right to anonymity is not explicitly stated in the First Amendment, its recognition dates back

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. Leeza Arbatman & John Villasenor, *Anonymous Expression and "Unmasking" in Civil and Criminal Proceedings*, 23 MINN. J.L. SCI. & TECH. 77, 83 (2022).

45. Brendan Gilligan, *EFF Urges New York Court to Protect Online Speakers' Anonymity*, ELEC. FRONTIER FOUND. (Mar. 12, 2024), <https://www.eff.org/deeplinks/2024/03/eff-urges-new-york-court-protect-online-speakers-anonymity> [<https://perma.cc/CMA5-EER7>].

to the founding of the United States.<sup>46</sup> After the United States' emancipation from Great Britain, the Nation's founders worked diligently to create a governing framework "of the people, by the people, for the people."<sup>47</sup> In support of the ratification of the Constitution, the Founders authored anonymous papers under the pseudonym Publius.<sup>48</sup> This early use of anonymity demonstrates the importance of the right to anonymity in the history and traditions of our nation.

When the government seeks to compel the identity of an anonymous speaker, courts apply exacting scrutiny.<sup>49</sup> The application of exacting scrutiny varies; the U.S. Supreme Court has used it to mean strict scrutiny, intermediate scrutiny, or something in between the two.<sup>50</sup> Generally, the Court has held that exacting scrutiny requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."<sup>51</sup> Unlike strict scrutiny, which requires that the government use the least restrictive means to achieve its objective, exacting scrutiny allows for flexibility—upholding the disclosure requirement as long as the government's means are substantially related to the stated interest.<sup>52</sup> However, even under exacting scrutiny, the government's interest must still be narrowly tailored to avoid unnecessarily burdening speech.<sup>53</sup> In the context of anonymous speech, this often involves balancing the need for transparency and accountability with the need to avoid unduly chilling free speech.<sup>54</sup>

One of the Supreme Court's key cases addressing anonymous speech is *McIntyre v. Ohio Elections Commission*.<sup>55</sup> In *McIntyre*, an individual was passing out leaflets regarding a school tax.<sup>56</sup> Because the author's name was not listed on the leaflets, which were categorized as campaign

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46. Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2153 (2011).

47. Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

48. Chesa Boudin, Note, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2153 (2011).

49. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 607 (2021).

50. R. Randall Kelso, *Clarifying the Four Kinds of "Exacting Scrutiny" Used in Current Supreme Court Doctrine*, 127 PENN ST. L. REV. 375, 376 (2023).

51. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Ams. for Prosperity Found.*, 594 U.S. at 607.

52. *Ams. for Prosperity Found.*, 594 U.S. at 608.

53. *Id.*

54. *Id.* at 609.

55. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350 (1995).

56. *Id.* at 337.

material, the leaflets violated Ohio state law.<sup>57</sup> The petitioner challenged the fine they were issued for violating this law.<sup>58</sup> The Court applied exacting scrutiny, requiring the government to show the restriction—having the author’s name on campaign material—was “narrowly tailored to serve an overriding state interest” and did not burden speech more than necessary.<sup>59</sup> The Court found that the government’s interest in transparency did not outweigh the author’s right to remain anonymous.<sup>60</sup> The majority opinion, authored by Justice Stevens, stated: “Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind 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.”<sup>61</sup>

The ruling in *McIntyre* reinforced the principle that anonymous speech is a fundamental aspect of the First Amendment, allowing individuals to express dissenting views without fear of retaliation. As the digital age changed the way people express dissenting views, the Supreme Court extended the ruling of *McIntyre* in *Reno v. ACLU* to apply to “the special attributes of Internet communication.”<sup>62</sup> In *Reno*, the Court evaluated the Communications Decency Act, which sought to regulate “offensive” and “indecent” online content by prohibiting its transmission to minors.<sup>63</sup> The Communications Decency Act required individuals to identify themselves when accessing certain material online in order to verify the individual’s age.<sup>64</sup> Appellees challenged the Communications Decency Act for violation of the First Amendment right to anonymity.<sup>65</sup> The Court ruled that the law was too vague and that requiring adults to disclose their identities in connection with protected sexual speech would have a chilling effect.<sup>66</sup> The Court found this blanket requirement too burdensome to withstand First Amendment protections, even in the age of online

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57. *Id.* at 338.

58. *Id.* at 340.

59. *Id.* at 347 (citation omitted).

60. *Id.* at 348-49.

61. *Id.* at 357 (citation omitted).

62. *Reno v. Am. C.L. Union*, 521 U.S. 844, 863 (1997) (quoting Dalzell, J., prior district court opinion, *aff’d* in part, 929 F. Supp 824 (E.D. Pa. 1996)).

63. *Id.* at 856, 858-59; 47 U.S.C. § 223(a), (d).

64. *Reno*, 521 U.S. at 860-61.

65. *Id.* at 849.

66. *Id.* at 872.

communication.<sup>67</sup> This holding reaffirmed that the right to anonymity extends to online speech and communication.<sup>68</sup>

The Second Circuit has concluded that monitoring sex offenders online does not constitute a compelling government interest sufficient to justify government-compelled disclosure under the First Amendment.<sup>69</sup> In *Cornelio v. Connecticut*, the court examined whether a state's law requiring sex offenders to notify the Department of Emergency Services and Public Protection when they created a new email account was unconstitutional because it burdened their First Amendment right to anonymous speech.<sup>70</sup> The court found this disclosure requirement violated the First Amendment—specifically, the right to anonymous speech.<sup>71</sup> In this case, the court applied intermediate scrutiny rather than exacting scrutiny, but it did not explain why; instead it: “[a]ssum[ed] that intermediate scrutiny [was] the appropriate standard.”<sup>72</sup> Under intermediate scrutiny, the government had to show that the regulation was substantially related to an important government interest and not overly broad in relation to the interest it sought to protect.<sup>73</sup> The court found that because the law forced sex offenders to disclose which email accounts were theirs, it prevented them from exercising their right to anonymous speech without a government-imposed identifier requirement, which the court deemed a violation of the First Amendment.<sup>74</sup>

While cases like *Cornelio* highlight the limitations of governmental authority over online speech, there remains a persistent tension in the digital age regarding government attempts to compel the identification of anonymous speakers, a practice known as *unmasking*. Unmasking occurs when the government seeks to obtain the identity of an anonymous speaker.<sup>75</sup> This governmental attempt to expose the speaker's identity may occur through subpoenas,<sup>76</sup> disclosure requirements,<sup>77</sup> or investigative

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67. *Id.*

68. *Id.* at 885.

69. *Cornelio v. Connecticut*, 32 F.4th 160, 169 (2d Cir. 2022).

70. *Id.*

71. *Id.* at 170.

72. *Id.* at 169.

73. *Id.* at 171.

74. *Id.* at 170.

75. Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405, 408 (2003).

76. *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1090 (W.D. Wash. 2001).

77. *S.F. Apartment Ass'n v. City & Cty. of S.F.*, 881 F.3d 1169, 1174 (9th Cir. 2018).

tools.<sup>78</sup> The Supreme Court has long upheld the principle that anonymous speech is protected under the First Amendment, recognizing its constitutional importance in fostering free discourse and protecting individuals from government retaliation.<sup>79</sup> In the digital age, unmasking remains at issue, as courts weigh the government's interests against the potential chilling effects on free speech. Ongoing concern about unmasking highlights the need for courts to balance governmental interests against the chilling effects that identifying an author could have on free expression. As digital communication keeps evolving, courts are left to figure out whether the government's actions go too far in limiting free speech or if it is putting people at risk of retaliation.

## **II. Government Use of AI: Compelled Identification or Investigative Tools?**

Under current Supreme Court precedent, as outlined in the historical analysis above, American citizens have the right under the First Amendment to be free from government-compelled identification in connection with protected speech.<sup>80</sup> This protection extends to the government's use of advanced technology in violation of the First Amendment. Advanced technology—while not necessarily illegal to use on its own—can lead to unconstitutionally compelled identification under the First Amendment. This is a result of the Supreme Court's precedent determining that if technology is not readily accessible to the general public—and the government uses it to conduct investigations that obtain protected information—the use of that technology constitutes a constitutional violation.<sup>81</sup>

Current legal precedents emphasize that when the government forces individuals to reveal their identity in connection with protected speech, such action must meet the demanding standard of exacting scrutiny.<sup>82</sup> This means that the government must demonstrate a substantial relationship between the disclosure requirement and a sufficiently important

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78. Steven Overly, *The Government Really Is Spying On You — And It's Legal*, POLITICO (Feb. 28, 2024, 5:00 AM EST), <https://www.politico.com/news/magazine/2024/02/28/government-buying-your-data-00143742>.

79. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348-49 (1995).

80. *Id.*

81. *Kyllo v. United States*, 533 U.S. 27, 40 (2001).

82. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 596 (2021).

governmental interest.<sup>83</sup> Federal courts have recognized that the right to speak anonymously online limits the government's ability to compel the disclosure of metadata to identify users.<sup>84</sup>

Metadata is the information that accompanies digital communications.<sup>85</sup> It can include things such as timestamps of when the messages were sent, details about who sent and received the information, and the location of the data, but it does not include the content of the message. Metadata can be used to uncover the identity of confidential sources used by journalists, often without the source's knowledge.<sup>86</sup> This is typically done by investigators requesting records containing metadata from internet service providers, the companies that handle online communications.<sup>87</sup> However, these sites generally do not want to share this information without a warrant authorizing law enforcement to access such metadata.<sup>88</sup>

In this context, the courts have developed a detailed system to assess whether there is a genuine need to uncover the identity of an anonymous speaker.<sup>89</sup> Compelled disclosure by the government, whether directly or through purchasing data, impacts the individual's right to remain anonymous in connection with protected speech online. It becomes significantly different if the government itself conducts the identification, as opposed to purchasing the information. This is because both involve the government using technology to uncover protected information. Under this analysis, the government must establish that it has a legitimate and compelling interest that is substantially related to the information it seeks, and that other means of obtaining the information are either insufficient or more intrusive than necessary to further the asserted governmental interest.

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83. *Id.* at 597.

84. *Am. C.L. Union v. Clapper*, 785 F.3d 787, 802-03 (2d Cir. 2015).

85. Garry Kranz, *Definition: Metadata*, TECHTARGET, <https://www.techtarget.com/whatis/definition/metadatametadadata> (last updated July 2021).

86. Julia Dacy, Comment, *Straight to the Source: Shielding a Journalist's Metadata with Federal Legislation*, 75 GEO. WASH. J.L. FED. COMM'NS. 371, 374 (2023).

87. Theodor Meyer, *No Warrant, No Problem: How the Government Can Get Your Digital Data*, PROPUBLICA (June 27, 2014, 10:29 AM), <https://www.propublica.org/article/no-warrant-no-problem-how-the-government-can-still-get-your-digital-data> [<https://perma.cc/H4AP-DZE5>].

88. *Id.*

89. Leeza Arbatman & John Villasenor, *Anonymous Expression and "Unmasking" in Civil and Criminal Proceedings*, 23 MINN. J.L. SCI. & TECH. 77, 79 (2022).

While the government is not directly compelling a company to provide information in the case of LLMs, it is still engaging in conduct that results in the forced disclosure of an individual's identity. By using advanced AI tools—many of which the general public may not even know exist—the government is achieving what would otherwise require a subpoena or court order. The result of this is the chilling of speech. The First Amendment's protections of anonymity focus on the impact of regulations or government actions—whether it deters individuals from engaging in protected speech. Here, the use of AI to unmask anonymous speakers online has the same effect as any other compelled disclosure: It forces disclosure in a way that chills free speech. Speech online is entitled to the same constitutional protection as speech in other forums, and while certain categories of speech may be unprotected, mere anonymity is not one.<sup>90</sup> The government's use of AI to unmask speakers is not only an overreach—it is an unconstitutional investigative technique that erodes the right to anonymous speech.

Surveillance of individuals quashes free speech. This is the exact reason why the government's surveillance of anonymous speakers' posts online, with the aim of later identifying them, is impermissible under the current landscape of the First Amendment.<sup>91</sup> While the authors of these anonymous posts may not be aware that they are being surveilled, the violation lies not in lack of *notice* about the surveillance but in the *unmasking* of the speaker. The purpose of the right to anonymity online is to allow for the free flow of speech. Permitting the government to use tools that are complex and not readily available to the public would have a chilling impact on speech, which I will address in more detail later.

The rise of sophisticated surveillance technologies, including AI, exacerbates concerns about government overreach and the chilling effect this has on speech. Surveillance tools capable of analyzing online activity and attributing speech to individuals can deter people from expressing dissenting or controversial views. The potential for misuse of these tools by the government requires an examination of their constitutional implications.

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90. *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997).

91. *Presbyterian Church v. United States*, 752 F. Supp. 1505, 1516 (D. Ariz. 1990) (“The government is constitutionally precluded from unbridled and inappropriate covert activity which has as its purpose or objective the abridgment of the first amendment freedoms of those involved.”).

Public attitudes and policy debates surrounding the use of AI for surveillance and identification of anonymous speech reflect growing concerns over privacy, civil liberties, and government transparency. Advocacy groups, academia, and technology experts have been actively shaping policy discussions to ensure that technological advancements do not undermine fundamental rights.<sup>92</sup> Efforts to establish guidelines and regulations that safeguard both security imperatives and constitutional protections are ongoing, reflecting a complex interplay between technological innovation and legal frameworks.

In *Doe v. Reed*, the Supreme Court acknowledged the potential chilling effect of public disclosure of petition signatories, emphasizing the need to protect anonymous speech to ensure vibrant public discourse.<sup>93</sup> This case highlights the delicate balance between transparency and privacy, a balance that is further complicated by the capabilities of AI.<sup>94</sup>

What remains insufficiently addressed is the issue of the government purchasing this information from private entities. Courts have long emphasized the role of *neutral and detached magistrates* in determining whether a search warrant is justified, ensuring that invasions of privacy are evaluated within constitutional bounds.<sup>95</sup> However, the decision to permit or regulate such government practices is not solely within the judiciary's discretion. While courts interpret and apply First Amendment constraints, there is space for democratic decision-making within those constitutional limits. The appropriate balance must be struck through established legal and policy channels rather than through the government's unilateral use of investigative tools.

The First Amendment anonymity case law suggests that matching the speech patterns of an unknown speaker with those of a known speaker to identify someone should be subject to the same standard of scrutiny as traditional methods of forced identification.<sup>96</sup> The Court in *McIntyre* held that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an

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92. Erin Simpson & Adam Conner, *How to Regulate Tech: A Technology Policy Framework for Online Services*, AM. PROGRESS (Nov. 16, 2021), <https://www.americanprogress.org/article/how-to-regulate-tech-a-technology-policy-framework-for-online-services/>.

93. *Doe v. Reed*, 561 U.S. 186, 203 (2010).

94. *See generally id.*

95. U.S. CONST. amend. IV.

96. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

aspect of the freedom of speech protected by the First Amendment.”<sup>97</sup> Such laws have been criticized for imposing undue burdens on speakers, potentially chilling free expression.

The Court has not clearly established when, if ever, the government’s use of advanced technology to identify individuals should be viewed as an investigative tool or as unconstitutionally-compelled disclosure. Legal scholars view the government’s use of technology to enhance its ability to identify individuals as compelled disclosure due to the power, authority, and benefits the government holds over its citizens.<sup>98</sup> However, before proceeding with this assumption, this Note will briefly discuss the discourse surrounding this issue.

In *Doe v. Ashcroft*, the court held that, as applied in this case, the FBI was not authorized to compel the identification of communications related to terrorism investigations, but clarified that such action could be permissible under the First Amendment under a different set of facts.<sup>99</sup> The FBI utilized internet service providers to identify the communications and their senders.<sup>100</sup> Plaintiffs brought suit, claiming that this violated their First Amendment right to anonymity.<sup>101</sup> The court in *Doe* found that although the government had a compelling interest in identifying possible threats to national security, the method used in this case went too far in violating the right to anonymity.<sup>102</sup> Requiring third parties to disclose information intended to be anonymous violated the First Amendment because the government was using advanced technology that could chill free speech by revealing communications.<sup>103</sup>

In *Doe v. Harris*<sup>104</sup> and *Washington Post v. McManus*,<sup>105</sup> the courts held that allowing the government to collect and monitor freely available data could still violate the First Amendment by compelling identification.<sup>106</sup> In both cases, state laws attempted to establish systems

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97. *Id.*

98. *See, e.g.,* Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1964 (2013).

99. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004).

100. *Id.* at 474-75.

101. *Id.*

102. *Id.* at 476.

103. *Id.* at 508.

104. *Doe v. Harris*, 772 F.3d 563, 568-69 (9th Cir. 2014).

105. *See generally* *Wash. Post v. McManus*, 355 F. Supp. 3d 272 (D. Md. 2019).

106. Apratim Vidyarthi, *The Public Square Has Eyes (or Cameras): Anonymous Speech Under the First and Fourth Amendments in the Age of Facial Recognition*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 630, 640-41 (2022).

that would require individuals in certain groups—sex offenders or those purchasing political advertisements—to disclose their online identifiers or email addresses to the government.<sup>107</sup> The courts in both cases found these requirements too burdensome.<sup>108</sup> The government in both cases argued that the disclosure requirements would not chill speech since the speech would still be anonymous.<sup>109</sup> However, the courts found that government surveillance and the potential for disclosure created a chilling effect on speech that was too significant to be justified under a blanket requirement.<sup>110</sup> It did not matter that the information the government sought to require was publicly accessible; the government's involvement would chill speech, thus violating the First Amendment.<sup>111</sup>

Other federal courts have found this principle extends to governmental requests for internet service provider records, which would provide the government with enough information to obtain the identity of users on those networks.<sup>112</sup> The court in *Doe v. 2TheMart.com Inc.* stated:

The free exchange of ideas on the Internet is driven in large part by the ability of Internet users to communicate anonymously. If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights.<sup>113</sup>

Under this approach, if the government identifies the author of anonymous speech, that alone constitutes compelled identification, and the tools used to identify the author are irrelevant. However, the identification of an author can be done legally if there is a sufficiently important government interest that satisfies exacting scrutiny.<sup>114</sup> Courts in applying

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See e.g., Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001) (addressing a civil subpoena seeking to unmask anonymous internet users in a securities fraud case and emphasizing the chilling effect such compelled disclosure would have on First Amendment rights).

113. *Id.* at 1093.

114. *McConnell v. FEC*, 540 U.S. 93, 275-76 (2003).

exacting scrutiny must strike a balance between guaranteeing the utmost protection of speech and the government's ability to identify anonymous speakers for a legitimate purpose.

With the standard of exacting scrutiny in mind, legal scholars have found that online monitoring—which is not itself illegal—is too burdensome under the First Amendment to be a lawful restriction on speech.<sup>115</sup> Blanket disclosure requirements are too onerous under the First Amendment and are viewed as governmental unmasking.<sup>116</sup> In these situations, the courts look at the result and impact of the governmental action, not the tools used to attribute the text to the anonymous speaker.<sup>117</sup> The government's use of tools and technology—such as internet protocol (IP) address tracking systems—to identify anonymous authors online should be viewed as unconstitutional unmasking.

Ben Sperry, a Senior Scholar at the International Center for Law & Economics, has discussed this issue by comparing the government's collection of IP addresses to the forceful removal of a face mask in public.<sup>118</sup> In this example, Sperry paints two pictures for us: one of an individual against whom the government committed a tort by removing a covering from their face in public—violating the First Amendment by unmasking them—and another where individuals who have not divulged their identities online, unknowingly click links that give the government information regarding their identity.<sup>119</sup> With this information, the government can compare these emails to multiple websites and could potentially connect an account to a user's real identity. While Sperry does not directly address the current law surrounding this issue—most likely because it has not been clearly established by the Supreme Court—his

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115. See, e.g., Jonathon W. Penney, *Chilling Effects: Online Surveillance and Wikipedia Use*, 31 BERKELEY TECH. L.J. 166-67 (2016) (concluding that surveillance disclosures chilled online activity).

116. *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611 (2021) (finding the “blanket demand” requiring all charities to disclose was “facially unconstitutional”).

117. See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (ruling that the registration requirement had a chilling effect on the exercise of First Amendment rights to engage in anonymous speech and expressive conduct).

118. Ben Sperry, *Right to Anonymous Speech, Part 1: An Introduction from First Principles*, TRUTH ON THE MARKET (Sept. 5, 2023), <https://truthonthemarket.com/2023/09/05/right-to-anonymous-speech-part-1-an-introduction-from-first-principles/> [https://perma.cc/TEL2-HBRR].

119. *Id.*

research raises an important question: “Should the government be able to unmask the anonymous individual?”<sup>120</sup>

While AI systems developed by the government show promise in enhancing national security by unmasking malicious actors online, their application raises concerns about privacy and the chilling effect it may have on speech.<sup>121</sup> To fall under constitutional protection, the government must be the one compelling the author to identify themselves in connection with their protected speech.<sup>122</sup> This is to prevent the chilling of free speech by ensuring that individuals are not silenced by fear of government backlash for their actions.<sup>123</sup> This mindset is rooted in the treatment of early American colonies that spoke out against the king before the Revolutionary War.<sup>124</sup> Speaking out against our government is one of the pillars on which our nation was built, so essential that it is explicitly listed in the Declaration of Independence.<sup>125</sup> Requiring users on social media platforms to verify their identity with a valid state ID, however, does not violate the First Amendment because this is not the government directly chilling speech, but rather a private platform exercising its discretion in managing its services.

In 2007, in response to 9/11, the Office of the Director of National Intelligence established the Intelligence Advanced Research Project Activity (IARPA).<sup>126</sup> This organization researches what it refers to as “high-risk/high-payoff” issues in the intelligence community.<sup>127</sup> The purpose of this organization is to address various issues of national security, prevent future attacks, and allow the intelligence community to better understand the issues they are facing.<sup>128</sup> In 2022, IARPA launched a program called the Human Interpretable Attribution of Text Using

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120. *Id.*

121. See *The U.S. National Security Memorandum on AI: Leading Experts Weigh in*, JUST SECURITY (Oct. 25, 2024), <https://www.justsecurity.org/104242/memorandum-ai-national-security> [<https://perma.cc/RA6M-SJ37>].

122. *In re Anonymous Online Speakers*, 661 F.3d 1168, 1173 (9th Cir. 2011) (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995)).

123. *McIntyre*, 514 U.S. at 357.

124. JEFFREY KOSSEFF, *THE UNITED STATES OF ANONYMOUS: HOW THE FIRST AMENDMENT SHAPED ONLINE SPEECH* 1, 16 (2022).

125. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

126. *History, Our Mission*, IARPA, <https://www.iarpa.gov/who-we-are/history> (last visited May 24, 2025).

127. *Id.*

128. *Id.*

Underlying Structure (HIATUS).<sup>129</sup> The purpose of this program was to “develop . . . human-useable systems for attributing authorship and protecting author privacy.”<sup>130</sup> The dual aim of this program was to help identify authors of malicious information online for counterintelligence purposes, as well as to protect authors who, if identified, could be placed in danger.<sup>131</sup>

HIATUS works by studying linguistic features to attribute who potential authors could be.<sup>132</sup> This program is in a forty-five-month research phase, with different researchers selected to build the programs.<sup>133</sup> While this means these programs may not be used by the government currently, their existence is evidence of the intention for the government to use AI to identify anonymous speakers. These programs present great benefits for our country’s national security efforts; however, the legality of this program under the First Amendment raises an important question that must be answered. The ability to unmask terrorists who are pushing materials out on the web or holding meetings online is an interest the government has long held.<sup>134</sup> Extremists use social media sites to post videos of themselves committing acts of violence; it is obvious why the government would want to use this technology to identify threats to our nation’s security and to stop them.

Further analysis of recent lower court decisions and scholarly commentary reveals a growing consensus on the need to protect anonymous speech in the digital age. Legal scholars—such as Erwin Chemerinsky and Geoffrey R. Stone—have argued that technological advancements should not erode constitutional protections.<sup>135</sup> Their works emphasize that robust legal safeguards are essential to prevent government overreach and ensure that the principles of free speech and anonymity endure in the face of emerging technologies.<sup>136</sup>

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129. *HIATUS, Human Interpretable Attribution of Text Using Underlying Structure*, IARP, <https://www.iarpa.gov/research-programs/hiatus> (last visited May 24, 2025).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Awni Etaywe et al., *A Cyberterrorist Behind the Keyboard*, 3 J. LANGUAGE AGGRESSION & CONFLICT 1, 33 (2024).

135. Alex Chemerinsky & Erwin Chemerinsky, *Misguided Federalism: State Regulation of the Internet and Social Media*, 102 N.C. L. REV. 1, 5-6 (2023).

136. *Id.*

The government's use of AI could involve the implementation of tech-savvy investigative techniques or the impermissible use of technology to unmask constitutionally protected speech. Until the Supreme Court rules on this issue, it is reasonable—based on precedent in other cases involving the government's use of advanced technology—to assume this is a constitutional violation.<sup>137</sup> In *Kyllo v. United States*, the Court ruled that “obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area’ constitutes a search—at least where . . . the technology in question is not in general public use.”<sup>138</sup>

Furthermore, Justice Sotomayor concurring in *United States v. Jones* stated that technology used to identify people could be a basis for First Amendment claims, but the Court in that case did not further explore when use of such technology could result in First Amendment violations.<sup>139</sup> Given this context—even in the absence of a specific Supreme Court ruling—it is likely that the Court would find the use of AI to identify online authorship to be an impermissible unmasking under the First Amendment.<sup>140</sup> Because the use of AI to identify authors involves the use of technology that is not in general public use, it raises significant First Amendment concerns, as it could lead to the unwarranted identification of anonymous speakers and discourage free expression, particularly if employed by the government or private parties without proper safeguards or oversight.<sup>141</sup> Moreover—even if such technology were widely used—it could still have a chilling effect on speech.<sup>142</sup>

The distinction between general public use and government use of such technology warrants careful consideration. This issue requires further analysis that falls outside the scope of this Note, but it is important to

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137. *Id.* at 19-20.

138. *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (citing *Silverman v. U.S.*, 365 U.S. 505, 512 (1961)).

139. As Justice Sotomayor suggested in *Jones*, the use of GPS and other technologies for identifying and tracking people may well give rise to a First Amendment claim in the appropriate case. See *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring).

140. *Id.*

141. Stephanie Lee, *Uncovering Hidden Authors with AI*, INFO. SCIS. INST. (Apr. 15, 2024), <https://www.isi.edu/news/65021/uncovering-hidden-authors-with-ai/> [<https://perma.cc/PDZ5-82Y3>].

142. *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring).

acknowledge that the increasing public use of technologies like AI to identify authors can present unique challenges.

One possible distinction is whether the government can use this technology in a way that causes greater harm to anonymity compared to its general public use. For example, government access to such data might be more invasive or applied in a broader context, creating a deeper intrusion into free speech rights. Additionally, the criminal penalties that the government can impose on individuals might necessitate different rules regarding the use of such technologies to ensure that individuals' rights are not unduly violated. Marc Blitz, James Grimsley, Stephen E. Henderson, and Joseph Thai have addressed this issue briefly.<sup>143</sup> They note the fact that many people believe even when something is in the public domain, there are "different expectations" regarding the behavior of the police compared to that of private actors.<sup>144</sup> Even if people accept private companies or individuals tracking their behavior without their consent, they may be less accepting of law enforcement using the same methods.<sup>145</sup> This concern, however, has not always convinced courts.<sup>146</sup> For instance, the Supreme Court has permitted law enforcement to engage in activities—such as trespassing on private property—that private individuals commonly carry out without violating the Fourth Amendment.<sup>147</sup> When applied to AI technology, this legal framework suggests that as private actors increasingly use AI tools to track or analyze individuals' data, it may become harder to argue that law enforcement should face stricter limitations when using similar AI technologies.

Ultimately, the burden of proof would likely rest on those seeking to restrict the government's use of AI, but such restrictions might not be justified under current Fourth Amendment standards, which focus on establishing a baseline of individual rights without imposing additional constraints based on the actor's identity.<sup>148</sup> This Fourth Amendment standard, however, may extend to the First Amendment if the use of AI to unmask anonymous authors becomes widely available to the public. Still, in the specific context of using AI to identify anonymous speakers—particularly through forensic linguistics—the government's actions would

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143. Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 76 (2015).

144. *Id.*

145. *Id.* at 76-77.

146. *Id.* at 77.

147. *Id.* (citing *Oliver v. United States*, 466 U.S. 170, 179 (1984)).

148. *Id.*

likely violate First Amendment protections aimed at preserving free speech.

### III. Counteractions

To protect their identity, authors could use AI as a countermeasure, leveraging technology to maintain anonymity against potential threats. There is a great potential for AI to hide the writing style of an author by masking key linguistic features.

Students at Drexel University's Privacy, Security, and Automation Lab have started a project called "Anonymouth" to help combat this issue.<sup>149</sup> This program combines two frameworks: one that detects unique features of the author's writing and another that suggests changes to stylistic characteristics to make the writing harder to identify.<sup>150</sup> This program had limited success but shows the potential for this technology to be leveraged by citizens to protect themselves from unwanted and unlawful government disclosures.<sup>151</sup> Additionally, while disclosure by private citizens may not be unlawful, it may be unwanted. These measures could prevent other citizens, who do not need to go through a warrant approval process, from using the aforementioned authorship identification programs to identify the author of the anonymous post in question.

Judicial oversight is paramount to ensuring that the government's use of AI for surveillance and identification respects constitutional rights. The principles established in *Katz v. United States* and *Kyllo v. United States* emphasize the need for judicial scrutiny in matters of privacy and government intrusion.<sup>152</sup> Extending these principles to the context of AI and anonymous speech underscores the importance of neutral and detached magistrates in safeguarding First Amendment protections.

In cases where the government seeks to use AI to identify anonymous speakers, it must demonstrate an interest that is substantial and related to the disclosure to pass exacting scrutiny. This judicial oversight ensures that any infringement on anonymity is justified and limited, preserving the fundamental freedoms enshrined in the Constitution.

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149. Sue Gee, *Anonymouth Hides Identity*, I PROGRAMMER (Aug. 4, 2013), <https://www.i-programmer.info/news/105-artificial-intelligence/6197-anonymouth-hides-identity.html> [<https://perma.cc/X5M8-RGSC>].

150. *Id.*

151. *Id.*

152. *See Katz v. United States*, 389 U.S. 347 (1967); *see also Kyllo v. United States*, 533 U.S. 27 (2001).

### **Conclusion**

As AI capabilities continue to evolve, courts will face questions about how traditional First Amendment protections apply to new technological contexts. The right to speak anonymously must be preserved regardless of how the digital landscape changes. When the government employs AI to identify anonymous speakers through linguistic analysis, it engages in compelled disclosure that triggers First Amendment protections. Such identification, even when achieved through technological means rather than a direct demand, produces the same chilling effect on speech that traditional compelled disclosure would. The government's use of advanced AI tools to unmask speakers circumvents established constitutional protections and accomplishes through technology what would otherwise require judicial oversight.

In an era where technological capabilities continue to advance, protecting anonymous speech is not merely about preserving a constitutional right. It is about maintaining the ability to engage in democratic discourse. The principles that guided our founding fathers in their anonymous support for constitutional ratification remain just as relevant today. The First Amendment's protection of anonymous speech must endure. It must adapt to new technologies while preserving its essential purpose, to ensure that citizens can speak freely without fear of government repercussion or censorship.

