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Special Report: Private Companies, Federal Government Respond to Data Privacy Issues Raised by *Dobbs*

On June 24, 2022, the United States Supreme Court overturned *Roe v. Wade*, ruling that the Constitution does not provide a right to abortion and that the authority to regulate abortion should be left to the states. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). After the *Dobbs* decision was published, privacy experts expressed significant concerns. The *Roe* decision was based on the "right to personal privacy" the Court found protected by the Fourteenth Amendment's due process clause. *Roe v. Wade*, 410 U.S. 113 (1973). Some experts worried the decision might threaten other civil liberties the Court has found implied in a right to privacy, such as the right to contraception or same-sex marriage.

Significantly, privacy lawyers warned the decision would raise thorny questions of data privacy in an era where law enforcement has access to unprecedented amounts of personal data that could indicate that someone had an illegal abortion. According to *The New York Times* on Aug. 26, 2022, at least twelve states have banned most or all abortions, and more bans are expected in the coming weeks and months. As technology reporter Scott Rosenberg reported for *Axios* on July 5, digital information like "period-tracking data, private text messages and emails and broader individual usage records like search queries and site visits" could provide valuable evidence for law enforcement seeking to prosecute now-illegal abortions. Sophisticated investigation techniques like geofence warrants and keyword search warrants could yield troves of personal data. On Aug. 9, 2022, *Vice* reported that police used a search warrant to access Facebook messages to investigate an allegedly illegal abortion, and privacy experts worried that such investigations could become common.

In the wake of the *Dobbs* decision, the federal government and private tech companies announced new measures to protect privacy. Journalists have also raised concerns about the decision's implications for larger issues of press freedom.

Google, Health Tech Apps Announce Efforts to Strengthen Privacy Protections

The *Dobbs* decision, and the subsequent state-level abortion bans, prompted developers of many reproductive health apps to rethink their data management practices. According to *STATNews*, the marketers of several period-tracking apps have announced that they would develop anonymous versions of their services. *Gizmodo* reported that period-tracking app Stardust announced in June that it would become the first app of its kind to provide end-to-end encryption of user data. In a blog post published June 30, 2022, digital rights group Electronic Frontier Foundation emphasized the importance of data security for reproductive health apps but cautioned that investigations into alleged illegal abortions would be more likely to occur after a trusted third party, such as a medical professional or family member, provided information to law enforcement. The blog post is available at: https://www.eff.org/deeplinks/2022/06/should-you-really-delete-your-period-tracking-app.

On July 1, Google stated it would automatically delete abortion clinic location data pertaining to its users. Jen Fitzpatrick, a senior vice president at Google, announced the change in a blog post. Although she did not provide an exact timeline, she said the change would "take effect in the coming weeks." Fitzpatrick also wrote that Google's Location History is an account setting turned off by default. The auto-deletion will also apply to other "particularly personal" locations like counseling centers, domestic violence shelters, fertility centers, and addiction treatment facilities. In the blog post, Fitzpatrick wrote that the company "did not commit to automatically deleting search records about abortions" and "made no commitments about changing the way it handles government data requests." The blog post is available at: https://blog.google/technology/safety-security/protecting-peoples-privacy-on-health-topics/.

When someone uses a service with Google location history enabled, Google tracks the phone's position every two minutes and can estimate the person's location within nine feet. According to reporting from National Public Radio (NPR) on July 11, Google received more than 50,000 requests in the first six months of 2021 from law enforcement for data it maintains about the locations of its users. Some experts worried that the proposed measures would not go far enough and urged Google and others to minimize the amount of sensitive data collected in the first place. *The Washington Post* observed on July 1, 2022 that the "sheer volume of Google's surveillance" makes it an "attractive police target." "Because this is a very highly charged issue, you're going to have law enforcement in states where abortion is illegal get extremely aggressive, because they want to make a political point," privacy and data security attorney Gary Kibel told *Adweek* on July 6. Though the proposed actions of private tech companies might be helpful in protecting data,

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Silha Center Staff

Jane E. Kirtley
Silha Center Director and Silha Professor of Media Ethics and Law

Claire Colby
Silha *Bulletin* Editor

Samantha Brunn
Silha Research Assistant

Luke Srodulski
Silha Research Assistant

Elaine Hargrove
Silha Center Staff

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those companies are still subject to search warrants from law enforcement.

Facebook Gives Messages to Police in Abortion Investigation

In June 2022, several news outlets reported that Facebook responded to a search warrant from Nebraska police and turned over private messages in an investigation of an allegedly illegal abortion. According to NPR, police in Norfolk, Neb. requested the messages as part of an investigation into Jessica Burgess, who they suspected of helping her daughter, Celeste Burgess, perform an illegal medication abortion. The Facebook messages showed that the mother had purchased abortion pills online and instructed her daughter on how to take them. The investigation began before the *Dobbs* decision was released, when Norfolk police received a tip that the daughter had miscarried and illegally disposed of the fetal remains. After police reviewed the Facebook messages, they charged Jessica and Celeste Burgess with breaking Nebraska's abortion laws, NBC News reported on Aug. 9, 2022.

COVER STORY

NPR reported on Aug. 12, 2022 that a 2010 Nebraska law prohibits abortions after 20 weeks, but "that time limit wasn't enforced" while *Roe* was still law. It is "not clear the illegal abortion charges will stand," as the charges are based on a retroactive application of the law. According to police, the pregnancy was 23 weeks along. A blog post by Sarah Hall and Elena Quattrone, attorneys with Epstein Becker & Green, asserted an abortion after 20 weeks is a felony in Nebraska, and "individuals who aid or abet the pregnant woman in the commission of a self-induced abortion are also subject to charges of reckless endangerment." The blog post is available at: https://www.commerciallitigationupdate.com/2022/08/12/post-dobbs-abortion-enforcement-nebraska-uses-facebook-messages-as-evidence/.

Meta, Facebook's parent company, issued a statement on August 9 about the investigation. "We received valid legal warrants from local law enforcement on June 7, before the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization," the statement read. "The warrants did not mention abortion at all." The full statement is available online at https://about.fb.com/news/2022/08/meta-response-nebraska-abortion-case/.

Privacy experts warned that that law enforcement agencies may continue to target platforms like Facebook to investigate abortion in a post-*Roe* landscape. "This is going to keep happening to tech companies that store significant amounts of communications and data," Jake Laperruque, deputy director at the Center of Democracy and Technology, told NBC News on Aug. 9, 2022. "If companies don't want to end up repeatedly handing over data for abortion investigations, they need to rethink their practices on data collection, storage and encryption," Laperruque said. Corynne McSherry, legal director of the Electronic Frontier Foundation, told *The Washington Post* on Aug. 12, 2022 that tech companies should limit the collection of personal information to avoid the challenges posed by law enforcement investigations. "If the order is valid and targets an individual, the tech companies will have relatively few options when it comes to challenging it," McSherry said. "That's why it's very important for companies to be careful about what they are collecting because if you don't build it, they won't come," she said.

Federal Government Pursued Multiple Paths to Protect Abortion-Related Data

In the time since the *Dobbs* draft decision was leaked in May 2022 and the final decision was released in June, officials across the federal government have taken steps to protect sensitive data surrounding reproductive health. The Office of Civil Rights clarified Health Insurance Portability and Accountability Act's (HIPAA) applicability to reproductive-health related data. 42 U.S.C. §1320d *et seq.* Several members of Congress contended that the *Dobbs* decision made the passage of a national data privacy bill more urgent, and several representatives proposed a bill that would specifically address reproductive health information. On July 8, 2022, President Biden released an executive order encouraging executive agencies to take steps to protect patient privacy.

On June 29, 2022, the Department of Health and Human Services Office of Civil Rights (OCR) issued guidance on HIPAA's applicability to disclosures of information related to reproductive health care. The OCR "administers and enforces" the HIPAA Privacy Rule. According to the OCR, the Privacy Rule "permits but does not require" covered entities to disclose private health information about a person without their consent when "such disclosure is required by another law and the disclosure complies with the requirements of the other law." In a state where abortion is illegal, HIPAA would not permit disclosure of a suspected abortion unless the state law explicitly required this reporting. The Privacy Rule would permit an abortion provider to provide patient records to law enforcement pursuant to a court order but would not require this disclosure. The OCR guidance is available online at https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html.

Privacy lawyers cautioned that HIPAA is not a panacea for abortion-related data concerns. On July 11, 2022, Faegre Drinker attorneys wrote in a blog post that the law applies only to health care providers and their business associates and generally does not protect health information stored on a personal device. According to reporting from *The Verge* on July 27, 2022, the law does not apply to crisis pregnancy centers run by anti-abortion activists, who may be particularly motivated to disclose the information.

The decision also raises the stakes for a national data privacy law. The American Data Privacy and Protection Act (ADPPA), which was passed by the House Committee on Energy and Commerce on July 20, includes protection for "sensitive data." The bill would protect "sensitive data" including information surrounding the "past, present or future physical health, mental health, disability, diagnoses or healthcare condition or treatment." Unlike HIPAA, the bill would protect healthcare-related information "regardless of whether it is in the hands of a covered provider." According to reporting from *Vox* on July 21, 2022, Rep. Anna Eshoo (D-Calif.) said that the bill would prevent law enforcement from accessing data to help prosecute people for getting abortions. The bill, introduced as H.R. 8152, is available at: https://www.congress.gov/bill/117th-congress/house-bill/8152/text.

Reps. Ron Wyden (D-Ore.), Mazie Hirono (D-Hawaii), and Sara Jacobs (D-Calif.) introduced a bill to address the *Dobbs* fallout more directly. The "My Body, My Data Act" establishes protections for "personal reproductive or sexual health information" including "information relating to past, present,

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or future surgeries or procedures, such as the termination of a pregnancy." The bill, which was introduced to the House Energy and Commerce Committee on June 16, would bar the collection, use, or disclosure of reproductive health information unless "the individual to whom such information relates" expressly consented or unless the information was "strictly necessary to provide a product or service that the individual to whom such information relates has requested." The bill would apply to any entity "engaged in activities in or affecting commerce." This would extend privacy protections to entities currently not regulated by HIPAA such as mobile apps, cell phones, and search engines. The bill would provide data subjects with a right to access any information collected about them and would require regulated entities to "make available a reasonable mechanism by which an individual, upon a verified request, may request the deletion" of their information. The bill would provide a private right of action for any individuals whose data was collected or shared unlawfully, and the law would be enforced by the Federal Trade Commission. The bill, introduced as H.R. 8111, is available at: https://www.congress.gov/bill/117th-congress/house-bill/8111?r=2&s=1).

On July 8, President Joe Biden issued an executive order regarding access to abortion. The order encouraged the Federal Trade Commission to "address the potential threat to patient privacy caused by the transfer and sale of sensitive health-related data and by digital surveillance related to reproductive healthcare services" and to "protect consumers' privacy when seeking information about and provision of reproductive healthcare services." The order also directed the Secretary of HHS, "in consultation with the Attorney General and Chair of the FTC, to consider options to address deceptive or fraudulent practices, including online, and protect access to accurate information." The executive order is available online at https://www.whitehouse.gov/briefing-room/presidential-actions/2022/07/08/executive-order-on-protecting-access-to-reproductive-healthcare-services.

Days later, Kristin Cohen, the acting associate director of the FTC's Division of Privacy and Identity Protection, published a blog post reaffirming the agency's commitment to protection of "highly sensitive data." "The misuse of mobile location and health information — including reproductive health data — exposes consumers to significant harm," Cohen wrote. "The Commission is committed to using the full scope of its legal authorities to protect consumers' privacy." The blog post is available online at https://www.ftc.gov/business-guidance/blog/2022/07/location-health-other-sensitive-information-ftc-committed-fully-enforcing-law-against-illegal-use.

Dobbs Decision Could Threaten Freedom of the Press

In the wake of the *Dobbs* decision, First Amendment experts have expressed concerns that the decision could threaten media freedom. On July 29, 2022, Gabe Rottman, director of the Technology and Press Freedom Project at the Reporters Committee for Freedom of the Press, wrote about implications the *Dobbs* decision may have for journalists. He identified several key threats to free press implicated by the decision. First, news outlets that report on ways to obtain abortions could theoretically be charged with "aiding and abetting" abortions. Before the final *Dobbs* decision was released, reporters from the Boise *Idaho Capital Sun* wrote about Planned Parenthood's plan to open an abortion clinic near the Oregon-Idaho border. Idaho has since banned most abortions. An "aggressive prosecutor" could argue that providing this information about the availability of abortion procedures in the neighboring state violated aiding and abetting provisions in anti-abortion laws, Rottman wrote. The argument is not without precedent. In 1975, the Supreme Court heard *Bigelow v. Virginia*, a case in which a newspaper editor was convicted of violating a Virginia anti-abortion statute after he published an advertisement for legal abortions in New York City. 421 U.S. 809 (1975). The Court overturned his conviction on First Amendment grounds, holding that Virginia's prohibition on abortion-related advertising emanating from a state where abortion was legal was "facially overbroad." The final decision was released two years after the Court decided *Roe*. Lynn Greenky, a professor at Syracuse University who teaches First Amendment law, told *The New York Times* that she would not be surprised if this precedent was revisited in the wake of the *Dobbs* decision.

State legislatures have already taken steps in this direction. In South Carolina, the General Assembly proposed a bill that would make it a crime to provide information about how to get an abortion via "telephone, internet, or any other mode of communication." The law could "bring in speech by journalists or politicians or public interest groups who are trying to help people understand their rights and the resources available to them," Alexandra Givens, president of the nonprofit Center for Democracy and Technology, told *Insider* on Aug. 3, 2022. Even if a state law were eventually found to violate the First Amendment, the process could take months and threaten journalists in the process. At the federal level, the Department of Justice has signaled opposition to state laws regulating communications about abortion. On August 3, U.S. Attorney General Merrick Garland stated that "under fundamental First Amendment principles" people must "remain free to inform and counsel each other about the reproductive care that is available in other states." The full statement is available online at: https://z.umn.edu/GarlandRemarks.

The *Dobbs* decision could also create problems with reporter-source confidentiality. Recent news articles have told the stories of people seeking medication abortion from pills obtained online, which may be illegal under state law. In a state where medication abortions are criminalized, Rottman wrote that "the most obvious avenue to crack the case will be the reporter with those confidential sources." Reporters who have relied on confidential sources "are going to be much richer repositories of valuable evidence for prosecutors and plaintiffs seeking to enforce abortion bans than they were fifty years ago, pre-*Roe*," Rottman said. Digital information, such as data from reporters' phones about their locations and with whom they may have met, could prove "irresistible for investigators and prosecutors facing intense political pressure to crack down on abortion services," he said. Rottman predicted that reporting on abortion after the *Dobbs* decision will "resemble reporting on things like military secrets, narcotics, public corruption, corporate malfeasance, or any other beat where promising confidentiality to a source is necessary to tell the story."

— Claire Colby
Silha *Bulletin* Editor

State, Federal Courts Grapple with High-Profile Defamation Cases

DEFAMATION

During the summer of 2022, both federal and state courts have fielded and considered several high-profile defamation cases. A challenge to the "actual malice" standard for defamation cases was not among them, as the Supreme Court declined yet again to revisit *New York Times v. Sullivan* despite the arguments of Justice Clarence Thomas. Former Alaska governor and vice-presidential candidate Sarah Palin lost her bid for a new trial against *The New York Times*, which she is expected to appeal. Although defamation suits brought by public figures are rarely successful, embattled conspiracy theorist Alex Jones faces a wave of actions to determine the damages he owes to the families of Sandy Hook victims, the first of which will cost him nearly $50 million. Reporter Yashar Ali and professional baseball player Trevor Bauer filed suit against publications they claim knowingly or negligently published false information about them. Meanwhile, a Delaware state judge allowed Dominion Voting Systems to continue a defamation lawsuit against Fox News parent corporation Fox Corporation for its role in spreading misinformation about the 2020 election.

Supreme Court Again Declines to Review "Actual Malice" Standard for Defamation Suits

On June 27, 2022, the U.S. Supreme Court denied a petition for a writ of *certiorari* in a case challenging the long-standing "actual malice" standard for libel lawsuits, once again declining to revisit the 1964 ruling in *New York Times v. Sullivan*. *Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr.*, 142 S. Ct. 2453 (2022). Only Justice Clarence Thomas dissented from the decision.

The case before the court concerned a nonprofit Christian media group that had objected to being included in a "Hate Map" created by the legal advocacy group Southern Poverty Law Center (SPLC) to monitor hate groups across the country. Coral Ridge produces and broadcasts a television program including messages from its late founder, Dr. D. James Kennedy, and has openly acknowledged its stance that homosexuality is wrong. The SPLC said in court papers that Coral Ridge calls homosexuality an "abomination," "lawless," and "shameful." Coral Ridge's defamation suit hinged upon the financial impact of being included in the "Hate Map." According to a June 27 *Reuters* report, Amazon prohibits groups on the list from participating in its Smile donation program, and it denied Coral Ridge's attempt to be added and to receive a portion of money from purchases. Amazon was also listed as a defendant in the lawsuit. On July 28, 2021, the U.S. Court of Appeals for the Eleventh Circuit upheld a district court's dismissal of the case on the grounds that Coral Ridge "failed to adequately plead actual malice." *Sullivan*'s "actual malice" standard requires public figures to show that the defendant acted "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not" to recover damages for libel. Coral Ridge conceded that it is a public figure under *Sullivan* but argued that the "actual malice" standard should not apply to a private party.

Coral Ridge's petition sought to undermine *Sullivan* by citing various statements and works by Supreme Court justices calling it into question. Seeking to reach the four-vote threshold needed for the Supreme Court to grant a petition, Coral Ridge focused on past dissents by Thomas and Justice Neil Gorsuch in similar petition reviews, as well as a 1993 law review article in which Justice Elena Kagan wrote that the holding "allows grievous reputational injury to occur without monetary compensation or any other effective remedy." Coral Ridge's lawyers then argued that the actual malice standard is unsupported by the U.S. Constitution and historical context. "The idea that a libelous publication would have to be evaluated to determine whether it is protected by the First Amendment would have been a completely foreign concept to the Founders," the petition stated. "The Founders understood libel to be completely outside the protections of the First Amendment." The opposition brief criticized the petition's failure to cite cases such as *Hustler Magazine v. Falwell* that have upheld *Sullivan* and sometimes even extended its reach. 485 U.S. 46 (1988). It added, "That some jurists and commentators disagree with aspects of *Sullivan*'s holding does not make for a 'deafening roar' calling for its re-examination." Coral Ridge's petition is available online at https://z.umn.edu/CoralRidgepetition and the SPLC's opposition at https://z.umn.edu/SPLCOpposition.

Although they may not constitute a "deafening roar," two justices' calls to revisit *Sullivan* have garnered national attention. In July 2021, Gorsuch cited "momentous changes in the Nation's media landscape since 1964" in dissenting from a denial of *cert.* in *Berisha v. Lawson*, to which Thomas also dissented. 141 S. Ct. 2424, 2430 (2021) (Gorsuch, J., dissenting). Two years before, Thomas derided *Sullivan* and other cases that extended it as "policy-driven decisions masquerading as constitutional law" in *McKee v. Cosby*, 139 S. Ct. 675, 676 (2019) (Thomas, J., dissenting). In addition, the influential Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit wrote in a 2021 opinion that *Sullivan* should be overturned, arguing that changes in the media landscape over the past 50 years have rendered it "a threat to American Democracy." *Tah v. Glob. Witness Publ'g*, 451 U.S. App. D.C. 248, 268 (2021) (Silberman, J., dissenting). (For more information on Justice Thomas' and Justice Gorsuch's opinions regarding the Sullivan standard, see *Justices Thomas and Gorsuch Call for Reevaluation of* New York Times v. Sullivan *Standard* in "Special Report: U.S. Supreme Court Rulings and Opinions Raise Numerous Freedom of Speech and Press, Privacy Issues and Questions" in the Summer 2021 issue of the Silha *Bulletin* and "Justice Thomas Calls for Supreme Court to Reconsider the Actual Malice Standard" in the Winter/Spring 2019 issue.)

Gorsuch was a member of the eight-justice majority rejecting the *cert.* petition by Coral Ridge, with only Thomas issuing a written dissent. Thomas acknowledged that under *Sullivan*, Coral Ridge needed to show that the hate group designation was "(1) provably false, (2) actually false, and (3) made with 'actual malice.'" Because the Court of Appeals rested its decision

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on the “actual malice” standard, Coral Ridge sought reconsideration of it, and Thomas simply agreed that “we should.” He cited Justice Byron White’s description of *Sullivan* as an “almost impossible” standard, arguing that it prevented Coral Ridge from “hold[ing] SPLC to account for what it maintains is a blatant falsehood.” He questioned the Supreme Court’s lack of consideration as to whether an “actual malice” standard falls under First or Fourteenth Amendment protections, and he closed by arguing that the Court should not impose such a standard unless the First Amendment requires it, citing his *Berisha* dissent. The full opinion is available at https://www.supremecourt.gov/opinions/21pdf/21-802_o759.pdf.

Despite the Court’s decision yet again not to revisit *Sullivan*, Thomas’s words still concerned free press advocates. Radio Television Digital News Association President and CEO Dan Shelley wrote in *The Hill* on June 30, “Thomas’ dissent should not be overlooked. His words signal a direct assault on the public’s need to know the activities of their legislatures, courts and other public servants. When we eliminate the safeguards that allow the media to seek and report the truth, we infringe upon the public’s right to know the truth.”

Case Western Reserve University School of Law Professor Jonathan H. Adler wrote in *Reason* on June 27, “[T]his is not the first time Justice Thomas has called for reconsidering *NYT v. Sullivan*, and I doubt it will be the last.”

Judge Rejects Palin’s Bid for New Trial in Libel Case Against *New York Times*

On May 31, 2022, Judge Jed S. Rakoff of the U.S. District Court for the Southern District of New York denied former Alaska governor and vice-presidential candidate Sarah Palin’s Feb. 28, 2022, petition for a new trial as well as Rakoff’s disqualification from hearing her libel case against *The New York Times*. Rakoff rejected the motion “in full” because, he wrote, it “is wholly lacking in merit.” *Palin v. New York Times*, No. 17-cv-4853 (S.D.N.Y. May 31, 2022).

In March, Rakoff dismissed Palin’s lawsuit after she “wholly failed to prove her case even to the minimum standard required by law.” The jury also returned a verdict of “not liable” one day after Rakoff’s February announcement of his planned dismissal. Palin’s attorneys had argued that the *Times* had knowingly made false claims in a 2017 editorial connecting her political rhetoric to the shooting of former Rep. Gabrielle Giffords (D-Ariz.). Rakoff conceded that “several sentences in the Editorial could be read to suggest” that the 2011 shooting that wounded Giffords and killed six people was prompted by a “graphic advertisement circulated some months earlier” by a political action committee associated with Palin. But following the “actual malice” standard set forth in *Sullivan* and New York law, Rakoff determined that Palin “failed to offer any affirmative evidence supporting the inference” that *Times* editor James Bennet knew or consciously disregarded that the challenged statements were false. (For more information on *Palin v. New York Times*, see *Judge, Jury Find* New York Times *Not Liable in Palin Libel Suit* in “Courts Continue to Grapple with Defamation Cases Involving Sarah Palin, Former President Trump, and Election Misinformation” in the Winter/Spring 2022 issue of the Silha *Bulletin*.)

Among Palin’s grounds for the post-trial motions were the announcement of the decision during jury deliberations, the court’s comments to a journalist about the jury’s exposure to push notifications about the decision, the exclusion of evidence that may have proved actual malice, and the “erroneous oral and written . . . decision” to dismiss the case under Rule 50 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 50(a). Rule 50 allows the judge in a jury trial to rule against a party after the party has been fully heard but before jury deliberations if “a reasonable jury would not have a legally sufficient evidentiary basis” to rule in favor of the party. Palin’s filing also claimed that Rakoff’s jury instructions included a misrepresentation of the law by stating that an inference from a statement by Bennet “is not itself sufficient to carry the clear and convincing burden” of proving actual malice.

Rakoff noted in his decision that the timing of the announcement of his plans to dismiss the case, the impact of this announcement on jury deliberations, and the allegedly inaccurate jury instructions were irrelevant to the outcome of the case, as his dismissal supersedes a jury verdict. “Put another way,” he wrote, “the Court’s dispositive Rule 50 ruling ultimately rests on Palin’s total failure to adduce affirmative evidence of actual malice, the core element of her libel claim, not any aspect of how the jury was selected, instructed, or managed.”

Rakoff next addressed the exclusion of evidence such as articles in *The Atlantic* from Bennet’s tenure as editor-in-chief, an article about the media coverage of the Arizona shooting that was emailed to Bennet in 2011, and evidence concerning Bennet’s brother Michael, a Democratic U.S. senator from Colorado. Rakoff wrote that he granted the *Times*’ motion to exclude such evidence *in limine* [initially], thus not permanently excluding it but rather waiting to see how evidence developed before determining its relevance or foundation. “Palin’s counsel,” he wrote, “having declined the Court’s invitation to try to lay the foundation that they had failed to establish during discovery, can hardly complain, let alone argue that these evidentiary rulings justify a new trial.”

As for the Rule 50 decision to dismiss the case, Rakoff rejected Palin’s challenges on two grounds. First, he denied that he had improperly “credited” Bennet’s testimony, instead restating that “Palin [had] adduced no affirmative evidence” to challenge or undermine it. Second, Rakoff shot down Palin’s attempts to reject the decision on legal grounds. Palin had argued that because of decisions made by the U.S. Court of Appeals for the Second Circuit to reverse Rakoff’s initial dismissal of the case in 2017, as well as Rakoff’s decision not to grant summary judgment to the plaintiffs at an earlier stage, Rakoff’s decision to dismiss the case was erroneous. However, Rakoff noted that previous decisions were made at different stages and based on different evidence, and thus did not preclude his Rule 50 decision.

Ultimately, Rakoff wrote, “Whatever she may have claimed in her complaint and pre-trial submissions, Palin was unable to deliver at trial admissible evidence that remotely supported her claim that she was intentionally or recklessly defamed by the defendants.” The ruling largely restated his grounds for dismissing the case in February, finding that Palin provided no evidence that *Times* editors knew or suspected that portions of the editorial were false, and that when they learned of

"cautionary information," they issued corrections to the piece.

"If Palin believes the Court erred in making [certain decisions]," Rakoff wrote, "she can address that on appeal." Indeed, on March 17, 2022, Palin filed a notice that she would appeal the judgment to the Second Circuit Court of Appeals, six days before filing her request for a new trial. The *Times* said in a statement after the ruling, "We are pleased to see the court's decision, and remain confident that the judge and jury decided the case fairly and correctly." While seeking reconsideration of the case, Palin announced her plans to run for the U.S. House seat in Alaska left vacant after the death of Republican Rep. Don Young in March. She lost to Democrat Mary Peltola, the first woman and Alaska native to hold the seat, in a ranked-choice contest.

Alex Jones Ordered to Pay Nearly $50 Million in Damages for Defamation; More Trials to Come

On August 5, 2022, a Texas District Court jury for Travis County ordered media entity "Infowars" owner and conspiracy theorist Alex Jones to pay $45.2 million in punitive damages to the parents of a Sandy Elementary School shooting victim. *Heslin v. Jones*, No. D-1-GN-18-001835 (Tex. Dist. Ct. 2018). The ruling came one day after a $4.1 million award in compensatory damages for defamation in the same court.

Neil Heslin and Scarlett Lewis, the parents of 6-year-old Jesse Lewis, who was murdered in the 2012 shooting, sought $150 million in total damages from Jones. Of the $45.2 million awarded in punitive damages, $4.2 million covered damages for defamatory publications, while each parent was awarded $20.5 million for intentional infliction of emotional distress. The decision was bolstered by court testimony the day of the punitive damages ruling from economist Bernard Francis Pettingill Jr., who had tracked Jones's income and found that he earned $53.2 million annually from 2015 to 2018. He also advised considering the value of Jones's businesses. "You cannot separate Alex Jones from these companies. He is the companies," Pettingill said, according to an August 1 *Law360* report.

The $4.1 million in compensatory damages covered damage to Heslin's reputation and intentional harm to Lewis for which Jones had already been found liable. The trial for these damages included testimony from a forensic psychiatrist who said that Lewis's parents are in constant distress and fear due to Jones's false claims. According to a June 25 story in *Law360*, Lewis testified that she now arms herself and does not turn on air conditioning during the summer because of fears that she will not hear an intruder.

Jones had repeatedly told his audience for years that the shooting, which resulted in 28 deaths including the shooter and his mother, was a "giant hoax" staged by the government via "crisis actors," according to various publications including *Newsweek* and National Public Radio (NPR). He later conceded in court that the shooting was "100% real" and that his false messaging about it was "irresponsible." However, in his first post-trial interview on August 2, Jones said, "I don't apologize anymore. I'm done."

During his closing argument, Jones's attorney had asked the jury to award only $270,000 in punitive damages arguing that the case had already achieved justice through compensatory damages. "You've already sent a message," he said. "A message for the first time to a talk show host, to all talk show hosts, that their standard of care has to change."

Default judgments in three defamation lawsuits filed by Sandy Hook families had already been awarded against Jones. Jones failed to comply with orders to release documents related to the suits, and Texas Judge Maya Guerra Gamble wrote in one of the 2021 decisions that Jones and Infowars "unreasonably and vexatiously failed to comply with their discovery duties." She added that the failure was "greatly aggravated by defendants' consistent pattern of discovery abuse throughout the other cases pending before this court."

Jones sought a mistrial ruling when opposing counsel surprisingly revealed at trial that his attorneys had accidentally shared 300 gigabytes of information, including a digital copy of every text message and email from Jones's phone. The lawyer who had received the data, Mark Bankston, then alleged that the content provided evidence of perjury on Jones's part. Gamble denied the request for a mistrial, stating that Jones could no longer claim the material was privileged.

Jones will now head to Connecticut Superior Court for a similar trial to determine how much Jones must pay eight Sandy Hook families in damages for defamation. In August, the parties agreed to lift a bankruptcy stay of litigation that had been imposed due to a Chapter 11 bankruptcy case involving Free Speech Systems, "Infowars" parent company. The parties had already agreed at the start of bankruptcy proceedings that jury selection could proceed as scheduled, allowing the trial to begin in September.

The agreement followed a ruling by Judge Julie Manning granting emergency requests by Sandy Hook families in August to send the case to trial. Jones and Free Speech Systems had asked that the state court cases be removed to bankruptcy court. However, although Free Speech Systems had filed for a form of bankruptcy protection in Texas, Jones himself has not filed for bankruptcy. Manning said that an increase in "Infowars" sales led the Texas bankruptcy court to allow Free Speech Systems to increase its cash budget, and that as a result, remanding the cases would not negatively affect efficient bankruptcy proceedings. "The Plaintiffs' rights to have [this] process continue in the Connecticut Superior Court should not be disturbed," the judge said.

Jones also faces a third trial in Texas. As with the pending Connecticut case and the resolved Texas case, Jones has already been found liable via default judgment, and the only issue to be resolved is the amount in damages owed by Jones.

Reporter Yashar Ali Sues *Los Angeles Magazine* for Defamation over Profile

Reporter and Twitter personality Yashar Ali sued *Los Angeles Magazine* for defamation exactly one year after its feature story on his career and personal life. *Ali Hedayat v. Los Angeles Magazine*, No. 22STCV18984 (Cal. Super. Ct. June 9, 2022).

The story, entitled "The Curious Rise of Twitter Power Broker Yashar Ali," was written and reported by Peter Kiefer and published on June 9, 2021. It reports that Ali met comedian Kathy Griffin through Twitter direct messages and became her "unofficial advisor and shadow publicist," even living in her mansion and only leaving under disputed circumstances. Ali also reportedly

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Defamation, *continued from page 7*

provided Kiefer with a spreadsheet of acquaintances to contact for the story, which included Meghan McCain, Mandy Moore, and Piers Morgan, among other celebrities. When Ali shared on Twitter that he was suffering with suicidal thoughts days before the story's publication, a litany of public figures shared their support. "He's always attached himself to rich, powerful people and to elected officials and made himself appear indispensable," an anonymous former colleague said in the story. The piece also detailed Ali's concerns about being pursued by Scientologists (due to an "anti-Scientology crusade") and a private investigator hired by another client.

Ali's suit claims that Kiefer's feature portrays him as someone who "backstabbed his friends to get ahead" and painted his journalistic standards as unethical. Kiefer wrote in the story that he found out after his interviews that Ali was secretly recording them, but Ali claims Kiefer allowed him to do so. Ali also claimed that Kiefer included information about Griffin in the story that was meant to be off the record. Publishing off the record comments, however, has no direct legal ramifications. Ali also claims that the magazine did not follow common industry practice of assigning a fact-checker for a longform feature story, nor did it verify allegations nor allow Ali a chance to disprove them. Kiefer, for his part, stated in the story that fact-checking immediately preceded publication, and the magazine's editor-in-chief, Maer Roshan, said in a statement, "Of course our article was rigorously fact-checked and legally vetted, and by prior agreement with Yashar, every quote of his that appeared in the story was approved by him."

"The profile contains many factual errors that don't even require private records, they can be found via Google search," Ali told freelance writer Parker Molloy in an interview for her Substack newsletter after the filing of the lawsuit. "The profile was the biggest media and politics story for two days, trending on Twitter for both days. It was shared by a wide variety of powerful and influential people." He also told Molloy that the story sent him into a "prolonged period of crippling depression and suicidal ideation" and led people to question the quality of his work. Ali's lawsuit also objects to the purported connection between the impending publication of the story and his suicidal thoughts, stating, "In making that statement, the article falsely implies that [Ali] acknowledged the truth of the supposed revelations in the article and was distraught that the public was going to learn the supposed truth about him." He claims he was unaware of any negative allegations in the article prior to publication.

Ali is suing *Los Angeles Magazine* for both defamation and promissory fraud, citing "repeated sloppiness" in reporting that does not consider harm to the subjects of its profiles. A representative for the magazine told the *Los Angeles Times* in an email one day after its filing in California state court that it was unaware of the lawsuit, but Roshan told Molloy that the magazine stands by its story.

Ali himself was sued for defamation by Fox News host Eric Bolling in 2017 in a lawsuit seeking $50 million. *Bolling vs. Ali Hedayat*, No. 655278/2017 (N.Y. Sup Ct. 2017). Ali had reported in August of that year for *HuffPost* that Bolling sent "an unsolicited photo of male genitalia" to multiple colleagues, though Bolling's summons did not specify the basis for his suit. Ali's lawyer demanded the immediate dismissal of the lawsuit and threatened costs and sanctions. As the *Bulletin* went to press, there was no further progress in the lawsuit.

Defamation Case Brought by MLB Player Trevor Bauer Against *The Athletic* Expected to Move Forward

A federal judge indicated in late August that he would be unlikely to heed *The Athletic*'s request to toss a defamation suit brought by Los Angeles Dodgers pitcher Trevor Bauer, according to an August 29, 2022, report from *Law360*. *Bauer v. Athletic Media Company*, No. 2:22-cv-02062 (C.D. Cal. 2022).

Judge Michael W. Fitzgerald of the U.S. District Court for the Central District of California issued a tentative ruling indicating that he was inclined to deny *The Athletic*'s motions to dismiss the case regardless of arguments made at the hearing that followed. However, he did not issue a final ruling at that time.

Bauer filed a complaint in March against *The Athletic* and its reporter Molly Knight, alleging that they had published "defamatory statements" about him related to an alleged assault during a sexual encounter. The alleged victim obtained an order for protection against Bauer after events that left her with "severe physical and emotional pain," according to her attorney. Knight subsequently reported "signs of a basilar skull fracture," citing the woman's declaration. A CT scan entered into court filings indicated that there was no skull fracture. Prosecutors ultimately decided not to charge Bauer, deeming the evidence insufficient to result in conviction.

"Defendants acted with actual malice because they deliberately ignored the truth — which was evident in the medical records possessed by The Athletic — and because the Defendants' defamatory statements were part of a campaign to harass Mr. Bauer, as evidenced by, among other actions, their prior and subsequent false and misleading statements about his conduct and character, their efforts to dissuade Major League Baseball teams from signing him, and their strident complaints about the Los Angeles Dodgers' decision to add him to their team," the complaint reads. Bauer was placed on administrative leave in July 2021 under Major League Baseball policy and has not played yet this season. The complaint is available online at https://unicourt.com/document/pc-db5-1-1-156115.

"The Athletic [and its editors] knew that the Complainant had CT scans on her head, neck, and face because the Article said so," the complaint continues. "The Article explained that the Complainant 'underwent rapid CT scans for her brain, face and neck' but nonetheless omitted the results of the scans included in the medical records the Complainant attached to her petition. The results of the Complainant's CT head scan attached to the petition clearly state that she suffered 'no acute fracture.'" The complaint also states that after receipt of a letter from Bauer's lawyers, *The Athletic* issued an update to the article that stated, "After publication, Trevor Bauer's representatives emphasized that medical records showed that while the woman was initially diagnosed with signs of a basilar skull fracture, a subsequent CT scan found no acute fracture."

The lawsuit includes two counts of defamation, one against *The Athletic* for the article and the other against both the publication and Knight for her tweets

on the matter. “Ms. Knight . . . explicitly communicated this false message in three tweets to her over 100,000 followers,” it claims. “Each of her tweets falsely referred to a ‘cracked’ or ‘fractured’ skull in describing the Complainant’s allegations against Mr. Bauer.” One of the tweets stated, “There seems to be some confusion surrounding the issue of consent but here is some clarity: it’s not possible to consent to a cracked skull.”

The Athletic filed its motions to strike the complaint and dismiss all claims on May 31, arguing that its reporting was accurate based on information available in court filings. It cited California Civil Code section 47(d) in stating that the defamation claim is barred by a “fair and true report privilege.” Additionally, it claimed that Knight’s tweet cannot be interpreted as stating a fact and that Bauer thus cannot sufficiently plead actual malice. At the motion hearing, Fitzgerald questioned the latter of the arguments, saying he “took it that she was saying there was a cracked skull here.” Defense counsel countered that she was commenting on consent rather than asserting a fact.

Although Fitzgerald did not issue a ruling during the hearing, he stated that it is plausible that “Ms. Knight read the entire petition and deliberately falsified information in it,” per the *Law360* report. Ultimately, he said, “[T]he point is Ms. Knight will have every opportunity to argue” her case on summary judgment or at trial, potentially before a jury.

Bauer filed a similar defamation case against the owner of the publication *Deadspin* in the U.S. District Court for the Southern District of New York in March. *Bauer v. Baud et al.*, No. 1:22-cv-01822 (S.D.N.Y. 2022).

Delaware Judge Allows Defamation Case Against Fox Corporation to Continue Over Election Misinformation

On June 21, 2022, Delaware Superior Court Judge Eric M. Davis issued an opinion denying Fox Corporation’s motion to dismiss a defamation lawsuit filed by Dominion Voting Systems Corporation over misinformation related to the 2020 presidential election. Davis dismissed claims against Fox Broadcasting.

Dominion sued Fox News, the network’s parent company Fox Corporation, and subsidiary Fox Broadcasting in Delaware in March 2021. According to Davis’s opinion, Fox Broadcasting was included as a defendant because “the allegedly defamatory broadcasts aired not only on Fox News and foxnews.com, but also on fox.com, which is operated by Fox Broadcasting.”

The complaint alleged that Fox television broadcasts that accused Dominion of fraud connected to the 2020 election had libeled the company. “After the November 3, 2020 Presidential Election, viewers began fleeing Fox in favor of media outlets endorsing the lie that massive fraud caused President Trump to lose the election,” the complaint read. According to the complaint, ‘[a]t least two top executives from Fox Corporation, Rupert and Lachlan Murdoch, exert direct control over Fox News’s programming decisions, including editorial control.” The complaint alleged “verifiably false yet devastating” lies that the network broadcast about Dominion, including that Dominion “committed election fraud by rigging the 2020 Presidential Election,” that “Dominion’s software and algorithms manipulated vote counts,” and that the company “paid kickbacks to government officials who used its machines in the 2020 election.” The complaint also alleged that Fox News acted as Fox Corporation’s agent in publishing this false information and that “the defamatory broadcasts stem from the agency relationship.” The full complaint is available online at: https://hamiltonps.app.box.com/s/pcjs5ijawo06dkkif57sjee05aaef1nh/file/883362796731.

Fox Corporation argued that it was not liable for the actions of its subsidiary and claimed that Dominion failed to establish any direct liability for Fox Corporation, Davis wrote. Davis rejected this argument, holding that Dominion adequately stated a claim for defamation against Fox Corporation on a “direct liability” theory. In its initial complaint, Dominion pleaded that “Fox Corporation relies on Fox News as its main profit vehicle” and established that executives of Fox Corporation exercised a high level of control over Fox News operations, including coverage of the 2020 presidential election. Davis wrote that Dominion had established a sufficient claim for defamation against Fox Corporation at the pleading stage.

Davis also wrote that Dominion adequately demonstrated actual malice by Fox Corporation. In its complaint, Dominion alleged that Rupert and Lachlan Murdoch caused Fox News to broadcast false claims about the voting machine company even though they did not personally believe them. Dominion further alleged in its complaint that Rupert Murdoch had told Trump in a phone call that he had lost the election, and also showed that other newspapers under the Murdochs’ control reported that Trump had lost the election.

These allegations “support a reasonable inference” that the Murdochs “either knew Dominion had not manipulated the election or at least recklessly disregarded the truth when they allegedly caused Fox News to propagate its claims about Dominion,” Davis wrote.

Davis did grant Fox Broadcasting’s motion to dismiss claims against the subsidiary because Dominion failed to establish that fox.com acted with actual malice when it reported Fox News videos on its website. The complaint “contains no well-pleaded allegations relating to Fox Broadcasting’s subjective knowledge or decision making,” Davis wrote. Davis’s June 21 opinion is available at: https://www.law360.com/pulse/articles/1504751/attachments/0.

Lawyers for Dominion are in the process of deposing Fox News hosts in the underlying lawsuit against Fox News, *The Washington Post* reported on Aug. 30, 2022. According to *The Post*, the trial is scheduled to begin in Delaware state court in April 2023.

(For more information on the ongoing defamation lawsuits related to the 2020 election, see *New York Judge Rules that Much of Smartmatic Defamation Case Against Fox News Can Continue* in “Courts Continue to Grapple with Defamation Cases Involving Sarah Palin, Former President Trump, and Election Misinformation” in the Winter/Spring 2022 issue of the Silha *Bulletin*. For information about the initial complaints, see *Voting Technology Companies Continue to Allege Defamation* in “Courts Consider Defamation Lawsuits Involving Right-Wing Radio Host, Politician, and Election Technology Companies” in the Fall 2021 issue of the Silha *Bulletin*.)

— Luke Srodulski
Silha Center Research Assistant

Media Ethics Concerns Arise in Republican Campaigning, Testimony Against Trump, and the Uvalde School Shooting

ETHICS

Media ethics issues have featured in political news leading up to the 2022 midterm elections. Requirements imposed upon reporters attending any of the "Unite & Win" Republican campaign rallies raised questions of whether reporters should cover the event at all if their independence could be compromised by the policy. Journalists were called to testify against former President Donald Trump, raising both legal and ethical questions. Finally, media ethics issues surrounding the photographs from the Uvalde school shooting in Texas prompted debate over shock value versus informing the public.

Turning Point USA and Ron DeSantis Limit Reporters' Independence at Conservative Rallies

Conservative activist group Turning Point USA and Florida's Republican Gov. Ron DeSantis imposed a strict media policy on any reporters who wished to cover the Unite & Win Rally events they hosted in August 2022. Media ethics experts criticized the restrictions as anti-democratic.

Reporters were required to sign a document prior to obtaining press credentials for the events, which included provisions granting Turning Point and its vendors "the right to have access to footage for archival and promotional purposes, upon request, and to know in what manner the footage will be utilized"; barring audio or visual recording of anything shown on screens during the event; prohibiting filming anyone at the event — including speakers — who do not wish to be filmed; allowing Turning Point to approve any interviews; and stating that reporters "shall adhere to all direction, instructions, and requests" from a Turning Point representative who "shall have the final say on all matters." DeSantis and Turning Point hosted numerous Unite & Win rallies across the country, including one in Pittsburgh, Pa. for Republican gubernatorial candidate Doug Mastriano, and one in Ohio for Republican Senate candidate J.D. Vance.

The president and executive director of the Ohio News Media Association, Monica Nieporte, told *The Washington Post* that the organization strongly discouraged members "from agreeing to any conditions which could lead to their content being censored or altered by a third party not affiliated with their media outlet." "We do not agree that the Unite & Win Rally has any standing to be asking for blanket access to the content that is created by journalists in exchange for permission to cover their event," Nieporte said. "The journalists work for their media outlet and not for the Vance campaign. Their content is owned by their employer."

> "We do not agree that the Unite & Win Rally has any standing to be asking for blanket access to the content that is created by journalists in exchange for permission to cover their event. The journalists work for their media outlet and not for the Vance campaign. Their content is owned by their employer."
>
> **— Monica Nieporte, President and Executive Director, Ohio News Media Association**

Maggie Patterson, a Duquesne University professor of media ethics, said the event's media policy was shocking and goes against democratic principles. "It's not what you expect to see in a developed democracy," Patterson said in an interview with WESA, Pittsburgh's National Public Radio (NPR) affiliate. "The provision that jumped out at me was that your material could be taken by the sponsoring organization to be used for their own promotional purposes. I don't think ethically they have any right to your material."

Editors from *Cleveland.com* and *The Plain Dealer* wrote a letter to their readers explaining their decision to not cover the Unite & Win rally in Ohio. "Think about what they were doing here. They were staging an event to rally people to vote for Vance while instituting the kinds of policies you'd see in a fascist regime. A wannabe U.S. Senator, and maybe a wannabe president," the editors wrote. "Anyway, we didn't accept the limitations, because they end up skewing the facts. If we can speak only with attendees chosen by the candidate, we don't get a true accounting of what people thought of the event. You get spin from the most ardent supporters."

The letter from the editors can be viewed at: https://www.cleveland.com/news/2022/08/we-reject-the-free-speech-trampling-rules-set-by-jd-vance-and-ron-desantis-for-covering-their-rally-letter-from-the-editor.html.

Journalists Called to Testify in Trump Investigation, Spurring Ethical Questions

A number of journalists from the state of Georgia have been called to testify before a grand jury as part of Fulton County District Attorney Fani Willis's investigation into President Trump's attempts to overturn the 2020 election, raising ethical dilemmas about whether journalists should have to provide subpoenaed information gathered in the course of their reporting.

On Dec. 14, 2020, George Chidi, an independent journalist, became swept up in the investigation after he walked in on a meeting of Republican "fake electors" that became part of Fulton County, and separate federal, criminal investigations into former President Trump's attempts to overturn the election. Greg Bluestein, an *Atlanta Journal-Constitution* political reporter, was also subpoenaed to testify in front of the grand jury, and others may also be on the list. Chidi unsuccessfully fought the subpoena in Fulton County

court but did limit the scope of questions to avoid information gathered for unrelated stories, according to reporting from the *Saporta Report* on Aug. 1, 2022.

Being asked to provide grand jury testimony is especially significant for journalists. The Supreme Court, in *Branzburg v. Hayes*, ruled that the First Amendment does not create a constitutional privilege protecting reporters from having to testify in grand jury proceedings about the identity of news sources or information received in confidence. 408 U.S. 665 (1972). But, as John Ruch wrote for the *Saporta Report* on Aug. 1, 2022: "Giving info to state prosecutors in a secret proceeding where protecting confidential sources may be impossible is just about the antithesis of a free press. The gist of the concern is that we're supposed to be independent watchdogs of the government, not its cops."

Experts commended Chidi's efforts to fight the subpoena. Jane Kirtley, director of the Silha Center for the Study of Media Ethics and Law, said in an interview with the *Saporta Report* on Aug. 1, 2022: "I think it's bad practice for journalists to comply with subpoenas, with perhaps a very rare exception," such as cases where reporters saw an incident while not on the job. "You have to stand up for their right to not be turned into investigators for the government," Kirtley said.

The Atlanta Journal-Constitution's Managing Editor Leroy Chapman Jr. said in an interview with the *Saporta Report* that his team would go to great lengths to protect Bluestein's reporting. "It is our position that Greg — or any reporter — should not have to testify about information obtained while reporting the news," Chapman said. "Georgia's law recognizes that shielding reporters from serving as witnesses — except in the most extreme cases — is essential to preserving the independence of journalists."

Georgia's Reporters' Shield Law, O.C.G.A. § 24-5-508 (2020), gives anyone working in newsgathering and reporting a qualified privilege from being compelled to disclose anything obtained in the course of reporting unless it falls under one of three exceptions: whether the information is material and relevant, whether it cannot be reasonably obtained by alternative means, and whether it is necessary to the proper preparation or presentation of the case of a party seeking the information. The law would apply in any state investigation, including that of Fulton County, but would not necessarily apply in a federal investigation.

Uvalde School Shooting Prompts Debate Over Whether Photos of Gun Violence Should Be Made Public

After the mass school shooting in Uvalde, Texas in May 2022, commentators, members of the public, and gun control advocates debated the ethics of disseminating photographs of the violence and its aftermath to the public at large, and whether doing so would help to quell the gun violence that plagues the United States.

> "I think it's bad pratice for journalists to comply with subpoenas, with perhaps a very rare exception. You have to stand up for their right not to be turned into investigators for the government."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Nineteen fourth-grade students and their two teachers were killed in the school shooting. Some advocates and experts argued making the violence visible may be the only way to put an end to such deaths, while others pointed out flaws in determining who gets to decide what is shown, as well as whether displaying such violence exploits the victims.

Meaghan Looram, the director of photography at *The New York Times*, said in an interview with the newspaper on May 30, 2022, that the calculation can be a difficult one. "We're always trying to balance the news value of an image and its service to our readers against whether or not the image is dignified for the victims or considerate toward the families or loved ones of those pictured," Looram said. "We don't want to withhold images that would help people to understand what has happened in scenarios like these, but we also don't publish images sheerly as provocation."

Nina Berman, a documentary photographer, filmmaker and Columbia University journalism professor, pointed out in *The New York Times* story the conflict between an American "culture so steeped in violence" and a culture of shielding it from view. "[W]e spend a lot of time preventing anyone from actually seeing that violence," Berman said. "Something else is going on here, and I'm not sure it's just that we're trying to be sensitive."

Susie Linfield, a journalism professor at New York University and the author of *The Cruel Radiance: Photography and Political Violence*, wrote an op-ed for *The New York Times* on May 31, 2022, arguing that the American public should see photographs of gun violence but not solely rely on those images to spark change. "In the case of Uvalde, a serious case can be made — indeed, I agree with it — that the nation should see exactly how an assault rifle pulverizes the body of a 10-year-old, just as we needed to see (but rarely did) the injuries to our troops in the Iraq and Afghanistan wars," Linfield wrote. "A violent society ought, at the very least, to regard its handiwork, however ugly, whether it be the toll on the men and women who fight in our name, on 'ordinary' crime victims killed or wounded by guns or on children whose right to grow up has been sacrificed to the right to bear arms. Despite the very real dangers of exploitation and misuse that disclosure of the Uvalde photographs would pose, I myself would like politicians to view them: to look — really look — at the shattered face of what was previously a child and to then contemplate the bewildered terror of her last moments on earth. But that would not mean that the jig is up. People, not photographs, create political change, which is slow, difficult and unpredictable. Don't ask images to think, or to act, for you."

Manny Garcia, the editor of the *Austin* (Texas) *American-Statesman*, wrote a letter to readers describing the publication's editorial decision to publish the videos from the Uvalde shooting and make them available outside of the paywall. "Our goal is

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Ethics, *continued from page 11*
to continue to bring to light what happened at Robb Elementary, which the families and friends of the Uvalde victims have long been asking for," Garcia wrote. "This tragedy has been made further tragic by changing stories, heroic-sounding narratives proven to be false and a delay or in most cases rejection of media requests for public information by law enforcement leaders, public officials and elected leaders. Many of the requests now rest in the hands of Attorney General Ken Paxton's office, who has not yet decided what should be released. But there are also heroes: elected leaders, public officials, law enforcement officers, survivors of the massacre who want the truth out. The truth always wins, maybe not on our clock, but the truth always prevails. And that is the reason that we publish alongside KVUE."

KVUE Austin, based in the state capital, aired the Uvalde footage live in its midday coverage. Bryan Mayes, a KVUE anchor, explained the station's reasoning: "We are interrupting programming this afternoon with some breaking news that we feel is really important to our viewers. But also really difficult," Mayes said. "Now we're doing this, for these people, for their families in Uvalde, for the people of the city and, really, for the people of the state of Texas who have been desperate to learn what happened inside that school back in May."

Uvalde's mayor, Don McLaughlin, shared the desire to make the videos public, but took issue with the fact that the victims' families were not able to view them first. "They need to see the video, but they don't need to see the gunman going in there. They don't need to listen to those gunshots. They know what happened in that classroom. Why put them through that?" he said in an interview with ABC News. "And half of these families are out of town right now in Washington, D.C., not even with the rest of their family [. . .] I'm sorry. That's wrong. These families were blindsided and it shouldn't have been done this way."

Michael Cohen, a columnist for MSNBC, argued the videos do more harm to the American psyche than good. "Making public the pictures of the children slaughtered at Uvalde's Robb Elementary School would likely do little to change minds or seriously reshape the debate about guns in America. But allowing people to see such pictures would increase the national trauma around gun violence," Cohen wrote. "When we're talking about something as truly ghastly as the shooting of schoolchildren, the emotional wounds run deep. It affects how parents look at their own children. It increases anxiety and stress levels. It's not healthy, and allowing people to see pictures of slain children will only compound the hurt. Americans can and should advocate for stronger gun control measures. They should cajole, demand and get angry at their leaders for doing nothing. But they need to take care of themselves, too. Looking at pictures of dead children isn't going to help."

— Samantha Brunn
Silha Center Research Assistant

The Summer 2022 issue of the Silha *Bulletin* includes several articles adapted from "Privacy and Data Protection," a chapter published in the course handbook for the Practising Law Institute's Communications Law in the Digital Age conference, which will take place in November 2022.

Professor Kirtley gratefully acknowledges the contributions of Samantha Brunn, Claire Colby, and Luke Srodulski.

Special Report: Journalists Remain Vulnerable to Surveillance from Tech, Law Enforcement, and Government Entities

Law enforcement and state actors threatened journalists' safety and data privacy this year in several major ways. A group of journalists and lawyers sued the CIA for allegedly spying on them while they were meeting with Wikileaks founder Julian Assange. A U.S. military defense firm attempted to purchase an Israeli firm that has spied on political activists and journalists worldwide. Newly discovered evidence showed that a popular transcription service may spy on users and the content of their recorded interviews. The U.S. Department of Justice announced its support for President Biden's drone action plan.

SURVEILLANCE

Group of Journalists, Lawyers Sue the CIA for Spying on Them while Meeting with Wikileaks Founder Julian Assange

According to reporting from *Reuters* on Aug. 15, 2022, a coalition of journalists and lawyers sued the CIA and its former director, Mike Pompeo, for allegedly spying on their electronic devices while they visited Wikileaks founder Julian Assange in Ecuador's London embassy between January 2017 and March 2018, violating their Fourth Amendment rights against unreasonable search and seizure. The plaintiffs are journalists Charles Glass and John Goetz, as well as attorneys Margaret Kunstler and Deborah Hrbek, who have previously represented Assange. Under the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1813 (1978), the CIA is prohibited from collecting intelligence on U.S. citizens. The suit, *Kunstler et al v. Central Intelligence Agency* (No.1:2022cv06913), which was filed in the U.S. District Court for the Southern District of New York, alleges the group was forced to surrender their electronic devices to Undercover Global S.L., a private security company that provided security to the embassy, before their meetings with Assange. The security firm then allegedly copied the device data and provided it to the CIA. The filing further contended that "While the named Plaintiffs initiate this action, the practices complained of violate the rights of well over 100 American citizens who visited Assange at the Ecuadorian Embassy in London, England," noting these individuals included "attorneys who were then representing him, journalists there to interview him, and even doctors who were then treating him."

Richard Roth, the lawyer representing the plaintiffs, said in an interview with *Axios* on Aug. 15, 2022, that the CIA's conduct was reprehensible. "That was outrageous and inappropriate conduct by the government that violated the most profound privacy rights of the plaintiffs and others who visited Assange in the embassy," Roth said.

Tim Edgar, a professor at Brown University and former deputy officer of privacy and civil liberties for the Office of the Director of National Intelligence, told *Newsweek* on Aug. 15, 2022 that the act of copying the entire device data of each person's phone would likely be unsupported by a claim of incidental collection. "That seems to me like a very excessive amount of collection," Edgar said. "What's the expected intelligence value from that? It's a high bar to justify. If it's just everyone who visited Assange, then it's not like you have a specific reason to look at a particular phone. It's another example of how intrusive intelligence collection has become in the digital age."

U.S. Defense Company to Acquire NSO Group After the Firm was Blacklisted By the U.S. Government Last Year for Spying on Journalists and Government Officials

According to reporting from *The New York Times* on July 10, 2022, L3Harris, a military defense contracting firm in the United States, reportedly is attempting to purchase the Israeli firm, NSO Group, after it was blacklisted by the U.S. government in 2021 for using Pegasus spyware to monitor the phones of political leaders, human rights activists, and journalists. *The Times* reported that White House officials said they were outraged by the potential deal, while journalists and other experts worldwide worried that press freedom and safety would be seriously hampered by the acquisition.

However, contrary to the White House's stated concern, *The New York Times* reported that "five people familiar with the negotiations said that the L3Harris team had brought with them a surprising message that made a deal seem possible. American intelligence officials, they said, quietly supported its plans to purchase NSO."

NSO's Pegasus spyware is a "zero-click" hacking tool that can remotely extract all digital content from a target's mobile phone, including messages, contacts, photos, and videos. Pegasus can also turn the target's mobile phone into a tracking and recording device entirely undetected. According to reporting from *The Washington Post* on June 15, 2022, L3Harris said it would restrict its sales of the tools it acquires from NSO Group to the U.S. government and some allies.

After L3Harris' plans to purchase the Israeli firm leaked, the firm allegedly abandoned the deal, *The New York Times* reported. But, according to the *Times* reports, "several people familiar with the talks said there have been attempts to resuscitate the negotiations." It is unclear where the negotiations stand as the *Bulletin* went to press.

In August 2022, Apple announced it discovered vulnerabilities in the operating systems of Macs, iPhones, and iPads that could be exploited by Pegasus spyware. Security experts advised users to update affected devices, including the iPhone6S and later models; several models of the iPad, including the 5th generation and later, all iPad Pro models and the iPad Air 2; and Mac computers running MacOS Monterey. The flaw also affects some iPod models.

John Scott-Railton, a senior researcher at Citizen Lab, an affiliate of the University of Toronto's Munk School of Global Affairs and Public Policy, said the potential deal would be a blow to U.S. national security. "[An] American defense contractor acquiring a demonstrably-uncontrollable purveyor of insecurity would be. . . atrocious for human rights [and] bad for . . . counterintelligence,"

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Surveillance, *continued from page 13*

Scott-Railton said in a tweet on July 10, 2022. "This is not a company that prioritizes America's national security. And it doesn't play well with our tech sector. … NSO spent years pretending they changed . . . while using all available tricks to hide the fact that they kept doing . . . risky biz and dictator deals," the tweet said.

Scott-Railton told *The Washington Post* on June 14 that the potential deal would probably have a greater impact on domestic policing than it would national security. "[Even with U.S. ownership,] it's doubtful that the most elite intelligence services like the CIA, NSA and [Britain's] GCHQ would trust this technology for their most sensitive operations," Scott-Railton said. "So where would the big market be? I fear the logical consumers are U.S. police departments. This would be an unprecedented threat to our civil liberties," he said.

Transcription Services Used by Journalists Found Vulnerable to Spying, Potential Governmental Surveillance

In February 2022, *Politico* reported that Otter.ai, a popular transcription service based in California and used by reporters around the world, potentially puts personal data and journalists' sources at risk due to the service's lax security policies and practice of selling user data to third parties. Privacy professionals and journalists warned the discovery is just the tip of the iceberg when it comes to the difficulties of maintaining privacy in reporting in the 21st century.

Phelim Kline, a *Politico* reporter, first realized that Otter.ai's might be monitoring his journalistic work product in November 2021. After recording an interview with Mustafa Aksu, a Uyghur and human rights activist based in Washington, D.C., Kline received a notification from Otter.ai inquiring about the purpose of the interview. When Kline reached out to Otter.ai's team to ask if the survey was a phishing attempt, he received conflicting information from the same Otter.ai representative over the course of their interaction. Despite its claims that it is in compliance with at least part of the EU General Data Protection Regulation (GDPR), Otter.ai and its competitors remain vulnerable to privacy breaches.

Additionally, Otter.ai's privacy policy explicitly states that the company will share data with law enforcement if legally required to do so, or if the company finds "a good faith belief that such [data sharing] is reasonably necessary to comply with a legal obligation, process, or request."

Experts warned the consequences of Otter.ai's weak privacy policy could be significant. "This is a very under-discussed issue in a lot of newsrooms because of how much people are dependent on transcription services and just how much of your personal interview data these services can access," Martin Shelton, principal researcher at the Freedom of the Press Foundation, told *Politico* on Feb. 16, 2022.

Others noted that the flimsy privacy protections combined with the trove of data stored in the Otter.ai cloud servers is a "magnet" for hackers. "Anytime you have a high concentration of otherwise nonpublic original information, it is going to be a target," Susan McGregor, a researcher at Columbia University's Data Science Institute, told *Politico*.

Mitchell Clark, writing for *The Verge* on Feb. 16, 2022, said "The [*Politico*] report is more of a wakeup call than a takedown of a popular service — there's no big reveal that the transcript had been accessed by a nation's spy agency, and Otter told the reporter that Aksu's name was in the survey because it was in the title of the transcription. The company also said that it's stopped doing those kinds of surveys, because of the disconcerting effect they could have. But the fact that the government can legally get its hands on the information we provide to these services is something worth keeping in mind — especially when it comes to choosing between cloud services and alternatives like apps that use on-device transcription, or offline recorders."

U.S. DOJ Announces Its Support for the Biden Administration's Drone National Action Plan

On April 25, 2022, the DOJ announced its support for the Biden Administration's Counter Unmanned Aircraft Systems (C-UAS) national action plan. Unmanned aircraft systems, commonly referred to as drones, represent potential threats to public safety and infrastructure at major venues such as international airports and large sporting events, for example. Drones can be used to initiate several types of attacks, including cyberattacks, terror attacks, collisions, smuggling, or surveillance. However, drones can also be used recreationally by private citizens, as well as for reporting purposes by professional journalists.

According to the press release on April 25, 2022, the DOJ believes "the threat posed by the criminal use of drones is increasing and evolving, and department components cannot protect everyone, everywhere, all the time." The DOJ supports the Counter-UAS plan because it would extend relief from federal criminal laws to state, local, territorial and tribal (SLTT) law enforcement entities to use technology to detect, and in limited circumstances, mitigate UAS threats under appropriate controls and federal oversight. "The Counter-UAS plan is a whole-of-government measured proposal that builds off existing authorities to address the threat that simultaneously protects privacy and civil liberties of the American people, the safety of the national airspace and the communications spectrum," the DOJ said. The DOJ press release is available at: https://www.justice.gov/opa/pr/justice-department-issues-statement-administration-s-counter-unmanned-aircraft-systems-c-uas.

The C-UAS policy coincides with a recent Federal Aviation Administration (FAA) rule requiring drone operators to broadcast their location if they are to use their drones at all. Zacc Dukowitz, writing for *UAV Coach* on May 11, 2022, explained that "This means that, as C-UAS tools are put into the hands of state and local law enforcement, those authorities will be able to locate not only any drone in their area using new detection tools provided through the C-UAS plan, but also the pilot themselves. And that ability could lead to privacy concerns among commercial drone pilots, as well as further concerns of overreach." The *UAV Coach* article is available at: https://uavcoach.com/biden-cuas/.

Patricia Cogswell, writing for *Homeland Security Today* on May 12, 2022, said a plan such as this one is much needed to ensure national security objectives are upheld. "For several years, when asked what I consider the highest risks to the U.S., I've consistently listed the need for

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Russian War Against Ukraine Results in Continued Challenges to Media

WAR IN UKRAINE

The Winter/Spring 2022 issue of the Silha *Bulletin* featured a compilation highlighting some of the effects on the media brought about by the war in Ukraine headlined "Russian War Against Ukraine Results in Numerous Challenges to International Media." The following article continues to chronicle more recent developments.

June 3 — Newspaper Fined for Post on Messaging App Telegram

On June 3, the Committee to Protect Journalists (CPJ) reported that the Kirovsky District Court in the central city of Yekaterinburg fined Technotorg — parent company of independent newspaper *Vecherniye Vedomosti* — 150,000 rubles (US $2,415) for "discrediting the Russian Armed Forces" in its reporting on messaging app Telegram.

According to the CPJ, the fine resulted from a March 18 Telegram post by *Vecherniye Vedomosti* about the detention of an artist who allegedly distributed anti-war stickers in the streets of Yekaterinburg. The Telegram post featured a blurred picture of the stickers, *Vecherniye Vedomosti* director Guzela Aitkulova told CPJ, saying the post contained "no words about the Russian army."

On June 6, Russian authorities further informed Aitkulova that they were investigating another 54 Telegram posts by *Vecherniye Vedomosti* that also allegedly discredited the armed forces. "We are outraged that we are, in fact, being punished precisely for our journalistic activities," Aitkulova told CPJ. "It all looks like revenge for our independent position. And an attempt to destroy us without blocking us — by crushing us financially."

Technotorg stated that it intends to appeal the June 3 ruling. As the *Bulletin* went to press, no additional hearings concerning the other posts had been scheduled.

June 14 — Russia Bans Members of British Media and UK Military Personnel From Entering Country

On June 14, the Ministry of Foreign Affairs of the Russian Federation issued a statement "on personal sanctions against members of the media and the [United Kingdom] defense lobby."

The statement read, "In connection with the anti-Russian actions of the British government on the introduction of personal sanctions against leading journalists of our country and heads of companies of the domestic defense complex, it was decided to include in the Russian 'stop list' the heads and correspondents of a number of major British media, as well as representatives of the command of the armed forces, the military-industrial complex and the UK defense lobby."

The statement continued, "The British journalists included in the list are involved in the deliberate dissemination of false and one-sided information about Russia and events in Ukraine and the Donbas. With their biased assessments, they also contribute to fueling Russophobia in British society."

The list of 29 banned journalists includes: two broadcast executives, including the Chairman of the Board of Governors and the CEO of BBC Television; ten broadcast and cable news journalists, including Clive Myrie, correspondent and anchor for the BBC, and Stuart Ramsay, chief correspondent for Sky News; and editors and reporters from print media, including John Witherow, editor-in-chief of *The Times of London* and Katharine Sophie Viner, editor-in-chief of *The Guardian*. The statement concluded, "Work on expanding the Russian 'stop list' will continue."

The banned list also included 20 members of the UK defense industry.

"The British journalists included in the list are involved in the deliberate dissemination of false and one-sided information about Russia and the events in Ukraine and Donbass. With their biased assessments, they also contribute to fueling Russophobia in British society," the Russian Foreign Ministry's statement read. "Persons associated with the defense complex of Great Britain are involved in making decisions on the supply of weapons to Ukraine, which are used by local punishers and Nazi formations to kill civilians and destroy civilian infrastructure." The Russian Foreign Ministry's statement is available at https://mid.ru/ru/foreign_policy/news/1817712/.

On June 14, an unidentified spokesperson for *The Guardian* stated,

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Surveillance, *continued from page 14*

counter-UAS in my top three," Cogswell wrote. "When I first began working in this arena more than a decade ago, our conversations were about preparing for the future — ensuring we were ahead and ready. We need to change our frame. The future has arrived. I'm hopeful Congress will move swiftly on legislation, permanently authorizing the various entities to counter this threat, and consistently fund federal operations at the levels necessary." Cogswell's article is available at: https://www.hstoday.us/featured/its-time-for-federal-counter-uas-to-be-permanently-authorized-and-consistently-funded/.

However, other experts, like Dukowitz, argue the drone policy actually may lead to more government overreach. "On its face, the idea of empowering more authorities to detect drones seems like a good thing," Dukowitz wrote in his May 11 article. "Drone detection tools already exist, so why not let law enforcement use them? But one potential concern with big, sweeping proposals like this C-UAS plan is that it could inadvertently encourage overreach. If, for example, a police department is already inclined to view most drone operations as suspect, and doesn't especially like the idea of a reporter or surveyor flying in a way that could allow them to see someone's private property, these measures may embolden officers to focus on detecting — and even jamming or destroying, if this becomes allowed — drones that are operating in a perfectly legal manner."

— Samantha Brunn
Silha Center Research Assistant

— Claire Colby
Silha *Bulletin* Editor

Ukraine, *continued from page 15*

"This is a disappointing move by the Russian government and a bad day for press freedom. Trusted, accurate journalism is more important now than ever, and despite this decision we will continue to report robustly on Russia and its invasion of Ukraine."

July 14 — Russian State Duma Passes Law Increasing Sanctions on Media that Spread "Fake News"

On July 14, 2022, the Russian State Duma passed Federal Law No. 277-FZ, "On Amendments to Certain Legislative Acts of the Russian Federation." The new law builds on the "fake news" statute passed in March 2022 that calls for sentences of up to 15 years in prison for people who distribute "false news" about the Russian military. (For more about the "fake news" statute, see *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down;* Novaya Gazeta *Editor Attacked* in "Russian War Against Ukraine Results in Numerous Challenges to International Media" in the Spring 2022 issue of the Silha *Bulletin.*)

The Coalition For Women In Journalism (CFWIJ), a nonprofit organization that offers mentorship to women journalists from both Western and non-Western countries, reviewed the draft law as it was progressing to the lower house of the State Duma, in an article posted May 17. CFWIJ noted that "[U]nder the proposed law, the Prosecutor General's Office, through the federal media regulatory authority, Roskomnadzor, will have the right to revoke licenses from media outlets that spread 'fake' information related to the activities of the armed forces, with circumstances that 'pose a threat to the life and safety of citizens', or pose a threat to the health of citizens or a mass violation of public order." The CFWIJ article is available online at: https://z.umn.edu/CFWIJRussiaDraftLaw.

Meduza, a Latvia-based independent Russian-language news site, reported on April 6 that the bill gives power to the prosecutor's office "to ban foreign media from operating in Russia in response to the closure of Russia media outlets abroad." In addition, the proposed law would "hold journalists responsible for reprinting materials from other media that contain 'inaccurate information' about the use of Russian military forces abroad." The existing law did not make journalists liable for quoting previously disseminated information. The *Meduza* article is available online at: https://z.umn.edu/MeduzaRussianDraftLaw.

The full text of the Russian law is available online at: http://actual.pravo.gov.ru/text.html#pnum=0001202207140041.

Aleksei Obukhov, editor for independent news outlet *SotaVision*, told the Committee to Protect Journalists (CPJ) that the new law does not bring significant changes but rather "legalizes a status quo." Obukhov continued, "There are no independent media outlets left in Russia in their classic sense, with websites and reporting. All of them are either blocked or have suspended their activity." Obukhov added that most independent news outlets have migrated to social media and the messaging app Telegram.

The CPJ article is available online at https://cpj.org/2022/05/proposed-russian-legislation-threatens-to-shut-down-all-independent-media/.

September 5 — *Novaya Gazeta*'s Print License Suspended

The *Moscow Times* reported that the Basmanny court of Moscow granted a request by Roskomnadzor, the Russian federal agency responsible for monitoring and censoring media, to suspend the printing license of independent newspaper *Novaya Gazeta*. Dmitry Muratov, *Novaya Gazeta*'s editor-in-chief, together with Maria Ressa, founder and CEO of *Rappler*, a digital media company focusing on investigative journalism, were awarded the 2021 Nobel Peace Prize. (For more about the 2021 Nobel Peace Prize, see "2021 Nobel Peace Prize Awarded to Two Journalists" in the Fall 2021 issue of the Silha *Bulletin.*)

The court's decision bans *Novaya Gazeta* from operating within Russia. According to *The* (London) *Guardian*, Roskomnadzor claimed the newspaper had failed to provide documents related to a change of ownership in 2006.

However, on March 28, *Novaya Gazeta* announced that it was suspending publication both in print and online following a warning from Roskomnadzor, stating the suspension would last " [U]ntil the end of the 'special operation on the territory of Ukraine.' Sincerely, the editors of the Novaya Gazeta." The statement is available online at: https://novayagazeta.ru/articles/2022/03/28/my-priostanavlivaem-rabotu.

On April 7, Muratov was attacked as he was boarding a train departing from Moscow when an assailant threw a mixture of red paint and acetone at him, resulting in chemical burns to Muratov's eyes. Muratov was able to take a photograph of his assailant, later identified as Nikolai Trifonov, a former Moscow State University student who *The Washington Post* identified as a member of Russian intelligence. Although *Novaya Gazeta* had announced that it would suspend operations, it did publish details of Muratov's attack on April 12.

Meanwhile, several of the paper's journalists have launched *Novaya Gazeta Europe*, which is publishing outside Russia and is available online at https://novayagazeta.eu/en. As for Muratov, he has said he has no plans to leave Russia. (See "Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; *Novaya Gazeta* Editor Attacked" in the Winter/Spring 2022 issue of the Silha *Bulletin.*)

On Sept. 5, 2022, *The Guardian* reported that Muratov said the ruling was "a political hit job, without the slightest legal basis." Muratov said the paper would appeal. *The Guardian* further reported that a Moscow court will decide in a separate ruling whether to also revoke the license for *Novaya Gazeta*'s website. At the time the *Bulletin* went to press, no further details about that ruling had become available.

— Elaine Hargrove
Silha Center Staff

Special Report: Federal Lawmakers Propose New Regulation to Strengthen Privacy Protections

Legislators at the national level took significant action to pass federal privacy laws during 2022. The first half of the year saw what may be the most promising attempt to pass a comprehensive federal data privacy law this century, as well as new cyberattack reporting requirements inspired by potential retaliation from Russia for the United States' backing of Ukraine. Additionally, two bills aimed at protecting children's privacy online remain under consideration in the U.S. Senate.

LEGISLATION

Lawmakers Unveil Bipartisan American Data Privacy and Protection Act

The U.S. Congress took a significant step to rectify a half-century of failure to pass a federal data privacy bill with the introduction of the American Data Protection and Privacy Act (ADPPA) on June 3, 2022. House Committee on Energy and Commerce Chair Frank Pallone (D-N.J.), ranking member Cathy McMorris Rodgers (R-Wash.), and ranking member of the Senate Committee on Commerce, Science, and Transportation Sen. Roger Wicker (R-Miss.) authored the draft and described it as "the best opportunity to pass a federal data privacy law in decades," in a press release published on June 3, 2022. The press release is available online at: https://energycommerce.house.gov/newsroom/press-releases/house-and-senate-leaders-release-bipartisan-discussion-draft-of. The draft legislation is available at: https://www.commerce.senate.gov/services/files/9BA7EF5C-7554-4DF2-AD05-AD940E2B3E50.

Three months earlier, President Biden called for Congressional action on data privacy in his State of the Union address, stating, "It's time to strengthen privacy protections, ban targeted advertising to children, and demand tech companies stop collecting personal data on our children," *The Washington Post* reported on March 2, 2022. This is not the first data privacy bill put forth during Biden's administration, and the House Energy and Commerce Committee made some limited bipartisan progress as recently as 2019 through a staff-level draft bill seeking to create a Bureau of Privacy within the Federal Trade Commission (FTC). However, this marks the first instance of bipartisan and bicameral support from committee leaders for such a proposal.

The bill is also consequential because of the passage of five comprehensive state privacy laws since 2018 while federal efforts continued to flounder. The California Consumer Privacy Act (Cal. Civ. Code §§ 1798.100 — 1798.199.100) passed in 2018, amended by the California Privacy Rights Act in 2020; the Colorado Privacy Act (Colo. S.B. 21-190) and Virginia Consumer Data Protection Act (Va. Code. Ann. § 59.1-571) passed in 2021; and the Connecticut Data Privacy Act (Conn. S.B. 6) and the Utah Consumer Privacy Act (Utah S.B. 227) passed in 2022. Additionally, the European Union's General Data Protection Regulation (GDPR), adopted in 2018, underscored the absence of comprehensive federal law in the United States. As University of Pennsylvania computer science professor Michael Kearns told *The New York Times* on May 24, 2018, "The E.U. is more advanced than the U.S. in protecting consumer privacy, and what happens there could be a harbinger of the future." (For more information on the GDPR, see "The United States, the European Union, and the Irish High Court Wrangle Data Privacy Concerns" in the Fall 2017 issue of the Silha *Bulletin*, *Adopted EU General Data Protection Regulation Establishes 'Right to Erasure'* in "Right to Be Forgotten Continues to Create Challenges for Online Entities" in the Summer 2016 issue, and "Special Report: European and U.S. Entities Interpret EU-U.S. Privacy Shield, GDPR, and Other Data Privacy Rules and Regulations" in the Summer 2021 issue).

The ADPPA covers all entities subject to the Federal Trade Commission Act (*i.e.*, commercial businesses), common carriers under the Communications Act of 1934 (*i.e.*, companies providing public telecommunications services), and nonprofits. Under the bill, these "covered entities" must conduct reasonable risk assessments, provide clear means for individuals to withdraw consent to the collection and use of their data, and limit data use to what is necessary for and proportionate to providing goods and services. "Covered data" under the bill means information that identifies, is linked to, or is reasonably linkable to an individual.

The ADPPA's civil rights protection prohibits covered entities from collecting, processing, or transferring covered data in a way that "discriminates in or otherwise makes unavailable the equal enjoyment of goods or services on the basis of race, color, religion, national origin, sex, or disability." Covered entities also may not collect "sensitive covered data" including biometric, geolocation, and health information apart from specified purposes. Notably, sensitive data includes two large categories not typically included in state privacy laws: private communications (such as telephone calls, text messages, and emails) and data within any other covered category that an entity knows is about an individual under 17 years old. Third-party data collection entities must register with the FTC and log their information processing activities.

The bill also lays out a set of individual privacy rights, such as the rights to access personally identifiable data in the hands of a covered entity, request data correction or deletion, opt out of data transfers to third parties, and opt out of targeted advertising. Individuals under 17 may not be subjected to targeted advertising at all.

The ADPPA represents bipartisan agreement on two areas of contention that have vexed legislators during past negotiations. The first is whether a federal law should preempt state laws. Republicans have supported preemption in the past, wanting to streamline compliance rather than add to a patchwork of varying laws, while Democrats are wary of weakening state privacy protections with the passage of a less comprehensive federal law, Cristiano Lima wrote for *The Washington Post* on April 13, 2022. The current bill would preempt state laws that are "covered by the provisions of the bill" by default, affecting comprehensive state privacy laws such as those in California, Colorado, and Virginia that address many of the same

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legal areas. However, the bill provides carveouts for 16 areas of the law that would not be subject to preemption, such as statutes on civil rights, facial recognition, financial records, and student privacy. Biometric data privacy laws like the Biometric Information Privacy Act (BIPA) in Illinois would be protected by these carveouts, WilmerHale attorneys Kirk J. Nahra & Ali A. Jessani wrote in a blog post on June 8, 2022. 740 Ill. Comp. Stat. 14.

The compromise on preemption has proven to be a sticking point for several Democratic legislators, including Sen. Brian Schatz (D-Hawaii). Schatz, prominent in previous privacy law negotiations, sent a letter to panel leaders criticizing the ADPPA as "falling short" in consumer protections. He added that absent a duty of care for data holders to protect consumer data, any bill "absolutely should not preempt states from adopting consumer-first online privacy reforms." Although the ADPPA does include a "duty of loyalty" restricting certain practices, Schatz's Data Care Act includes a stronger duty of care, which places the onus on data holders to protect consumer data. Schatz's Data Care Act is available at: https://www.congress.gov/117/bills/s919/BILLS-117s919is.pdf.

However, former FTC Commissioner Maureen K. Ohlhausen, now a Baker Botts partner and co-chair of the 21st Century Privacy Coalition, a consortium of telecommunications companies that would be subject to the legislation, praised the state preemption framework during a June 14 congressional hearing, saying, "American consumers and businesses deserve the clarity and certainty of a single federal standard for privacy. That is why state preemption must be an essential component of national legislation." Ohlhausen's testimony is available at: https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Testimony_Ohlhausen_CPC_2022.06.14.pdf.

After strong pushback from California leaders, the House Energy and Commerce Committee's amended bill included the California Privacy Protection Agency (CPPA) as a State Privacy Authority with state enforcement authority. The move followed a July memo from the CPPA to U.S. House of Representatives Speaker Nancy Pelosi (D-Calif.) sharing its objections. The memo asserted that though the proposed federal law would create new protections, the ADPPA "seeks to preempt nearly all provisions" of the California Consumer Privacy Act and eliminates the agency's authority to implement regulations and enforce the law. It also pointed out that the bill would hinder California's work on legislation governing children's data privacy, smart speaker data, and in-car cameras that has already begun. The memo is available at: https://aboutbgov.com/3XA.

Similarly, California Gov. Gavin Newsom had expressed "significant concerns" that the bill would undermine the state's privacy protections, and California Attorney General Rob Bonta had led a letter with nine other state attorneys general urging lawmakers to pass legislation that would "continue to allow the states to innovate to regulate data privacy," *The Washington Post* reported on July 26, 2022.

The second significant area of compromise is on a private right of action. Democrats have sought to empower individuals to sue for privacy violations, while Republicans want to limit lawsuits by requiring that government agents, such as state attorneys general, must bring suit, *The Hill* reported on June 14, 2022. Democrats secured their private right of action in principle, making it available to consumers two years after the bill goes into effect, lowered from four years after markup after markup in the House Energy and Commerce Committee. However, there would be limitations. For example, accused violators must be notified and would have 45 days to correct the issue. Consumers would also have to notify the FTC and relevant state attorneys general, who would have the first opportunity to sue if they choose. Consumers could only sue if the government declines to do so.

Although the Lawyers' Committee for Civil Rights Under Law endorsed the ADPPA in a press release on June 22, 2022, David Brody, Managing Attorney for the Committee's Digital Justice Initiative, criticized the limited private right of action, saying it "severely curtails the ability of individuals to obtain relief from a court when a company violates the Act. . .. The current proposal inserts several procedural hurdles that will not reduce litigation costs but will block injured individuals from being able to have their day in court . . .." However, think tanks and advocacy organizations affiliated with technology companies do not appear satisfied, either, and have called for the private right of action to be eliminated entirely. The press release is available online at: https://www.lawyerscommittee.org/lawyers-committee-for-civil-rights-under-law-endorses-american-data-privacy-and-protection-act/.

The ADPPA has made considerable progress in the House, where Pallone, Rodgers, Jan Schakowsky (D-Ill.), and Gus Bilirakis (R-Fla.) formally introduced it as H.R. 8152 on June 21. Two days later, the House Energy and Commerce Committee's Subcommittee on Consumer Protection and Commerce held an open markup session leading to several key changes, such as removing entities "acting in a non-commercial context" from those covered by the bill and requiring that entities must know an individual is under 17 to be liable for using the individual's data. The subcommittee favorably reported and ordered the amended bill to the full committee.

On July 20, the full committee advanced the bill to the House floor with a 53-2 vote following revisions including granting regulatory authority to the CPPA, shortening the private right of action delay to two years and including a tiered approach to what constitutes "knowledge" of an individual's age related to targeted advertising. The inclusion of the provision on express authority for the CPPA did not prevent Reps. Anna Eshoo (D-Calif.) and Nanette Barragán (D-Calif.) from opposing the amended bill, the *National Law Review* wrote on July 26, 2022. Eshoo had proposed an amendment that would have struck preemption provisions from the ADPPA. The amendment failed, 8-48. On Aug. 7, 2022, *The Washington Post*'s editorial board sought to push the bill over the line in early August by urging Pelosi to bring it to a vote, writing, "Not everyone is going to be happy with everything in the bill, but enough people should be happy with enough things to push it through to passage." The editorial board's statement is available at https://www.washingtonpost.com/opinions/2022/08/07/federal-privacy-legislation-deserves-vote/.

However, the bill faces a difficult path forward in the Senate. Senate Commerce Chair Maria Cantwell (D-Wash.) told *The Washington Post*

on June 29 that she was not close to supporting the bill, citing worries about enforcement and preemption. Cantwell said that Senate Majority Leader Chuck Schumer (D-N.Y.) would not bring up the bill as written and told reporters, "They can come back to the table on something strong because people who want to get a bill know that you can't preempt states with a weak federal standard." Without Cantwell, the bill is unlikely to progress, and even after several amendments made in hopes of garnering her support, she did not indicate a change of heart after the bill advanced out of committee.

The Supreme Court's overturn of *Roe v. Wade* also raises the stakes for a federal data privacy bill. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). A memo distributed by Senate Commerce Committee Democratic staffers expressed concerns that the ADPPA "makes it harder for women to seek redress when their sensitive health data has been used against them" if stronger state laws are preempted and the delay on a private right of action is imposed, *The Washington Post* wrote on June 27, 2022. Rep. Sara Jacobs (D-Calif.) and Sen. Ron Wyden (D-Ore.) voiced similar concerns about protections of women's geolocation and health data, according to the *Post*. (For more information on the press and privacy implications posed by *Dobbs*, see "Private Companies, Federal Government Respond to Data Privacy Issues Raised by Dobbs" on page 1 of this issue of the Silha *Bulletin*.)

Business leaders have also expressed opposition to the ADPPA. The U.S. Chamber of Commerce said in a draft letter to congressional leaders obtained by CNBC on June 9 that the bill is "unworkable at this time." Initially, the draft had stated that the bill should be rejected, but ultimately that language was removed, CNBC reported on Dec. 1, 2021. The Chamber, which is the world's largest business lobbying group, primarily took issue with the private right of action. Although the right is significantly limited, the Chamber had already stated that it would oppose any bill with what it calls "a blanket private right of action." The Chamber also objected to preemption carveouts for BIPA and certain provisions of the California Consumer Privacy Act (CCPA), citing concerns about an "unmanageable patchwork of laws." The Chamber's letter is available at: https://www.uschamber.com/technology/data-privacy/u-s-chamber-letter-on-national-privacy-legislation.

The August recess arrived without a House vote, and with midterm elections looming, where Democrats are not expected to retain their holds on both the House and Senate, prospects for passing the ADPPA look increasingly fraught. "Its existence is noteworthy, however," wrote Mitchell S. Noordyke, an intellectual property attorney at Faegre Drinker in a blog post on June 13, 2022, "as an indication that progress can be made on the key obstacles to a federal standard for consumer privacy — the hurdles for that progress to be meaningful, however, remain tall." The blog post is available at: https://www.faegredrinker.com/en/insights/publications/2022/6/progress-on-federal-privacy-legislation-but-still-a-long-way-to-go.

President Biden Signs Bill Expanding Cybersecurity Reporting Requirements

On March 15, President Biden signed the Consolidated Appropriations Act of 2022 into law, expanding obligations for critical infrastructure entities to report cybersecurity incidents. The law is available at: https://www.congress.gov/117/plaws/publ103/PLAW-117publ103.pdf.

The process began in early March, when the U.S. Senate passed the Strengthening American Cybersecurity Act of 2022. The bill, authored by Sen. Gary Peters (D-Mich.) and introduced jointly with Sen. Rob Portman (R-Ohio), passed with unanimous bipartisan support. Peters implied that the bill was at least in part a reaction to concerns about retaliatory cyberattacks from Russia as the United States continues to support Ukraine, CNN reported March 2, 2022. It would most notably mandate that critical infrastructure operators and civilian federal agencies report "substantial cyber incidents" to the Cybersecurity and Infrastructure Security Agency within 72 hours and ransomware attacks within 24 hours, according to CNN. The group of 16 sectors covered by the bill include financial services, healthcare, manufacturing, transportation, and others deemed "so vital to the United States that their incapacitation or destruction would have a debilitating effect" on national security, *Fortune* reported on March 18, 2022. The senate bill is available at: https://www.congress.gov/bill/117th-congress/senate-bill/3600/text.

House lawmakers then copied the language on reporting requirements into the larger omnibus spending bill, which both chambers passed by wide margins before sending to Biden. The Cybersecurity and Infrastructure Security Agency (CISA) Director Jen Easterly has since issued proposed regulations including what entities the requirements will cover and how reporting must be done. A 60-day period of public comment opened on Sept. 12, 2022. "We look forward to continuing to learn from the critical infrastructure community — through our request for information and our coast-to-coast listening sessions — to understand how we can implement the new cyber incident reporting legislation in the most effective way possible to protect the nation's critical infrastructure," Easterly said in a September 9 statement available online at https://www.cisa.gov/news/2022/09/09/cisa-welcomes-input-new-cyber-incident-reporting-requirements.

Two Bipartisan Federal Children's Privacy Bills Advance in Senate Committee

On July 27, the Senate Commerce Committee voted to advance two bipartisan bills as part of an effort aimed at strengthening protections for children and their personal information online. The push for expanded federal safeguards ramped up in 2021 when data engineer and Facebook whistleblower Frances Haugen disclosed internal documents on the impact of the company's products on teenagers' mental health, *The Washington Post* wrote on July 27, 2022.

First, the Children and Teens' Online Privacy and Protection Act (CTOPPA), introduced in 2021 by Sens. Ed Markey (D-Mass.) and Bill Cassidy (R-La.), would take privacy protections already applicable to children ages 0-12 via the Children's Online Privacy Protection Act of 1998 (COPPA) and expand them to children ages 13-16. The draft legislation is available at: https://www.congress.gov/bill/117th-congress/senate-bill/1628. CTOPPA would amend COPPA to prohibit companies operating websites, applications, or other online services directed at children from

Legislation, *continued on page 20*

Legislation, *continued from page 19*

collecting personal data on children ages 13-16, defined as minors in the bill, without their opt-in consent. It would also require such companies to provide parents or minors a description of the types of information collected along with the opportunity to delete the information upon request. In a June 24, 2021 press release, Markey called the latter an "eraser button." The press release is available at: https://www.markey.senate.gov/news/press-releases/senators-markey-and-cassidy-propose-bipartisan-bill-to-update-childrens-online-privacy-rules.

Finally, the bill would require companies to identify and mitigate risks that their products may pose to children's privacy, *The Washington Post* reported on July 28, 2022. CTOPPA would task the FTC with enforcement and established a Youth Privacy and Marketing Division within the Commission to assess the bill's impact on marketing directed at children as well as children's privacy.

Proponents of the bill note that the "eraser button" offers a protection not provided by the ADPPA by allowing children to delete their data from websites such as social media platforms that did not exist when COPPA was passed, *The Washington Post* reported on July 28, 2022. "This is an important step toward creating a safer and less exploitative internet for children and teens," Josh Golin, executive director of the advocacy group Fairplay, which aims to protect children from online harms, told *The Washington Post* on July 27, 2022.

In a July 27 press release, Markey emphasized the changing landscape following CTOPPA's passage through committee, saying, "In 1998, Congress enacted the Children's Online Privacy Protection Act — a law I authored. And that law is still the constitution of children's privacy today. But so much has changed since 1998. The threats to kids' privacy and wellbeing are more pressing than ever." The press release is available online at: https://www.markey.senate.gov/news/press-releases/senator-markey-celebrates-successful-passage-of-children-and-teens-privacy-legislation-through-senate-commerce-committee.

However, CTOPPA faces a tough road forward because of the comprehensive data privacy legislation moving toward a potential full House of Representatives floor vote. Sen. Roger Wicker (R-Miss.), who introduced the American Data Privacy and Protection Act and is leading a companion to the House bill, said in July that he would not support CTOPPA because of his view that the Senate Commerce Committee should focus on privacy protections for all ages, *The Washington Post* reported on July 27, 2022. "The need for a national law that provides data protections for everyone must be this committee's priority," he said.

Second, the Kids Online Safety Act (KOSA), introduced by Sens. Richard Blumenthal (D-Conn.) and Marsha Blackburn (R-Tenn.), focuses less on data than on measures aimed at preventing harm to children. It would create a duty of care obliging applications or electronic services used by minors to prevent and mitigate heightened risks of harm faced by minors including addiction, bullying, eating disorders, self-harm, and sexual exploitation that can be promoted by certain content. It would require these companies to provide children under 16 and their parents "easy-to-use" settings and tools to limit screen time, track online activity, and limit or ban certain types of content. The bill is available at: https://www.congress.gov/bill/117th-congress/senate-bill/3663/.

However, KOSA would provide key data privacy provisions. Covered platforms would need to provide minors and their parents with "readily accessible" safeguards to limit others' ability to contact or find a minor, prevent others' from viewing their personal data, restrict geolocation sharing, opt out of algorithmic recommendation systems that use personal data, delete their account, and request removal of their data. The FTC would also be tasked with enforcement of KOSA, despite Blackburn's lack of support for CTOPPA due to the authority it gives the Commission, *The Hill* wrote on July 27, 2022.

"Protecting our kids and teens online is critically important, particularly since COVID increased our reliance on technology," Blackburn said in a press release on Feb. 16, 2022. "In hearings over the last year, Senator Blumenthal and I have heard countless stories of physical and emotional damage affecting young users, and Big Tech's unwillingness to change. The Kids Online Safety Act will address those harms by setting necessary safety guiderails for online platforms to follow that will require transparency and give parents more peace of mind." The press release is available online at: https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-and-blackburn-introduce-comprehensive-kids-online-safety-legislation.

The bill evoked a strong reaction from nonprofit digital rights lobbying group the Electronic Frontier Foundation, which shared its concerns in a blog post after the bill's introduction in March. Associate Director of Digital Strategy Jason Kelley said that teenagers covered under the bill "have a greater need for privacy and independence than younger teens and kids" and that KOSA would enable parents to spy on their children and control conversations. He added that the safeguards would counterintuitively result in more tracking of data and that platforms would over-censor content to avoid liability. The blog post is available at: https://www.eff.org/deeplinks/2022/03/kids-online-safety-act-heavy-handed-plan-force-platforms-spy-young-people.

Ultimately, KOSA appears to be at a standstill for the same reasons as CTOPPA. Although Blumenthal said in late July that "the focus should be on children," Wicker maintained his position that the Senate Commerce Committee needs to prioritize comprehensive privacy legislation, *The Washington Post* reported on July 28, 2022.

— Luke Srodulski
Silha Center Research Assistant

Minnesota Journalists Face Barriers to Reporting from Courts, Law Enforcement

In 2022, journalists in Minnesota saw new — and ongoing — obstacles to reporting. First, after more than a year of review, the Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure issued a report that did not recommend expanding audiovisual access to criminal proceedings. According to the *MIT Technology Review*, Minnesota law enforcement used an app to monitor local journalists after the George Floyd protests. Finally, the Minnesota Supreme Court allowed a warrantless search of a cloud storage system in a decision that has far-reaching implications for reporters.

ACCESS

Minnesota Supreme Court Advisory Committee Does Not Recommend Expanding Access to Cameras in Court

On June 30, 2022, the Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure issued a report with recommendations on camera access to courtrooms. A majority of the Committee "respectfully recommends to the Court" that no changes that would "modify the current consent rule or expand pre-guilt coverage" be made.

The report comes a year after the Minnesota Supreme Court issued an order on June 18, 2021 directing the committee to review Rule 4 of the General Rules of Practice for the District Courts and "consider whether the requirements set forth in that rule for audio and video coverage of criminal proceedings should be modified or expanded." The full order is available online at: https://www.mncourts.gov/mncourtsgov/media/CIOMediaLibrary/News%20and%20Public%20Notices/Orders/ADM10-8049_Order_6-18-2021.pdf.

Rule 4 permits journalists to record most criminal proceedings only after the prosecution, defense, and judge all consent. Minn. Gen. R. Prac. 4.01 *et seq.* According to the Supreme Court order, Rule 4 has been in place for more than five years. The Rule was first enacted as part of a pilot program but was later enacted as a permanent rule for district courts. According to the order, the COVID-19 pandemic greatly expanded audio and visual access to court proceedings. The Court ordered the Committee to "consider whether the requirements set forth in [Rule 4] for audio and video coverage of criminal proceedings should be modified or expanded." (For more information on the success of audiovisual coverage of criminal trails during the COVID-19 pandemic, see "Chauvin Trial Marks Key Moment in Minnesota Media Access to Court Proceedings During Pandemic" in the Summer 2021 issue of the Silha *Bulletin*.)

The report came after numerous public comments and a public hearing. According to the report, in general, "the public defender, prosecutor, and victim organizations and representatives oppose any expansion of the current rule." Media representatives stated that "camera coverage should be allowed at every stage of a criminal case; coverage increased public access, promotes transparency, and fosters public trust and confidence in the judicial system; and judges can be trusted to exercise their discretion in managing their courtrooms and setting appropriate limits." The report emphasized the need for "judicial discretion" and stated that the Committee "opposes any rules that would require coverage of certain cases or under certain circumstances."

The proposed amendments would clarify and constrain livestreaming policies for media organizations. According to the report, "there are 2 types of livestreaming in this context: the type done by media from the courtroom for distribution to the public as was done in the recent high-profile trials, and the type that occurs when the court is holding a hearing remotely by video technology. Although the latter is a 'livestreamed' hearing in the sense that it is being streamed over the internet, the media are not allowed to record or rebroadcast because of the limitations in Rule 4." The proposed amendments would explicitly state that the Committee "does not support any media broadcast of such hearings unless specifically authorized by the judge."

The other significant proposed amendment would add references to the defendant "everywhere there are specific references to victims, witnesses, or other participants." The "intent of this change is to ensure fairness and balance in the rule" and the Committee "recommends that any rule change adopted by the Court should always provide for a balancing of considerations, keeping the list of factors that are salient to each party evenly weighted." The proposed amendment would direct judges to consider the "privacy, safety, and well-being" of the defendant in addition to other trial participants before allowing coverage. The proposed amendment would also add defendants who are minors to the list of parties who can never be recorded.

Several media organizations filed comments ahead of a Sept. 20, 2022 public hearing in front of the Minnesota Supreme Court about the report and proposed amendments.

Jane E. Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center, submitted comments on behalf of the Silha Center. "Minnesota has been singularly cautious about permitting cameras in criminal trials and pre-trial proceedings," she wrote. "As this Court considers the question of whether the Minnesota Rules governing cameras in criminal proceedings should be permanently expanded, it would be appropriate to reflect on and acknowledge the unmitigated success of extended media coverage in both the *Chauvin* and *Potter* trials in 2021." Kirtley wrote that these trials "were conducted with dignity and preserved the rights of the defendants and the right of access guaranteed to the press and to the public." She stated it was "ironic" that the June 30 report "continues to reject the experience of 2021 and to recommend that this Court repudiate any expansion of the use of cameras in Minnesota courtrooms. . . . Particularly at a time when confidence in our governmental institutions has been eroded, in part because of misinformation and disinformation spread by those who seek to undermine them, it is essential to provide the public with meaningful access to our courts," she wrote.

Attorney Leita Walker submitted testimony on behalf of a News Media Coalition that consisted of eleven media organizations, including the Silha

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Center for the Study of Media Ethics and the Law. Walker described the success of cameras in covering several high-profile Minnesota cases, including the *Chauvin* and *Potter* trials. She said these trials "demonstrated that historic concerns about expanded coverage, though perhaps genuinely held, are not borne out by actual evidence or experience — either locally or around the country." "[G]iven the long history of cameras in the vast majority of states, there is every reason to believe the risks identified are negligible, if not entirely speculative," she wrote. "Meanwhile, the Chauvin and Potter trials demonstrated the many benefits of permitting cameras: The livestreaming of those trials helped people understand what was happening and built trust and confidence in the system. It had a therapeutic value, perhaps especially in the Chauvin case, a trial over a murder that itself was subject to a recording that 'went viral.' And in these times of partisan politics and a fragmented media ecosystem — at a time when 'fake news' is, for some, an unfortunate mantra — the livestreaming allowed the public to bypass the media as a gatekeeper and watch events unfold for themselves, free of any 'bias' they might suspect journalists harbor."

Mickey H. Osterreicher, general counsel for the National Press Photographers Association, submitted written comments on behalf of the organization. He wrote that expanding camera access to criminal trials is not merely about transparency, but also about fairness. "Many Minnesotans do not enjoy the opportunity to attend Court in person, for reasons of work, health, childcare responsibilities, or lack of transportation," he wrote. "For certain trials, the number of interested observers can far exceed the capacity of the courtroom. There are not enough overflow courtrooms in America to accommodate the estimated 18.4 million Americans who watched the Derek Chauvin trial on television. The rules committee, which advised against expanding video access, expressed great concern that the media would only provide snippets of sensational news, but not inform the public about substantive issues during a trial. A livestreamed public record of the entire trial — as provided after the Chauvin and Potter trials — should assuage any of those concerns." He recommended that the rule be changed to "presumptively permit visual and audio recording in all criminal proceedings in Minnesota trial and appellate courts, subject to rebuttal and require, at minimum, a showing of good cause by the party opposing visual and audio recording before such recording is prohibited."

During the Sept. 20, 2022 hearing, Ramsey County District Judge Richard Kyle, who led the advisory committee, presented his findings to the court. "A majority of my committee, which consists of seasoned prosecutors, defense lawyers, judges, and court administrators from across the state, respectfully recommend against an expansion of the use of cameras in Minnesota courtrooms," Kyle said. Minnesota Supreme Court Justice Natalie Hudson asked if Kyle's committee had identified any examples of allowing cameras in other states had gone "horribly wrong." Kyle mentioned the O.J. Simpson case, but ultimately said that there needed to be more research on this question. Justice Anne McKeig asked Kyle about the impact that the committee's recommendations would have on communities of color. Kyle acknowledged that although the *Chauvin* case was an "educational experience" that alleviated public "suspicions" by being livestreamed, this was a consideration that needed to be balanced with the defendant's constitutional rights.

After Kyle's presentation, several supporters of expanded access testified. Mark Anfinson, an attorney for the Minnesota Newspaper Association and the Minnesota Broadcasters Association, followed Kyle. He recommended that the court not adopt the committee's recommendation to keep camera access limited. "There's a great deal of evidence that's been accumulated that such access does not cause serious problems in the real world," he said. "Should the court adopt the committee's recommendation . . . it will deprive not just the public, but the court system itself of real and important benefits with few, if any, countervailing benefits to that decision." Justice Hudson said the report "persuasively" argued that bail and pretrial hearings should not be televised because sensitive information could prejudice potential jurors. Anfinson said that successful camera programs in other states have demonstrated that allowing judges to exercise discretion has resulted in few, if any, issues.

Joe Spear, past president of the Minnesota-Pro chapter of the Society of Professional Journalists, also testified during the Sept. 20 hearing. Spear said that the perceived legitimacy of the judiciary should be included as a factor in any balancing test about whether to allow cameras in the courtroom. He said that recent successes of livestreamed trials should be seen as evidence that camera coverage of trials can be successful in Minnesota.

Hal Davis, who serves on the board of the Minnesota Coalition on Government Information (MNCOGI), said that full livestreaming of trials is an "antidote" to concerns that media members may distort coverage to include only sensational content. He said that MNCOGI "urges expansion" of cameras in the court such that all civil and criminal trials in lower courts are presumed open to video coverage.

Kyle acknowledged that he was in the "minority" of speakers during the hearing, but said he looks forward to the court's final decision, the *Star Tribune* reported on September 20. "People have strong feelings about this issue," he said. "It's an important issue and I'm confident that the court will give it due consideration."

The court did not communicate a deadline to make a decision during the hearing, CBS reported on Sept. 20, 2022.

(For more information on the Committee's activities, see *Minnesota Supreme Court Advisory Committee Considers Cameras* in Court in "Minnesota Journalists Fight for Court Access" in the Winter/Spring 2022 issue of the Silha *Bulletin*.)

Minnesota Police Used Intrepid Response App to Spy on Journalists During George Flyod Protests

According to a report from *MIT Technology Review* (*MIT*) in March 2022, the Minneapolis Police Department (MPD) used Intrepid Response, an app that catalogs and shares location and personal information identifying anyone who is photographed by MPD smartphones, to monitor local journalists attending the George Floyd protests, and has continued to employ the database ever since. Minnesota journalists expressed deep concern at the state's potential chilling effect on the free press.

According to the *MIT* report, Intrepid Response was also used to monitor the Brooklyn Center, Minn. protests in the wake of Daunte Wright's

murder. MPD recorded at least six local journalists' photographs and location data at those protests, and a number of those journalists later requested their personal data files which contained their photographs, press badges, and location data.

J.D. Duggan, a reporter for *Finance & Commerce*, was one of those journalists. "I asked where the pictures would go, and the officer told me that it just goes into their system," Duggan said in the *MIT* report. "He didn't really give me any details. He said they have an app."

According to the report, the app helps law enforcement almost instantly de-anonymize protest attendees and monitor their movements. The three main components of the app, according to its parent company Intrepid Networks, are geo-mapping, emergency notification, and it serves as a communication platform for sharing messages and photos. Intrepid Networks CEO Britt Kane said Intrepid Response does not have any data sharing policies.

Many of the local journalists cataloged by MPD warned of the potential First Amendment chilling effects that could result from the use of Intrepid Response. Chris Taylor, a freelancer working on behalf of the Minneapolis Television Network, a nonprofit organization that provides training and support for media use by community members in the Twin Cities, said the monitoring is anti-democratic. "We committed no crime, and yet records were kept on us. I believe this is a step in the direction of authoritarianism, and has a chilling effect on the free press. It's against the ethos of being American."

Dominick Sokotoff, a photojournalist and University of Michigan student, was also photographed at the protests. "It was unlike anything I'd seen and was extremely disturbing," he said in the *MIT* report. Parker Higgins, director of advocacy for the Freedom of the Press Foundation, said the monitoring "doesn't appear to serve any law enforcement purpose beyond intimidating reporters who are doing their job." He also noted that it is still unclear "why the photos were taken, how the images were shared or stored, and whether that data remains in law enforcement databases." The report is available online at: https://www.technologyreview.com/2022/03/17/1047413/secret-police-surveillance-protesters-george-floyd-operation-safety-net/.

In response to media concern over the documentation of journalists at the protests and to a temporary restraining order issued by the state, the Minnesota State Patrol (MSP) released a statement. "During recent enforcement actions in Brooklyn Center, troopers checked and photographed journalists and their credentials and driver's licenses at the scene in order to expedite the identification process. Journalists were then allowed to continue reporting. This process was implemented in response to media concerns expressed last year about the time it took to identify and release journalists. Following feedback from media, and in light of a recent temporary restraining order (TRO) filed in federal court, MSP will not photograph journalists or their credentials. However, troopers will continue to check credentials so media will not be detained any longer than is necessary." The statement is available online at https://content.govdelivery.com/accounts/MNDPS/bulletins/2cd922e, and the temporary restraining order is available online at https://www.aclu-mn.org/sites/default/files/field_documents/goyette_tro_granted.pdf.

(For more information on the temporary restraining order, see "Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order," in the Winter/Spring 2021 issue of the Silha *Bulletin*.)

Minnesota Supreme Court Allows Warrantless Search of Cloud Storage

On Aug. 24, 2022, in an opinion written by Justice Anne McKeig, the Minnesota Supreme Court held that a warrantless search of a defendant's personal online cloud storage did not violate the Fourth Amendment "because the search by law enforcement officers did not exceed the scope of the private search performed by an employee of the online cloud storage account company." *State v. Pauli*, No. A19-1887 (Minn. Aug. 24, 2022).

The case arose after defendant Tyler Ray Pauli was charged with four counts of possession of pornographic work involving minors. Pauli used a personal cloud storage account with private company Dropbox. Dropbox's terms of service state that the company may disclose user information to law enforcement to "comply with the law." In October 2016, a Dropbox employee submitted a report of suspected child pornography possession to the National Center for Missing & Exploited Children, which in turn forwarded the report to the Minnesota Bureau of Criminal Apprehension (BCA). The BCA confirmed that the images contained child pornography and connected the email address associated with the account to Pauli. The BCA then filed a warrant to search the entirety of Pauli's Dropbox account, and a district court judge approved the warrant.

Pauli argued that the initial law enforcement search of images from his Dropbox account, before the warrant was served, violated his rights under the Fourth Amendment.

McKeig rejected this argument under the private search doctrine. Though the Fourth Amendment bars unreasonable searches and seizures, this protection is "intended as a restraint on the activities of the government, not the actions of private parties," she wrote. Even if Pauli did have a reasonable expectation of privacy in his Dropbox account, the initial search of his account was conducted by a Dropbox employee. Because the BCA performed the same search — and waited for a warrant to conduct more extensive surveillance — McKeig wrote that the search was not barred by the Fourth Amendment. The full opinion is available online at: https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Standard%20Opinions/OPA191886-082422.pdf.

In April 2021, the Electronic Frontier Foundation, the ACLU, and the Minnesota ACLU submitted an *amicus* brief arguing that Dropbox's terms of service could not defeat its users' reasonable expectations of privacy. "While a [terms of service] may govern the relationship between the provider and the user, such form contracts cannot extinguish a user's constitutional rights as against the government," the brief stated. The *amicus* brief is available online at: https://www.eff.org/document/state-v-pauli-minnesota-supreme-court-eff-aclu-amicus-brief.

— Samantha Brunn
Silha Center Research Assistant

Robert Corn-Revere to Deliver 37th Annual Silha Lecture: "Inherit the *What*? Banning Books in 2022"

SILHA CENTER EVENTS

The award-winning play and film *Inherit the Wind* immortalized the Scopes "monkey trial" of 1925, one of the first to be called "the trial of the century." That case involved Tennessee's ban on teaching the theory of evolution in public schools — particularly a biology textbook that accepted it as established fact.

But contrary to the assumption that book bans are relics of the distant past, they have enjoyed a banner year in 2022 as the broader culture war sparks fierce battles across the country over purging books from schools, libraries, and even bookstores. According to the literary and free expression advocacy organization PEN America, censorship in schools has risen rapidly in the past nine months. On its website, PEN America posts an Index of School Book Bans with more than 1500 entries. (The Index is available online at: https://docs.google.com/spreadsheets/d/1hTs_PB7KuTMBtNMESFEGuK-0abzhNxVv4tgpI5-iKe8/edit#gid=1171606318.) What are the First Amendment implications of these hotly contested battles? And how do we, as a society, maintain a culture of free expression in highly polarized times?

On Tuesday, Oct. 25, 2022, the Silha Center for the Study of Media Ethics and Law will present the 37th Annual Silha Lecture, "Inherit the *What*? Banning Books in 2022." Robert Corn-Revere, a First Amendment expert and partner at Davis Wright Tremaine LLP in Washington, D.C., whose career as a free speech advocate for media, communication, and information technology clients has spanned nearly forty years, will deliver the Lecture. A former journalist as well as a former Federal Communications Commission official, he has successfully argued cases in every federal appellate court as well as the U.S. Supreme Court on issues ranging from content and commercial speech regulation, newsgathering issues, and speech restrictions.

Corn-Revere recently represented booksellers in a case challenging a Virginia law that allowed citizens to ask a state court to declare books to be obscene and to limit their distribution. A candidate for the House of Representatives had filed petitions under the law seeking an obscenity finding for two books: Maia Kobabe's *Gender Queer: A Memoir* and Sarah Maas' *A Court of Mist and Fury*. On August 30, 2022, Virginia Beach Circuit Court Judge Pamela Baskervill dismissed the petitions and ruled that the Virginia law is unconstitutional. Some of Corn-Revere's other landmark cases include *United States v. Playboy Entertainment Group, Inc.* and *United States v. Stevens*. In 2003, he obtained a posthumous pardon for the comedian Lenny Bruce from then-New York Governor George Pataki, the first such pardon in New York history. Corn-Revere's work in First Amendment law, entertainment law, advertising law, and media law has been recognized by organizations such as Best Lawyers, Chambers USA, and Thomson Reuters.

Corn-Revere is coauthor of a three-volume treatise titled *Modern Communications Law*, published by West Publishing Company, and is editor and coauthor of the book *Rationales & Rationalizations*, published in 1997. His latest book, *The Mind of the Censor and the Eye of the Beholder – The First Amendment and the Censor's Dilemma*, was published by Cambridge University Press at the end of 2021. Copies of *The Mind of the Censor and the Eye of the Beholder* will be available for purchase following the Lecture.

This will be Corn-Revere's second appearance in the Silha Lecture series. In 2007, Corn-Revere delivered the 22nd Annual Silha Lecture: "The Kids Are All Right: Violent Media, Free Expression, and the Drive to Regulate." A video of that Lecture is available online at: https://www.youtube.com/watch?v=VsO5TSgdgk4.

The 37th Annual Silha Lecture is sponsored by the Silha Center for the Study of Media Ethics and Law. Covid restrictions permitting, the Lecture will take place live at Cowles Auditorium, 301 19th Avenue South, Minneapolis, MN 55455 (located at the Humphrey School Conference Center), on Tuesday, Oct. 25, 2022, beginning at 7:00 p.m. CDT. It will also be livestreamed. The Lecture is free and open to the public with no tickets required. However, registration for the livestream version is required. Registration is available at: https://z.umn.edu/2022SilhaLecture_register.

Silha Center activities, including the annual Silha Lecture, are made possible by a generous endowment from the late Otto and Helen Silha. For further information, please contact the Silha Center at 612-625-3421 or silha@umn.edu, or visit the Silha website at www.silha.umn.edu.

— Elaine Hargrove
Silha Center Staff

The Silha Center for the Study of Media Ethics and Law was established in 1984 with an endowment from Otto and Helen Silha.
Located in the Hubbard School of Journalism and Mass Communication at the University of Minnesota, Twin Cities, the Silha Center is the vanguard of the School's interest in the ethical responsibilities and legal rights of the mass media in a democratic society.

The Center focuses on the concepts and values that define the highest ideals of American journalism: freedom and fairness.
It honors the importance of these ideals by examining their theoretical and practical applications and by recognizing the interdependence of ethical and legal principles.

Inherit The What? Banning Books in 2022

37TH ANNUAL SILHA LECTURE

Inherit the Wind immortalized the 1925 "Scopes Monkey Trial." One of the first to be called the "trial of the century," the case involved Tennessee's ban on teaching Charles Darwin's theory of evolution in public schools.

Many Americans believed book bans were a relic of the distant past, yet 2022 turned out to be a banner year for banning, as the broader culture war sparked fierce battles across the country about purging books from schools, libraries and even bookstores.

What are the First Amendment implications of these hotly contested battles? And how do we as a society maintain a culture of free expression in highly polarized times?

Robert Corn-Revere's career as a free speech advocate has spanned nearly 40 years. His latest book, *The Mind of the Censor and the Eye of the Beholder—The First Amendment and the Censor's Dilemma,* was released by Cambridge University Press in 2021. ***For more information, visit https://z.umn.edu/2022SilhaLecture.***

ROBERT CORN-REVERE

FIRST AMENDMENT EXPERT AND **PARTNER, DAVIS WRIGHT TREMAINE LLP, WASHINGTON, D.C.**

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Mailing Address:
111 Murphy Hall/206 Church Street SE
Minneapolis, MN 55455
silha@umn.edu
www.silha.umn.edu
(612) 625-3421