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Journalists Face Potential Threats in President-elect Trump's Second Term

Since at least 2017, Donald Trump has labeled the press as "the enemy of the American people," echoing the words of the dictator Joseph Stalin, who used the phrase to characterize various oppositional forces in the Soviet Union. As *Salon* reported on Oct. 24, 2024, Trump continued to refer to the press this way throughout the 2024 campaign. Whether he recognizes the historical significance of his words or not, Trump's use of the epithet nevertheless suggests that journalists may face grave threats during his second term. The *Salon* article is available online at: https://www.salon.com/2024/10/24/enemy-of-the-people-press-at-arizona-rally/.

These threats may come in many forms. One is the possibility that journalists may be subject to invasive subpoenas, threatening the confidentiality of their sources and chilling their ability to gather news. David Remnick, editor in chief of *The New Yorker*, wrote in a Nov. 30, 2024, op-ed, "[m]edia lawyers now fear that Trump will ramp up the deployment of subpoenas, specious lawsuits, court orders, and search warrants to seize reporters' notes, devices, and source materials." *The New Yorker* piece is available online at: https://www.newyorker.com/magazine/2024/12/09/stopping-the-press.

As Remnick noted, most states grant journalists certain privileges to withhold information about confidential sources from compelled production. However, there is no federal reporters' privilege. A law that would create a federal privilege, known as the Protect Reporters from Exploitative State Spying (PRESS) Act was proposed in 2023. The PRESS Act unanimously passed the House of Representatives in January 2024. In a press statement following the bill's passage in the house, sponsor Jamie Raskin (D-Md.) stated "House passage of the PRESS Act in a unanimous vote moves America closer to establishing our first federal press shield law ever. The PRESS Act will greatly strengthen the meaning of the constitutional promise of press freedom. This awesome bipartisan vote at a time of party polarization underscores the binding power and universal appeal of freedom of the press as a leading constitutional principle. This is a significant victory for the people and our First Amendment values." Rep. Raskin's statement is available online at: https://raskin.house.gov/2024/1/raskin-kiley-s-bipartisan-press-act-unanimously-passes-house-of-representatives. For more information on the PRESS Act, see "'Protect Reporters From Exploitative State Spying (PRESS)' Act Awaits Senate Action, Again, After Unanimous Passage in the House" in the Winter/Spring 2024 issue of the Silha *Bulletin*.

As *Slate* reported, the PRESS Act would not only prevent federal investigators from subpoenaing journalists to identify confidential sources, but it would also prevent them from subpoenaing "electronic middlemen," such as phone and internet providers whose stored communications might also be able to identify journalists' sources. The Act would codify an order issued by the current Attorney General Merrick Garland in 2022 that barred the Department of Justice (DOJ) from seizing reporters' records. According to *The New York Times*, Garland issued a preliminary version of the order in 2021 after it was revealed that the DOJ under President Trump and Attorney General William Barr "had secretly pursued email records of reporters at The New York Times, The Washington Post and CNN." Speaking about the policy in 2022, Garland stated: "These regulations recognize the crucial role that a free and independent press plays in our democracy. Because freedom of the press requires that members of the news media have the freedom to investigate and report the news, the new regulations are intended to provide enhanced protection to members of the news media from certain law enforcement tools and actions that might unreasonably impair news gathering." *The New York Times* report on Garland's order is available online at: https://www.nytimes.com/2022/10/26/us/politics/justice-department-reporters.html. For more information on Garland's order, see "U.S. Department of Justice Limits Seizure of Journalists' Records and Information" in the Summer 2021 issue of the Silha *Bulletin*.

However, as *Slate* reported, despite the PRESS Act's bipartisan support in January 2024, the bill's chances of becoming law have since dimmed. First, President-elect Trump has come out in strident opposition to the measure. On Nov. 20, 2024, he posted in all caps on Truth Social, "REPUBLICANS MUST KILL THIS BILL," referring to the PRESS Act. The Senate will be busy in the weeks before the New Year confirming the last of President Biden's judicial picks, a process that has been slowed by Republicans' forcing of roll call votes on every selection. Because the bill did not pass before January, it will have to be reintroduced in the next

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session, in which case it would fall to a Republican majority Senate. In addition, the new attorney general will have the power to decide whether to continue with the policy instituted by Garland. At the time the *Bulletin* went to press, Trump had selected former Florida Attorney General Pam Bondi to be his nominee for United States attorney general. The *Slate* report is available online at: https://slate.com/business/2024/11/press-act-journalist-media-protections-trump-administration.html.

Given these facts, journalism advocacy groups had urged the Senate to vote on the PRESS Act before Trump takes office. The Freedom of the Press Foundation called the bill "the most important press freedom legislation in modern history," and urged readers of the organization's newsletter to contact their congressperson and support the Act "before time runs out." In a statement for Reporters Without Borders (RSF), the organization's Executive Director in the U.S. said: "Senate Democrats have had numerous opportunities this year to pass the PRESS Act after the House led the way by passing it unanimously. Now, as Donald Trump prepares to take office, they may never get another chance to enact this commonsense reform. Enough is enough. The Senate has dragged its feet for far too long — it's time to pass the PRESS Act and enshrine these vital protections for the journalism our republic depends on." And in an October 8 letter to the House and Senate, a diverse group of journalism organizations including the *Associated Press* (*AP)*, *Bloomberg*, *Fox News*, and *The New York Times*, led by the Reporters Committee for the Freedom of the Press, wrote that the PRESS Act's protections "reflect the reality that the press cannot fulfill its constitutionally recognized watchdog role without some safeguard for confidential source identities and sensitive newsgathering material. Congress must step in to provide a durable shield at the federal level." The Freedom of the Press Foundation report is available online at: https://freedom.press/issues/clock-is-ticking-for-press-act/. RSF's statement is available online at: https://rsf.org/en/usa-senate-must-pass-press-act-end-congress. The letter to congressional leaders is available online at: https://cpj.org/wp-content/uploads/2024/10/2024-10-08-Senate-PRESS-Act-letter.pdf.

COVER STORY

On Dec. 10, 2024, the Senate failed to pass the PRESS Act by unanimous consent. Under a unanimous consent request, the Senate can pass legislation if no senators object. However, Sen. Tom Cotton (R-Ark.) blocked the Act's passage. According to a report by the international U.S. broadcasting network *Voice of America* (*VOA*), Cotton made a speech on the Senate floor in opposition to the Act, stating: "Passage of this bill would turn the United States Senate into the active accomplice of deep-state leakers, traitors and criminals, along with the America-hating and fame-hungry journalists who help them out." Cotton further added, "[c]ontrary to what members of the press may think, a press badge doesn't make you better than the rest of America." In response to Cotton's speech, Sen. Ron Wyden (D-Ore.) stated, "I understand that we don't have unanimous consent today. I think it's unfortunate. I think America would be stronger and freer if we were passing this legislation today. But we'll be back. . . . This is about as important as it gets. Free speech is fundamental to what makes our country so special." According to *VOA*, the only way now for the PRESS Act to pass the Senate is if it is attached to a year-end spending bill or brought up for a standalone vote. Free speech advocates once again urged action. "We need more than speeches about the PRESS Act's importance. We need action. Senate Democrats had all year to move this bipartisan bill, and now time is running out," stated Seth Stern, advocacy director for the Freedom of the Press Foundation. The *VOA* report is available at: https://www.voanews.com/a/bill-to-protect-journalists-fails-in-senate/7897008.html.

On the same day that the Senate failed to pass the PRESS Act by unanimous consent, the DOJ's Office of the Inspector General released a report highlighting the importance of the Act's protections. The Inspector General is an in-house government watchdog that conducts internal investigations to make sure the DOJ is complying with its own policies. According to *The Washington Post*, the report detailed the DOJ's efforts during the first Trump administration to uncover the sources of leaked classified information that was reported by various news outlets in 2017. The leaked information primarily concerned communications between Trump aides and Russia. The Report revealed that, during three different investigations into the source of leaks to the news media, the DOJ failed to adhere to its own policies in seizing the emails and phone records of reporters, often bypassing important steps in a process designed to ensure that DOJ investigations respect First Amendment rights. The Inspector General wrote about the failures: "Given the important interests at stake, we were troubled that these failures occurred, particularly given that only a few years had elapsed since the Department substantially overhauled its News Media Policy in 2014 and 2015 following serious criticisms concerning the Department's efforts to obtain communications records of members of the news media. Having once again revised its News Media Policy to address this most recent criticism, the Department must make every effort to ensure full and exacting compliance with its new policy in the future." The *Washington Post* report is available online at: https://www.washingtonpost.com/national-security/2024/12/10/justice-department-communications-seizures-inspector-general/. The full Inspector General Report is available online at: https://oig.justice.gov/reports/review-department-justices-issuance-compulsory-process-obtain-records-members-congress.

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Another potential threat to journalists posed by a second Trump term is the possibility that the president will appoint Supreme Court justices who will strip away protections that shield journalists from libel claims.

Dating back to his 2016 campaign for president, Trump has criticized the Constitutional protections libel laws afford journalists sued by public figures. According to *Politico*, when

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Trump was first running for president in 2016, he pledged to revamp the country's libel laws, at one point saying: "One of the things I'm going to do if I win . . . . I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected." Trump reiterated this position in 2018, calling the country's libel laws a "sham" and a "disgrace," as a second *Politico* report noted. He further added, "We are going to take a strong look at our country's libel laws so that when somebody says something that is false and defamatory about someone, that person will have meaningful recourse in our courts. And if somebody says something that's totally false and knowingly false, that the person that has been abused, defamed, libeled, will have meaningful recourse." The *Politico* report on Trump's 2016 comments is available online at: https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866. The *Politico* report on Trump's 2018 comments is available online at: https://www.politico.com/story/2018/01/10/trump-libel-laws-2018-333705.

Despite his pronouncements, Trump cannot unilaterally change the country's libel laws. Libel law in most circumstances is a state, not federal, issue, except in specific circumstances as recognized by the U.S. Supreme Court. For example, the higher standard of proof for public figures to prevail in libel cases is the product of a 1964 Supreme Court case, *New York Times Co. v. Sullivan*. 376 U.S. 245 (1964). In *Sullivan*, the Court held unanimously that, in addition to proving the elements of defamation, the First Amendment requires public figures to prove that defendants acted with "actual malice," meaning they knew a statement was false or acted with reckless disregard as to whether a statement was false. The Court stated that this heightened protection was necessary to preserve debate about important civic issues, writing "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive."

Though this precedent has proven durable for over half a century, two Supreme Court justices have recently suggested that they think the Court should reconsider *Sullivan*. Clarence Thomas was the first when, in 2019, he characterized *Sullivan* as a "policy-driven decision[] masquerading as constitutional law." In Thomas's view, the standard set out by the Court in *Sullivan*, which balanced the "competing values at stake in defamation suits," is not true to the original meaning of the First Amendment. Thomas further wrote: We should not continue to reflexively apply this policy driven approach to the Constitution. . . . If the Constitution does not require public figures to satisfy an actual-malice standard in state-law defamation suits, then neither should we." In 2021, Justice Neil Gorsuch, a Trump appointee to the Supreme Court, joined Thomas in calling for a reevaluation of the "actual malice" rule, arguing that the "momentous changes in the Nation's media landscape since 1964" have made it "less clear" whether "*Sullivan* and all its various extensions serve its intended goals in today's changed world." Justice Thomas's statement is available online at: https://www.supremecourt.gov/opinions/18pdf/17-1542_ihdk.pdf. Justice Gorsuch's statement is available online at: https://www.law.cornell.edu/supremecourt/text/20-1063. For more information on Justices Thomas and Gorsuch's writings on *Sullivan*, see "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 of the Silha *Bulletin*.

As David Remnick wrote in his op-ed for *The New Yorker*, the prospect of Trump appointed justices changing the *Sullivan* "actual malice" standard is a "longer-range worry." But given Trump's antipathy toward the press, and his longstanding belief that libel laws should be weakened, a willingness to alter the "actual malice" rule may be a criterion he uses in considering nominees to the Supreme Court.

A final and more amorphous, though nonetheless serious, threat posed to journalists by a second Trump term is the risk that they will be prosecuted or subjected to violence for their reporting. Various legal impediments would stand in the way of any attempts by the Trump administration to physically harm journalists. However, this has not stopped Trump and his allies from paying rhetorical lip service to the idea.

For example, on Oct. 23, 2022, *Rolling Stone* reported on a Trump rally where the then-former president addressed the leaking of the Supreme Court decision that would eventually overturn *Roe v. Wade*. Trump stated that a way to force journalists who reported leaks to reveal their sources would be to threaten them with jail time. According to a second *Rolling Stone* report from Nov. 8, 2022, Trump reportedly spoke with advisors about whether it would be possible to imprison journalists during a second term. According to *Rolling Stone*'s source, who was present for Trump's conversation with aides, "[Trump] said other countries [imprison journalists] — the implication being: Well, why not here?" The *Rolling Stone* report on Trump's rally comments is available online at: https://www.rollingstone.com/politics/politics-news/trump-threatens-journalists-prison-rape-1234616603/. The *Rolling Stone* report on Trump's conversation with aides is available online at: https://www.rollingstone.com/politics/politics-news/trump-imagines-journalists-raped-prison-1234626493/.

Members of Trump's circle, including some who may occupy important positions during a second term, have also floated the idea of trying to jail journalists. On Nov. 30, 2024, Trump announced his pick for director of the FBI, Kash Patel. Patel, a strident Trump loyalist, has, according to *The New York Times*, vowed to investigate and prosecute journalists and members of the media who have been critical of Trump. Patel made the remarks on former Trump advisor Steve Bannon's podcast. In the episode, which is from late 2023, Bannon asked Patel: "Do you feel highly confident that when you go back as a senior member of President Trump's administration [in 2025] . . . . that you will be able to deliver the goods that we can have serious prosecutions and accountability?" Before Katel could answer, Bannon added "I want the

morning show producers that watch us [to know] . . . this is just not rhetoric. We are absolutely dead serious." Katel then answered: "Yes . . . . We will go out and find the conspirators, not just in government, but in the media. Yes, we're going to come after the people in the media . . . who helped Joe Biden rig presidential elections. We're going to come after you — whether it's criminally or civilly we'll figure that out." Steve Bannon's interview with Patel is available online at: https://rumble.com/v3zrlia-patel-were-gonna-use-the-constitution-to-prosecute-those-destroying-the-rep.html.

As the Foundation for Individual Rights and Expression (FIRE) documented in a report on Patel, these are not his only remarks denigrating the press. In his 2023 book *Government Gangster*, he wrote: "[T]he media is not just one-sided, but liars. . . . What exactly is the 'Deep State' that I speak of? Some of the characters . . . are elected leaders. Others are yellow journalists in the media who serve as peddlers of propaganda and disinformation at the behest of the ruling elites." At a speaking engagement in 2023, Patel said: "We [must] collectively join forces to take on the most powerful enemy that the United States has ever seen, and no it's not Washington, D.C., it's the mainstream media and these people out there in the fake news. That is our mission!"

Writing for FIRE, Silha Center Director and Professor of Media Ethics and Law Jane Kirtley detailed the dangers posed by Patel's potential nomination. "If Kash Patel becomes the director of the FBI, it will mark the apotheosis of the concerted attack on the independent media which has been brewing for more than 20 years. Vengeance and retribution will be the order of the day, and without the PRESS Act, coupled with the likely repeal of Merrick Garland's DOJ's regulations on obtaining information from the news media, we will be back in the maelstrom of the Nixon administration's surveillance of journalists. In addition to direct attacks on media entities and individual reporters who challenge the Trump administration, we can expect bogus, but rigorous, investigations and prosecutions not only of leakers, but of the recipients of those leaks." Kirtley added that now is not the time for the news media to be "complacent, much less compliant." She urged the press to "shout from the rooftops" that Patel and Trump's threatened actions are unconstitutional." "The survival of a free press is essential to everyone in our democracy," she concluded. The FIRE report is available online at: https://www.thefire.org/news/blogs/ronald-kl-collins-first-amendment-news/trumps-fbi-director-pick-kash-patel-clear-and.

The current FBI director Christopher Wray's term lasts through 2027, although Wray announced his intention to resign on Dec. 11, 2024. Trump would have to fire Wray to nominate Patel, a move that, although within his power, would break with custom. In 1976, in the aftermath of Watergate, Congress passed a law setting the length of terms for FBI directors at ten years, and limiting the number of terms a director may serve to one. The legislation was part of an effort to insulate the agency from political pressure. According to some, Trump's decision to announce Patel as his pick signals that he would remove Wray from his post. "This is firing the F.B.I. director," stated one anonymous law enforcement officer to *The New York Times*, in reference to Patel's selection. *The Times* report is available online at: https://www.nytimes.com/2024/11/30/us/politics/trump-replace-christopher-wray.html.

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>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

It remains to be seen whether and how Trump and Patel will carry out their threats to imprison journalists. Legal safeguards stand in the way. However, as the journalist Jon Allsop wrote in the *Columbia Journalism Review* (*CJR*) of Patel's threats: "There may yet prove to be a gulf between Bannon-adjacent podcast bloviating and what Patel would be prepared — or, perhaps more pertinently, *able* — to do in practice. But his pledge to 'go out and find the conspirators, not just in government but in the media,' is so overt that it demands to be taken seriously." The *CJR* piece is available online at: https://www.cjr.org/the_media_today/fbi_trump_patel_journalists.php.

Finally, some commentators have argued that, whether or not Trump has the legal power to imprison journalists, his dark rhetoric and denunciations of the press endanger journalists by making them targets for violence. Indeed, Trump himself has at times joked about subjecting reporters to violence. For example, as was recounted in the earlier cited *Rolling Stone* report from Oct. 23, 2024, after Trump suggested that journalists should be threatened with jail, he seemed to imply that the threat of prison rape could be used to make journalists reveal their confidential sources. He stated: "[Journalists are] going to jail. And when this person realizes that he is going to be the bride of another prisoner very shortly, he will say, 'I'd very much like to tell you exactly who that leaker [is]. It was Bill Jones, I swear, he's the leaker.' And we got him. But they don't want to do that." More recently, as *The Atlantic* reported on Nov. 3, 2024, after describing the bulletproof glass that surrounded his podium at a rally, Trump stated, "[t]o get me, somebody would have to shoot through the fake news, and I don't mind that so much." *The Atlantic* article is available online at: https://www.removepaywall.com/search?url=https://www.theatlantic.com/politics/archive/2024/11/trump-fantasizes-about-reporters-being-shot/680514/.

Whereas some characterize Trumps' suggestions that journalists should be subject to violence as bluster that he does not really mean, other commentators worry that he is serious — and worse, that his supporters take him seriously. As *The Atlantic* noted, after Trump's statement about not minding if the media were shot, "[t]he crowd whooped and clapped." As Reporters Without Borders (RSF) stated in an Oct. 25, 2024, report on Trump's threats to the media, "[Trump's] diatribes against the press have grown more threatening and increasingly encourage audience participation, potentially increasing the possibility of a violent confrontation between his political supporters and the media." RSF's U.S. executive director gave the following warning about Trump's threats to journalists:

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"Trump's tirades against the press have become so commonplace that we risk not even noticing them anymore. But the regularity of Trump's abuse only adds to the urgency to call them out. The dangers of growing numb to Trump's attacks on the media cannot be overstated — what starts as a verbal insult can easily turn into something far more serious if left unchecked. RSF is deeply concerned that violent rhetoric can easily lead to violent actions." The RSF report is available online at: https://rsf.org/en/usa-trump-verbally-attacked-media-more-100-times-run-election.

For further information about former President Trump's interactions with the press, see the following selected *Bulletin* stories: "Former President Donald Trump Involved in Lawsuits Regarding Access, Copyright, and Defamation" in the Winter/Spring 2023 issue of the Silha *Bulletin*; *Trump Countersues for Anti-SLAPP Violation* in "Three Defamation Cases Against Former President Donald Trump Continue to Play Out in Courts" in the Summer 2023 issue; *Trump Campaign*, *Allies*, *Paint a Picture of a Vengeful Second Administration If Elected*, *Particularly Toward the Press* in "Former President Donald Trump's Defamation Cases Persist Amid Campaign, Criminal Charges" in the Fall 2023 issue; "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" in the Fall 2020 issue; *White House Excludes CNN from Media Session with President Trump* in "U.S. Senate and Trump Administration Impose Restrictions on Media Access" and *United States and China Engage in "Media War" Amidst COVID-19 Pandemic* and *President Trump Calls for DOJ Investigation into News Media for Market Manipulation*, *Continues Anti-Press Rhetoric and Actions and COVID-19 Pandemic Raises New Concerns About Misinformation Online* in "Special Report: COVID-19 Pandemic Raises Media Law and Ethics Issues, Challenges, and Opportunities" in the Winter/Spring 2020 issue; "President Trump's Campaign Demands CNN Retract and Apologize for Poll, but Network Decline" and "D.C. Circuit Affirms Ruling Requiring White House to Return White House Reporter's Press Credential" in the Summer 2020 issue; "Letter Sent on Behalf of President Trump Threatens Legal Action Against CNN, Prompting Criticism" and "Federal Judge Orders White House to Reinstate Reporter's Press Credential" in the Fall 2019 issue; "Second Circuit Rules President Trump Violated the First Amendment By Blocking Twitter Users" and "White House Revokes and Suspends Hard Press Passes Under New Rules" in the Summer 2019 issue; *PEN America Files First Amendment Lawsuit Against President Trump*, *Alleges He Retaliated Against Media Outlets and Journalists* in "President Trump Prevails in Two Federal Courts' First Amendment Rulings, Faces New First Amendment Lawsuit" and *President Trump Calls CNN Reporter "Rude, Terrible Person," Revokes His Press Credentials; Federal Judge Requires Trump Administration Reinstate Credentials* in "President Trump Continues Anti-Press Rhetoric and Actions" and "President Trump Continues Anti-Press Rhetoric and Actions" and "Journalists in the United States and Abroad Face Threats of Violence and Incarceration" and The New York Times *Publishes Op-Ed by Senior Trump Administration Official*, *Drawing Criticism from President Trump and Some Observers* in "President Trump Continues Anti-Press Rhetoric and Actions" and "Trump Administration Threatens Regulation of Social Media Companies and Google for Alleged Political Bias" in the Fall 2018 issue in the Fall 2018 issue; *Book About the Trump Administration's White House Raises Ethical and Legal Questions* in "The Ethics of Covering President Donald Trump" in the Winter/Spring 2018 issue; *Federal Judge Rules President Trump Cannot Block Twitter Users*, *Violated First Amendment* in "Federal Courts and State Governors Deal with First Amendment Implications of Politicians Blocking Social Media Users" and *Five Newspaper Staff Members Killed*, *Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Physical Violence, Other Dangers in the United States and Abroad," and *Federal Prosecutors Seize Phone and Email Records of* New York Times *Reporter in Leak Investigation* in "Trump Administration Targets Journalist, Leaker of Government Information, and Former Government Employees Who Took Classified Documents," in the Summer 2018 issue; "Media Face Several Challenges During President Trump's First Months in Office" in the Winter/Spring 2017 issue; "Reporters and Leakers of Classified Documents Targeted by President Trump and the DOJ" and "President Trump and his Administration Spark Debate Over Several Media Law Issues" and *West Virginia Journalist Arrested and FCC Commissioner Apologizes for Treatment of Reporter* in "Journalists Face Physical Restraints and Arrests; Trump Video Raises Further Concerns About Violence Against the Media" in the Summer 2017 issue; "2016 Presidential Candidates Present Challenges for Free Expression" and *Trump Alleges News Organizations Deliberately Print False News*, *Suggests Changes in Libel Laws* and Washington Post *Joins Several Organizations that Trump Bars from Covering Campaign Events* and *Observers Suggest Either Outcome of 2016 Election Could Be Troublesome for the Press* in "2016 Presidential Candidates Present Challenges for Free Expression" in the Summer 2016 issue.

"Trump's tirades against the press have become so commonplace that we risk not even noticing them anymore. But the regularity of Trump's abuse only adds to the urgency to call them out. The dangers of growing numb to Trump's attacks on the media cannot be overstated — what starts as a verbal insult can easily turn into something far more serious if left unchecked."

— Reporters Without Borders statement

— Stuart Levesque
Silha *Bulletin* Editor

Donald Trump Threatens Media Companies with Business and Legal Consequences

In the waning days of his 2024 campaign for president, Donald Trump escalated his rhetoric against the news media, threatening to "prosecute" tech companies, revoke the licenses of news organizations whose coverage displeased him, and to sue those same organizations for defamation.

TRUMP AND THE MEDIA

Trump's Threats to Sue News Organizations

On Nov. 14, 2024, the *Columbia Journalism Review* (*CJR*) reported that Donald Trump's attorney had sent a letter to *The New York Times* and Penguin Random House on Oct. 31, 2024, demanding $10 billion in damages over "false and defamatory statements," contained in articles published by the paper. The letter singled out *Times* stories such as "For Trump, a Lifetime of Scandals Heads Toward a Moment of Judgment," and "As Election Nears, Kelly Warns Trump Would Rule Like a Dictator." It also identified stories related to a book published by *Times* reporters Susanne Craig and Russ Buettner, *Lucky Loser: How Donald Trump Squandered His Father's Fortune and Created the Illusion of Success*.

The letter, which was reviewed by *CJR*, stated, "[t]here was a time, long ago, when the New York Times was considered the 'newspaper of record." However, the letter noted, "[t]hose halcyon days have passed." It further accused *The Times* of being "a full-throated mouthpiece of the Democratic Party" that engages in "industrial-scale libel against political opponents." *The Times* responded the same day and stated that it stood by its reporting.

The letter claimed that *The Times* reporting had "harm[ed]" the value of Trump Media — Trump's company that runs Truth Social — stating that, if not for *The Times* reporting, "the stock would likely be even higher now than it is." It further alleged that *The Times* had "every intention of defaming and disparaging the world-renowned Trump brand that consumers have long associated with excellence, luxury, and success in entertainment, hospitality, and real estate, among many other industries, as well as falsely and maliciously defaming and disparaging him as a candidate for the highest office in the United States."

Also on October 31, Trump sued *CBS News* for $10 billion, alleging that the network's *60 Minutes* program had misleadingly edited its interview with Kamala Harris to help her candidacy. The lawsuit was filed in the United States District Court for the Northern District of Texas in Amarillo. The Amarillo division of the Northern District of Texas has only one judge: Matthew J. Kacsmaryk, an outspoken conservative who was appointed by Trump during his first term and who has often shown sympathy for conservative legal causes. As the legal news site *Legal Dive* noted in a report on the suit, litigants are generally required to show that there is a "factual nexus" between their case and the jurisdiction they wish to litigate in. This requirement typically prevents what is called "forum shopping," a practice in which litigants try to ensure that their case is heard by a favorable judge. Although Trump is a Florida resident, and CBS is based in New York, Trump's lawyer argued that it is proper to have the case heard in Texas because "the Interview [was] transmitted by CBS into [the Northern District of Texas] (and elsewhere)." The complaint also stated that the interview "damaged President Trump's fundraising and support values by several billions of dollars, particularly in Texas." The *Legal Dive* report is available online at: https://www.legaldive.com/news/trump-lawsuit-cbs-60-minutes-editing-judge-shopping-Kacsmaryk/732071/. For more information on the controversy surrounding Vice President Harris's appearance on *60 Minutes*, see "Trump Accuses *60 Minutes* of Deceptive Editing, Prompting Journalism Ethics Questions" on page 18 of this issue of the Silha *Bulletin*.

Forum shopping can have damaging consequences for defendants. Even though they have a right to an appeal in which they may receive a more favorable outcome, frivolous lawsuits impose costs on defendants by forcing them to pay legal fees and endure burdensome discovery. As the *CJR* report noted, "litigation is costly and time-consuming." Further, Trump has proved himself not to be above bringing frivolous lawsuits. In 2005, author Tim O'Brien published *TrumpNation: The Art of Being the Donald*, which argued that Trump was not a billionaire as he claimed but was in fact worth between $150 and $250 million. Trump subsequently sued O'Brien for libel seeking $5 billion in damages. The lawsuit was dismissed, and O'Brien won on appeal. However, according to *CJR*, after the lawsuit, Trump stated that he "spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make [O'Brien's] life miserable, which I'm happy about."

The problem is potentially exacerbated by the absence of a federal anti-SLAPP law. SLAPP stands for strategic lawsuits against public participation. Anti-SLAPP laws provide a mechanism to dismiss frivolous lawsuits that are aimed at chilling speech, thereby saving defendants from being subjected to the costs and long-haul of spurious litigation. These laws have proven effective at preventing the rich and powerful from overwhelming with expensive lawsuits individuals and journalism organizations whose speech displeases them. Indeed, Trump had previously sued Susanne Craig and Russ Buettner — the same reporters mentioned in the October 31 letter — in relation to a 2018 article on his family's wealth and tax practices. According to a Jan. 14, 2024, report from the *Associated Press* (*AP*), that lawsuit was dismissed under New York's anti-SLAPP law, and Trump was ordered to pay nearly $400,000 in legal fees. However, that was a state suit, whereas Trump's recent complaint against CBS news was filed in federal court, and there is no federal anti-SLAPP statute. The *AP* report is available online at: https://apnews.com/article/trump-new-york-times-taxes-lawsuit-slapp-f39342501d9a2a5cfd36181f9f336215. For more information on developments in anti-SLAPP legislation, see "Anti-SLAPP Legislation Update: Two More States Adopt the UPEPA's Model Statute" on page 28 of this issue of the Silha *Bulletin*.

As the *CJR* report noted, Trump's repeated legal threats against news organizations "signals a potentially ominous trend for journalists during Trump's second term in office." According to Anne Champion, a lawyer who has represented CNN, Jim Acosta, Mary Trump, and others sued by soon-to-be President Trump, "[i]t really has a mental chilling effect to be under a microscope like that." "It is both

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conscious and unconscious. Journalists at smaller outlets know very well that the costs for their organization to defend themselves could mean bankruptcy. Even journalists at larger outlets don't want to burden themselves or their employees with lawsuits. It puts another layer of influence into the journalistic process." The *CJR* report is available online at: https://www.cjr.org/the_trump_reader/trump-threatens-new-york-times-penguin-random-house-critical-coverage.php.

Trump Files Complaint with Federal Election Commission, Alleging *Washington Post* Aided Harris

The same day that Trump sent the letter to *The New York Times* and sued CBS, he also filed a complaint against *The Washington Post* with the Federal Election Commission (FEC). The complaint alleged that *The Post* had made illegal in-kind (non-monetary) donations to the Harris campaign. In the words of Trump's lawyer, *The Post* was "conducting a dark money corporate campaign in opposition to President Donald J. Trump."

The complaint stemmed from a story published on the news website *Semafor*. The article alleged that, after *The Post* lost hundreds of thousands of subscribers in the wake of its announcement that it would not endorse a presidential candidate, the paper tried to signal to readers that it was still anti-Trump by paying to boost articles related to the election on Facebook. The story noted that the "articles about Vice President Kamala Harris were relatively neutral in tone and focused on her "innovative digital strategy, her policy proposals, and her chances of winning next week," whereas the articles about Trump were largely critical, focusing on his misstatements, his low energy on the campaign trail, and his odd fixation with the fictional serial killer Hannibal Lecter. The story, which mixed reporting and editorial points of view, included the opinion of a *Semafor* staffer that *The Post*'s decision to advertise its articles was a "reaction to the massive subscriber departure following its non-endorsement decision." The staffer continued, "[i]nstead of using the opportunity to boost its tech or culture coverage, the paper leaned more into what it knows converts readers into subscribers: Its critical reporting and op-eds about the former president." The *Semafor* story is available online at: https://archive.is/zzFuz#selection-1343.414-1343.624. For more information on *The Washington Post's* decision not to endorse a presidential candidate, see "Billionaire Owners of *Los Angeles Times* and *Washington Post* Quash Presidential Endorsements, Raising Questions of Journalistic Independence" on page 14 of this issue of the Silha *Bulletin*.

Trump seized on the *Semafor* story in his complaint to the FEC. Under the Federal Election Campaign Act (FECA), corporations are prohibited from making in-kind contributions to political campaigns. So-called "coordinated communications" can constitute in-kind campaign contributions. A communication is "coordinated" when it is paid for by someone other than the campaign and satisfies certain content and conduct standards. Three distinct elements must be present for a communication to be considered a "coordinated communication" in violation of FECA.

According to Trump's complaint, all three prongs of the test were satisfied. *The Post* paid for the advertisements which satisfied prong one. Further, the advertisements were public communications that referenced clearly identifiable candidates, and therefore the content prong was satisfied. However, Trump also needed to prove the conduct prong, which required showing that the campaign was materially involved in the creation, production, or distribution of the communication, including its content. To prove this element, Trump pointed to a quote from one of *The Post's* articles about the Harris campaign in which a campaign worker said that the Harris team "create[s] the news." The full quote, which is not included in the complaint, was from Parker Butler, the leader of Harris's digital response team, which was tasked with watching Trump's speeches and creating content for social media about them. Butler stated, "[c]ampaigns are not just responding anymore. Our job is to create the news." Trump's complaint further cited that the articles boosted by *The Post* "include[d] multiple quotes with Harris campaign officials," as evidence that the paper had colluded with the Harris team. It also cited the fact that "[t]he content promoted by The Washington Post mirrors themes and issues highlighted by the Harris Campaign," concluding: "A reasonable inference is that the Harris team has communicated its messaging strategy to The Washington Post, and that that messaging strategy is reflected in what The Post chooses to promote." The complaint did not mention the fact that the stories *The Post* boosted about Trump also included quotes from members of his campaign team.

Notably, FECA has a press exemption that excludes costs "incurred in covering or carrying a news story, commentary, or editorial by any . . . newspaper," from being considered as in-kind campaign contributions. The press exemption does not require entities to be objective in their reporting or editorials. However, Trump argued that the press exemption did not apply to *The Post* because it was not "functioning within the scope of a legitimate press entity." Trump's complaint to the FEC is available online at: https://prod-static.gop.com/media/documents/DJTFP_Complaint_10-31-24_WaPo_Corporate_Contribution_1730472578.pdf.

In response to the allegations, a *Washington Post* spokesperson described them as "improper," and "without merit," and stressed that the type of advertising identified in the complaint was "routine" in the media business. "As part of The Washington Post's regular social media marketing strategy, promoted posts across social media platforms reflect high-performing content across all verticals and subjects," the spokesperson said.

A report on the complaint from *The Post* noted that one potential reason for the paper's increase in political ad buys could have been the fact that Meta, the parent company of Facebook, had announced that it was not accepting new ads related to the election for the week before election day. The ad buys were therefore, potentially, an attempt to boost *The Post's* content before the advertising window closed.

The Post also spoke with Harvard University Emeritus law professor Mark Tushnet, who has authored books on the First Amendment, about the complaint. He characterized the complaint as "ridiculous" and said the First Amendment would "almost certainly" protect *The Post* because the advertising was likely within the paper's "legitimate press function." The *Washington Post* report is available online at: https://www.washingtonpost.com/style/media/2024/11/01/donald-trump-campaign-violations-washington-post-advertising-fec-complaint/.

Trump's Threats to Prosecute Social Media Companies, Revoke Broadcasting Licenses, and Impede Media Mergers

On Sept. 27, 2024, Trump posted statements to Truth Social threatening

to "criminally prosecute" Google for manipulating its search algorithm to disfavor him. He wrote: "It has been determined that Google has illegally used a system of only revealing and displaying bad stories about Donald J. Trump, some made up for this purpose while, at the same time, only revealing good stories about Comrade Kamala Harris." And then: "This is an ILLEGAL ACTIVITY, and hopefully the Justice Department will criminally prosecute them for this blatant Interference of Elections. If not, and subject to the Laws of our Country, I will request their prosecution, at the maximum levels, when I win the Election, and become President of the United States!"

The New York Times reported that it was not immediately clear what motivated Trump to post the threats. Groups such as the Media Research Center (MRC), a conservative media advocacy group have previously argued that Google's search results favor Democrats. The MRC describes its mission as "document[ing] and combat[ing] the falsehoods and censorship of the news media, entertainment media and Big Tech in order to defend and preserve America's founding principles and Judeo-Christian values." Google has disputed that its search function favors either liberals or conservatives. A Google spokesperson stated in response to Trump's comments, "[b]oth campaign websites consistently appear at the top of search for relevant and common search queries." *The New York Times* report is available online at: https://www.nytimes.com/2024/09/27/us/politics/trump-google-prosecute.html. Information on the Media Rights Center is available online at: https://mrcfreespeechamerica.org/about.

According to a separate *Times* report published on Oct. 21, 2024, Trump lashed out at CBS for what he perceived as the network's bias in favor of Kamala Harris. On Oct. 17, 2024, Trump posted on Truth Social that "CBS SHOULD LOSE ITS LICENSE. THIS IS THE BIGGEST SCANDAL IN BROADCAST HISTORY." The post was made in response to the controversy over *60 Minutes'* editing of its interview with Kamala Harris. Trump added that Harris herself should be investigated, and that Joe Biden should be allowed to take back his place at the head of the Democratic party, calling the replacement of Biden by Harris a "SORDID AND FRAUDULENT EVENT" and a "THREAT TO DEMOCRACY." According to *The New York Times*, Trump later told *Fox News* in an interview that, "[w]e're going to subpoena [CBS's] records," in relation to the *60 Minutes* interview. Trump's accusations that CBS engaged in biased reporting were boosted by Nathan Simington, a conservative commissioner on the FCC. With respect to the allegations, Simington posted on X: "Interesting. . . . Big if true." Trump later shared a screenshot of Simington's post on Truth Social. *The Times* report is available online at: https://www.nytimes.com/2024/10/21/business/media/trump-media-broadcast-licenses.html. Trump's Truth Social post is available online at: https://truthsocial.com/@realDonaldTrump/posts/113323858833174216.

> "Broadcast licenses are a public trust. They're not a political toy . . . ."
>
> **— Tom Wheeler, FCC chair during Obama Administration**

Trump's recent criticisms are not the first time he has expressed his contempt for the news media, nor are they the first time he has ever threatened retribution for what he perceives as unfair coverage. In October 2017, during Trump's first term, *NBC News* reported on a July 2017 meeting between Trump and his national security advisors. The meeting took place amidst rising tensions between the United States and North Korea. Starting earlier in the year, North Korea had conducted a series of nuclear and missile tests. At the July meeting with Trump and his national security team, the then president reportedly said that he wanted to increase the nation's nuclear stockpile tenfold. The remark was apparently made in response to a briefing slide Trump was shown that depicted the steady reduction in U.S. nuclear armament since the 1960s. Trump's advisors were reportedly surprised by Trump's comments. *NBC News* further reported that, following the meeting, then Secretary of State Rex Tillerson called Trump a "moron." The *NBC News* report is available online at: https://www.nbcnews.com/news/all/trump-wanted-dramatic-increase-nuclear-arsenal-meeting-military-leaders-n809701. Additional information about the standoff between the United States and North Korea is available online at: https://www.cfr.org/global-conflict-tracker/conflict/north-korea-crisis.

As *The New York Times* reported on Oct. 11, 2017, Trump responded to the *NBC News* story with a flurry of posts on Twitter (now X). One tweet called the report "[f]ake news," "pure fiction," and a "made up story." Trump also disparaged NBC by comparing the organization to CNN, a network he has repeatedly expressed disdain for, writing "NBC = CNN." In two subsequent tweets, Trump wrote: "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!" and "Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!" When asked about the story by reporters covering Trump's meeting with Canadian Prime Minister Justin Trudeau, Trump stated: "It's frankly disgusting the way the press is able to write whatever they want to write and people should look into it." However, when asked if he favored limiting what the media could say, Trump responded, "no. The press should speak more honestly."

Following Trump's comments, both former government officials and free press advocates condemned his threats to revoke broadcasting licenses. Although television news networks do not, themselves, hold federal broadcasting licenses, their individual television stations do. Tom Wheeler, who was chair of the FCC under President Barack Obama, stated in response to Trump's comments: "Broadcast licenses are a public trust. They're not a political toy, which is what he's trying to do here." Matt Woods, then-policy director at the advocacy group Free Press, stated: "This is not just a huge issue from a First Amendment standpoint, it is at best a weird way to go at it and nonetheless very problematic." He added, "you don't have to work hard to see how those words are chilling." Alexandra Ellerbeck, then North America program coordinator for the Committee to Protect Journalists (CPJ), likened Trump's tactics to those used in authoritarian countries such as Russia and Saudi Arabia. She further stated that Trump's comments would embolden other governments to "embrace authoritarian tendencies." *The New York Times* report on the response to Trump's threats against NBC is available online at: https://www.nytimes.com/2017/10/11/us/politics/

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trump-nbc-fcc-broadcast-license.html. For more information on the potential for broadcasters to have their licenses revoked during a second Trump administration, see "Trump Selects Brendan Carr to Chair the FCC" on page 11 of this issue of the Silha *Bulletin*.

In addition to his threats to revoke licenses, it has previously been speculated that Trump used his power over the DOJ to exact financial retribution against media companies that had angered him. In 2016, on the campaign trail, Trump pledged that if elected, his Justice Department would block the potential merger of AT&T and Time Warner. Time Warner is the owner of CNN, a network that Trump has often expressed contempt for. According to an Oct. 22, 2016, CNN report, Trump stated, "[a]s an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration because it's too much concentration of power in the hands of too few." At the time, CNN quoted Andrew Jay Schwartzman, a media policy and telecommunications attorney as saying: "It is wholly inappropriate for a president (or a candidate) to tell the attorney general how to decide a case before the Justice Department has a chance to make a recommendation." The CNN report is available online at: https://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/.

This sentiment was echoed in a March 4, 2019, report from *The New Yorker* on the Trump presidency's relationship with the media, which noted that presidents have traditionally refrained from commenting on matters before the judicial department. According to *The New Yorker*, the unorthodoxy of Trump's approach caused many to speculate that his opposition to the deal was "a matter of petty retaliation against CNN." *The New Yorker* further reported that Trump ordered the then-director of the National Economic Council Gary Cohn to "pressure the Justice Department to intervene," in late summer 2017 because he was frustrated that the Justice Department had not filed suit to stop the deal. Trump reportedly said to Cohn and his chief of staff John Kelly, "I've been telling Cohn to get this lawsuit filed and nothing's happened! I've mentioned it fifty times. And nothing's happened. I want to make sure it's filed. I want that deal blocked!" After the meeting, Cohn, apparently worried about the propriety of the president using the Justice Department to undermine companies he disfavored, reportedly told Kelly not to call the Justice Department, stating, "[w]e are not going to do business that way." *The New Yorker* report is available online at: https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house.

Nevertheless, the Justice Department filed suit to block the deal in late 2017 in federal District Court in Washington, D.C. As *The New York Times* reported on Nov. 20, 2017, speculation that Trump was behind the move persisted. Speaking to reporters, AT&T's CEO Randall L. Stephenson raised the potential of Trump's involvement, stating that, although he did not know what role Trump played, his potential influence was the "elephant in the room." Stephenson further stated that the government's actions were "unprecedented," and "defie[d] logic," citing previous telecommunications mergers that had been allowed to go through. *The Times* also reported that Sen. Amy Klobuchar had written a letter in July 2017 to Attorney General Jeff Sessions inquiring as to whether any White House employees had contacted the Justice Department regarding the AT&T Time Warner merger. The letter further stated that: "Any political interference in antitrust enforcement is unacceptable. Even more concerning, in this instance, is that it appears that some advisers to the President may believe that it is appropriate for the government to use its law enforcement authority to alter or censor the press. Such an action would violate the First Amendment." *The New York Times* report is available online at: https://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html. Sen. Klobuchar's letter is available online at: https://www.klobuchar.senate.gov/public/index.cfm/2017/7/klobuchar-to-attorney-general-on-at-t-time-warner-merger-political-interference-in-antitrust-enforcement-is-unacceptable.

The merger was eventually allowed to go through after the media companies won at trial in 2018. The court's opinion is available online at: https://www.dcd.uscourts.gov/sites/dcd/files/17-2511opinion.pdf. For more information on Trump's attempt to block the merger, see *Federal Judge Dismisses Defamation Lawsuit Brought By Stormy Daniels Against President Trump* in "President Trump Prevails in Two Federal Courts' First Amendment Rulings, Faces New First Amendment Lawsuit" in the Fall 2018 issue of the Silha *Bulletin*.

> "While repeated attacks against broadcast stations by the former President may now be familiar, these threats against free speech are serious and should not be ignored.. . . [T]he First Amendment is a cornerstone of our democracy. The FCC does not and will not revoke licenses for broadcast stations simply because a political candidate disagrees with or dislikes content or coverage."
>
> **— Jessica Rosenworcel, FCC chair**

Media and press advocates have responded to Trump's recent comments about revoking broadcaster licenses with dismay and condemnation. Jessica Rosenworcel, the chair of the FCC, issued an Oct. 10, 2024, statement saying: "While repeated attacks against broadcast stations by the former President may now be familiar, these threats against free speech are serious and should not be ignored. As I've said before, the First Amendment is a cornerstone of our democracy. The FCC does not and will not revoke licenses for broadcast stations simply because a political candidate disagrees with or dislikes content or coverage." Rosenworcel's statement is available online at: https://docs.fcc.gov/public/attachments/DOC-406463A1.pdf.

According to the Oct. 21, 2024, *Times* report, former Democratic chairman of the FCC Tom Wheeler predicted that Trump's remarks would have a chilling effect on news organizations' editorial decisions. He noted that, although it is difficult for the FCC to revoke a license on the order of the president, it is "not hard to have an impact on decision making."

— Stuart Levesque
Silha *Bulletin* Editor

Trump Selects Brendan Carr to Chair the FCC

On Nov. 17, 2024, following Donald Trump's election victory, the incoming president announced on Truth Social that he had selected Brendan Carr to chair the Federal Communications Commission (FCC). The statement read in part:

"Commissioner Carr is a warrior for Free Speech, and has fought against the regulatory Lawfare that has stifled Americans' Freedoms, and held back our Economy. He will end the regulatory onslaught that has been crippling America's Job Creators and Innovators, and ensure that the FCC delivers for rural America." (Capitalization appears as in the original). Trump's statement is available online at: https://truthsocial.com/@realDonaldTrump/posts/113501214659806466.

The new FCC chair will play an important role in the regulation of the media and telecommunications industry. Among other things, the agency sets rates for some telecommunications services, promotes internet access, and licenses airwaves for use by broadcast radio and TV. The FCC is headed by five commissioners who are selected by the president and approved by the Senate. By law, only three of the five commissioners can be from the same political party. The chair has significant powers that are not shared with the other commissioners. The chair sets the FCC's agenda, decides what matters will be voted on, and coordinates the FCC's work.

Carr was first appointed as a commissioner by President Trump in 2017 after serving as the FCC's general counsel. He has retained his position on the commission since. His appointment to the chairmanship could signal a drastic shift for the agency. Analysts and lawyers cited by *The New York Times* speculated that Carr could shake up the agency by "expanding its mandate and wielding it as a political weapon for the right." Notably, Carr authored the chapter on the FCC for Project 2025, the conservative vision statement released by the Heritage Foundation that set out an agenda for Trump's second term. He has harshly criticized large tech companies for their content moderation policies, which he perceives as suppressing conservative voices. He has also shown an openness to revoking the licenses of TV broadcasters with perceived liberal biases. *The New York Times* report on Carr's appointment is available online at: https://www.nytimes.com/2024/11/17/technology/fcc-nominee-brendan-carr-trump.html.

In the chapter on the FCC that Carr authored for Project 2025, he set out the following mission statement: "The FCC should promote freedom of speech, unleash economic opportunity, ensure that every American has a fair shot at next-generation connectivity, and enable the private sector to create good-paying jobs through pro-growth reforms that support a diversity of viewpoints, ensure secure and competitive communications networks, modernize outdated infrastructure rules, and represent good stewardship of taxpayer dollars."

Carr's focus on "freedom of speech" and "diversity of viewpoints" is particularly noteworthy. In Carr's view, the greatest threat to free speech is large tech companies, such as Apple, Meta, and Google, which he believes have trammeled American's free speech rights through their content moderation policies. In Project 2025, he wrote that "reining in" big tech should be the FCC's top priority, and that big tech poses a "threat[] to individual liberty" because it "attempts to drive diverse political viewpoints from the digital town square."

On Nov. 13, 2024, Carr issued a letter to the CEOs of Alphabet (Google's parent company), Microsoft, Apple, and Meta accusing them of playing a "significant role[]" in an "unprecedented surge of censorship." The letter cited the companies' use of NewsGuard, a service that rates the credibility of news and information outlets. According to Carr, the listed companies either used NewsGuard to make content moderation decisions, or enabled their customers to use NewsGuard. However, far from accurately reflecting the credibility of news sources, Carr argued that NewsGuard systematically disfavored certain viewpoints. Together, Carr accused the companies and NewsGuard of forming a "censorship cartel." He wrote that he was "confident that once the ongoing transition [of presidential administrations] is complete, the Administration and Congress will take broad ranging actions to restore the First Amendment rights that the Constitution grants to all Americans . . . [potentially including] both a review of your companies' activities as well as efforts by third-party organizations and groups that have acted to curtail those rights." For the time being, he asked the CEOs to provide the FCC with information about their companies' use of NewsGuard. Carr's letter to the CEO's is available online at: https://www.fcc.gov/sites/default/files/DOC-407732A1.pdf.

Once Trump resumes the presidency, the steps the FCC might take to launch the "review" hinted at in Carr's letter are further outlined in his writing for Project 2025. Carr's main proposal is that the FCC reinterpret Section 230 of the Communications Act to eliminate the immunity from lawsuits that the provision currently extends to providers of online services who moderate content.

According to the Congressional Research Service, Section 230 of the Communications Act was enacted in 1996. 47 U.S.C. § 151–646. It was passed to modernize the historical Communications Act of 1934 — which regulated the "obscene, lewd, indecent or harassing uses of a telephone" — by updating the framework to also apply to internet and computer services. Section 230 specifies that internet services providers may not "be treated as the publisher or speaker of any information provided by another information content provider." A federal court has held that this provision bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content." *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). The Congressional Research Service report is available online at: https://crsreports.congress.gov/product/pdf/R/R46751.

Because the Communications Act empowers the FCC to promulgate rules necessary to carry out the Act's provisions, the agency could issue a rule interpreting Section 230. However, it is at best unclear, and some experts say unlikely, that the FCC will be able to reinterpret Section 230. Chris Lewis, president and CEO of Public Knowledge, a progressive

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tech advocacy group, said in a report by *Wired*, "[it] is a radical view that they can somehow do something about Section 230 at the FCC." Adam Kovacevich, founder and CEO of Chamber of Progress, a tech trade group, stated bluntly in a report by *Roll Call*, "I don't believe the FCC has the authority to do this." Numerous legal roadblocks stand in the way.

For one, Carr's suggestion that the FCC could summarily "issue an order" reinterpreting the section is misleading. Although federal agencies are empowered to issue so-called "interpretive rules" on short notice, such rules cannot have a legally binding effect. Rather, interpretive rules can only state the agency's concept of what the statute means. These rules may serve as guides for the conduct of regulated actors insofar as they suggest how the agency or a court *might* rule on a particular issue, but an interpretive rule itself cannot form the basis for the removal of a party's substantive rights that are guaranteed by a previous interpretation of the law.

Only substantive rules can have legally binding effect, and substantive rules cannot be issued summarily. They are issued through a process known as "notice and comment rulemaking," in which the agency announces its intention to issue a rule on a particular topic and allows the public to weigh in on the proposed rule. The agency is then obligated to respond to material comments and issue a statement of purpose outlining the factors that guided the agency's decision making with respect to the final rule. This process often takes years.

In fact, as outlined in the *Wired* report, conservative lawmakers already tried to get the FCC to reinterpret Section 230 in 2020. That year, a Trump executive order instructed the FCC to issue a rule reinterpreting the Section. The Center for Democracy and Technology, a tech advocacy trade group, challenged the order as unconstitutional. After several months, the FCC's general counsel Tom Johnson published a blog post arguing that the agency has the power to reinterpret the rule. Shortly thereafter, Ajit Pai, the chairman of the FCC, announced that rule-making would go forward. But the process was not begun by the time Joe Biden was inaugurated, and the new administration reversed course.

Additionally, even if the FCC were able to eventually pass a rule reinterpreting Section 230 via the notice and comment rulemaking process, the agency's interpretation would still be subject to judicial review. Under *Loper Bright Enterprises v. Raimondo*, a recently-decided landmark Supreme Court case, courts are no longer required to defer to agency interpretations of ambiguous statutes. 144 S.Ct. 2244 (2024). Before *Loper Bright*, decided by the conservative Roberts Court, if an agency's interpretation of an ambiguous statute was "reasonable," courts were required to accept the agency interpretation. However, the Court in *Loper Bright* overturned this longstanding precedent and declared that the judiciary has the final say about the meaning of statutes. Courts may still defer to agency interpretations if those interpretations are particularly persuasive, but they are not required to do so. Thus, courts unpersuaded by the FCC's justifications for reinterpreting Section 230 could strike down the agency's interpretation. "Agencies are basically losing the ability to interpret how they can enforce when language is vague in the statute," Chris Lewis told *Wired*. "Section 230's language is actually very short and very straightforward and has no FCC action attached to it." Kovacevich said of Carr's plan, "[i]n general, Republicans have been critical of activist agencies, but what Carr is proposing to do is to turn the FCC into an activist agency. . . . I think he's going to run into a legal buzz saw."

> "[W]hat Carr is proposing to do is to turn the FCC into an activist agency. . . . I think he's going to run into a legal buzz saw."
>
> **— Adam Kovacevich, Founder and CEO, Chamber of Progress**

Finally, any rule promulgated by the FCC would also have to pass constitutional muster. And in another recently-decided case, the Supreme Court strongly signaled that social media companies' content moderation practices are protected by the First Amendment. The case, *Moody v. NetChoice LLC*, concerned state laws in Florida and Texas that prohibited social media platforms from "deplatforming," or deprioritizing, content based on its content or source. 144 S.Ct. 2383 (2024). The laws were passed in response to the perceived suppression of conservative voices online. Although the Supreme Court did not issue a final ruling on the content moderation issue — the decision ultimately turned on a technical analysis of the standard of review used by the lower courts — it set out a framework for the lower courts to use in evaluating whether content moderation is protected by the First Amendment. The majority's opinion suggested that content moderation by social media companies is analogous to the editorial decisions made by traditional news organizations about what to publish, and is therefore protected speech.

Notably, Justices Samuel Alito and Clarence Thomas wrote concurring opinions in which they agreed that the lower courts had used the wrong standard of review, but seemed to disagree with the majority's assertion that social media companies that moderate content are analogous to news organizations making editorial decisions. Justice Thomas suggested that, in his view, social media platforms are akin to common carriers, and that they therefore must serve all comers. Justice Neil Gorsuch joined Justice Alito's concurrence, but not Justice Thomas's. For more information on *Moody v. NetChoice LLC*, see "Supreme Court Outlines How First Amendment Protections May Apply to Social Media Platforms; Conservative Justices Advance Competing Theories" in the Summer 2024 issue of the Silha *Bulletin*.

The majority decision in *Moody*, which included three of the Court's six conservative justices, suggests that, even if the FCC were to reinterpret Section 230 to eliminate immunity for internet service providers, they may still be shielded from liability by the First Amendment, although this could potentially change with future Trump appointments to the Supreme Court, assuming that the new justices agree with Thomas and Alito's position in *Moody*. The *Wired* report is available online at: https://www.wired.com/story/brendan-carr-fcc-trump-speech-social-media-moderation//. The *Roll Call* report is available online at:

https://rollcall.com/2024/11/19/carrs-fcc-plan-heading-for-buzz-saw-of-big-tech-opposition/. For more coverage of Section 230, see "U.S. Supreme Court Considers Section 230, Free Expression, Anti-Discrimination, and True Threats" in the Winter/Spring 2023 issue of the Silha *Bulletin*; and "U.S. Supreme Court Considers True Threats, Free Expression, and Section 230" in the Summer 2023 issue.

In addition to proposing to reinterpret Section 230 of the Communications Act, Carr has also signaled that he could potentially use the FCC's regulatory power to punish broadcasters whose coverage he perceives as biased, or who displease the president.

On Nov. 2, 2024, Kamala Harris appeared on an episode of *Saturday Night Live* (*SNL*). The episode aired the weekend before election day. Carr's post on X called Harris's appearance a "clear and blatant effort to evade the FCC's Equal Time rule." According to *Deadline*, the so-called "Equal Time Rule" — also known as the Equal Opportunities Rule — requires broadcasters who provide airtime to legally-qualified political candidates prior to an election to grant comparable time to opposing candidates, other than for limited exceptions such as *bona fide* news events. Carr wrote, "[t]he purpose of the rule is to avoid exactly this type of biased and partisan conduct — a licensed broadcaster using the public airwaves to exert its influence for one candidate on the eve of an election." Carr's tweet is available online at: https://x.com/BrendanCarrFCC/status/1852887210330341693.

According to *Deadline*, NBC affiliates that aired the episode of SNL posted notices in their public inspection files of the free airtime, as required by regulation. The *Deadline* report further noted that the Equal Time Rule does not require networks to seek out opposing campaigns to offer comparable time. They must, however, provide the time if requested. The Trump campaign did not comment on whether it had requested comparable time. *Deadline* also noted that it is not unprecedented for a political candidate to appear on *SNL* so close to an election. John McCain appeared on the show the weekend before the 2008 election.

In response to Carr's post, former FCC chairman Reed Hundt wrote on X that Carr was "wrong" that NBC was trying to evade the rule. He added that "[Carr was] clearly and blatantly trying to help the Trump campaign. That's also wrong." Nevertheless, Carr reiterated his beliefs in statements made to *Fox News*, in which he said: "At the end of the day, the penalties range all the way up to, potentially in egregious situations, license revocation. And in my view, every single remedy needs to be on the table, at least as an initial matter, as we investigate more . . . . You obviously have to engage in some sort of response, that if this proves to be an entire violation, there is a consequence sufficient enough that no broadcast station does this again . . . ." The *Deadline* report is available online at: https://deadline.com/2024/11/fcc-kamala-harris-saturday-night-live-equal-time-rule-1236165780/. Carr's statements to *Fox News* are available online at: https://www.foxnews.com/politics/fcc-commissioner-rips-nbc-over-harris-last-minute-snl-appearance-plainly-designed-evade-rules.

Carr's statement that license revocation could be considered echoes Donald Trump's repeated statements that networks whose coverage displeases him should lose their broadcasting licenses.

Although the FCC does regulate broadcasting licenses, the way Trump speaks about the issue is misleading. The FCC does not license broadcaster networks, but rather licenses the local affiliate stations that carry their broadcasts. The FCC could, in theory, revoke those licenses if it believed doing so was in the public interest. For example, Trump suggested that CBS's "license" should be revoked because of the supposedly biased editing of Kamala Harris's *60 Minutes* interview. The network itself does not have a broadcasting license, but the FCC theoretically could punish CBS by revoking the licenses of the local stations it owns. Speaking to *Forbes* about the potential for license revocations, Craig Aaron, co-CEO of the Free Press Action Fund, a non-profit advocacy group promoting diverse media ownership and equitable access to technology, stated: "All of these major networks also own local television stations, and the FCC is also in charge of those licenses — that access to the airways. So if they were to rule that these companies were not serving the public interest, the FCC could theoretically take away those licenses." Aaron added that, insofar as Carr's promotion to chair of the FCC merely raise the potential of license revocations, his appointment to lead the agency would have a "chilling" effect on the ability of television news stations to do their jobs. The *Forbes* article is available online at: https://www.forbes.com/sites/forbestv/2024/11/20/how-fcc-nominee-brendan-carr-could-punish-news-networks-under-the-trump-administration/.

Speaking about the FCC's ability to revoke broadcast licenses on the WCCO radio *Adam and Jordana Show*, Silha Center Director and Professor of Media Ethics and Law Jane Kirtley stated that, since the Reagan administration, the agency has effectively "rubber stamped" license applications, and that any movement towards license revocation for local stations would reflect a "major departure from what the commission has been doing" for years. Speaking more broadly on Carr's nomination, Kirtley stated that "the most interesting thing" about the appointment was Carr's interest in regulating big tech. She characterized the FCC's ability to institute Carr's desired changes as uncertain, given that the agency "does not have clear authority" on the matter. Also "notable" about Carr's appointment, Kirtley stated, was the degree to which he has echoed Trump in criticizing certain television networks for their perceived negative coverage of the President-elect. Kirtley predicted that, because the FCC does not have authority to regulate media companies based on viewpoint, an FCC led by Carr might try to interfere the networks' business deals, "hit[ting] [the networks] in their pocketbooks rather than going directly after them for their speech." Kirtley's comments are available online at: https://www.audacy.com/podcast/adam-and-jordana-6dea1/episodes/will-a-new-head-of-the-fcc-help-reel-in-big-tech-companies-b204e. For more information on Trump's threats to revoke broadcasting licenses, and his attempts to interfere with the business interests of media companies, see "Donald Trump Threatens Media Companies With Business and Legal Consequences" on page 7 of this issue of the Silha *Bulletin*.

— Stuart Levesque
Silha *Bulletin* Editor

Billionaire Owners of *Los Angeles Times* and *Washington Post* Quash Presidential Endorsements, Raising Questions of Journalistic Independence

JOURNALISM ETHICS

In October 2024, as the election between Vice President Kamala Harris and former President Donald Trump entered its final phase, the *Los Angeles Times* and *The Washington Post* broke from recent tradition by not endorsing a candidate for president. The subsequent revelation that the papers' billionaire owners were responsible for the decisions not to endorse sparked debate about journalistic independence and whether the business interests of wealthy media owners tend to compromise that independence.

The *Los Angeles Times*

On Oct. 14, 2024, the *Los Angeles Times* (*LA Times*) Editorial Board updated its list of 2024 political endorsements. The board prefaced its endorsements by writing that, "[the 2024 election] might be the most consequential election in a generation." The endorsements included politicians running for local, state, and national office. However, the *LA Times* made no endorsement in the presidential election, marking a change for the paper, which had endorsed the Democratic nominee in every presidential election between 2008 and 2020. Prior to 2008 — from 1976 to 2004 — the *LA Times* did not endorse candidates for president. The paper offered no explanation at the time for its decision not to endorse a candidate in the 2024 election. The *Times* 2024 endorsements are available online at: https://www.latimes.com/opinion/story/2024-09-10/los-angeles-times-elections-endorsements-2024-november.

On Oct. 22, 2024, *Semafor* published a story stating that the owner of the *LA Times*, Dr. Patrick Soon-Shiong, had personally blocked the paper's editorial board from endorsing either of the candidates in the 2024 presidential election. According to sources within the paper, the editorial board had planned to endorse Kamala Harris, and had drafted an outline of the endorsement, but was told in early October by the *Times'* executive editor Terry Tang that no presidential endorsement would be made. The directive apparently came directly from Soon-Shiong. Soon-Shiong is a multibillionaire who made his fortune in the healthcare industry. According to *Forbes*, he invented the cancer drug Abraxane, and later sold several drug companies he owned for a combined $9.1 billion. He bought the *LA Times* in 2018. The *Semafor* article is available online at: https://www.semafor.com/article/10/22/2024/los-angeles-times-wont-endorse-for-president.

Soon-Shiong's decision to quash the *Times'* Kamala Harris endorsement was not the first time he had influenced editorial decisions at the paper. In 2020, members of the *Times* editorial board reportedly met with primary candidates for the Democratic presidential nomination and were set to endorse Elizabeth Warren before Soon-Shiong overruled them at the last minute. And in early 2024, according to reporting by *The New York Times*, Soon-Shiong pressured Kevin Merida, the then-executive editor of the *LA Times*, to suppress an article about a doctor acquaintance of Soon-Shiong's who was embroiled in a lawsuit. According to further reporting by *The New York Times*, Soon-Shiong's daughter, Nika Soon-Shiong, has also attempted to influence the *LA Times'* news coverage. Nika Soon-Shiong, who is a progressive political activist, has criticized the newspaper's coverage of crime, policing, and the Israel-Hamas war, at times even reaching out directly to reporters to express her dismay with their work. According to *The New York Times* report, it was sometimes difficult for reporters at the *LA Times* to know whether Nika Soon-Shiong's criticism reflected her own opinions or her father's. *The New York Times* article is available online at: https://www.nytimes.com/2024/10/26/us/los-angeles-times-endorsement-Soon-Shiong.html.

On October 23, the day after the *Semafor* article was published, *LA Times* editorial editor Mariel Garza resigned in protest. In an interview with Sewell Chan — himself former editorial editor at the *LA Times*, and current executive editor of the *Columbia Journalism Review* — Garza stated "I am resigning because I want to make it clear that I am not okay with us being silent. In dangerous times, honest people need to stand up. This is how I'm standing up." Garza confirmed in the interview that Soon-Shiong had quashed the endorsement. She stated that although she did not think the *LA Times'* endorsement would have changed many minds given the paper's liberal readership, an endorsement was nevertheless the "next logical step" following a series of editorials detailing "how dangerous Trump is to democracy," his unfitness for the presidency, and his threats to jail his enemies. Garza added that she thought the *LA Times'* decision not to endorse would seem "perplexing to readers, and possibly suspicious." Garza's interview with Chan in the *Columbia Journalism Review* is available online at: https://www.cjr.org/business_of_news/los-angeles-times-editorials-editor-resigns-after-owner-blocks-presidential-endorsement.php.

In the days after Garza's resignation, the fallout over the *LA Times* non-endorsement continued to spread. On October 24, two members of the *LA Times* editorial board, Robert Greene and Karin Klein, resigned their posts. According to the *Associated Press* (*AP*), Greene, who won a Pulitzer Prize for editorial writing in 2021, said that Patrick Soon-Shiong's decision not to endorse, "hurt particularly because one of the candidates, Donald Trump, has demonstrated such hostility to principles that are central to journalism — respect for the truth and reverence for democracy." On October 25, the staff of the *LA Times* issued an open letter to Patrick Soon-Shiong and Terry Tang. The letter noted with dismay that, although the *LA Times*' refusal to issue an endorsement had been covered extensively by other news organizations, the newspaper had yet to cover the story itself. In order to regain the *LA Times'* readers' trust, the staff argued that Soon-Shiong and Tang should cover the non-endorsement in the newspaper and provide a rationale for why no endorsement was made. The *AP* report is available online at: https://apnews.com/article/los-angeles-times-editors-resign-af6c077d502c9d4878bee0

1fa6575450. The open letter from the *LA Times* staff is available online at: https://latguild.com/news/2024/10/25/open-letter-from-la-times-staff.

As the backlash spread, Patrick Soon-Shiong and his daughter attempted to clarify, in several seemingly contradictory public statements, how and why the decision not to endorse had been made. On Oct. 23, 2024, following Garza's resignation, Patrick Soon-Shiong explained his decision in a post on X. He wrote that, rather than an endorsement, he had suggested to the editorial board that it publish an analysis of the positive and negative aspects of each candidate's policy positions. According to his post, instead of taking this approach, the editorial board elected to "remain silent," and he had "accepted their decision." However, this account of events was immediately complicated by further statements. On Oct. 24, 2024. Nika Soon-Shiong posted on X that the decision not to endorse was "not a vote for Donald Trump," writing instead that it was "a refusal to ENDORSE a candidate that is overseeing a war on children." Her post suggested that the paper's decision was motivated by Kamala Harris's continued support for Israel in its war with Hamas. She confirmed this view in an Oct. 26, 2024, statement to *The New York Times*, in which she said: "Our family made the joint decision not to endorse a Presidential candidate. This was the first and only time I have been involved in the process. As a citizen of a country openly financing genocide, and as a family that experienced South African Apartheid, the endorsement was an opportunity to repudiate justifications for the widespread targeting of journalists and ongoing war on children." However, Patrick Soon-Shiong rejected this version of events in his own statement, saying that his daughter did not speak for the paper. "Nika speaks in her own personal capacity regarding her opinion, as every community member has the right to do," he said. "She does not have any role at The LA Times, nor does she participate in any decision or discussion with the editorial board, as has been made clear many times." Patrick Soon-Shiong's statement on X is available online at: https://x.com/DrPatSoonShiong/status/1849217132183060705. Nika Soon-Shiong's statement on X is available online at: https://x.com/nikasoonshiong/status/1849676214941679831.

Following the Soon-Shiongs' statements, *LA Times* staff members contested Patrick Soon-Shiong's assertions and cast doubts on his and his daughter's motivations. According to the *AP* report, Karin Klein cited Mr. Soon-Shiong's initial October 23 statement about what happened as the reason for her resignation. She wrote in a post on X, "[t]he decision to resign was made simple and easy when [Patrick Soon-Shiong] posted on X yesterday about his suggestion that the board create an analysis of the positives and negatives of each candidate and let the voters make their own decisions. News side does an excellent job of neutral analysis. That's not an editorial." In its open letter, the *LA Times* staff wrote: "Our newspaper's owner publicly blamed the members of the Editorial Board for his decision not to endorse, saying incorrectly that 'they chose to remain silent.' They did not. They planned an endorsement — one that was rejected. The owner's action unnecessarily made Editorial Board members vulnerable to harassment, impacting their ability to effectively perform their jobs." Speaking to *The New York Times*, several senior editors at the newspaper speculated that Patrick Soon-Shiong's decision could have been politically motivated. They noted that he had often been critical of the Biden administration, had bragged about having dinner with Donald Trump shortly after he won the presidency in 2016, and often has approvals pending before the Food and Drug Administration (FDA).

> "In talking about the choice of a President of the United States, what is a newspaper's proper role? . . . Our own answer is that we are, as our masthead proclaims, and independent newspaper, and that with one exception (our support of President Eisenhower in 1952), it has not been our tradition to bestow formal endorsement upon presidential candidates. We can think of no reason to depart from that tradition this year. "
>
> **— William Lewis, Publisher and CEO, *The Washington Post*, quoting *The Post*'s 1972 Editorial Board**

The Washington Post

On Oct. 25, 2024, William Lewis, publisher and CEO of *The Washington Post* (*The Post*), announced in an editorial that the paper would not endorse a candidate in the 2024 presidential election. Lewis framed the decision as a return to the paper's roots. He noted that during much of the 20th century, *The Post* had not endorsed presidential candidates until, "for understandable reasons," it chose to endorse Jimmy Carter in the 1976 election. And although the paper continued to endorse presidential candidates in all but one subsequent election (1988), Lewis wrote that the paper "had it right before," and would no longer make presidential endorsements. In support of the decision, he quoted approvingly from a 1972 editorial in which *The Post's* Editorial Board explained its decision not to endorse a candidate in that election: "In talking about the choice of a President of the United States, what is a newspaper's proper role? . . . Our own answer is that we are, as our masthead proclaims, an independent newspaper, and that with one exception (our support of President Eisenhower in 1952), it has not been our tradition to bestow formal endorsement upon presidential candidates. We can think of no reason to depart from that tradition this year." Lewis further wrote that while he expected that the decision would be interpreted in a variety of ways, including both as a tacit endorsement of one candidate and a repudiation of another, ultimately *The Post* hoped to support its "readers' ability to make up their own minds on this, the most consequential of American decisions — whom to vote for as the next president." Lewis's editorial explaining the decision is available online at: https://www.washingtonpost.com/opinions/2024/10/25/washington-post-endorsement/.

Endorsements, *continued on page 16*

Endorsements, *continued from page 15*

According to a report from *The Post's* news division that ran the same day as Lewis's editorial, the decision not to endorse was made by Jeff Bezos, the paper's billionaire owner who also owns the space exploration company Blue Origin and the mega-retailer Amazon. Bezos made the decision even though members of the editorial board had already drafted an endorsement of Kamala Harris. The report also noted that although *The Post* would no longer be endorsing candidates for president, it would continue to endorse candidates in other elections.

As detailed in *The Post's* report, condemnation of the decision was swift. When it was announced to the Editorial Board, several members reportedly expressed "vehement opposition." Robert Kagan, a longtime *Post* editorial writer and editor-at-large in the opinion department, resigned in protest. He described Bezos's decision as a "preemptive bending of the knee to who [Bezos] may think is the probable winner." He continued, "[a]nybody who is as much a part of the American economy as Bezos is . . . they obviously want to have a good relationship with whoever is in power. [It's] an attempt to try not to be on the wrong side of Donald Trump." In an editorial that was also published on October 25, twenty-one *Post* columnists condemned Bezos's decision, calling it a "terrible mistake" that "abandon[ed] . . . the fundamental editorial convictions of the newspaper that we love." The editorial continued: "This is a moment for the institution to be making clear its commitment to democratic values, the rule of law and international alliances, and the threat that Donald Trump poses to them . . . . There is no contradiction between The Post's important role as an independent newspaper and its practice of making political endorsements, both as a matter of guidance to readers and as a statement of core beliefs."

The decision also caused uproar in *The Post's* newsroom, and was bitterly criticized by distinguished alumni of the paper. Carol D. Leonnig, a Pulitzer Prize winner and *Post* staff reporter wrote in an email: "I don't care who the Post opinion section endorses. . . . For me, and for the readers and sources who today have flooded me with calls and messages, what's curious is the timing and odd explanation of this endorsement change. It raises concerns about the thing I *do* care so deeply about: whether our ownership will continue to let my colleagues and me pursue hard-hitting reporting, independently, without worrying who is upset with our coverage." In a statement, The Washington Post Guild, the union which represents newsroom employees, wrote that it was concerned by the fact that the decision was made so close to the election, and further worried that the announcement by Lewis suggested *The Post's* management was trying to exert control over the paper's editorial division. In a text message, former *Post* executive editor Martin Baron called the decision "cowardice," and predicted that "Donald Trump will celebrate this as an invitation to further intimidate The Post's owner, Jeff Bezos (and other media owners)," while former executive editor Marcus Brauchli wrote in an email that, "the decision looks craven." *The Washington Post* report is available online at: https://www.washingtonpost.com/style/media/2024/10/25/washington-post-endorsement-president/.

On October 28, Jeff Bezos published an op-ed in *The Post* responding to the criticism. He wrote that the decision was motivated by a desire to restore Americans' perilously low trust in the media. According to Bezos, political endorsements do not influence voters and only enhance the sense that the media is biased. Further, this sense of bias causes citizens to turn to potentially inaccurate alternative forms of media for information. Bezos wrote that he was unwilling to let *The Post* "fade into irrelevance — overtaken by unresearched podcasts and social media barbs." Addressing accusations that he made the decision not to endorse to protect his own interests, Bezos assured readers that "no *quid pro quo* of any kind is at work here." One could view his wealth and business interests as a "web of conflicting interests," or as a "bulwark against intimidation," he wrote. "Only my own principles can tip the balance from one to the other. I assure you that my views here are, in fact, principled." Bezos's editorial is available online at: https://www.washingtonpost.com/opinions/2024/10/28/jeff-bezos-washington-post-trust/.

Reactions From Readers and Free Press Advocates

Criticism of the *LA Times* and *The Washington Post's* non-endorsements was not confined to the papers' respective newsrooms and editorial staffs. In the days after the announcements, thousands of readers canceled subscriptions. Reports varied, but according to NPR, it is likely that the *LA Times* lost between 10,000 and 18,000 subscribers because of the non-endorsement, whereas *The Washington Post* lost 250,000 subscribers, or nearly ten percent of its subscriber base. The NPR report is available online at: https://www.npr.org/2024/10/29/nx-s1-5170939/more-than-250-000-subscribers-have-left-washington-post-over-withheld-endorsement.

According to journalism ethics experts, Soon-Shiong and Bezos's decisions to exert influence over the news organizations they own raised pressing ethical concerns about journalistic independence. An October 28 report on the non-endorsements from the Society of Professional Journalists (SPJ) noted that "acting independently is one of four core principles of ethical journalism, and that journalists should 'Deny favored treatment to advertisers, donors or any other special interests, and resist internal and external pressure to influence coverage.'" (Quoting from the SPJ Code of Ethics). The SPJ worried that the non-endorsements marked the beginning, not the end, of ownership interference in journalism. Lynn Walsh, former ethics committee chair and former SPJ National President, warned that, "it's [not] far-fetched that publishers or part-time owners might try to exert more control over editorial decisions in the future. If ownership begins dictating what stories can or can't be published, it sets a precedent for compromising journalistic independence, which could lead to deeper restrictions on news coverage over time." The SPJ report is available online at: https://www.spj.org/news.asp?ref=3041.

Press advocates further noted that the danger of ownership encroachment on journalistic independence is magnified by the far-reaching nature of Soon-Shiong and Bezos's business interests. For instance, although Bezos claimed in his op-ed that the non-endorsement was not part of a *quid pro quo* arrangement, as the independent journalism watchdog *Popular Information* noted, his assertion was belied by the fact that Amazon and Blue Origin's business

prospects are inextricably linked to the procurement of lucrative federal government contracts. Worse, on the same day that Bezos quashed the planned endorsement, executives from his space exploration company Blue Origin reportedly met with Donald Trump, further heightening the sense of impropriety. Unlike Amazon and Blue Origin, *The Post* is a money loser that reportedly operated with a $100 million deficit in 2023. Further, there is evidence that *The Post's* reporting has affected Bezos's bottom line — or at the very least, that Bezos believes it has. In 2019, Amazon sued the federal government alleging that it awarded a $10 billion computing contract to Microsoft instead of Amazon because of then President Trump's personal dislike for Bezos and *The Washington Post*. As *Popular Information*, a news site authored by Judd Legum, the founder of *Think Progress*, noted, Bezos "faces an even more acute threat to his business interests" in a second Trump term given the former president's alliance with Bezos's competitor Elon Musk, and his well-documented disdain for Bezos and *The Post*. The incentive for Bezos to avoid this risk by influencing *The Post's* coverage of Trump is plain. Accordingly, his decision not to endorse struck many as corruptly motivated. And the same conflict of interest is potentially present for Soon-Shiong, who, according to *Popular Information*, regularly has business interests before the FDA (a fact that was also noted by editors at the *LA Times*). The *Popular Information* article from which this information is sourced is available online at: https://popular.info/p/the-billionaire-media-complex.

In light of this, the media reform advocacy group Free Press responded to the non-endorsements by calling for the end of billionaire ownership of journalism organizations, writing: "[W]e must demand that our elected officials put the public's needs above corporate profits. We should stand with the workers in these newsrooms committed to doing good work despite the actions of their bosses. We must invest in the independent and locally controlled nonprofit outlets reinventing local journalism." The Free Press report is available online at: https://www.freepress.net/blog/washington-post-los-angeles-times-save-journalism-from-billionaires/.

In an editorial on the non-endorsements, Monika Bauerlein, CEO of *Mother Jones*, encouraged readers to support local and non-corporate owned newsrooms. She wrote, "[t]hese journalists are incredibly hard-working, efficient, and fearless — I know because we often partner with them." She further acknowledged that independent journalism is chronically starved for money, and that "this time of the year means losing sleep because I don't know how we'll put together a budget for the following year to maintain a newsroom." However, she wrote, she took courage from the fact, "when we are ready to publish, no one can tell us not to." The *Mother Jones* piece is available online at: https://www.motherjones.com/politics/2024/10/billionaire-owned-news-is-not-our-only-option/.

> "It is important for news organizations to [take a position on the 2024 election], not because I think that they will turn the election one way or the other, but because they have a stake in democracy that's perhaps unique — the First Amendment is so important to what they do — they ought to be standing up and being counted on this point."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Silha Center Director and Professor of Media Ethics and Law Jane Kirtley characterized *The Post's* decision not to endorse as a "body blow," saying that she was "stunned" and "devastated" by the decision. Speaking on Minnesota Public Radio's *Minnesota Today* program, Kirtley stated: "Jeff Bezos [in his op-ed] . . . said 'I'm not an ideal owner of The Washington Post,' and many of us today would agree with him on that. . . . [T]o undertake this kind of action, so close to the election, is, to me, really unconscionable, and reflects the fact that he's not a journalist, that's not his background, and he really doesn't understand the core mission of the news media." Although Kirtley acknowledged that there is a long history in the United States of news organization owners directing editorial content, she argued that Bezos and Soon-Shiong's cases are distinct insofar as both billionaires had previously stated that they intended to steward the news organizations they own in the public interest. And yet, the timing of the non-endorsements — so close to the election — and their apparent connection with the billionaires' business interests, called the owner's earlier commitments into question. "Because of some unfortunate revelations in the last few days about Mr. Bezos, and Blue Origin, and meetings of his employees with members of the Trump team, it is really hard to avoid the appearance that this is all about amassing power and influence," Kirtley stated. "[R]ather than take a stand, [Bezos and Soon-Shiong have] chosen to take no stand at all."

Speaking further about the non-endorsements to WGN Radio in Chicago, Kirtley characterized the decisions in one word: "cowardice." "If you're going to be a major news organization's owner, I think you have an obligation to help to guide public understanding. . . . [An endorsement is] a statement of where you stand. And I'd like to think you stand for democracy. That's not biased." Kirtley concluded by stating that, "It is important for news organizations to [take a position on the 2024 election], not because I think that they will turn the election one way or the other, but because they have a stake in democracy that's perhaps unique — the First Amendment is so important to what they do — they ought to be standing up and being counted on this point."

Kirtley's interview with Minnesota Public Radio is available online at: https://www.mprnews.org/episode/2024/10/29/minnesota-now-oct-29-2024, and her interview with WGN is available online at: https://wgnradio.com/john-williams/.

— Stuart Levesque
Silha *Bulletin* Editor

Trump Accuses *60 Minutes* of Deceptive Editing, Prompting Journalism Ethics Questions

JOURNALISM ETHICS

On Oct. 7, 2024, *CBS News* aired an episode of its weekly news magazine program *60 Minutes* featuring an interview with Democratic nominee for president Kamala Harris. The interview was highly publicized before appearing on air. Following the episode's release, Donald Trump accused *CBS News* of misleadingly editing Harris's interview based on a discrepancy between one of the clips in previews of the interview and the interview itself. The controversy raised important questions of journalism ethics at a key juncture in the presidential race.

The controversy surrounded *60 Minutes'* editing of Harris's remarks about the Israel-Hamas war, and the United States' relationship with Israel. As the *New York Post* reported on October 6, the day before the interview aired, a preview clip showed Harris responding to questions from *60 Minutes* correspondent Bill Whitaker on the war. In the clip, Whitaker notes that the United States supplies Israel with billions of dollars in military aid but seems to have little sway over Israeli Prime Minister Benjamin Netanyahu's actions. Harris responded that the aid the United States gives Israel allows it to defend itself. She further stated that the diplomatic work the United States does with Israel is an "ongoing pursuit around making clear [the United States'] principles," and concluded "we're not going to stop, in terms of putting that pressure on Israel." Whitaker responded that it seemed like Prime Minister Netanyahu was not listening. Harris then answered, haltingly: "Well Bill, the work that we have done has resulted in a number of movements in that region by Israel that were very much prompted by, or a result of, many things, including our advocacy for what needs to happen in the region." The *New York Post* article, including the preview clip, is available online at: https://nypost.com/2024/10/06/us-news/kamala-harris-demurs-on-whether-israeli-pm-benjamin-netanyahu-is-a-good-ally/.

However, in the version that aired, Harris appeared to give a different answer following Whitaker's remark that Netanyahu did not seem to be listening to American leaders. She stated: "We are not going to stop pursuing what is necessary for the United States to be clear about where we stand on the need for this war to end." The full *60 Minutes* segment is available online at: https://www.youtube.com/watch?v=TJys7OVH24E/.

On October 8, the day after the segment aired, the *New York Post* reported that the Trump campaign had demanded that *CBS News* release the "unedited transcript" of Harris's interview, accusing the network of selectively editing Harris's remarks to cover up her "word salad." Trump 2024 national press secretary Karoline Leavitt told the *New York Post*, "[o]n Sunday, 60 Minutes teased Kamala's highly-anticipated sit-down interview with this epic word salad that received significant criticism on social media. During the full interview on Monday evening, the word salad was deceptively edited to lessen Kamala's idiotic response." Leavitt added that she wondered what else *CBS News* had cut, stating "What do[es *60 Minutes*], and Kamala, have to hide?" The *New York Post* story is available online at: https://nypost.com/2024/10/08/us-news/trump-campaign-demands-unedited-transcript-of-kamala-harris-60-minutes-interview-after-her-israel-word-salad-disappears/.

On October 9, Donald Trump posted on Truth Social calling for an investigation into *CBS News* over the incident. He wrote: "I've never seen this before, but the producers of 60 Minutes sliced and diced ('cut and pasted') Lyin' Kamala's answers to questions, which were virtually incoherent, over and over again, some by as many as four times in a single sentence or thought, all in an effort, possibly illegal as part of the 'News Division,' which must be licensed, to make her look 'more Presidential,' or at least, better." He further added, "[i]t is the very definition of FAKE NEWS! The public is owed a MAJOR AND IMMEDIATE APOLOGY! This is an open and shut case, and must be investigated, starting today!" (Capitalization in Trump's posts appear as in the original). Trump's post is available online at: https://truthsocial.com/@realDonaldTrump/posts/113277179676731743.

On the same day, *Variety* reported that the Harris campaign distanced itself from the incident. A spokesperson told *Variety*, "[w]e do not control CBS's production decisions and refer questions to CBS." The *Variety* report is available online at: https://variety.com/2024/tv/news/kamala-harris-responds-60-minutes-edit-controversy-cbs-1236173842/.

Despite the Harris campaign's attempts to move past the incident, furor continued to stir in conservative media over CBS's editing choices, which Trump supporters argued represented a blatant attempt to buoy Harris's popularity. On October 16, the conservative watchdog group Center for American Rights (CAR) filed a formal complaint with the FCC alleging that CBS had violated the FCC's news distortion policy. According to the FCC, the policy prohibits over the air broadcasters (including local channels that carry programming from national broadcasters, such as CBS) from deliberately distorting the news in relation to a significant event. On October 22, Trump's lawyer Edward A. Paltzik sent a letter to CBS threatening to sue it over the incident. (Trump did eventually sue CBS on October 31). On October 23, FCC commissioner Brendan Carr weighed in. He stated: "My FCC colleague, Republican Commissioner [Nathan] Simington, has been very active on this. What he's pointed out is the news distortion rule is a very, very narrow rule at the FCC. In almost every case, it doesn't apply because it could get into sort of editorial decisions that are protected by the First Amendment. But what he said is that CBS should release the transcript." CAR's complaint is available online at: https://drive.google.com/file/d/1kBqZo-10xBLE0Y1dhvBpzZnvcRUvH0H4/view. FCC information on its news distortion policy is available online at: https://www.fcc.gov/broadcast-news-distortion. Carr's comments are available online at: https://nypost.com/2024/10/23/media/fcc-commissioner-brendan-carrm-urges-cbs-release-kamala-harris-60-minutes-interview-transcript/?utm_campaign=nypost&utm_medium=referral. For more information on Trump's suit of CBS over its editing of Kamala Harris's *60 Minutes* interview, see "Donald Trump Threatens Media

Companies With Business and Legal Consequences" on page 7 of this issue of the Silha *Bulletin*. For more information on Brendan Carr, see "Trump Selects Brendan Carr to Chair the FCC" on page 11 of this issue of the Silha *Bulletin*.

In the midst of this blowback, *60 Minutes* responded with a brief statement addressing the issue. The statement, dated October 20, said: "60 Minutes gave an excerpt of our interview to Face the Nation that used a longer section of her answer than that on 60 Minutes. Same question. Same answer. But a different portion of the response. When we edit any interview, whether a politician, an athlete, or movie star, we strive to be clear, accurate and on point. The portion of her answer on 60 Minutes was more succinct, which allows time for other subjects in a wide ranging 21-minute-long segment." In response to Trump's charge that the show had deceitfully edited Harris's interview, the statement said: "That is false." The statement further noted that Trump had pulled out of his planned *60 Minutes* interview, and that if he wished to discuss the issues facing the nation and the Harris interview, he was welcome to come on the show. The *60 Minutes* statement is available online at: https://www.cbsnews.com/news/60-minutes-statement/.

Speaking to *Politifact* about the ethics of *60 Minutes* editing practices, senior vice president and chair of the Craig Newmark Center for Ethics and Leadership at the Poynter Institute for Media Studies Kelly McBride stated that the program's decision to feature one part of Harris's answer rather than another was typical. "It is a time-limited medium, so they're definitely going to select portions of a response in an interview," she stated. She further noted that some broadcast news networks have rules about not jumbling clips together, though she didn't know specifically what practices *60 Minutes* followed. In most cases, she said, editors are attempting "to make the production more digestible for the audience, not to deceive, by either making a candidate look better or worse." However, she noted that, by failing to release the full unedited interview, *60 Minutes* allowed Trump to question the show's journalistic integrity. "Once you cast doubt on something, it's really on the news organization to explain and demonstrate why it's trustworthy, and that shouldn't be hard to do," McBride said. McBride's statements are available online at: https://www.politifact.com/factchecks/2024/oct/12/donald-trump/trump-claimed-harris-60-minutes-interview-violated/.

In an opinion piece on *Poynter*, the website's managing editor, Ren Laforme, and *Politifact's* audience director, Josie Hollingsworth, wrote that, "news outlets across all mediums . . . routinely edit for brevity, clarity, and a host of other factors. It's a standard, long-accepted practice. Raw, unedited video or transcripts of conversations rarely make it to publication outside of places like C-Span, in part because audiences simply expect a more polished product." They opined further that "some of the outrage reflects a broader trend of vilifying standard journalistic practices," citing as an example how, in 2022, social media users lashed out at a journalist who went door knocking to track down an anonymous TikTok user who had spread LGBTQ hate online. "Door-knocking to verify facts or gather information is one of the most fundamental methods in journalism, yet it was portrayed as invasive or unethical by critics who were either unfamiliar with the practice or theatrically pearl-clutching to denigrate reporters," the pair wrote. The op-ed is available online at: https://www.poynter.org/newsletters/2024/60-minutes-fox-friends-edit-clips-kamala-harris-donald-trump/.

> "Things are edited in every story. . . . I think there are things that get said in a transcript with a subject that are not going to make sense in context. It's kind of not the way the game is played."
>
> **— Jon Wertheim. *Sports Illustrated* senior writer**

The sentiments expressed by McBride and the writers at Poynter were echoed by Jon Wertheim in an interview with OutKick.com. Wertheim is a *Sports Illustrated* senior writer who also became a correspondent for *60 Minutes* in 2017. "Things are edited in every story," he stated. When asked if he thought CBS should release the full transcript, Wertheim said, "I think there are things that get said in a transcript with a subject that are not going to make sense in context. It's kind of not the way the game is played." Wertheim's statements are available online at: https://www.outkick.com/culture/jon-wertheim-defends-60-minutes-kamala-harris-interview.

Other commentators were less sympathetic to *60 Minutes*. Journalist, educator, and advocate for press freedom Ksenija Pavlovic McAteer wrote on her own website that *60 Minutes'* editing decision was part of a troubling trend in American political journalism: "the selective editing of the news." Pavlovic McAteer continued, "[t]he kind of media distortion by editing interviews into a Final Cut according to their own narrative, biases, or political agenda is a deliberate reshaping of reality. Harris, like any politician, crafts her messages carefully, balancing the demands of public perception with political strategy. But when those carefully constructed messages are edited to make her sound like a leader of the free world who needs to fit into some ideal formula for electability, not only does it diminish her, but it also lowers the level of public discourse." She also noted that *CBS News* has previously released full, unedited transcripts for interviews, and its decision not to in this case raised the question — "why not now?" Pavlovic McAteer's take is available online at: https://thepavlovictoday.com/kamala-harris-the-manufactured-candidate-why-cbss-60-minutes-edit-betrays-the-larger-problem/.

Conservative commentator and former *Fox News* host Megyn Kelly responded harshly to the incident on her radio program, *The Megyn Kelly Show*. She called the fact *CBS News* would not release the transcript "bizarre." She further characterized *60 Minutes*' statement on the issue as "hackery," objecting to how the show effectively challenged Trump to sit for an interview rather than address his critiques. The Megyn Kelly segment is available online at: https://www.youtube.com/watch?v=oDawbKSg-HA.

— Stuart Levesque
Silha *Bulletin* Editor

Central Park Five Sue Donald Trump for Defamation

President-elect Donald Trump is facing a new defamation lawsuit, brought by the men known as the "Central Park Five," following comments Trump made about them at the Sept. 10, 2024, presidential debate with Kamala Harris. The plaintiffs in the case are five men who were convicted, but later exonerated, of a 1989 rape and beating in New York City. In the defamation complaint, the plaintiffs refer to themselves as "The Central Park Five, now also known as the Exonerated Five." The complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.paed.628885/gov.uscourts.paed.628885.1.0.pdf.

DEFAMATION

In 1989, Yusef Salaam, Antron McCray, Kevin Richardson, Raymond Santana, and Korey Wise were teenagers living in New York City. They were arrested near Central Park on April 20 and accused of the rape and beating of a white woman who was attacked while jogging. The teenagers, who were all Black or Latino, were questioned by police for hours before they eventually confessed. The confessions were videotaped, but the hours of questioning before the confessions were not. The five later recanted the confessions and pled "not guilty" at trial. Salaam, who is now a New York City Council Member, later wrote about the incident in a 2016 op-ed for *The Washington Post*, "[w]hen we were arrested, the police deprived us of food, drink or sleep for more than 24 hours. Under duress, we falsely confessed." The case went to a jury trial, and all five boys were convicted and imprisoned for between five and twelve years. For background about the case and discussion of the coerced confessions, see: https://nysba.org/from-the-central-park-5-to-the-exonerated-5-can-it-happen-again/?srsltid=AfmBOopIgJdh34DKyP0dgIIEhE6NIS64phASlpCZp90XnaCLcaEQX1ix. Yusuf Salaam's 2016 op-ed is available online at: https://www.washingtonpost.com/posteverything/wp/2016/10/12/im-one-of-the-central-park-five-donald-trump-wont-leave-me-alone/.

The case received extensive contemporaneous media coverage. LynNell Hancock, who was a reporter at the time, and is currently a journalism professor at Columbia University, told New York Public Radio in a 2019 interview, "[t]he coverage itself was pretty much hysterical. The headlines just kept coming." An article published by MSNBC described the case as emblematic of "what was wrong with crack-era justice in New York City during the 1980s, with apparently uncrossable lines between races and classes, with shoddy police work and with politicians and a media quick to use racial stereotypes to stoke fear in a polarized public." New York Public Radio's retrospective on "justice and journalism" in the Central Park case is available online at: https://www.wnyc.org/story/justice-and-journalism-thirty-years-after-central-park-jogger-case/. The MSNBC article is available online at: https://www.msnbc.com/politicsnation/its-if-we-were-born-guilty-the-central-msna16885.

On May 1, 1989, Donald Trump jumped into the media frenzy, taking out a full-page advertisement in four New York City newspapers with the headline "BRING BACK THE DEATH PENALTY. BRING BACK OUR POLICE!" In the ad, Trump wrote "I want to hate these murderers and I always will. I am not looking to psychoanalyze or understand them, I am looking to punish them." The ad did not explicitly reference the five defendants in the Central Park case, but according to *The New York Times*, the ad "made clear that [Trump] was voicing his opinion" because of the Central Park case. In a 2019 retrospective on Trump's ad, *TIME Magazine* reported that "though the news was already making headlines, Trump's ad, which ran in local papers less than two weeks after the incident, played a key role in shaping public opinion about the case." The *TIME* article is available online at: https://time.com/5597843/central-park-five-trump-history/. For additional information on Trump's ad, see *The New York Times* article available online at: https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html.

As recounted in a *Newsweek* retrospective on the case, at trial, each of the defendants was convicted of some crime in relation to the jogger's beating and rape. However, in 2002, all five convictions were vacated after Matias Reyes, who had been convicted of other rapes, came forward as the sole perpetrator. His DNA also matched evidence from the crime. A year after they were exonerated, the five men filed a civil suit against the City of New York and the police and prosecutors involved in the conviction. The case settled for $40 million in 2014. The exoneration also received widespread commentary and media attention. This included a 2012 documentary film called *The Central Park Five* made by Ken Burns and his daughter Sarah Burns. For details of the sentences and time served by the five men, see: https://www.newsweek.com/how-long-central-park-five-incarcerated-when-they-see-us-1443119. For more on the exoneration, civil suit, and documentary, see: https://time.com/5597843/central-park-five-trump-history/.

However, despite the men's exoneration, Trump has continued to assert that the five are guilty of the crimes with which they were charged. He has also never apologized for the ad he took out which implicitly called for their death. In 2013, Trump tweeted about the 2012 Ken and Sarah Burns documentary covering the exoneration of the five, writing "The Central Park Five documentary was a one-sided piece of garbage that didn't explain the horrific crimes of these young men while in park [*sic*]." In a 2014 op-ed, Trump wrote: "My opinion on the settlement of the Central Park Jogger case is that it's a disgrace" and "[t]hese young men do not exactly have the pasts of angels." Before the 2016 election, Trump said to CNN, "[t]hey admitted they were guilty. The police doing the original investigation say they were guilty. The fact that that case was settled with so much evidence against them is outrageous." In 2019, when asked about the newspaper ads, Trump said, "You have people on both sides of that. They admitted their guilt. If you look at Linda Fairstein [the Manhattan sex crimes district attorney in 1989] and if you look at some of the prosecutors, they think that the city never should have settled that case — so we'll leave it at that." Coverage of Trump's prior comments about the Central Park Jogger case is available online at: https://time.com/5597843/central-park-five-trump-history/ and at: https://www.nytimes.com/2019/06/18/nyregion/central-park-five-trump.html.

Trump's most recent attack on the five men came during the Sept. 10, 2024, presidential debate in Philadelphia, Pa. Vice President Kamala Harris brought up the case during the "race and politics" portion of the debate, saying of Trump, "[l]et's remember, this is the same

individual who took out a full-page ad in The New York Times calling for the execution of five young Black and Latino boys who were innocent, the Central Park Five. Took out a full-page ad calling for their execution." Trump responded, "[t]hey come up with things like what she just said going back many, many years when a lot of people including Mayor Bloomberg agreed with me on the Central Park Five. They admitted — they said, they pled guilty. And I said, well, if they pled guilty they badly hurt a person, killed a person ultimately. And if they pled guilty — then they pled we're not guilty." None of the Central Park Five ever pled guilty; neither the rape victim nor anyone else was killed in Central Park on the night in question; and the mayor at the time of the assaults was Ed Koch. One of the five, Salaam, was present at the debate as a supporter of Vice President Harris. Trump and Harris are quoted in debate coverage available online at: https://abcnews.go.com/US/central-park-five-trump-lawsuit/story?id=114994231 and at: https://www.cnn.com/2024/10/21/politics/central-park-five-trump-defamation/index.html. The relevant clip of the debate is available online at: https://exoneratedfiveversustrump.com/.

On Oct. 21, 2024, Salaam, Santana, Richardson, Brown, and Wise filed a defamation suit against Trump based on the statements at the debate in the United States District Court for the Eastern District of Pennsylvania, the district where the debate took place. The plaintiffs brought the action in federal rather than state court under what is known as "diversity jurisdiction." Federal law allows plaintiffs to sue in federal court when there is diversity of citizenship — meaning the opposing parties are residents of different states — and the amount in controversy exceeds $75,000. The plaintiffs further argued that suing in the Eastern District of Pennsylvania was proper because, "a substantial part of the events or omissions giving rise to the claim occurred in this District." The complaint details the comments at the debate as well as Trump's history of commenting on the Central Park Five case and the exoneration of the five men. The complaint brought three counts: defamation, false light, and intentional infliction of emotional distress. In the complaint, the men allege that Trump caused them "harm, including severe emotional distress and reputational damage," which was the "direct result of . . . Trump's false and defamatory statements at the September 10 debate." The defamation case is *Salaam et al. v. Trump*, Docket No. 2:24-cv-05560 (E.D. Pa. Oct 21, 2024) and the complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.paed.628885/gov.uscourts.paed.628885.1.0.pdf.

The complaint does not mention the specific community in which the men's reputations were damaged. As the Kentucky law firm Hemmer, Wessels, McCurty noted in a 2022 article on defamation, "[d]amages . . . have usually been gauged by the harm suffered by the victim in the community where he or she lives or works . . . ." However, the growth of the internet has made "'the community' . . . very difficult to define." This has led more plaintiffs to file defamation suits in federal court. Defendants in these cases sometimes attempt to have the cases removed back to state court. The article from Hemmer, Wessels, McCurty is available online at: https://www.hemmerlaw.com/blog/federal-court-jurisdiction-in-internet-defamation-cases/.

Both Trump and the Five have spoken publicly about the case since it was filed. Shanin Specter, co-lead counsel for the Five, told the *Associated Press* (*AP*) that Trump essentially "defamed them in front of 67 million people, which has caused them to seek to clear their names all over again." The *AP* also reported on a statement from Trump spokesman Steven Cheung who described the suit as "just another frivolous, Election Interference lawsuit, filed by desperate left-wing activists, in an attempt to distract the American people from Kamala Harris's dangerously liberal agenda and failing campaign." The *AP* coverage is available online at: https://apnews.com/article/central-park-five-exonerated-donald-trump-lawsuit-harris-6d7cfa4e5d117fb653d83555423b35f9.

On Nov. 15, 2024, *The Hill* reported that Trump had requested that the original judge in the case, Michael Baylson, recuse himself. Specter, the Five's lead attorney, is a childhood friend of the judge and has represented the judge and his wife in legal matters. The plaintiffs did not object to Trump's motion. The case was reassigned to Judge Wendy Beetlestone, also of the federal District Court for the Eastern District of Pennsylvania. *The Hill's* report on the recusal is available online at: https://thehill.com/regulation/court-battles/4993678-central-park-five-defamation-lawsuit/.

Trump's election in November 2024 has created uncertainty about how the pending civil cases against him will proceed. Two precedential cases from the Supreme Court may shed some light on the continuation of the defamation case. In *Nixon v. Fitzgerald*, the Court found that a sitting president has immunity from civil liability for official conduct, which would not be directly applicable in this case. 457 U.S. 731 (1982). More relevant may be *Clinton v. Jones*. 520 U.S. 681 (1997). That case involved a civil action brought against President Bill Clinton alleging misconduct from before Clinton took office and unrelated to any official duties. The Court allowed the civil charges to proceed, but held that special arrangements would be required to prevent the action from interfering with presidential duties. In an online article, Syracuse University law professor Gregory Germain suggested that pending appellate cases probably could continue because they do not require personal participation from Trump. For the Central Park Five case, Trump's participation may be more complicated because the case is in the early stages of litigation. The Court in *Clinton v. Jones* held that presidents cannot be compelled to testify live, and suggested other restrictions, including that any depositions would have to occur in the White House. It remains to be seen whether a potential jury trial could proceed in a manner that does not interfere with presidential duties. Germain's article is available online at: https://news.syr.edu/blog/2024/11/06/what-happens-to-the-pending-criminal-and-civil-cases-against-trump-following-his-election/.

For more information about other Trump defamation cases, see "Three Defamation Cases Against Former President Donald Trump Continue to Play Out in Courts" in the Summer 2023 issue of the Silha *Bulletin*; "Former President Donald Trump's Defamation Cases Persist Amid Campaign, Criminal Charges" in the Fall 2023 issue; *Jury Rules Against Trump in Defamation Trial; Second Suit Postponed Indefinitely* in "Former President Donald Trump Involved in Lawsuits Regarding Access, Copyright, and Defamation" in the Winter/Spring 2023 issue.

— Alex Lloyd
Silha Center Research Assistant

Wisconsin Defamation Suit Targets Independent Media Organization, Considers Who Is a "Public Figure"

On Sept. 17, 2024, the Wisconsin Court of Appeals, an intermediate appellate court, ruled that a man who allegedly used an anti-gay slur at a community meeting, and who later sued the newspaper that reported on the incident for defamation, was a public figure for purposes of his suit. Because he was a public figure, the court held, the plaintiff, Cory Tomczyk, had to prove that the paper had acted with "actual malice" in order to succeed in proving defamation. The case gives insight into who is considered a public figure for the purpose of defamation law, and also serves as an example of the danger posed by strategic lawsuits against public participation (SLAPPs) to independent media organizations.

DEFAMATION

The events that led to Tomczyk's suit began in 2020. As *The New York Times* reported, that summer, following the police killing of George Floyd in Minneapolis, county officials in Marathon, Wis., gathered to draft a resolution that they hoped would help the community reckon with systemic racism and injustice. The first iteration of the resolution, which was titled "No Place For Hate," was deemed too divisive. In 2021, the county board, which had been unable to reach an agreement on the resolution, began considering an amended version which would have declared the county a "Community for All." The resolution called on the Marathon County Board of supervisors to recognize "diversity, inclusion, and equity as essential to a positive and healthy life" and acknowledge the opportunity disparities, particularly along racial lines, that existed in Wisconsin. The resolution would have "proclaim[ed] Marathon County as 'A Community For All' and reject[ed] and condemn[ed] any hate-based activity or conduct directed to harm a person due to a person's protected class." The original resolution text is available online at: https://wpr-public.s3.amazonaws.com/wprorg/community_for_all_resolution.pdf.

As detailed in *The Times* report, at a May 2021 debate on the resolution, Supervisor William Harris, the only Black member of the board, advocated for the resolution, saying, "I want to feel like I'm a part of this community. That's what a lot of our residents are saying. We want to contribute to our community. We want to feel like a part of this community." Black and Hmong county residents and board members also shared their own perspectives of experiencing racism and noted the demonstrated opportunity gaps. Supervisor Harris noted, "[r]acial and ethnic minorities are significantly more likely to live below the poverty level. The numbers don't seem to match up with the [idea] everyone has equal access to the same opportunities." La'Tanya Campbell, a Black social worker, noted: "Typically, the racism you experience is behind closed doors, but since I've started on this resolution I can't believe some of the things that I'm hearing. You feel unsafe being a woman, I feel unsafe being a Black woman."

Others quoted by *The Times* opposed the measure. Supervisor Craig McEwen, who is a white, retired police officer, argued that the resolution was racially discriminatory because, "[w]hen we choose to isolate and elevate one group of people over another, that's discrimination." In debates on the resolution, local Republican Party chairman Jack Hoogendyk claimed that it would lead to "the end of private property" and "race-based redistribution of wealth." A local dairy farmer and public opponent of the resolution who also organized counter demonstrations to Black Lives Matter Protests told *The Times* that racism "doesn't exist [in Marathon County]" and stated that he (a white man) could not "recall any type of racial instances that has [*sic*] been reported in this community that has [*sic*] caused any type of stress." Supervisor Arnold Schlei, a community board member for 11 years who opposed the measure said, "[t]hey're creating strife between people labeling us as racist and privileged because we're white. You can't come around and tell people that work their tails off from daylight to dark and tell them that they got white privilege and they're racist and they've got to treat the Hmongs and the coloreds and the gays better because they're racist. People are sick of it."

On May 13, 2021, in a 6 to 2 vote, the County Board's Executive Committee rejected the resolution. An Appleton, Wis.-based newspaper, the *Post-Crescent*, reported that the matter was returned to the Diversity and Affairs Commission, a subcommittee of the Marathon County Board, to be revised. The paper further reported on community members who disagreed with the Executive Committee's decision to reject the proposal. Notably, Mayor Katie Rosenberg of Wausau, the county seat of Marathon County, declared Wausau a "Community for All" in a public statement, because the county would not. *The New York Times* report is available online at: https://www.nytimes.com/2021/05/18/us/politics/race-inclusion-wasau-wisconsin.html?action=click&module=Top%20Stories&pgtype=Homepage. Additional coverage from the *Wausau Daily Herald* is available online at: https://www.postcrescent.com/story/news/local/2021/05/20/marathon-county-community-all-diversity-resolution-not-dead-yet/5091221001/.

According to reporting from the *Wausau Pilot & Review* (*Pilot & Review*), a nonprofit local news organization, in August 2021, the Diversity Affairs Commission proposed a new version of the resolution which removed the words "equity" and "systemic inequality." Debate on the resolution again ramped up as the Executive Committee of the Wausau County Board voted to advance the amended version of the proposal. On August 19, 2021, the 38-member county Board weighed the updated resolution and heard from more than 50 residents and three supervisors with deeply divided opinions on the measure.

The *Pilot & Review* covered the August 19 meeting and included much of the commentary from community members in an Aug. 21, 2021, article. One of the comments was from Norah Brown, the mother of 13-year-old Julian Brown who had spoken in favor of the resolution at an Executive Committee meeting the prior week. At the August 19 meeting, Norah Brown stated that her son had been called a slur after his remarks. Brown's statement was corroborated by Lisa Ort Sondergard, a member of the County's Diversity Affairs Commission who was quoted by the *Pilot & Review* as saying she heard a local businessman use the slur "fag" in reference to Brown's son. The Aug. 21, 2021, *Pilot & Review* article is available online at: https://

wausaupilotandreview.com/2021/08/21/as-diversity-decision-nears-conclusion-an-adult-dismisses-a-slur-against-13-year-old-saying-get-over-it/.

On Aug. 28, 2021, the *Pilot & Review* followed up on the story about the slur and named the "local businessman" as Cory Tomczyk. The newspaper reported that "Tomczyk, earlier this month, was widely overheard calling a 13-year-old boy who spoke in favor of the resolution a 'fag,' prompting another resident, Christopher Wood, to say later that the boy should 'get over it.'" The August 28, 2021, story is available online at: https://wausaupilotandreview.com/2021/08/28/threats-against-elected-officials-marked-heated-debate-on-community-for-all-resolution/.

On Nov. 5, 2021, Tomczyk filed a defamation lawsuit against the *Pilot & Review*, its editor Shereen Siewert, and reporter Damakant Jayshi in the Wisconsin Circuit Court for Marathon County in Wausau. Tomczyk denied ever using the slur and argued that the *Pilot & Review* never spoke to meeting attendees who identified him as the speaker. However, the defendants cited evidence from three meeting attendees who confirmed that they heard Tomczyk use the slur. The *Pilot & Review* filed for summary judgment, and on April 28, 2023, Judge Scott M. Corbett granted the defendants' motion and dismissed the case. Notably, the court held that Tomczyk was a public figure during his participation in the "Community For All" debate, and therefore had to prove that the allegedly defamatory statements had been made with "actual malice," meaning that the speaker made them knowing they were untrue, or acted with reckless disregard for their truth. The "actual malice" standard was outlined by the United States Supreme Court in the landmark case *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In *Sullivan*, the Court established that the constitution requires "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'" The Court held that this standard was necessary to prevent public figures from using litigation to chill speech on matters of public importance.

In his opinion, Judge Corbett held that Tomczyk was a public figure "at least for the limited purpose of the 'Community for All' debate." The court noted that, in Wisconsin, a public figure does not need to be "generally famous or notorious" and can be considered a public figure "because of his or her involvement in a particular public controversy." The court added that Tomczyk "was a local business owner who spoke out against the resolution at two public meetings on the issue, including the August 12 meeting at which he allegedly uttered the slur. Both his public comments and the alleged use of a slur toward another person making public comment were newsworthy, making his role in the controversy more than trivial or tangential. And, given that the stated purpose of the 'Community for All' resolution was to promote inclusivity, his alleged use of the slur would be germane to the resolution and to his participation in the controversy." Once the court determined that the plaintiff met the definition of at least a limited purpose public figure, Tomczyk was required to demonstrate that the *Pilot & Review* acted with actual malice.

On this point, the court held that Tomczyk failed to prove that the defendants acted with actual malice, writing, "[w]hat the plaintiffs' arguments amount to is an indictment of the defendants' journalistic practices. However, '[a] court's role is to interpret and apply the law, not to enforce standards of journalistic accuracy or ethics.'" The trial court held that Tomczyk failed to prove the *Pilot & Review* "knew the statement was false, or made the statement with reckless disregard for whether it was true or false" and dismissed the claim. The summary judgment opinion is *Tomczyk v. Wausau Pilot & Review Corp.*, No. 21-CV-625, 2023 WL 11159655 (Wis. Cir. Apr. 28, 2023). More coverage on the defamation case is available from the *Post-Crescent* online at: https://www.postcrescent.com/story/news/2023/08/27/cory-tomczyks-lawsuit-against-wausau-pilot-review-spurs-anti-slapp-bill-community-for-all/70658682007/.

On June 6, 2023, Tomczyk appealed the trial court's decision that he was a public figure for the purposes of defamation law. In the briefing before the state appeals court in Wausau, Tomczyk argued that although he had subsequently become a state senator (he was elected in 2023 after the incident that led to the defamation lawsuit), when the article in question was published, he "was a private citizen whose only connection to the Community for All Resolution was that he attended public hearings to express opposition to the resolution. This act of basic citizenship should not be used to transform unsuspecting private citizens into public figures." A three-judge panel of the Wisconsin appeals court disagreed, and on Sept. 17, 2024, ruled in favor of the local news outlet, affirming the lower court's grant of summary judgment.

The court explained that Tomczyk qualified as a "limited purpose public figure," which for purpose of defamation law are "otherwise private individuals who have a role in a specific public controversy. The court explained that in Wisconsin, there is a two-prong test for determining a plaintiff's status as a limited purpose public figure: First, courts determine if there is "a public controversy;" and second, they "look at the nature of the plaintiff's involvement in the public controversy." Tomczyk conceded there was a public controversy, so the court only needed to resolve the second prong — determining the nature of Tomczyk's involvement. This analysis requires three steps under the Wisconsin Supreme Court case *Wiegel v. Capital Times Co.* 426 N.W.2d 43 (Ct. App. 1988). Courts must: "(1) isolat[e] the controversy at issue; (2) examin[e] the plaintiff's role in the controversy to determine whether it is more than trivial or tangential; and (3) determin[e] whether the alleged defamation was germane to the plaintiff's participation in the controversy."

The court held that the controversy at issue was the debate surrounding the "Community for All" resolution. With respect to the second prong — the plaintiff's role in the controversy — the court highlighted Tomcyzk's extensive participation in the "Community for All" debate, especially Tomczyk's vocal opposition to the resolution at multiple meetings where he rebuked county board members, and the appearance of his photo below the headline of a *New York Times* article on the resolution. The court also highlighted Tomczyk's public-facing community actions, including that he organized and promoted "numerous community protests against COVID-19 pandemic measures and vaccinations," gave interviews with local news promoting the protests, served on the Mosinee County School Board from 2006-2019, served as the vice chair of the Republican Party of Marathon County from 2008-2015, and was part of a number of other community boards. The court wrote that "it is clear that

Tomczyk, *continued on page 24*

Tomczyk, *continued from page 23*

Tomczyk voluntarily 'thrust' himself 'to the forefront of' the Community for All debate 'in order to influence the resolution of the issues involved'" by "attending the county board meetings and speaking out against both the resolution and the board itself, which brought particular attention to the divisive nature of the controversy and drew more attention to the debate than merely opposing the resolution would have."

With respect to the third issue, the court analyzed whether "the alleged defamation was germane to the plaintiff's participation in the controversy," or, in other words, whether the allegedly defamatory statements related to Tomczyk's role in the controversy. The court explained that the *Pilot & Review* articles "focused entirely on the Community for All debate" and "detailed the divisive viewpoints" on the resolution and county leadership. The court noted that the resolution promoted inclusivity of all, regardless of sexual orientation, and the slur allegedly used by Tomczyk specifically targeted gay people. The court wrote, "given that Tomczyk strongly opposed the resolution and that the resolution specifically identified sexual orientation as a consideration, we agree with Wausau Pilot's assertion that it reported the allegedly defamatory statements 'in connection with and to emphasize' the acrimony of the 'Community for All' debate and the sharply opposing viewpoints on issues of diversity, which would certainly encompass the use of an anti-gay slur." Because Tomczyk's involvement satisfied all the necessary factors, the court held that he was a limited purpose public figure for purpose of the defamation suit.

The court went on to find that Tomczyk's complaint could not meet the standard for "actual malice" because, based on testimony about the steps *Pilot & Review* took to confirm the information, the court could not "conclude that Wausau Pilot knew that the allegation was false or even that it harbored any doubts as to that fact." The deadline for appealing to the Wisconsin Supreme Court is 30 days after an adverse position which expired on October 17, 2024, without an appeal from Tomczyk. The court of appeals case is *Tomczyk v. Pilot*, No. 2023AP998, 2024 WL 4211943 (Wis. Ct. App. Sept. 17, 2024) and coverage from the *Post-Crescent* is available online at: https://www.postcrescent.com/story/news/2023/08/27/cory-tomczyks-lawsuit-against-wausau-pilot-review-spurs-anti-slapp-bill-community-for-all/70658682007/.

Despite its legal victories, the lawsuit has put the *Pilot & Review* into a precarious financial position and raised concerns about Wisconsin's lack of protections for those who exercise their First Amendment rights. Democratic state lawmakers cited the legal battle between Tomczyk and the *Pilot & Review* in 2023 when introducing a bill to protect against "Strategic Lawsuits Against Public Participation" or SLAPPs. SLAPPS are meritless lawsuits designed to chill public speech. Anti-SLAPP laws allow for the dismissal of such lawsuits at an early stage, before defendants are subjected to expensive and lengthy discovery. Although many states have anti-SLAPP legislation, Wisconsin does not. An anti-SLAPP bill expired in the 2023 legislative session and "failed to gain a single Republican sponsor and it never advanced to a public hearing in the GOP-controlled state Legislature." Without such protective legislation, the *Pilot & Review* has had to fight a now three-year legal battle and shoulder extensive legal costs. Coverage of the appellate court's decision and lack of anti-SLAPP protections in Wisconsin is available from Wisconsin Public Radio at: https://www.wpr.org/news/appeals-court-wausau-pilot-review-defamation-case-tomczyk. For more on anti-SLAPP developments in other states, see "Anti-SLAPP Legislation Update: Two More States Adopt the UPEPA'sModel Statute" on page 28 of this issue of the Silha *Bulletin*.

In August 2023, *Pilot & Review* editor and publisher Shereen Siewert (and co-defendant in the Tomczyk suit), told Wisconsin Public Radio that the paper had accrued between $150,000 and $200,000 in legal bills, which has been devastating for an organization with a normal annual operating budget of $180,000. Siewert said "It's extremely frustrating that this kind of money is just being completely wasted. It's money that could go to boots-on-the-ground reporting." Siewert described her vision for the *Pilot & Review* as an organization that "shine[s] a light on local issues and fill[s] gaps as news organizations downsize." She said "As larger news organizations continue to shrink, they continue to cut back, they continue to remove reporters. We're looking to grow and fill that gap. You build, and build, and build something that is meant to be a huge service to the community, and just to see it all so easily taken away, potentially taken away. It's frightening." Erik Ugland, a media law professor at Marquette University, also discussed the suit with Wisconsin Public Radio, saying, "[o]ne of the concerns is that this is an example of somebody using their resources to try to . . . push somebody else around. This case never had a chance of succeeding — not a prayer — and yet it accomplished a goal in the sense that it has now put this organization in jeopardy to the point where they're having to do GoFundMe campaigns." The Wisconsin Public Radio story is available online at: https://www.wpr.org/justice/wausau-news-site-raises-money-legal-fees-after-politician-sues-defamation.

The weekly Madison newspaper *The Capital Times* also covered the story in a report that included commentary from press freedom scholar Stephen Solomon, founding editor of New York University's First Amendment Watch and Marjorie Deane Professor at NYU's Arthur L. Carter Journalism Institute. Solomon noted that lawsuits like this one "sit[] in a larger context of all the financial struggles that the industry is having. It sits in the context of fewer reporters and publications covering state capitals and other important locales. It's a cumulative effect." *The Capital Times* also highlighted that the U.S. "has lost more than one quarter of its newspapers since 2005 and is on track to lose one third by 2025." In a report on Tomczyk's lawsuit, the Freedom of the Press Foundation wrote: "The case against the Wausau Pilot & Review is a prime example of how resentful subjects of reporting can weaponize the legal system to attack the First Amendment. Without strong laws that protect against meritless lawsuits that chill speech, known as strategic lawsuits against public participation, or SLAPPs, even journalists who win can lose." *The Capital Times* article is available online at: https://captimes.com/news/government/wausau-defamation-case-linked-to-broad-threats-to-press-freedoms/article_5ebf4ebe-66ec-11ee-9c64-8bb89155c415.html. The Freedom of the Press Foundation article is available online at: https://freedom.press/issues/frivolous-suits-stalk-journalists-in-states-without-anti-slapp-laws/.

— Alex Lloyd
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New Jersey's Superior Court Appellate Division Hands Down Mixed Ruling in Defamation Case

DEFAMATION

On Oct. 15, 2024, the Superior Court of New Jersey, Appellate Division, addressed the standard of "actual malice" in defamation law in a case dealing with an Olympian's social media posts about a public-school teacher's alleged treatment of a Muslim student. Tamar Herman, a second-grade teacher, sued Ibtihaj Muhammad, a Muslim-American fencer and Olympic bronze medalist, for comments she made about Herman online. Herman also sued the Counsel on American Islamic Relations Foundation (CAIR), CAIR New Jersey, and CAIR New Jersey's executive director (collectively CAIR defendants). The trial court declined to grant the defendants' motion to dismiss Herman's claims. On appeal, the appellate court upheld the lower court decision with respect to one of the defendants — Muhammad — but granted the CAIR defendants' motion to dismiss in two separate, unpublished decisions.

Details in this story are drawn from the cited sources. Additional details about the allegations are drawn from the Superior Court Appellate Division decisions. The court's decision with respect to Muhammad's claim, *Herman v. Muhammad*, No. A-1328-23 (N.J. Super. Ct. App. Div. Oct. 15, 2024), is available online at: https://www.njcourts.gov/system/files/court-opinions/2024/a1328-23.pdf. The decision with respect to the CAIR defendants, *Herman v. Muhammad*, No. A-0784-23 (N.J. Super. Ct. App. Div., Oct. 15, 2024), is available online at: https://www.njcourts.gov/system/files/court-opinions/2024/a0784-23.pdf. Herman's complaint is available online at: https://www.bloomberglaw.com/product/blaw/document/XA442AR3949R785G3HQ53CBK16.

The suit stemmed from Herman's alleged mistreatment of one her Muslim students in 2021. As *The New York Times* reported on October 22 of that year, the details of the incident were disputed. According to Herman's recounting of the event in her complaint to the court, on Oct. 6, 2021, she noticed that one of her Muslim students, who normally wore a form fitting hijab, was wearing what appeared to be a hood that covered her eyes. Unaware that the student was in fact wearing a loose-fitting hijab, and in an attempt to reengage the student in the class, Herman asked her to remove her hood. She then "lightly brush[ed] back" the student's hijab, exposing the student's hair. Upon realizing that it was in fact the student's hijab, Herman claimed that she "immediately and gently brushed [it] back." She stated that "out of respect for [the student and] the religious practices of Islam," she apologized. Herman further claimed that the hijab never left the student's head, and that the class resumed "without disruption." *The New York Times* article is available online at: https://www.nytimes.com/2021/10/22/nyregion/hijab-muslim-nj-student.html.

After the incident, the student told her mother, who then spoke about the incident with others and posted about it on Facebook. According to a report from *Reason.com*, an online libertarian magazine that tracks free speech litigation, the next day, the Muslim-American Olympic fencer and bronze medal winner Ibtihaj Muhammad publicly decried Herman's actions. Muhammad, who in addition to winning an Olympic medal, was the first American woman to wear a hijab in the Olympics, posted the following statement to Instagram:

"I wrote this book [The Proudest Blue: A Story of Hijab and Family] with the intention that moments like this would never happen again. When will it stop? Yesterday, Tamar Herman, a teacher at Seth Boyden Elementary in Maplewood, NJ forcibly removed the hijab of a second grade student. The young student resisted, by trying to hold onto her hijab, but the teacher pulled the hijab off, exposing her hair to the class. Herman told the student that her hair was beautiful and she did not have to wear [a] hijab to school anymore. Imagine being a child and stripped of your clothing in front of your classmates. Imagine the humiliation and trauma this experience has caused her. This is abuse. Schools should be a haven for all of our kids to feel safe, welcome and protected — no matter their faith. We cannot move toward a post-racial America until we weed out the racism and bigotry that still exist in all layers of our society. By protecting Muslim girls who wear hijab, we are protecting the rights of all of us to have a choice in the way we dress. Writing books and posting on social is not enough. We must stand together and vehemently denounce discrimination in all of its forms. CALL Seth Boyden Elementary (973) 378-5209 and EMAIL the principal sglander@somsd.k12.Nj.us and the superintendent Rtaylor@somsd.k12.Nj.us."

Muhammad edited the statement shortly after posting it, deleting the first two sentences and adding a photo of the elementary school where the incident occurred. She reposted the edited version to Instagram and to Facebook. The report from *Reason.com* is available online at: https://reason.com/volokh/2024/10/16/teachers-defamation-lawsuit-over-allegations-she-mistreated-muslim-student-can-go-forward/.

Muhammad's posts were widely shared on social media. In response to the posts, CAIR New Jersey's executive director, Selaedin Maksut, made posts online decrying Herman's actions, and appeared on local television where he stated, "[a]nyone who thinks it's OK to do this to a student clearly is not fit to be a teacher." Both CAIR and CAIR New Jersey called for Herman's firing in response to the incident. CAIR New Jersey issued the following statement on Oct. 8, 2021: "We call for the immediate firing of the teacher. Anything less is an insult to the students and parents of Maplewood. Forcefully stripping off the religious head scarf of a Muslim girl is not only exceptionally disrespectful behavior, but also a humiliating and traumatic experience. Muslim students already deal with bullying from peers, it's unthinkable that a teacher would add to their distress. Islamophobia in our public schools must be addressed in New Jersey and nationwide. Classrooms are a place for students to feel safe and welcome,

Herman, *continued on page 26*

Herman, *continued from page 25*

not fear practicing their faith." CAIR New Jersey's statement is available online at: https://www.cair.com/press_releases/cair-nj-calls-for-immediate-firing-of-teacher-who-allegedly-pulled-off-muslim-students-hijab/.

On Feb. 15, 2022, Joseph and Cassandra Wyatt, the parents of the Muslim student, filed suit against Herman and the South Orange Maplewood School District Board of education in the Superior Court of New Jersey Essex County Division for nine counts related to discrimination, assault, negligence, and intentional infliction of emotional distress. In the complaint, the parents reiterated the claims that Herman forcibly removed their daughter's hijab and described other instances of misconduct from Herman. The case, *Wyatt v. Herman*, L-001491-22 (N.J. Super. Ct. Law Div. Essex County Ct. Mar. 4, 2022), was eventually dismissed after the matter was "amicably adjusted by and between the parties." The complaint is available online at: https://portal.njcourts.gov/CIVILCaseJacketWeb/pages/civilCaseSummary.faces?cid=3. The dismissal stipulation notice is available online at: https://portal.njcourts.gov/webcivilcj/CIVILCaseJacketWeb/pages/civilCaseSummary.faces?cid=3.

In October 2022, nearly a year after the original incident, *The New York Times* reported that Herman sued Muhammad and the CAIR defendants in the Superior Court of New Jersey for Union County for defamation and false light invasion of privacy, a tort similar to defamation but which focuses on an individual's peace of mind rather than their reputation. *Romaine v. Kallinger*, 537 A.2d 284, 290 (N.J. 1988). She alleged that Muhammad's post, and the CAIR defendants' boosting of the post, prompted Essex County to open a criminal investigation into the incident. On Jan. 19, 2022, the Essex County prosecutor's office informed Herman that no charges would be brought. The prosecutor's office issued a statement that "Following a full investigation and a thorough review of all the available evidence and the applicable law, the Essex County Prosecutor's Office has concluded that there is insufficient evidence to sustain a criminal prosecution in this case." The statement also noted: "While we understand that many may find the incident troubling, as prosecutors we have a legal and moral obligation to only bring charges in cases where we believe we can prove beyond a reasonable doubt that a crime has been committed. For those reasons, we will not move forward with this case." In her complaint, Herman stated that although she was eventually "vindicated by the outcome" of the investigation, she still faced emotional distress, threats, the destruction of her reputation, and condemnation from her childhood rabbi. *The New York Times* article is available online at: https://www.nytimes.com/2022/10/18/nyregion/nj-teacher-hijab-ibtihaj-muhammad.html. Reporting on the Essex County Prosecutor's Office statement is available online at: https://www.northjersey.com/story/news/essex/2022/01/19/maplewood-nj-teacher-pulling-hijab-wont-face-charges/6581205001/.

The defendants moved to dismiss Herman's suit, arguing that she had failed to allege that the statements were made with "actual malice." The Supreme Court imposed the actual malice standard in certain types of libel suits in *New York Times Co. v. Sullivan* U.S. 254, 279–80 (1964). In that case, the Court held that the First Amendment prohibits "public officials from recovering damages for a defamatory falsehood relating to [their] official conduct unless [they] prove that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." By requiring public officials to prove that statements about them were made with knowledge of their falsehood, the Court made it more difficult for public figures to prove defamation claims. Though the Court based its holding in the First Amendment, it was also motivated by policy considerations. Specifically, it wanted to ensure that public figures could not chill debate on matters of public concern, or silence political criticism, by bringing defamation suits. In the years after *Sullivan*, the Court expanded the doctrine, extending its holding to public figures as well as public officials. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Associated Press v. Walker*. 388 U.S. 130, 162 (1967).

Under the *Sullivan* line of cases, only public officials, public figures, and those seeking punitive damages are constitutionally required to demonstrate that allegedly defamatory statements were made with actual malice. Some states apply the actual malice standard in other circumstances as well. This is the case in New Jersey, where courts have adopted the actual malice standard, not only in cases involving public officials or public figures, but also with respect to matters of "public concern" generally. New Jersey courts have held that issues of public concern include statements concerning the welfare of children in the care of teachers. *See Senna v. Florimont*, 196 N.J. 469, 495 (2008); *Rocci v. Ecole Secondaire Macdonald-Cartier*, 165 N.J. 149, 160 (2000). Thus, although Herman, as a public school teacher, was not considered a public figure under New Jersey law, she nevertheless had to prove the defendants acted with actual malice because her defamation suit was about a matter of public concern. For more on the development on New Jersey's defamation law, see https://www.law.com/njlawjournal/2023/10/06/public-defamation-suits-face-higher-hurdles-in-new-jersey/?slreturn=20241207173933.

Following the defendants' attempt to dismiss the suit, Herman amended her complaint on April 18, 2023, with further allegations designed to prove that Muhammad and the CAIR defendants knew, or should have known, that their statements were false. Herman alleged that Muhammad "did not investigate whether the allegations in her posts were true or false, or even make a good faith effort to determine whether the allegations were true." She argued that the post was "unbelievable" given that it was a third-hand account, and was based on the 7-year-old student's version, which was inherently unreliable because of the girl's age. Herman also alleged that the removal of the Instagram post was evidence of Muhammad's "reckless disregard for the truth of her statements." Finally, Herman alleged that she had a longstanding personal relationship with Muhammad — that they knew each other prior to the

incident, used the same personal trainer, and had exchanged numbers to discuss Muhammad coming to speak at the school. Herman further stated that, after seeing Muhammad's post, she texted her to tell her that her account of the incident was false. Herman alleged that despite this text exchange, "Muhammad made no effort to verify the truth," and admitted that she was relying on the young student's recall of the incident.

With respect to the CAIR defendants, Herman alleged that they had "repeated Muhammad's allegations and expanded upon them without investigation or a good faith effort to determine whether the allegations were true or false, or to get the facts straight, because — like Muhammad — [they] simply did not care at all whether the statements were true or not." Herman further claimed that the defendants never "attempted to contact Herman to learn what happened," and that "these facts demonstrate[d]" CAIR's "actual malice."

Following the filing of Herman's amended complaint, the defendants renewed their motion to dismiss, but the trial court denied the motion on Oct. 23, 2023. The trial court cited the U.S. Supreme Court's decisions in *Garrison v. Louisiana* and *St. Amant v. Thompson* holding that to show reckless disregard for the truth, a "plaintiff must show that the publisher made the statement with a 'high degree of awareness of [its] probable falsity,' … or with 'serious doubts' as to the truth of the publication." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1968); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The court found that Herman's "complaint plead[ed] detailed and particularized factual allegations" and that those "detailed facts … call into question whether Defendant Muhammad and thus, in turn, all Defendants, here knew or had serious doubts about the veracity of the alleged defamatory statements they made or circulated." The court denied the defendants' motion to dismiss based on the specific factual allegations that Muhammad and CAIR knew the statements were false or had serious doubts about their truth at the time of publishing.

In reaching this conclusion, the court applied the deferential standard of review that is customary for evaluating motions to dismiss. To survive a motion to dismiss, litigants need only allege sufficient facts to demonstrate that they have a plausible case. They do not need to prove their case at the dismissal stage. When a motion to dismiss is filed, the court construes all facts in the light most favorable to the non-moving party. Courts use this permissive standard in evaluating motions to dismiss to protect litigants' due process and avoid preemptively dismissing potentially valid claims. The trial court decision on the motion to dismiss is *Tamar v. Muhammad*, L-002913-22, (N.J. Super. Ct. Law Div. Union County Ct. May 8, 2023).

Following the trial court's ruling on the motion, Muhammad and the CAIR defendants decided to appeal the ruling in a process that is known as an interlocutory appeal. Generally, only final decisions in cases are appealable. However, certain non-final orders can also be appealed before a case is ultimately decided. The types of orders that are subject to interlocutory appeals vary by jurisdiction.

On Oct. 15, 2024, the New Jersey Superior Court, Appellate Division in Trenton issued two separate, unpublished decisions authored by Hon. Judges Sumners, Susswein and Bergman. One decision was for the motion to dismiss the case against the CAIR defendants and the other for the motion to dismiss the case against Muhammad. Breaking from the trial court, the appellate court granted the motion to dismiss with respect to the CAIR defendants. The court held that, "[m]ere failure to investigate all sources [of information to be published] does not prove actual malice." The court further stated that "Herman makes conclusory claims — with no factual support — that defendants knew the statements were false, were made with reckless disregard as to their truth, or they had reason to doubt their truth."

With respect to Muhammad's motion, however, the appellate court upheld the trial court's decision to deny the motion to dismiss. The court found Herman alleged specific facts sufficient to make out a plausible claim of defamation and false light invasion of privacy based on Muhammad's social media statements. The court pointed out that this decision did not indicate whether Herman would ultimately prevail in the case, but her complaint was sufficient to survive the motion to dismiss because if the facts alleged were proven true, they would constitute actual malice. The court focused on Herman's allegations about the text messages exchanged after the post went up that informed Muhammad that the information in the post was false. The court considered that according to Herman, "almost one month after the initial posts — Muhammad referred to the teacher-student interaction as the 'alleged incident,'" and that this indicated that Muhammad knew that she had "committed libel against Herman" and that she "'was (unsuccessfully) attempting to buffer herself against' her prior statements." The court concluded that "Herman's allegations of actual malice were not merely conclusory. Nor did she perfunctorily parrot the legal test. Rather, she detailed facts questioning whether Muhammad knew or had serious doubts about the veracity of the student's reports of the incident as relayed to the student's mother and Muhammad's mother." Additional coverage of the cases is available online at: https://www.bloomberglaw.com/bloomberglawnews/litigation/X5J34FMS000000?bna_news_filter=litigation#jcite.

At the time the *Bulletin* went to press, Herman had not appealed the dismissal of the claim against the CAIR defendants to the New Jersey Supreme Court. Muhammad has not appealed the denial of her motion to dismiss and filed an answer to Herman's complaint on Dec. 5, 2024. Muhammad's answer is available online at: https://portal.njcourts.gov/CIVILCaseJacketWeb/pages/civilCaseSummary.faces?cid=4.

— Alex Lloyd
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Anti-SLAPP Legislation Update: Two More States Adopt the UPEPA's Model Statute

In 2024, Minnesota and Pennsylvania passed anti-SLAPP statutes, bringing the total number of states with some form of anti-SLAPP law to 34, plus Washington D.C., according to the Reporters Committee for Freedom of the Press (RCFP). The RCFP's report is available online at: https://www.rcfp.org/anti-slapp-legal-guide/#:~:text=As%20of%20July%202024%2C%2034,%2C%20New%20Jersey%2C%20New%20Mexico%2C.

ANTI-SLAPP

Anti-SLAPP laws protect against "strategic lawsuits against public participation," known as SLAPPs, which are lawsuits aimed at stifling speech by imposing cost and discovery burdens on defendants. Anti-SLAPP laws allow defendants to avoid these burdens by providing a mechanism for early dismissal of frivolous claims. Although the specific processes set forth in anti-SLAPP legislation vary from state to state, the laws generally allow defendants to file a motion under a provision that stays proceedings, including discovery. The court must then determine whether the defendant has shown that the lawsuit implicates their right to free speech, petition, or association. If the lawsuit does implicate those rights, the plaintiff must demonstrate that they have a potentially viable claim. If they fail to do so, the lawsuit is terminated with prejudice and the moving party is entitled to costs, attorney's fees, and expenses.

The Uniform Law Commission (ULC), which defines its mission as providing "states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law," explained the general operation of anti-SLAPP laws in its prefatory note to the Uniform Public Expression Protection Act (UPEPA), a model anti-SLAPP statute, which is available online at: https://www.uniformlaws.org/viewdocument/final-act-110?CommunityKey=4f486460-199c-49d7-9fac-05570be1e7b1&tab=librarydocuments.

The ULC developed the UPEPA in 2020. In commentary on the law, the ULC noted that, since the 1980s, "the civil litigation system was increasingly being used in an illegitimate way: not to seek redress or relief for harm or to vindicate one's legal rights, but rather to silence or intimidate citizens by subjecting them to costly and lengthy litigation." When the UPEPA was developed, 32 states and the District of Columbia had some form of anti-SLAPP law, but the operation of those laws varied considerably. According to the ULC, the UPEPA was developed to "harmonize these varying approaches by enunciating a clear process through which SLAPPs can be challenged and their merits fairly evaluated in an expedited manner" in order to serve two purposes: "protecting individuals' rights to petition and speak freely on issues of public interest while, at the same time, protecting the rights of people and entities to file meritorious lawsuits for real injuries." The UPEPA with ULC commentary is available online at: https://shorturl.at/9OcAd.

In May 2024, Minnesota became the eighth state to adopt a version of the UPEPA. Minnesota's previous anti-SLAPP law was adopted in 1994. However, that law was struck down by the Minnesota Supreme Court in 2017. The court held that version of the law to be unconstitutional because it violated the Minnesota Constitution's guarantee of a trial by jury. See *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623 (Minn. 2017). This decision made Minnesota the second state, after Washington, to have its anti-SLAPP statute declared unconstitutional. The Reporters Committee for Freedom of the Press discussed the Minnesota law in an article available online at: https://www.rcfp.org/anti-slapp-guide/minnesota/. For previous coverage of developing anti-SLAPP laws, see "Several State Courts and Legislatures Grapple with Anti-SLAPP Laws" in the Summer 2017 issue of the Silha *Bulletin*.

After the anti-SLAPP statute in the state of Washington was struck down, the state adopted the UPEPA in 2021. The law was then challenged in the Washington courts, which led to the first appellate decision in the country on the validity of the UPEPA. The Washington Court of Appeals upheld the constitutionality of the UPEPA in a case concerning the speech rights of a city council member sued for an article she wrote during her campaign. *Jha v. Khan*, 520 P.3d 470 (Wash. Ct. App. 2022). For more on the original Washington anti-SLAPP law, see "Updates to State Laws Create Challenges, New Benefits for News Organizations" in the Summer 2015 issue of the Silha *Bulletin*.

On May 25, 2024, Minnesota followed in Washington's footsteps by adopting the UPEPA. Minn. Stat. § 554.17. The measure was passed as part of an omnibus bill addressing "public safety and judiciary budget and policy provisions." The law protects speech about matters of public concern, but does not have any restrictions with respect to particular categories of speech. Defendants can avoid the discovery process by filing an anti-SLAPP motion within 60 days of a plaintiff initiating a lawsuit. If a defendant establishes that their speech falls under the anti-SLAPP law, plaintiffs are required to demonstrate the legitimacy of their case, and defendants can appeal the denial within 30 days if an anti-SLAPP motion is denied, without litigating a full trial. If defendants are successful in anti-SLAPP motions to dismiss, the law contains a fee-shifting provision that awards costs and attorneys' fees to defendants. The law also "provides that it should be interpreted and applied broadly to protect the exercise of constitutional rights." The new law reportedly cured the defects for which the 1994 law was struck down, and the adoption of the UPEPA is expected to protect against further constitutional challenges. Details about the law's provisions can be found in a report from the Reporters Committee for Freedom of the Press, available online at: https://www.rcfp.org/anti-slapp-guide/minnesota/.

In a report published by the Minnesota House of Representatives, the legislature outlined its motivation for enacting the new law. The report noted: "UPEPA has the same goals and purposes as the 1994 legislation but it does not have the constitutional infirmities. The more carefully drafted procedures and evidentiary standards do not jeopardize the constitutional right to jury trial on

factual determinations or provide a higher burden-of-proof standard than the preponderance-of-the-evidence standard that would apply if the case went to trial." In an article about the law, the Institute for Free Speech, a First Amendment advocacy non-profit based in Washington, D.C., wrote, "with these robust provisions, Minnesota residents can speak out on public issues without fearing retaliatory legal actions designed to bankrupt and bully them into silence. The anti-SLAPP law creates a more equitable playing field for speakers of all means against the deep pockets of corporations or suit-happy individuals who might try to suppress criticism." The report from the Minnesota House of Representatives is available online at: https://www.house.mn.gov/comm/docs/Dwzp3u1PFU6YIfoE3vy3pA.pdf. The Institute for Free Speech's article on the Minnesota anti-SLAPP law is available online at: https://www.ifs.org/blog/free-speech-protections-get-a-boost-as-minnesota-enacts-a-strong-new-anti-slapp-law/

In July 2024, Pennsylvania became the ninth state, and the second in 2024, to adopt a version of the UPEPA, joining Minnesota, Maine, Oregon, New Jersey, Utah, Hawaii, Kentucky, and Washington. 42 Pa. Stat. § 8320.1. More on the latest developments related to anti-SLAPP laws is available online at: https://www.rcfp.org/anti-slapp-guide/latest-developments/.

The Pennsylvania law went into effect on July 17, 2024, amending the previous anti-SLAPP law in line with the UPEPA. The law recognizes "a disturbing increase in lawsuits brought primarily to chill the valid exercise of protected public expression" and "grants immunity to those groups or parties exercising the rights to protected public expression." The RCFP highlighted that under the law, "protected public expression" includes "news articles and commentary about issues on matters of public concern" and "also applies to lawsuits based on a person's communications in a legislative, executive, judicial, administrative, or other government proceeding and to communications on an issue under consideration by any of those bodies." The RCFP's coverage is available online at: https://www.rcfp.org/anti-slapp-guide/pennsylvania/.

Before the new law was enacted, Pennsylvania had a narrow anti-SLAPP law that was passed in 2000 and protected only free speech related to environmental issues. The 2024 law applies to all First Amendment protected speech. The fight in Pennsylvania for more robust anti-SLAPP protections was spurred by then-State Sen. Larry Farnese (D-Philadelphia) who first introduced similar legislation in 2013, but the bill did not pass. In 2023, Pennsylvania received a "D-" from the Institute for Free Speech, which publishes an annual evaluation of how well state anti-SLAPP laws protect First Amendment rights. The poor grade was based on the old law's narrow scope. The 2023 Anti-SLAPP report card is available at: https://www.ifs.org/anti-slapp-report/.

Not all Pennsylvanians, however, favored expansion of the original anti-SLAPP law. For example, the Pennsylvania Chamber of Business and Industry raised concerns about whether the law would permit slander of business developments or other enterprises. Sam Denisco, the vice president of government affairs of the Chamber stated: "We are worried that someone — an individual or business — will use the guise of a First Amendment protection when in fact they're blatantly slandering or distorting the facts in a situation that's really about stopping economic growth or development." Largely, however, the new Pennsylvania law received broad support across the political spectrum. State Rep. Ryan Bizzarro (D-Erie), who introduced the bill, described the ideological diversity of the Speak Free PA coalition, a self-described "bipartisan commonsense effort to update Pennsylvania law to protect people from being 'SLAPPed'" that supported the bill, saying: "When you're having the ACLU and you're having Americans for Prosperity . . . coming together on something, that usually never happens." Pennsylvania newsroom *Spotlight PA*, a non-profit news organization that covers state government and is based in Harrisburg, reported on the bill, and its coverage is available online at: https://www.spotlightpa.org/news/2024/07/pennsylvania-slapp-law-free-speech-lawsuits-protections/. Commentary from the Pennsylvania Chamber of Business and Industry is available online at: https://www.cityandstatepa.com/politics/2017/03/pa-may-finally-crack-down-lawsuits-aimed-curbing-free-speech/365104/.

As state protections against SLAPPs have increased, there have also been calls for a federal anti-SLAPP statute. With 16 states lacking any anti-SLAPP measures, and variations in state statutes as to levels of protection, the lack of any federal legislation has resulted in location-based discrepancies in the protection of First Amendment rights. Further, the lack of protections in certain states sometimes leads to forum shopping, a practice in which litigants seek to have their lawsuits heard by favorable judges. Federal courts have split on whether state anti-SLAPP laws apply in federal court. The 5th Circuit held in *Klocke v. Watson*, 936 F.3d 240, 245 (5th Cir. 2019) that the Texas anti-SLAPP statute does not apply in federal court. Some commentators have suggested that this decision motivated Elon Musk to select Texas as the forum for a suit he filed in 2023 against the nonprofit news organization Media Matters. The 2nd, 10th, 11th, and D.C. Circuits have also found that anti-SLAPP rules do not apply in federal court. *La Liberte v. Reid*, 966 F.3d 79 (2d Cir. 2020); *Los Lobos Renewable Power, LLC v. Americulture, LLC*, 885 F.3d 659 (10th Cir. 2018); *Carbone v. Cable News Network*, 910 F.3d 1345 (11th Cir. 2018); *Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015). The 1st and 9th Circuits, however, have found that anti-SLAPP rules are compatible with the Federal Rules of Civil Procedure and applied anti-SLAPP protections in federal suits. *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010); *U.S. ex rel. Newsham v. Lockheed Missiles & Space*, 190 F.3d 963 (9th Cir. 1999); *Planned Parenthood Federation of America, Inc. v. Ctr. for Medical Progress*, 890 F.3d 828 (9th Cir. 2018). The Supreme Court has yet to hear a case to resolve the conflict in the circuit courts. Discussion of the circuit split is available online at: https://www.law.com/newyorklawjournal/2023/12/08/substance-over-form-application-of-anti-slapp-statutes-in-federal-court/?slreturn=20241205135114 and https://thehill.com/opinion/4698689-federal-law-must-fix-loophole-allowing-abusive-lawsuits-targeting-speech/. For more information on Musk's suit of Media Matters, see "X, Texas and Missouri Attorneys General Sue Watchdog Media Matters, Testing Government and Corporate

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U.S. Supreme Court Revives Citizen Journalist's Retaliatory-Arrest Suit

On Oct. 15, 2024, in a decision with potentially far-reaching consequences for journalists reporting on police and official corruption, the U.S. Supreme Court vacated the 5th Circuit U.S. Court of Appeals' ruling in *Villarreal v. Alaniz* and remanded the case for further proceedings. The case concerned a suit brought by an independent journalist who alleged that she was arrested in retaliation for her reporting. A closely divided 5th Circuit had held, in January 2024, that the journalist's suit was barred. However, the Supreme Court's October order will require the 5th Circuit to reevaluate that decision. *Villarreal v. City of Laredo*, 94 F.4th 374 (2024) *Villarreal v. Alaniz, et al.*, 604 U.S. 1 (2024) (summary disposition).

U.S. SUPREME COURT

The case was initially brought by Priscilla Villarreal in 2019, in relation to events that occurred in 2017. Villarreal is a citizen journalist who reports on local crime, accidents, and other events happening in her community in Laredo, Texas. Dubbed by *The New York Times* in 2019 as "arguably the most influential journalist in Laredo," Villarreal reports entirely on Facebook, sometimes by live-streaming events on her page. Her career started in 2015. Since then, she has broken stories ranging from the arrest of a school superintendent for marijuana possession to a former police investigator accused of taking gambling proceeds from raids on slot machines. Her reporting has garnered her a devoted online following and has made her into something of a local celebrity in Laredo, a border town of 260,000. Known to her fans as "La Gordiloca," an affectionate nickname which translates roughly to "crazy chubby lady," Villarreal is occasionally stopped on the street to sign autographs or take selfies, and local businesses have hired her for advertising campaigns. *The New York Times* article is available online at: https://www.nytimes.com/2019/03/10/us/gordiloca-laredo-priscilla-villarreal.html.

Villarreal's fans respond both to her irreverent, unorthodox style, and her dogged reporting on local corruption. Her reports — which mix Spanish and English — are often profanity-laced and peppered with slang. Speaking to *The Texas Observer*, Celeste González de Bustamante, a journalism professor at the University of Texas at Austin, noted that Villarreal's sensationalism and focus on the crime beat resemble the *nota roja* genre of tabloid journalism and *policíaca* crime stories popular in Mexico and on the border. "[Villarreal] has a certain amount of authenticity for her followers that they don't see in traditional publications. That's been a difficult thing for news outlets," said González de Bustamante. "People don't see themselves in what's reported sometimes, so they end up not reading these traditional outlets."

Still, others in the community have been less pleased with Villarreal's unorthodox style, and what they see as her irresponsible approach to journalism. *The Texas Observer* noted that "[Villarreal's] rush to be first has generated some embarrassing errors with wide-reaching consequences — and spawned a subgenre of *Laredo Morning Times* setting the record straight." (The *Laredo Morning Times* is the Hearst-owned daily newspaper in Laredo.) In 2020, Villarreal livestreamed video shot through the window of her car of a Webb County sheriff's deputy arresting a Black man, while narrating the event with her own imagined dialogue that included racist epithets. She later apologized. *The Texas Observer* reported that, in 2017, Villarreal "created a panic by falsely reporting that Laredo was facing a gas shortage." And in 2016, she reported that a Laredo day care center was mistreating children. The day care center sued Villarreal for defamation and a judge ordered her to pay nearly $300,000 in damages. Villarreal appealed the judgment to the Texas Court of Appeals, but in May 2020, the appeal was dismissed because it was not filed in time. *Villarreal-Trevino v. All Star Kids Day Care and Learning Center, Inc.*, No. 04-20-00041-CV (Tex. App. 4th 2020)

Speaking to *The New York Times* in 2019, Abundio Rene Cantú, a lawyer for the day care center, said, "[e]very other word out of [Villarreal's] mouth is obscene." "She is a woman who has no respect for the rule of law, or due process. I feel she is a danger to this community because she interferes with law enforcement." *The Texas Observer* report is available online at: https://www.texasobserver.org/priscilla-villarreal-la-gordiloca-laredo/.

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Power to Suppress Critical Speech" in the Summer 2024 issue of the Silha *Bulletin*.

A federal Anti-SLAPP statute could standardize anti-SLAPP protections and resolve the issue percolating in the federal Courts of Appeals. In 2022, U.S. Rep. Jamie Raskin (D-Md.) proposed the SLAPP Protection Act of 2022, but the bill was not presented for a vote. According to the bill summary, the bill would "establish[] a motion in federal courts to allow for the dismissal of a claim with prejudice if (1) that claim [was] shown to be based on the moving party's exercise of free speech, (2) the responding party [could not] establish essential elements of the claim or that there [was] a genuine issue of material fact, and (3) no exception under this bill applie[d]." The bill, or another iteration modeled after state anti-SLAPP laws or the UPEPA, could be reintroduced at any time. However, as a June 2, 2023, report from the law firm Skadden, Arps, Slate, Meagher & Flom LLP noted, "[i]t is hard to predict when Congress will return to this issue given its expansive legislative agenda." However, the report continued: "What is clear is the need for federal action — the majority of states have spoken, and it is time for Congress to enact a federal anti-SLAPP statute to ensure that free speech and petitioning rights are uniformly protected nationwide in federal court." The Skadden report is available online at: https://z.umn.edu/SkaddenANTISlappReport.

— Alex Lloyd
Silha Center Research Assistant

The events that led to Villarreal's suit occurred in 2017. In April of that year, a U.S. Border Patrol employee jumped off a Laredo public overpass to his death. Villarreal later reported the employee's name after confirming it with a source inside the Laredo police department. In May 2017, Villarreal posted a live feed of a fatal traffic accident that included the last name of the deceased. Villarreal's source inside the police department corroborated this information as well. As recounted in the 5th Circuit's decision, acting on a tip that an officer was secretly communicating nonpublic information to Villarreal, the Laredo Police department conducted an internal investigation, which included a search of the officer's cellphones pursuant to grand jury subpoenas, and identified Villarreal's source within the department. The officer, who allegedly communicated with Villarreal "about 72 times a month" over a seven-month period, was suspended for twenty days. The specific department policy under which the officer was disciplined was not cited in the court's opinions. Then, in December 2017, the police used the information obtained in the investigation to secure warrants for Villarreal's arrest. Villarreal was charged with violating section 39.06(c) of the Texas Penal Code, which makes it a crime to solicit or receive nonpublic information from a public servant with intent to obtain a benefit. The supposed "benefit" that Villarreal received was popularity on Facebook. Find the full 5th Circuit decision online at: https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjrlkaypr/01232024journalist-5th.pdf,

After the warrant was issued, Villarreal voluntarily surrendered to the police. She alleged that when she did so, she was surrounded by Laredo police officers and department employees who laughed at her, took pictures of her with their phones, and otherwise tried to humiliate her. Villarreal further alleged that she was temporarily detained and was released on bond the same day. Following the incident, Villarreal petitioned for a writ of *habeas corpus* — a request that the court consider the validity of her detention — in Texas state court. Judge Monica Z. Notzon of the 111th Judicial District of Texas granted Villarreal's *habeas* petition and held the statute unconstitutionally vague. Webb County did not appeal Judge Notzon's ruling.

In 2019, Villarreal brought a federal lawsuit in the United States District Court in the Southern District of Texas, Laredo division, against the government officials involved in her arrest: Laredo police officers, the Laredo Chief of Police, Webb County prosecutors, as well as the county, city, and anonymous defendants. Villarreal alleged violations of 42 U.S.C. § 1983, the federal civil rights law that allows individuals to sue state actors who have deprived them of their constitutional rights in federal court. Villarreal alleged the following violations of her rights: direct and retaliatory violations of free speech and freedom of the press based on the First Amendment; wrongful arrest and detention based on the Fourth Amendment; and selective enforcement of section 39.06(c) of the Texas Penal Code, in violation of the equal protection clause of the Fourteenth Amendment.

In May 2020, the federal district court dismissed Villarreal's claims based on the defendants' qualified immunity, as well as her failure to state a claim. Qualified immunity is a legal doctrine that protects government officials from lawsuits where plaintiffs allege a violation of their rights. Suits against government officials can only proceed when the officials have violated a clearly established right. Courts typically determine whether this is the case by asking whether a reasonable official would have known that the conduct in question violated the plaintiff's rights. If the court determines the official acted in a reasonable though incorrect way, the plaintiff's claim cannot proceed. Thus, when a suit is brought against a public official and qualified immunity is raised as a defense, officials are only held responsible for actions that are known violations of the law. More information on qualified immunity is available online at: https://www.law.cornell.edu/wex/qualified_immunity.

Villarreal appealed the district court's dismissal to the U.S. Court of Appeals for the 5th Circuit. Initially, in August 2022, a three-judge panel partially reversed the district court. In a 2 to 1 decision, the panel held that the court erred in dismissing Villarreal's First and Fourth Amendment claims on qualified immunity grounds, and further erred in dismissing Villarreal's Fourteenth Amendment claim. On Villarreal's First Amendment claim, Judge James Ho wrote that the complaint shows that defendants sought to arrest Villarreal for asking questions of public officials, which "should be patently obvious to any reasonable police officer that [such conduct] constitutes a blatant violation of Villarreal's constitutional rights." The Fourth Amendment violation was also "obvious" to any reasonably well-trained police officer, said the court. To prevail on a Fourth Amendment wrongful arrest claim, a plaintiff must show that they were seized, and the arrest was unreasonable because it lacked probable cause. Here, the court reasoned that "a reasonably well-trained officer would have known that arresting a journalist for merely asking a question violates the First Amendment," and officers may not base their determination of probable cause on speech protected by the First Amendment. Thus, Villarreal's First Amendment claim is "inextricably intertwined with, tethered to, and inseparable from the facts that gave rise to her Fourth Amendment claim." Both violations were "obvious for purposes of qualified immunity." Finally, the panel held that the district court erred in dismissing Villarreal's Fourteenth Amendment selective enforcement claim. To prevail on a selective enforcement claim, a plaintiff must show that similarly situated individuals — here, journalists — were treated differently than the plaintiff. Though Villarreal did not name specific journalists who solicited or received nonpublic information from the police, drawing all reasonable inferences in favor of Villarreal, the court concluded that the Fourteenth Amendment claim should have been allowed to proceed. *Villarreal v. City of Laredo*, 44 F.4th 363 (2022).

Following the decision, the defendants petitioned for the case to be heard by the entire 5th Circuit Court of Appeals in a process called *en banc* review. Following an *en banc* rehearing of the case, the entire 5th Circuit overruled the court's original decision by a vote of 9 to 7 in January 2024, holding that the government's qualified immunity claim prevailed, and that therefore Villarreal's suit could not proceed. The majority disagreed with the three-judge panel as to the government officials' assessment of the constitutionality of Texas Penal Code § 39.06(c). Although the three-judge panel held that the officials' actions were a clear violation of the First and Fourth Amendments, the

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en banc panel said that each defendant was entitled to qualified immunity from this suit. Villarreal's Fourth Amendment claim failed, according to the court, because "Villarreal was arrested on defendants' reasonable belief, confirmed by a neutral magistrate, that probable cause existed based on her conduct." Likewise, Villarreal's First Amendment claim failed because "[n]o controlling precedent gave the defendants fair notice that their conduct, or this statute, violates the Constitution facially or as applied to Villarreal." And Villarreal's Fourteenth Amendment claim failed because "Villarreal did not provide even one example of an individual similarly situated to her in all relevant aspects who was not arrested for his conduct."

The majority further said the statute was not "obviously unconstitutional" and that federal courts do not require law enforcement officers to predict the constitutionality of statutes. The court concluded: "[T]he Fourth Amendment's benchmark is reasonableness, and '[t]o be reasonable is not to be perfect.'"

The court declined to reach the question of whether the statute was in fact constitutional — the question that inspired Villarreal's initial suit. Rather, Judge Edith Jones, author of the majority opinion, opined: "Villarreal and others portray her as a martyr for the sake of journalism. That is inappropriate. She could have followed Texas law, or challenged that law in court, before reporting nonpublic information from the backchannel source. By skirting Texas law, Villarreal revealed information that could have severely emotionally harmed the families of decedents and interfered with ongoing investigations. Mainstream, legitimate media outlets routinely withhold the identity of accident victims or those who committed suicide until public officials or family members release that information publicly. Villarreal sought to capitalize on others' tragedies to propel her reputation and career."

In a dissenting opinion, Judge James Ho called the majority's view an "extreme vision where public officials and legislators can overturn federal constitutional rights at their whim." He continued by saying that this case should have been an easy case for denying qualified immunity because "[i]t should have been obvious to Defendants . . . that they were violating Villarreal's First Amendment rights when they arrested and jailed her for asking a police officer for information."

Another dissenter, Judge James Graves, called the outcome "unfortunate, unfair, and unconstitutional." Judge Graves predicted: "[T]he majority would limit journalists who work the government beat to publicly disclosed documents and official press conferences, meaning they will only be able to report information the government chooses to share." The entire 5th Circuit *en banc* decision, including all dissenting opinions, is available online at: https://fingfx.thomsonreuters.com/gfx/legaldocs/xmpjrlkaypr/01232024journalist-5th.pdf.

In April 2024, Villarreal appealed by filing a writ of *certiorari* with the United States Supreme Court.

In October 2024, the Supreme Court vacated the 5th Circuit's decision in an order for summary disposition. This order, allowed by Supreme Court Rule 16, vacated the *en banc* panel's holding and remanded the case for further consideration. The rule permits the Supreme Court to resolve a case, without oral argument, when there are no factual disputes, relying solely on established law. The two-sentence order explained that the reconsideration was necessary in light of the Court's June 2024 decision in *Gonzalez v. Trevino*, 602 U.S. 653 (2024) (*per curiam*), another case involving a federal Civil Rights claim for retaliatory arrest which the 5th Circuit had dismissed. In an article published by *The Yale Law Journal*, one commentator suggests that such reconsideration orders indicate that the Court believes there is a reasonable probability that reconsideration will propel the lower court to reject a legal premise it had previously relied on. The Court's summary disposition order is available online at: https://fingfx.thomsonreuters.com/gfx/legaldocs/gdpzkqrmyvw/10152024scotus_order.pdf. A detailed explanation of summary dispositions and their use by recent Courts is available online at: https://www.yalelawjournal.org/forum/courts-as-managers-american-tradition-partnership-v-bullock-and-summary-disposition-at-the-roberts-court.

In *Gonzalez v. Trevino*, the Supreme Court reversed the 5th Circuit's decision that a former member of the city council claiming retaliatory arrest could not sue. The Court found that the 5th Circuit's view of earlier precedent too narrow — specifically, their interpretation of an exception to the rule that a plaintiff bringing a retaliatory-arrest claim must prove the absence of probable cause for the arrest. The existence of probable cause does not defeat a plaintiff's claim, the Court held, if the plaintiff produces "objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." The 5th Circuit incorrectly added a requirement to this rule that the plaintiff provide specific comparative evidence of people who "mishandled a government petition" in the same way *Gonzalez* did, but nevertheless evaded arrest. The Court stated that this version of the rule is wrong: "the demand for virtually identical and identifiable comparators goes too far."

In *Villarreal v. Alaniz*, the 5th Circuit applied the same probable cause exception the Supreme Court in *Gonzalez* deemed incorrect. The 5th Circuit reasoned, in concluding that Villarreal failed to state a First Amendment retaliation claim: "Villarreal does not offer evidence of other similarly situated individuals who engaged in the same conduct in violation of 39.06(c) yet were not arrested." However, like Gonzalez, Villarreal argued that no one had ever been arrested under the statute in question, even though the statute had been on the books for a long time. The Supreme Court's opinion in *Gonzalez v. Trevino* is available online at: https://www.supremecourt.gov/opinions/23pdf/22-1025_1a72.pdf.

Villarreal is represented by a lawyer with the Foundation for Individual Rights and Expression (FIRE). As the *Bulletin* went to press, the rehearing at the 5th Circuit was not yet scheduled.

For additional coverage of Villarreal's case, see *Fifth Circuit Hears Case on Journalist's Arrest for Interviewing Police* in "Federal Courts Hear Cases with Widespread Implications for Press Freedom and Access" in the Winter/Spring 2023 issue of the Silha *Bulletin*.

— Ryan Clemmons
Silha Center Research Assistant

Las Vegas Politician Sentenced in Murder of Journalist

In October 2024, a former Las Vegas-area elected official was sentenced to 28 years in Nevada state prison for the first-degree murder of investigative journalist Jeff German. Robert Telles was convicted of stabbing *Las Vegas Review-Journal* reporter Jeff German to death in 2022. German had written articles criticizing Telles' conduct at the Clark County (Nev.) Public Administrator's office and had exposed Telles' extramarital relationship with a coworker.

ENDANGERED JOURNALISTS

Las Vegas Review-Journal Executive Editor Glenn Cook said in a statement shortly after Telles' guilty verdict: "Today . . . brought a measure of justice for slain journalists all over the world. Our jobs are increasingly risky and sometimes dangerous. In many countries, the killers of journalists go unpunished. Not so in Las Vegas." For additional coverage of Jeff German's murder, see "Nevada Supreme Court Holds Murdered Journalist's Electronic Devices Are Covered by the State Reporter's Privilege" in the Fall 2023 issue of the Silha *Bulletin*; and *Las Vegas Reporter Murdered; Police Arrest Government Official*, *Seek Review of Reporter's Files* in "Two American Journalists Killed in Connection with Their Work; Western Journalists Covering Protests in China Detained" in the Fall 2022 issue of the Silha *Bulletin*.

German reported on Telles in a May 16, 2022, article for the *Las Vegas Review-Journal.* At the time, Telles was the Clark County Public Administrator. Prior to his election in 2018, Telles had never served in public office. At the Clark County Public Administrator's office, Telles was paid about $120,000 per year and oversaw fewer than 10 people. The office primarily handled unclaimed estate and probate cases. Before running the office, Telles was an attorney practicing probate and estate law. German's reporting described the Clark County Public Administrator's office as "mired in turmoil and internal dissension . . . with allegations of emotional stress, bullying and favoritism leading to secret videotaping of the boss and a co-worker outside the office." German interviewed at least six employees, current and former, who described a hostile work environment cultivated by Telles. The employees told German that Telles's "inappropriate relationship" with a staffer had harmed the office's ability to carry out its functions. According to these employees, the staffer with whom Telles had a relationship, who German identified by name in the article, in some cases was allowed to act beyond her assigned duties because of her favored status with Telles. Animosity over the unfair treatment grew among the staff and led one employee to secretly videotape Telles meeting with the staffer in the back seat of her car to show proof of their relationship. Another employee filed a retaliation complaint with the county against Telles.

Telles blamed "a handful of old-timers" in his office for exaggerating his relationship with the female staffer and making false claims that he mistreated them. "They are unhappy with the way the office has been taken out of their control," German quoted Telles as saying. "All my new employees are super-happy and everyone's productive and doing well. We've almost doubled productivity in the office." German's reporting can be found online at: https://www.reviewjournal.com/investigations/county-office-in-turmoil-with-secret-video-and-claims-of-bullying-hostility-2577147/.

German's story was published shortly before the 2022 primary for County Administrator. Telles faced several challengers in his bid for a second term in office, including one of his subordinates at the County Administrator's office. After German's stories were published, county officials hired a consultant to help oversee Telles' office to ensure that employees were not being mistreated. According to a Sept. 9, 2022 report by the *Associated Press* (*AP)*, Telles angrily denounced German on Twitter, now X, following the article's publication, calling German a bully who was "obsessed" with him. Telles ended up finishing last in the June 2022 primary.

In the following weeks, German published several more articles covering Telles and the race for Clark County Public Administrator. Then, on Sept. 4, 2022, the *Las Vegas Review-Journal* reported that German had been found outside his home on September 3, dead of multiple stab wounds. As *CBS News* reported in 2024, police quickly identified Telles as a suspect. Surveillance footage had captured the murder, showing a person wearing an orange shirt and a large straw hat ambushing German as he opened his garage door. Police photos of the suspect's car showed a Maroon Yukon Denali, identical to one owned by Telles' wife. The police brought Telles in for questioning, took DNA samples, and then released him. Following a positive DNA match, Telles was arrested after a standoff at his home. A grand jury indicted him for murder several weeks later. The *CBS News* report is available online at: https://www.cbsnews.com/news/jeff-german-slaying-robert-telles-arrest-las-vegas-photos-48-hours/.

In the *AP's* Sept. 19, 2022, report, Cook reminisced about German. Though the reporter was aged 69, he never talked about retirement, Cook said. German had joined the *Las Vegas Review-Journal* in 2010 after more than 20 years at the *Las Vegas Sun*. Cook said of German's death: "We'll never forget Jeff. His killing remains an immeasurable loss for his family, friends, colleagues and community, and for journalism itself." Cook also said that there had been talk around the *Review-Journal* office that Telles was "unhinged," but that he had never made any physical threats against German, and German never said he was worried. More about German's work and dedication to exposing corruption in government is available online at: https://apnews.com/article/crime-las-vegas-mass-shooting-organized-government-and-politics-57a029429632d25345236d4ab71ebafb.

Telles pleaded not guilty in German's murder. His trial took place in August 2024. At trial, Telles did not invoke his Fifth Amendment right to remain silent. Instead, he testified, denying that he stabbed German to death. "I understand the desire to seek justice and hold somebody accountable for this. But I did not kill Mr. German," Telles said, according to an Aug. 15, 2024, report from the *AP*. Prosecutors rebutted Telles' testimony with video footage, caught by neighborhood cameras, that showed a maroon SUV leaving Telles' neighborhood and driving near German's home around the time he was killed. The SUV was very similar to the one owned by Telles' wife. The prosecution also brought strong physical evidence against Telles, including his DNA beneath German's fingernails. Authorities also found cut up pieces of a straw hat and athletic shoe at Telles' house, which appeared to be the same garments worn

Telles, *continued on page 34*

Telles, *continued from page 33*

by the figure caught on camera outside German's house. Evidence also showed that Telles' wife sent him a text asking, "Where are you?" at the same time the SUV was spotted outside German's home. Telles told the jury he was out for a walk and at the gym during the time in question.

The state's theory of the case was rooted in revenge — that Telles retaliated because he did not like what German wrote about him. The prosecution asserted that Telles felt German, through his reporting, cost him an elected position. According to an Aug. 28, 2024, report from the *AP*, the jury deliberated for three days before reaching a guilty verdict. The August 15 *AP* report is available online at: https://apnews.com/article/vegas-journalist-killed-telles-murder-trial-efd86acb2605829a60bf664a8c7e4ba0. The August 28 *AP* report is available online at: https://apnews.com/article/vegas-journalist-killed-telles-murder-trial-393c5588c1babe5b111ca905363f6a45.

According to an Oct. 19, 2024 *AP* report, at Telles' sentencing, Prosecutor Pamela Weckerly told the judge: "This type of violence, this sort of political violence, is unacceptable and dangerous for a community as a whole." The judge sentenced Telles to 28 years, invoking sentencing enhancements for use of a deadly weapon and the victim being older than 60 years of age. These enhancements added eight years to the minimum 20-to-life sentence set by the jury in August. Clark County District Attorney Steve Wolfson told reporters after the sentence was announced: "The judge couldn't sentence him to any more time . . . She gave him the maximum." The *AP's* account of the sentencing is available online at: https://apnews.com/article/vegas-journalist-murder-politician-sentence-485cbcbc07ec75c22a61abc22bdf8b14.

Jeff German was the sole journalist killed in the United States in 2022, according to the Committee to Protect Journalists (CPJ). Killing of journalists in the United States in retaliation for their work is rare; before German's death, eight journalists have been killed in the country since 1992, according to CPJ. The deadliest of these attacks was a shooting at Maryland's *Capital Gazette* in 2018 that left five employees dead. Diana Fuentes, executive director of the organization Investigative Reporters & Editors, said: "Jeff's death is a sobering reminder of the inherent risks of investigative journalism. Journalists do their jobs every day, digging deep to find information the public needs to know and has a right to see." Katherine Jacobsen, CPJ's U.S., Canada, and Caribbean program coordinator told the *AP*: "Although the jailing of Telles cannot undo Jeff German's murder, it can act as an important deterrent to would-be assailants of journalists." CPJ's tracking of journalist deaths in the U.S. since 1992 is available online at: https://z.umn.edu/CPJJournalistsDeathsReport.

For more information on the Maryland *Capital Gazette* shooting, see "Journalists Face Attacks and Threats at Jan. 6, 2021 Insurrection, Prompting Arrests and Investigations; *Capital Gazette* Gunman Receives Maximum Sentence" in the Fall 2021 issue of the Silha *Bulletin*; and *Five Newspaper Staff Members Killed, Two Injured in Shooting at Local Maryland Newsroom* in "Journalists Face Physical Violence, Other Dangers in the United States and Abroad" in the Summer 2018 issue.

— Ryan Clemmons
Silha Center Research Assistant

The Silha Center for the Study of Media Ethics and Law was established in 1984 with an endowment from Otto and Helen Silha. Located within 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.

5th Circuit Says Texas County's Ban on Public Access to Bail Hearings Is Unconstitutional

Caldwell County, a Texas county with fewer than 50,000 people, tried to ban the press from attending bail hearings, known as "magistration proceedings," in Texas state court. The county asserted that bail-setting hearings were informal procedures and that the public did not have a right to view them. Two Texas-based news organizations and a criminal justice organization sued the county in federal court seeking access to the hearings. The United States District Court for the Western District of Texas issued a preliminary injunction enjoining the ban. The preliminary injunction was upheld by the U.S. Court of Appeals for the 5th Circuit in November 2024, which found a presumptive First Amendment right of access to magistration proceedings. *Texas Tribune v. Caldwell County*, 121 F.4th 520 (5th Cir. 2024)

ACCESS TO COURTS

In August 2023, three Texas-based organizations sued Caldwell County — as well as Caldwell County justices of the peace, magistrates, and the sheriff — for their policy of closing magistration proceedings to the public. The plaintiffs, the *Texas Tribune*, the *Caldwell/Hays-Examiner*, and *Mano Amiga*, which engages in advocacy and provides assistance in immigration cases, alleged that this policy "violates the First Amendment right of access of the press and public, as well as [the organizations'] Fourteenth Amendment right to notice and opportunity to be heard." Because the issue was a dispute over federal constitutional protections, the plaintiffs brought a federal suit in the Western District of Texas. *Texas Tribune v. Caldwell County*, No. 1:23-cv-00910-RP (W.D. Tex)

According to the plaintiffs, settled law holds that the court can only close proceedings to the public if the court finds that closure is "narrowly tailored to serve a compelling interest, and that reasonable alternatives to closure would be inadequate." Further, public access to criminal proceedings provides the public with a more complete understanding of the justice system and restrains abuses of judicial power. The plaintiff's original complaint, filed on Aug. 3, 2023, is available online at: https://www.bloomberglaw.com/product/blaw/document/X7QH2PIAOLV94C9D4N7VOCKADVH/download?imagename=1

In their original complaint, the plaintiffs provided five reasons that Caldwell County's closure policy is unconstitutional. First, the closure of proceedings violates the presumption that magistration proceedings must be open to the public and closed only in exceptional circumstances. Second, the categorical ban is unconstitutional because magistrates may consider closures only on a case-by-case basis. Third, the magistrates' failure "to provide the press and public with notice and an opportunity to be heard prior to the closure of any arrestee's magistration" violates the First and Fourteenth Amendments. Fourth, the magistrates' failed to determine that the closure of any particular magistration is narrowly tailored to serve a compelling interest. And finally, the magistrates failed to make on-the-record findings that justify closure of a proceeding. Plaintiffs sought a declaratory judgment that the county violated the First and Fourteenth Amendments and an injunction requiring the county to open all proceedings to the public.

The defendants filed a joint motion to dismiss the plaintiffs' claim and responded to the motion for preliminary injunction. The defendants argued that plaintiffs lacked Article III standing because their claim to access is "not based on any statutory or constitutional provision that requires or provides the press and/or public access . . . ." Article III standing is a constitutional procedural requirement that plaintiffs must satisfy before they can sue. The standing requirement requires plaintiffs to show that they were concretely injured by the conduct they are suing over, and that the court can provide them some form of redress. The defendants' joint motion and response is available online at: https://www.bloomberglaw.com/product/blaw/document/X7U9J0HMNO48GIBAPQMLTU36NFP/download?imagename=1.

The district court agreed with the plaintiffs, granting their motion for a preliminary injunction and denying the defendants' motion to dismiss in February 2024. The district court rejected the defendants' attempts to distinguish *United States v. Chagra*, a 5th Circuit case holding that the press and public have a presumptive First Amendment right to access bail reduction hearings. 754 F.2d 1186 (5th Cir. 1985). The 5th Circuit in *Chagra* noted that the same societal interests that compelled a first amendment right of access at criminal trials also apply to pretrial criminal proceedings. Applying the reasoning of *Chagra*, the district court found that the "[p]laintiffs are likely to show that the press and public have a presumptive First Amendment right to access magistrations in Caldwell County." The Western District of Texas's order is available online at: https://www.bloomberglaw.com/product/blaw/document/X3A5U5U3B99VARHOQBOB3J2I5K/download.

Caldwell County appealed the district court's decision, arguing that the organizations do not have Article III standing to sue and failed to demonstrate a substantial likelihood that their First Amendment claim would prevail. The 5th Circuit three-judge panel, consisting of U.S. Circuit Judges Dana M. Douglas and Cory T. Wilson and U.S. District Judge Wendy Baldwin Vitter sitting by designation, expressed skepticism about the county's position during oral argument.

According to reporting by *Law360*, U.S. District Judge Wendy Baldwin Vitter pushed back on the county's argument that the magistration proceedings are informal. Judge Vitter asked why a proceeding involving someone who the government has arrested and charged with a crime would be considered informal.

"They're there voluntarily, these defendants?" she asked counsel for the county, Eric Magee of Allison Bass & Magee LLP. Magee responded that the proceedings are informal because the accused is not appearing before a criminal court, but rather in front of a neutral magistrate. Magee also argued that a policy that forces magistrate judges to inform the press about the hearing would create unnecessary delay in the magistration proceedings, which must take place within 48 hours after a person is arrested.

Hearings, *continued on page 36*

Hearings, *continued from page 35*

Judge Douglas seemed skeptical of Magee's argument. She countered that she had run magistrate proceedings herself, and even though the proceedings had to be done quickly, they were not conducted in a way that would bar the press from entering. Judge Douglas also expressed concern with the "blanket ban" imposed by the county. Magee argued it does not count as a blanket closure because that is always how magistration proceedings have been done throughout Texas, and an automatic assumption that the proceedings are public has never existed.

Scott Wilkens of the Knight First Amendment Institute at Columbia University, counsel for the challengers to the ban, argued that the county could not point to a single case that claims the public does not have a right to attend bail hearings. The question is whether a presumptive First Amendment right of access exists for a bail hearing, said Wilkens, and precedent lies on the side of the newspapers. Judge Wilson asked how giving notice to the press works practically. Wilkens responded that, because the district court granted the preliminary injunction, the county has given press notice and the press have seamlessly been able to attend hearings virtually. Reporting from *Law360* on the oral argument is available online at: https://www-law360-com.ezproxy.law.umn.edu/articles/1887982/texas-tribune-can-attend-bail-hearings-5th-circ-told.

The 5th Circuit panel ultimately affirmed the District Court's ruling granting the preliminary injunction and temporarily enjoining the county's policy of categorically excluding press and the public. Judge Wendy Vitter wrote the unanimous opinion. On the county's standing argument, the court sided with the organizations. The county's argument for why the organizations did not have Article III standing appeared to be that the organizations did not suffer an injury in fact because Texas law does not require open magistrations. According to the opinion, this argument confuses the sufficiency of the litigants' claim, which is a merits-based analysis, with Article III standing, which asks simply whether the litigants may have the court decide the merits of the dispute.

The county also argued that the district court's injunction should not stand because the organizations had not demonstrated that their First Amendment claim had a substantial likelihood of success. The Circuit Court looked to guidance from the Supreme Court on this question. The Supreme Court first established that the First Amendment guarantees the right to attend criminal trials in 1980 in *Richmond Newspapers, Inc. v. Virginia*. A few years later, the Court extended this right to certain pretrial proceedings. And the applicable test for determining whether a proceeding falls within the protections of the First Amendment is the "experience and logic test," which comes from the 1986 Supreme Court decision *Press-Enter. Co. v. Superior Ct. Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Press-Enter. Co. v. Superior Ct.*, 478 U.S. 1 (1986)

As described by the Circuit Court, the test has two prongs: experience and logic. The experience prong asks, "whether the place and process have historically been open to the press and general public." The logic prong asks, "whether public access plays a significant positive role in the functioning of the particular process in question." If the proceeding passes both of these tests, a First Amendment right of public access attaches to the proceeding.

The court reasoned that the proliferation of laws requiring open bail hearings and the recognition of bail as a central element of the criminal process, taken together, satisfy the experience prong. The logic prong is also satisfied here, said the court. Public access to bail hearings helps to ensure that "courts act fairly and justly in setting bail." Private proceedings allow the court to avoid criticism and proceed less carefully, according to the court. Allowing public access leads to "enhance[d] public confidence in the process and result" of the justice system.

Having determined that both prongs were met, the court found that magistration proceedings fall under the First Amendment's right of access protections. This right is not absolute; there may be instances where the rights of the arrestee or government trump the public's right to access magistrations. But those instances are not currently before the court. "Our holding today," said the court, "is limited to our finding that there is a presumptive First Amendment right of access to magistrations."

The 5th Circuit's decision in *Texas Tribune v. Caldwell County* is available online at: https://cases.justia.com/federal/appellate-courts/ca5/24-50135/24-50135-2024-11-15.pdf?ts=1731717014.

— Ryan Clemmons
Silha Center Research Assistant

UN Special Rapporteur Releases Report Finding War in Gaza Has "Unleashed a Global Crisis of Freedom of Expression"

On Aug. 23, 2024, UN Special Rapporteur for Freedom of Opinion and Expression Irene Khan issued her report on "[g]lobal threats to freedom of expression arising from the conflict in Gaza." At a press conference announcing the report, Khan stated: "No conflict in recent times has threatened freedom of expression so far beyond its borders as the war in Gaza. . . . Rarely have we seen — and this is what bothers me — [such] extensive patterns of unlawful, discriminatory and disproportionate restriction by countries and private actors on freedom of expression." Video of the press conference is available online at: https://news.un.org/en/story/2024/10/1155881.

ISRAEL-HAMAS WAR

Khan, a lawyer from Bangladesh, is the first woman to hold the mandate of UN Special Rapporteur for Freedom of Opinion and Expression. She was appointed in June 2020. UN Special Rapporteurs are independent experts appointed by the United Nations Human Rights Council to monitor and report on specific country situations or issues.

In the report, Khan wrote that she found "an extensive pattern of unlawful, discriminatory and disproportionate restrictions on advocacy for the rights of Palestinian people." She wrote further that the "conflict in Gaza has unleashed a global crisis of freedom of expression." The report cites several factors affecting the right to information of people in Gaza and across the world.

Specifically, the report identified three challenges arising from the war in Gaza that pose a danger to freedom of opinion and expression: (1) attacks on journalists and media that have endangered access to information about the conflict globally; (2) what the report characterized as the "discriminatory and disproportionate" suppression of Palestinian voices and views, "undermining academic and artistic freedom as well as freedom of expression more generally;" and (3) "the blurring of boundaries between protected and prohibited speech."

With respect to attacks on journalists, the report cited statistics from the Committee to Protect Journalists (CPJ) showing that the Israel-Hamas conflict was "the deadliest conflict for journalists and media workers globally in the last three decades." The CPJ statistics show that, one year after the start of the war in Gaza, at least 137 journalists have been killed, the vast majority of whom were Palestinian.

> "No conflict in recent times has threatened freedom of expression so far beyond its borders as the war in Gaza. . . . Rarely have we seen . . . [such] extensive patterns of unlawful, discriminatory and disproportionate restriction by countries and private actors on freedom of expression."
>
> **— Irene Khan, UN Special Rapporteur for Freedom of Opinion and Expression**

Khan pointed to the "pattern of killings and arbitrary detention of journalists and destruction of press facilities in Gaza" as evidence of a deliberate strategy of the Israeli military to "silence critical reporting and obstruct documentation of possible international crimes." Under international law, the killing of journalists is illegal unless they are actively participating in hostilities or war crimes. Yet, evidence shows that journalists who were wearing clearly identifiable press gear and were traveling in marked press vehicles have been attacked by the Israeli army, which suggests that they may have been targeted. Under international humanitarian law, killing journalists is a war crime. Protocols Additional to the Geneva Conventions arts. 51, 79. Although Israel has claimed that some journalists participated in hostilities, none of the claims have been substantiated. The report further accused Israel of failing to investigate, prosecute, and punish crimes against journalists, stating that this failure "denies justice to the victims' families . . . emboldens perpetrators to continue and can have a chilling effect on other journalists."

Reporting by the CPJ has documented claims that the Israeli government has targeted at least five journalists for their work. The CPJ is continuing to investigate at least 10 more cases of targeting. The CPJ's reporting is available online at: https://cpj.org/2024/10/one-year-and-climbing-israel-responsible-for-record-journalist-death-toll/.

Further, the report described the destruction of press facilities in Gaza. Since October 2023, around seventy press organizations in Gaza — including news agencies, local radio stations, and journalist training institutes — have been partially or completely destroyed. Also, disruptions to internet connectivity in Gaza through destruction of telecommunications infrastructure and purposeful restrictions on electricity have severely affected reporting and access to information.

Legislation passed by the Israeli government has also contributed to the lack of independent information on the war in Gaza. In April 2024, the Israeli Parliament enacted a law which gives unchecked power to the Executive to place bans on foreign media and impose other restrictions. The Israeli government used the law to temporarily — and then permanently — ban news outlet *Al Jazeera*, citing national security concerns and the outlet's support for Palestinians. For more information on Israel's ban of *Al Jazeera*, see "Israel Bans *Al Jazeera*" in the Summer 2024 issue of the Silha *Bulletin*; and "Latest Israel-Hamas War Raises Concerns About Journalist Safety, Media Bias, Freedom of Speech, and Misinformation" in the Fall 2023 issue.

Gaza, *continued on page 38*

Gaza, *continued from page 37*

The report also cited various instances of what it calls "the discriminatory and disproportionate" suppression of Palestinian, and pro-Palestinian, voices and views. The report identified news companies in Western countries that have taken retaliatory measures against their journalists for expressing personal views about the war in Gaza. For example, after 38 of its employees signed a letter condemning the killing of journalists in Gaza, the *Los Angeles Times* reportedly banned the employees from covering issues related to Israel or Palestine. Australian news outlets the *Sydney Morning Herald* and *The Age* reportedly banned journalists from reporting on the war after the journalists signed an open letter criticizing Australian media for its coverage of the Israeli military. And the BBC reportedly launched an investigation into six of its Arabic Service journalists for bias. Although the journalists were found not to have violated the BBC's editorial policies, they were nevertheless disciplined.

Several countries imposed preemptive and blanket bans on demonstrations in support of Palestinian people. The report called these responses "arbitrary, unfairly equating Palestinian advocacy as antisemitic or in support of terrorism, and discriminatory as no demonstrations in support of Israel appear to have encountered any specific restrictions."

Germany's response was the harshest, said the report. In October 2023, Germany imposed a blanket ban on all demonstrations in support of Palestinian people. The German government justified its action on the basis of preventing "public celebration of the Hamas terrorist attacks." On Oct. 12, 2023, France's government also announced a total ban on all rallies in support of Palestinian people. However, this ban was overruled by the highest administrative court of France on the grounds that such decisions are in the hands of local authorities. The report also alleged excessive use of force by police in retaliation to pro-Palestinian demonstrations in Belgium, Canada, France, Germany, Greece, Italy, and the Netherlands, among other countries.

According to the report, more than 100,000 demonstrations in support of Palestinian people — ranging from student encampments, vigils, and street protests — occurred in the United States between October 2023 and June 2024. Though most events were held peacefully, authorities resorted to "repressive measures, including widespread police action against the demonstrators and stigmatization of Palestinian advocacy as inherently dangerous." The report also noted that state and federal lawmakers had proposed more than 45 pieces of legislation intended to restrict pro-Palestinian protests, punish student protesters, and label their Palestinian advocacy as "terrorism." For more information on the First Amendment implications of protests against the Israel-Hamas war, see "Journalists in Danger, First Amendment Rights Threatened, At Campus Protests Over Israel-Hamas War" in the Summer 2024 issue of the Silha *Bulletin*, and "Journalists Face Issues Covering the Israel-Hamas War and Related Protests in the U.S. and Abroad" in the Winter/Spring 2024 issue.

The report stated that social media platforms have played an important role in the transmission of information from Gaza to the outside world given the destruction of traditional media in Gaza. Social media "influencers," particularly women, had become vital to conveying the reality of Gaza to the outside world, according to the report. At the same time, the report criticized social media companies for being more lenient with Israeli-generated content and more restrictive of Palestinian and Gazan expression. The "disproportionate" censorship of Palestinian content took place on X, Meta, Google, and Telegram, according to the report. Censorship of content related to Palestinian rights included disabling of accounts, restriction on the ability to engage with posts (through liking, commenting, or sharing), and decreasing visibility of user content without notification or justification.

In a December 2023 Human Rights Watch study of 1,050 instances of Meta removing content, 1,049 of these removals involved peaceful content in support of Palestine. Censored content included the phrases, "From the River to the Sea, Palestine will be free," "Ceasefire Now," "Stop the Genocide," and the Palestinian flag emoji.

Countries and companies that have restricted or prohibited speech have done so in the name of combating support for terrorism or antisemitism. But such censorship blurs the line between protected and prohibited speech and may not be drawn in accordance with international human rights law, the report claimed.

According to the report, the blurring of the boundaries between protected and prohibited speech is the third way that the war has harmed freedom of expression. In the wake of the Oct. 7, 2023, attacks by Hamas on Israel, some countries used counter-terrorism laws to justify bans on demonstrations in support of civilians in the Gaza conflict. Although counter–terrorism is a legitimate objective for restricting freedom of expression under international law, these laws often leave room for misuse. Article 19, Section 3 of the International Covenant on Civil and Political Rights provides that the freedom of expression may only be restricted when necessary to "respect the rights or reputations of others" or for the protection of "national security, public order, or of public health or morals." International Covenant on Civil and Political Rights, Article 19(3). But laws and policies restricting freedom of expression, such as those enacted in the wake of the October 7 attacks, are often vague and fail to define what constitutes an offense. For example, Meta instituted a policy that prohibited the "glorification" or "support" of terrorism, but failed to define what those terms meant, leading to the taking down of legitimate political expression. Similar laws and policies often lead to "the silencing of legitimate human rights advocacy," the report stated. The International Covenant on Civil and Political Rights is available online at: https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights

Also in violation of international law are blanket bans imposed by some countries on the display of Palestinian symbols, such as the national flag and the keffiyeh, the traditional headdress worn by men in parts of the Arab world, including Palestine. Countries have banned and criminalized these symbols as signs of antisemitism and support for Hamas. These symbols should be regarded as legitimate forms of expression, stated the report, since they are general symbols of Palestinian identity. "Equating advocacy of Palestinian rights with terrorism or antisemitism," the report stated, "is not only a disproportionate response, but

may indicate an underlying institutional racism against Palestinians, violating fundamental human rights." In addition, use of the slogan "From the River to the Sea, Palestine will be Free" has been criminalized in some Western countries. Such criminalization of "the mere utterance" of a slogan is a disproportionate response and in violation of international human rights law, according to the report.

The report also argued that countries responding to Palestinian advocacy have confused and conflated criticism of the policies of Israel — a legitimate exercise of freedom of expression — with antisemitism. For example, the "boycott, divest and sanctions" (BDS) movement is regarded as discriminatory and antisemitic in some Western countries, such as the United States and Germany. But the demands of the BDS movement — which include ending the occupation, ensuring full equality of all citizens, and respecting the right of return for Palestinian refugees — are in line with the international obligations of Israel which it has failed to uphold. Antisemitism, the racial and religious hatred against Jews, must be clearly distinguished from political expression and framed according to international human rights standards, the report argued. It further contended that equating the BDS movement and criticism of the policies of Israel with antisemitism is not in accordance with international human rights standards. This conflation risks "discrimination against one vulnerable group [being] replaced with discrimination against another group, which, far from reducing antisemitism, will fuel more hatred and intolerance."

The report's main conclusion is that the most fundamental principle of human rights — that all persons have an equal right to enjoy all human rights — has been endangered by an extensive pattern of unlawful, discriminatory and disproportionate restrictions and repression of freedom of expression, primarily of Palestinian activists and their supporters in Western Europe and North America.

The report concluded with recommendations for countries, companies, academic institutions, and the international community. Recommendations to countries include: (1) to refrain from blanket prohibitions on demonstrations; (2) to repeal or refrain from adopting laws that penalize opposition against Israeli occupation, such as laws against the BDS movement; (3) to not restrict expression in support of Palestinian self-determination; (4) to condemn antisemitism, anti-Arab racism, and Islamophobia; (5) to not ask platforms to remove content. Recommendations to Israel specifically include: (1) to ensure the safety of all journalists and refrain from targeting journalists or destroying media facilities and (2) to investigate all attacks on journalists.

The full UN Special Rapporteur's report is available online at: https://documents.un.org/doc/undoc/gen/n24/247/88/pdf/n2424788.pdf. A press release on the report is available at: https://news.un.org/en/story/2024/10/1155881.

— Ryan Clemmons
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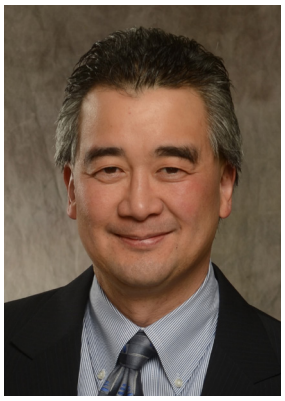

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Silha Spring Ethics Forum

"High Value Lies: Ethics and Undercover Investigations in the Contemporary News Environment"

Monday, February 24, 2025, 7:00 p.m.
Coffman Memorial Union Theater
University of Minnesota – Twin Cities

This year's Silha Spring Ethics Forum features Alan Chen, the Thompson G. Marsh Law Alumni Professor at the University of Denver Sturm College of Law, co-author of *Truth and Transparency: Undercover Investigations in the Twenty-First Century* and *Free Speech Beyond Words: The Surprising Reach of the First Amendment.*

Prof. Chen's book talk will discuss the legal and media ethics implications of undercover reporting, both contemporary and historical. A former ACLU staff attorney, he will focus on the rise of so-called "ag-gag" laws, designed to criminalize unauthorized investigations of agricultural facilities to expose inhumane or illegal practices. He actively litigates cases in federal courts across the country challenging these statutes, many of which have been struck down as unconstitutional.

Prof. Chen teaches and writes about free speech doctrine and theory, and has published numerous scholarly articles about the First Amendment in leading national law journals.

The Association for Education in Journalism and Mass Communication honored *Truth and Transparency* with the 2024 James A. Tankard, Jr. Book Award for the most outstanding book in the field of journalism and communication. *The New York Review of Books* called it "the definitive work on this subject and a powerful resource for lawyers." *Truth and Transparency* will be available for sale at the Silha Spring Ethics Forum; a book signing will follow the event.

The 2025 Silha Spring Ethics Forum will also be offered as an online webinar. To register, go to: https://z.umn.edu/2025SilhaSpringForum.

This event is co-sponsored by the Silha Center for the Study of Media Ethics and Law, the Minnesota Journalism Center, and the Minnesota Pro Chapter of the Society of Professional Journalists

Ukraine Update: Impact of the War on Press Freedom, and the Death of a Journalist Detained

As the war between Russia and Ukraine drags on, threats to press freedom persist. Press advocates have identified and decried threats to journalists from both sides in the conflict. While Russia has committed violence against journalists, Ukraine has restricted reporting in the name of national defense.

WAR IN UKRAINE

Shrinking Press Freedom in Ukraine

On Oct. 9, 2024, the online Ukrainian newspaper *Ukrainska Pravda* issued a press release stating that it was under "systemic pressure" from the office of Ukrainian President Volodymyr Zelensky. The announcement was the latest sign that press freedom is on the wane in Ukraine amidst its ongoing war with Russia.

The statement from *Ukrainska Pravda* was addressed to the paper's "colleagues, partners, and international organisations [*sic*]." It stated that, since *Ukrainska Pravda's* founding in 2000 by dissident journalist Georgiy Gongadze, its values have been "editorial independence, unbiased reporting and the ability to freely tell the truth." However, it claimed that these values are being threatened by a pressure campaign waged by the Ukrainian government. The statement accused the government of trying to block officials from speaking with *Ukrainska Pravda* journalists and pressuring businesses to stop advertising with the paper. It also pointed to an "openly emotionally-charged" exchange between President Volodymyr Zelensky and *Ukrainska Pravda* journalist Roman Kravets at a press conference in August 2024 as evidence of the Zelensky administration's attempts to wield influence over the paper. The statement further noted that there had been other "non-public" attempts to influence *Ukrainska Pravda*. The pressure campaign was "especially outrageous" at the "time of Russia's full-scale invasion of Ukraine, when our joint struggle for both survival and democratic values is essential," the statement continued. "We emphasise [*sic*] once again that Ukrainska Pravda's goal is to report the truth and serve the interests of Ukrainian society. The free choice of topics and personalities in reporting is an inherent function and right of any independent news agency." The paper pledged to "publicly report[]" every attempt by officials in the government to pressure *Ukrainska Pravda's* journalists, and concluded with a "call on everyone who values freedom of speech and the independence of Ukrainian journalism to join us in defending these values."

In a follow-up article published the next day, *Ukrainska Pravda* identified Dmytro Lytvyn, a former speech writer for Zelensky who in September was made an advisor, as one of the leaders of the pressure campaign. The statement is available online at: https://www.pravda.com.ua/eng/columns/2024/10/9/7478844/. The follow up article in Ukrainian is available online at: https://www.pravda.com.ua/news/2024/10/10/7479033/.

Ukrainska Pravda's statement alleging government attempts to pressure its reporting and editorial staff is the most recent sign that press freedom has diminished in Ukraine since the start of war with Russia. In March 2022, weeks after Russia invaded Ukraine, President Zelensky issued an order consolidating Ukraine's various television news programs into a single government-controlled broadcast called "Telemarathon." Under the decree, six networks, representing about 60% of Ukraine's pre-war television viewership, are each given multiple hour slots that they can fill with news and commentary. The program is then broadcast by all participating networks on their news channels. According to a *New York Times* article from January 2024, 40% of Telemarathon's funding comes from the government, but it was unclear, at the time, to what degree the government controlled editorial decisions. Although Telemarathon was widely approved of by Ukrainians upon its conception as a wartime measure to combat Russian disinformation and maintain morale, by the time of *The New York Times* report, trust in the broadcast had waned. According to *The Times*, viewers have complained that the broadcast paints too rosy a picture of the war effort that does not correspond with reality, and leads to unrealistic expectations for the war's future course. This sentiment was echoed by Oksana Romaniuk, head of the Kyiv-based media monitoring organization Institute of Mass Information. She stated, "[e]veryone is fed up with this picture that says, 'We're winning, everyone likes us and gives us money.' It's state propaganda." According to the Ukrainian media watchdog Detector Media, in 2023, nearly 68% of the guests on Telemarathon were from Zelensky's Servant of the People party, despite the fact that the party only controlled half of Ukraine's parliamentary seats. *The New York Times* story on Telemarathon is available online at: https://www.nytimes.com/2024/01/03/world/europe/ukraine-war-tv-news-telemarathon.html?searchResultPosition=1.

Reporting from summer 2024 reflected further challenges to press freedom in Ukraine. A *New York Times* report from June 18, 2024, identified multiple instances in which the Ukrainian government attempted to pressure or surveille journalists or media organizations. For example, in January 2024, members of Ukraine's intelligence secretly filmed reporters who were attending the holiday party held by the investigative news site *Bihus*. The agents reportedly drilled peepholes into the coat racks of the hotel rooms where the reporters were staying. The director of the intelligence service subsequently condemned the spying, and Zelensky fired an official in relation to the incident. Another example of alleged interference occurred at the putatively nonpartisan state news agency Ukrinform, where, in late 2023, a list circulated that labeled certain officials as "undesirable" as potential sources to quote in news stories. Many of those labeled as "undesirable" were members of the opposition to the Zelensky administration. Ukraine's acting minister of culture, Rostyslav Karadeev, denied knowledge of the list, and President Zelensky did not comment. Another journalist recounted how, the day after he revealed that a state news agency was trying to prevent interviews with opposition politicians, he received a notice to renew his draft registration. Although he could not confirm that the events were related, he thought them "suspicious." According to media analysts cited by *The Times*, the Ukrainian government's suppression efforts were aimed at limiting negative coverage of the government and positive reporting on the opposition. *The New York Times* story on declining press freedom in Ukraine is available online at: https://www.nytimes.com/2024/06/18/world/europe/ukraine-press-freedom.html.

A June 19, 2024, report from Reporters Without Borders (RSF) identified further attempts by government officials to influence reporting. The report noted that, following a June 12 government decree, all interviews with members of the armed forces would have to be submitted to the government's center for strategic communications at least three days in advance of publication. It further identified several additional instances of reporters being threatened with forced enlistment in the Ukrainian army, presumably as a consequence of their reporting. The report concluded with calls to action, encouraging the Ukrainian government to, among other things, "[e]ncourage media pluralism and independence," "[e]nd arbitrary restrictions and discrimination with regard to coverage of the war," and "[c]ombat impunity for crimes of violence against journalists." The RSF report is available online at: https://rsf.org/en/shrinking-press-freedom-ukraine-urgent-need-implement-roadmap-right-information.

However, in light of the October 9 allegations from *Ukrainska Pravda*, RSF's exhortations may have fallen on deaf ears. In the wake of the newspaper's revelations, further calls to defend press freedom in the face of government pressure tactics issued from journalism organizations. The Committee to Protect Journalists (CPJ) issued a statement dated October 10 calling on the Ukrainian government to "stop obstructing the reporting of . . . Ukrainska Pravda." "[Ukrainska Pravda] has paid a steep price for a quarter-century of rigorous reporting," the group's Europe and Central Asia program coordinator said in the statement. "The Ukrainian president's offices' efforts to block its work are nothing short of anti-democratic given the essential role of the newsroom in upholding a core national value of freedom of the press. Ukrainian authorities must never discourage investigative journalistic work, whether during periods of peace or war." The CPJ statement is available online at: https://cpj.org/2024/10/cpj-calls-for-an-end-to-systematic-pressure-on-ukrainska-pravda/.

On Nov. 17, 2024, the *Kyiv Independent* reported that Dymytro Lytvyn had responded to *Ukrainska Pravda's* allegations. In an interview with Liga.net, a Ukrainian news outlet that says it is "primarily focused on publishing business, finance, and war-related content," he stated that the allegations were an "incorrect story." "It is impossible to make any effective refutation in this story. When you say that you are not doing something, who will believe it? If so, many people say the opposite," he said. Lytvyn claimed that *Ukrainska Pravda* had never reached out to him in the three years for either question or comment. The *Kyiv Independent* report is available online at: https://kyivindependent.com/zelenskys-advisor-responds-to-accusations-of-pressure-on-ukrainska-pravda/.

> "Russia's systemic censorship of free speech cannot go overlooked or unchecked. Free, independent journalism is essential to informing the global public of the realities of the war on Ukraine."
>
> **— International Women's Media Foundation statement**

Ukrainian Journalist Dies in Russian Captivity

On Oct. 10, 2024, Ukrainian human rights ombudsman Dmytro Lubinets posted on Telegram that he had received confirmation from Russian authorities that 27-year-old journalist Viktoria Roshchyna had died in Russian captivity. Lubinets' post is available online at: https://t.me/dmytro_lubinetzs/6946.

Roshchyna was a Ukrainian journalist who went missing in August 2023 while reporting from Russian-occupied territory in southeastern Ukraine. According to reporting from *The New York Times* and NPR, Roshchyna worked as a freelance reporter for several independent Ukrainian publications, including *Ukrainska Pravda* and *Hromadske*. In 2022, she was awarded the Courage in Journalism Award by the International Women's Media Foundation (IWMF) for her reporting on life in Russian-occupied Ukraine. Her work brought her to Enerhodar in southeastern Ukraine, a city with a large nuclear power plant that is now under Russian control. Her reporting from the city, which included interviews with everyday Ukrainians and Russian military personnel, painted a stark human portrait of the occupation. Roshchyna had previously been arrested by Russian authorities in Berdyansk in March 2022. She was released ten days later, but only after she was forced to record a video message stating that photos of Russian military equipment had been found on her phone and she had no complaints against the Russian military. She disappeared on Aug. 3, 2023, while traveling to the Russian-occupied town of Zaporizhzhia in southeastern Ukraine, 130 kilometers southwest of Enerhodar. Roshchyna's reporting from Enerhodar is available online in Ukrainian at: https://hromadske.ua/ru/posts/gorod-sveta-reportazh-iz-okkupirovannogo-energodara.

Roshchyna's whereabouts were unknown for over eight months, during which time the IWMF issued a statement expressing the organization's "deep distress" at her disappearance. "We are extremely concerned for [Roshchyna's] safety and urge international attention on this situation," the IWMF wrote. "Russia's systemic censorship of free speech cannot go overlooked or unchecked. Free, independent journalism is essential to informing the global public of the realities of Russia's war on Ukraine. We ask our peers in the human rights and press freedom space to join our demand for information on Roshchyna's whereabouts and stand with journalists continuing to bring truth to light amid Russia's invasion." The IWMF statement is available online at: https://www.iwmf.org/2023/10/disappearance-of-victoria-roshchyna/.

In late April 2024, the Russian government confirmed Roshchyna's detention in a letter to her father, Volodymyr Roschyn. The letter stated that Roshchyna had been detained and was being held in the Russian Federation. It was later reported by Tatyana Katrychenko, a member of the Ukrainian humanitarian group Media Initiative for Human Rights, that Roshchyna was held in a prison in Taganrog, a city in southern Russian near the Ukrainian border. According to Katrychenko, the prison housed Ukrainian military personnel and civilians, and particularly women. The information from Katrychenko is available in her Facebook post,

Ukraine, *continued on page 42*

Ukraine, *continued from page 41*

available online at: https://z.umn.edu/KatrychenkoFacebookPost.

A *New York Times* report from Oct. 11, 2024, gave further details about Roshchyna's death. The report stated that, according to the National Union of Journalists of Ukraine, the Russian Defense Ministry had informed Roschyn in a letter that his daughter had died on Sept. 19, 2024, although the date of her death could not be independently verified. Speaking to the Ukrainian news outlet *Suspilne*, Andriy Yusov stated that Roshchyna died while being transferred from Taganrog to Moscow where she would have been part of a prisoner exchange. *The New York Times* was unable to independently verify Yusov's account. *The New York Times* report is available online at: https://www.nytimes.com/2024/10/11/world/europe/ukraine-journalist-viktoria-roshchina-dies-russia.html#:~:text=Viktoria%20Roshchina%2C%20a%20Ukrainian%20journalist,Russian%20custody%2C%20Ukrainian%20officials%20said. The *Suspilne* report is available online in Ukrainian at: https://suspilne.media/855365-rosina-bula-u-spiskah-na-obmin-usov/.

In the days after Roshchyna's death was reported, numerous journalism and human rights organizations condemned Russia and called for an investigation into the circumstances of her demise. The IWMF wrote: "Victoria's passing is not just the loss of a remarkable woman, but of an intrepid witness to history. Regardless of her cause of death, we can say with certainty that her life was taken because she dared tell the truth. We hope her death will not be in vain: the international community must pressure Russia to cease targeting journalists and silencing press freedom." The statement is available online at: https://www.iwmf.org/2024/10/iwmf-statement-on-death-of-victoria-roshchyna-2022-courage-award-winner/.

A spokesman for the Committee to Protect Journalists (CPJ) stated that the organization was "shocked" by the news of Roshchyna's death during her "unlawful" imprisonment in Russia. "Responsibility for her death lies with the Russian authorities, who detained her for daring to report the truth on the Russia-Ukraine war," said Gulnoza Said, CPJ's Europe and Central Asia program coordinator. "Ukrainian and Russian authorities must do everything in their power to investigate Roshchyna's death." The CPJ statement noted that at least fifteen journalists and one media worker have been killed covering the war in Ukraine. In addition, multiple Ukrainian journalists have been detained in the Russian occupied territories of Ukraine. On Oct. 15, 2024, CPJ joined a coalition of media and civil society organizations demanding justice for Roshchyna's death and calling for an investigation. CPJ's initial statement is available online at: https://cpj.org/2024/10/ukrainian-journalist-viktoria-Roshchyna-dies-during-russia-prisoner-exchange/. CPJ's call to action is available online at: https://cpj.org/2024/10/cpj-partners-demand-justice-for-ukrainian-journalist-viktoria-Roshchyna/.

> "Responsibility for [Roshchyna's] death lies with the Russian authorities, who detained her for daring to report the truth on the Russia-Ukraine war. Ukrainian and Russian authorities must do everything in their power to investigate Roshchyna's death."
>
> **— Gulnoza Said, CPJ's Europe and Central Asia program director**

The Director-General of UNESCO and Reporters Without Borders (RSF) each issued statements condemning Russia's actions regarding Roshchyna. The Director-General, Audrey Azoulay, wrote, "I deplore the death of Viktoria Roshchyna and call for a thorough and transparent investigation into the circumstances surrounding her death. I reiterate my call to respect UN Security Council Resolution 2222 unanimously adopted in 2015 on the protection of journalists, media professionals and associated personnel as civilians in situations of conflict, a status recently reaffirmed in the UN Pact for the Future." RSF stated that it mourned Roshchyna's death and called for an investigation. The RSF statement further noted that Russia ranked 162nd out of 180 countries in RSF's 2024 world press freedom index. The UNESCO statement is available online at: https://www.unesco.org/en/articles/unesco-director-general-deplores-death-journalist-viktoria-roshchina-russia. The RSF statement is available online at: https://rsf.org/en/ukrainian-journalist-victoria-roshchyna-has-died-russian-jail-rsf-demands-investigation.

The NPR report that this story draws from is available online at: https://www.npr.org/2024/10/11/nx-s1-5149881/ukrainian-journalist-dies-russia-captivity.

For more Silha *Bulletin* coverage of the war in Ukraine, the resulting threats to the press, and Russian censorship, see "*The Moscow Times* Designated an 'Undesirable Organization' by Russia's Prosecutor General's Office;" "Journalist Masha Gessen Convicted and Sentenced in Russian Court;" and "Journalists Detained by Russia Freed in Prisoner Exchange" in the Summer 2024 issue of the Silha *Bulletin*; "Ukraine Journalists Injured Covering War with Russia;" and "American Journalists in Russia Face Arrest, Censorship;" in the Winter/Spring 2024 issue; and "Russia's War in Ukraine Continues to Challenge Journalists' Ability to Cover the Conflict" in the Winter/Spring 2023 issue; "Russian War Against Ukraine Results in Continued Challenges to Media" in the Summer 2022 issue; and "Russian War Against Ukraine Results in Numerous Challenges to International Media" in the Winter/Spring 2022 issue.

— Stuart Levesque
Silha *Bulletin* Editor

Professor Jacob Mchangama Explores Decline in Free Speech at the 39th Annual Silha Lecture

The 39th annual Silha Lecture featured Professor Jacob Mchangama, the founder and executive director of The Future of Free Speech, an independent, non-partisan think tank located at Vanderbilt University. His presentation, "The Free Speech Recession and How to Reverse It: Five Lessons from History," explored the ongoing decline in freedom of speech and offered historical lessons to safeguard free speech for the 21st century.

SILHA CENTER EVENTS

The 2024 Silha Lecture took place on October 7 at 7 p.m. at Cowles Auditorium on the West Bank of the University of Minnesota, Twin Cities campus in Minneapolis. In addition to directing The Future of Free Speech, Mchangama is a research professor at Vanderbilt and a Senior Fellow at the Foundation for Individual Rights and Expression (FIRE). He has written extensively on free speech and human rights in media outlets including *The Economist*, *Los Angeles Times*, *The Washington Post*, BBC, *CBS News*, NPR, CNN, *Foreign Affairs*, *Foreign Policy*, *The Wall Street Journal*, and *Politico*, as well as top-tier academic and peer-reviewed journals. In addition, he produces and narrates the podcast "Clear and Present Danger: A History of Free Speech" and is the author of the critically-acclaimed book, *Free Speech: A History From Socrates to Social Media*, published by Basic Books in 2022. A book signing followed the lecture.

In his presentation, Mchangama argued that support for freedom of expression and free speech rights has waned in recent years, in contrast to the period immediately following the end of the Cold War, when support for freedom of expression surged. He cited the revival of authoritarianism as an example of this waning support, and further noted how Russia and some countries in Europe often restrict protests, that the internet has been "reverse engineered" by authoritarian states, and that countries such as China have used the internet to censor dissidents and watch their citizens. Taken together, these trends indicate that we are in the midst of a "speech recession." However, Mchangama argued, it is possible to reverse this trend if we heed five lessons from history.

The first lesson he called "elite panic." "Elite panic," Mchangama explained, "breaks out every time the public sphere is expanded." When members of the public are able to participate meaningfully, access to a society's general conversation expands beyond the voices of the elite. Mchangama noted that the ancient Romans claimed the reason Athens collapsed was that it "let the unwashed mob into the assemblies to make decisions and obviously things go wrong, when the unlearned . . . who don't know anything, are given a direct voice in public affairs."

A similar elite panic over the expansion of expression followed the invention of the printing press, the telegraph, and now the internet. Mchangama noted how former President Barack Obama's effective use of the internet "won the so-called Facebook generation twice over." But despite his prior effective use of the technology, "Barack Obama the elder statesman was less convinced about the blessings of the internet after the 2020 election, and the systematic campaign of lies about the election's outcome by Donald Trump and his supporters.. . . Obama told *The Atlantic* that the internet and online disinformation is the single biggest threat against democracy." Mchangama noted that former president Donald Trump also shifted his position after using the internet to gain political office, leading Mchangama to speculate that Trump might say: "Now that I have the power I don't think it's a good idea that people should be allowed to criticize me." Although Mchangama acknowledged that concerns about the internet's impact on the spread of disinformation may have some validity, he nevertheless argued that the threat of disinformation was overblown, and does not justify further cramping freedom of expression.

The second historical lesson Mchangama identified was "Milton's Curse," named for the English poet and author of *Areopagitica*, which is widely recognized as an early defense of press freedom and reaction against the pre-publication censorship and licensing then imposed by the English parliament. However, although Milton is often praised for his defense of the free press, Mchangama noted that his views on free expression were actually more complicated. "[R]ead [the *Areopagitica*] more carefully and you will see that John Milton is not in favor of press freedom for everyone. For instance, if you are a Catholic, no need to apply for press freedom. If you are too critical of the government, if you are seditious, press freedom is not really for you. In fact, press freedom is mostly for mainline Protestant sects who should be able to sort of discuss their minor differences in good order." Mchangama observed that this selective defense of free speech is a "recurring phenomenon throughout history. Many of the champions of free speech that we revere have had a selective, unprincipled defense of free speech. They've defended certain aspects of free speech but not ideas that they found too radical or for people that they found too dangerous.. . . [T]his is not something, unfortunately, that we have evolved beyond as a species."

For example, Mchangama cited Texas Gov. Greg Abbott who, in 2019, signed a law protecting free speech on college campuses, and then in the wake of the Oct. 7, 2023, attacks on Israel, "signed an executive order cracking down on anti-Semitism based on a definition of anti-Semitism that almost certainly violated the First Amendment." Mchangama also cited Elon Musk, who has called himself a free speech absolutist, but has sued "civil society organizations, [and] nonprofit organizations for criticizing X saying that they allow too much hate speech or anti-Semitism. Then he brings these frivolous lawsuits in order to shut them down." Mchangama further noted that Musk "has been pretty cozy with the governments of India and Turkey in suppressing and basically complying with takedown requests."

Mchangama's third lesson was called the "Weimar Fallacy," named after the German democracy that lasted from 1918 to 1933. The example of Weimar Germany, Mchangama argued, cautions against limiting freedom of expression in times of emergency. He noted that, "[t]he Weimar constitution allowed the president to suspend civil

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Lecture, *continued from page 43*

liberties including free speech at a time of emergency," which ultimately led the German President Hindenburg to sign a decree presented by Adolf Hitler, suspending civil liberties. Within six months, there was a one-party totalitarian dictatorship that would ultimately end up killing six million European Jews. To defend the idea that freedom of expression should not be limited in times of emergency, Mchangama cited the writings of many free speech luminaries, including Eleanor Roosevelt, Frederick Douglass, and Martin Luther King Jr.

The fourth historical lesson cited by Mchangama was that "free speech tends to thrive when control over information and ideas is decentralized." This was the case following the invention of the printing press, when "the Dutch Republic [became] the printing house of Europe." By moving to different provinces within the Dutch Republic, printers could take advantage of laws that were less restrictive of their specific subject matter, resulting in what Mchangama called "the Dutch Dark web." This meant, Mchangama said, "that if you're an author in France or anywhere else where there's strong censorship what you have to do is you have your manuscript published in the Netherlands under a pseudonym and then you smuggle it back to wherever you want to publish it. So it basically functions like a VPN, the Dutch Republic. And the reason why that works is because of this decentralized authority." Mchangama noted that the internet was similarly decentralized in the 1990s. But now, he stated, "we've had a move towards centralization with platforms which means that you have much more corporate and state control. In fact, you have the worst of both worlds. So, you have these huge corporate entities with outsized power over speech and they can be leaned on by governments whether Russia or the European Union to say 'You need to live up to our rules. You need to moderate content according to our rules or we'll imprison whoever representative you're obliged to have in our territory.'"

The fifth and final lesson Mchangama cited was that freedom of expression tends to flourish when there is a "culture of free speech." He cited as evidence early Athenian democratic society, which venerated "the ideal of *parrhesia* — civic commitment to tolerance of dissent and misunderstanding that free speech really is the antithesis to violence. It's really the only way we can live together as neighbors, colleagues, friends, and live together in peace while vehemently disagreeing about things but then working it out through conversations, debates, dialogue. In fact, we need radical free speech in order to be able to be pragmatic and [to] compromise."

During the brief question and answer session following the Lecture, Mchangama addressed issues regarding the ebb and flow of nations' restriction and relaxation of power over freedom of speech and the press by saying, it will always be so since "states will be states." He encouraged the audience to keep fighting for their rights under the First Amendment. Other questions addressed the "echo chamber" effect created by modern media. Mchangama urged the audience to fight the tendency to shut oneself off, and instead to engage with others. Finally, when one audience member asked about dealing with disinformation or misinformation, Mchangama said he believes that there is a tendency to overstate the impact of such messages, and that shutting down the sources of them will not work. "If you want to approach truth, I don't think there's a substitute for free speech," Mchangama said. "How are you going to disprove something if you can't rely on freedom of speech and freedom of information? So yes, free speech allows disinformation, misinformation to thrive but it's also the only real remedy to try and counter it. Does that mean that it will always be a remedy? Clearly not. But we have always had misguided views." In conclusion, Mchangama stated, "I hope that you will be advocates for a vibrant, flourishing culture of free speech."

Approximately 80 people attended the 2024 Silha Lecture in person, while another 85 joined the online webinar. The 39th Annual Silha Lecture is available on YouTube at https://www.youtube.com/watch?v=pzM8T3cly1s&t=2s. At the time the Silha *Bulletin* went to press, the video had been viewed nearly 260 times.

The Annual Silha Lecture is sponsored by the Silha Center for the Study of Media Ethics and Law, based at the Hubbard School of Journalism and Mass Communication at the University of Minnesota in Minneapolis. 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