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Lawsuit Seeks to Keep Records Secret Regarding Jan. 6, 2021 Insurrection

On Dec. 9, 2021, the U.S. Court of Appeals for the D.C. Circuit denied former President Donald Trump's effort to block the release of some White House records sought by the U.S. House Select Committee to Investigate the January 6th Attack on the United States Capitol (Committee). *Trump v. Thompson*, No. 21-5254, 2021 WL 5832713 (D.C. Cir. 2021).The ruling upheld a district court order allowing the disclosure of the records. Previously, on Oct. 18, 2021, President Trump filed a lawsuit in the U.S. District Court for the District of Columbia against the Committee, Committee Chairman Bennie G. Thompson (D-Miss.), the National Archives and Records Administration (NARA), and Archivist of the United States David S. Ferriero. The lawsuit aimed to keep secret certain presidential records and communications sought by the Committee in connection to the insurrection at the U.S. Capitol building (Capitol).

On Jan. 6, 2021, protests around the Capitol erupted into chaos as hundreds of President Trump's supporters forced their way into the Capitol. The insurrectionists, as they were referred to by several media outlets around the United States, caused significant property damage and forced members of Congress — who were set to confirm the election results despite opposition from some Republican representatives and senators — to retreat to safety elsewhere in the Capitol. Additionally, at least five individuals died as a result of the Capitol attack. (For more information on the insurrection and the media law issues and questions it raised, see "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" in the Fall 2020 issue of the Silha *Bulletin*.)

Following the 2020 presidential election, Congress created the Committee under H.R. 503 to investigate the events surrounding the January 6 insurrection. According to President Trump's complaint, on Aug. 25, 2021, the Committee sent requests for documents and records to Ferriero seeking information from the Executive Office of the President (EOP) and the Office of the Vice President (OVP). The requests for the records were made pursuant to the Presidential Records Act (PRA), 44 U.S.C. § 2205(2)(C), which governs the official records of Presidents and Vice Presidents. Under the statute, "presidential records" are defined as "documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President's immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."

Under § 2205(2)(C), "Presidential records shall be made available . . . (C) to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available." Additionally, the statute gives the Archivist of the United States the power to promulgate regulations to administer the statute. In the event of a records request, the Archivist must notify the President of the request. The President, in turn, "may assert a claim of constitutionally based privilege against disclosing the record within thirty calendar days after the date of the Archivist's notice," according to the complaint. The Archivist then consults with the incumbent or sitting President to determine whether they will uphold the claim of the former President. If the president does not uphold the claim, the Archivist discloses the Presidential record sixty calendar days after the Archivist received notification of the claim, barring a court order.

On Aug. 30, 2021, Ferriero informed President Trump that he was planning to produce certain documents requested by the Committee. On October 8, President Joe Biden's administration informed Ferriero that it would not be asserting the executive privilege over the documents. The same day, President Trump informed Ferriero that he was asserting executive privilege over a portion of the documents, with the Biden administration again deciding not to invoke the privilege.

On Oct. 13, 2021, Ferriero notified President Trump that, "[a]fter consultation with Counsel to the President and the Acting Assistant Attorney General for the Office of Legal Counsel, and as instructed by President Biden" he had "determined to disclose to the Select Committee" all responsive records that President Trump determined were subject to executive privilege on Nov. 12, 2021, "absent any intervening court order," according to the complaint.

On October 25, CNN and NBC News reported that in a letter to the National Archives, White House counsel Dana Remus wrote that President Biden determined that President Trump's efforts were "not in the best interests of the United States" and therefore "does not uphold the former President's assertion of privilege.

President Trump's complaint contended that the Committee's request for documents was "illegal, unfounded, and overbroad."

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The complaint contended that the PRA is unconstitutional if it is "read so broadly as to allow an incumbent President unfettered discretion to waive the previous President's executive privilege, mere months following an administration change." The complaint further argued that the request "lacks a valid legislative purpose and thus violates the Constitution and separation of powers."

Additionally, the complaint asserted that President Trump "has identified a limited number of records allegedly responsive to the Committee's request that are covered by numerous privileges, including the presidential communications privilege, and the deliberative process privilege, among others. Moreover, the request seeks documents protected by the attorney-client privilege and the attorney work-product doctrine."

COVER STORY

The complaint further contended that the records request was "almost limitless in scope and effectively seeks every presidential record and communication that could tenuously relate to events that occurred on January 6, 2021. The request also seeks records with no reasonable connection to the events of that day." The complaint also called the request "a political ploy" in which President Biden "to accommodate his partisan allies, . . . has refused to assert executive privilege over numerous clearly privileged documents requested by the Committee."

The full complaint is available online at: http://cdn.cnn.com/cnn/2021/images/10/18/trump.lawsuit.pdf.

In an Oct. 18, 2021 statement, White House spokesperson Mike Gwin defended the Biden administration's decision not to assert privilege over the requested documents. "The former president's actions represented a unique — and existential — threat to our democracy that can't be swept under the rug," he said. "As President Biden determined, the constitutional protections of executive privilege should not be used to shield information that reflects a clear and apparent effort to subvert the Constitution itself."

Thompson and Committee Vice Chair Liz Cheney (R-Wyo.) released a joint statement on October 18 asserting that "the former President's clear objective is to stop the Select Committee from getting to the facts about January 6th and his lawsuit is nothing more than an attempt to delay and obstruct our probe. Precedent and law are on our side."

On Oct. 19, 2021, President Trump filed a motion for a preliminary injunction "prohibiting Defendants from enforcing or complying with the Committee's request."

On November 9, the U.S. District Court for the District of Columbia denied the motion, holding that President Trump's "assertion of privilege is outweighed by President Biden's decision not to uphold the privilege." *Trump v. Thompson*, No. 21-cv-2769 (TSC), 2021 WL 5218398 (2021). Judge Tanya Chutkan also held that President Trump had not identified any irreparable harm that could arise from the disclosure of the records, reasoning that President Biden concluded that the documents could softly be released. Additionally, Chutkan concluded that in balancing the potential harms asserted by President Trump with the public interest in releasing the documents, the court concluded that "discovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance[,]" and that "the public interest lies in permitting — not enjoining — the combined will of the legislative and executive branches[.]" President Trump summarily filed an appeal and a motion for both an injunction pending appeal and expedited briefing.

On Dec. 9, 2021, the D.C. Circuit upheld the lower court ruling. Judge Patricia Millett wrote the unanimous panel opinion and acknowledged that the appeal "involves only a subset of those requested documents over which former President Trump has claimed executive privilege, but for which President Biden has expressly determined that asserting a claim of executive privilege to withhold the documents from the January 6th Committee is not warranted." Millett wrote that "[t]he central question in this case is whether, despite the exceptional and imperative circumstances underlying the Committee's request and President Biden's decision, a federal court can, at the former President's behest,

> "[D]iscovering and coming to terms with the causes underlying the January 6 attack is a matter of unsurpassed public importance.. . . [T]he public interest lies in permitting — not enjoining — the combined will of the legislative and executive branches[.]"
>
> **— Judge Tanya Chutkan, U.S. District Court for the District of Columbia**

override President Biden's decision not to invoke privilege and prevent his release to Congress of documents in his possession that he deems to be needed for a critical legislative inquiry."

Millett concluded that "[o]n the record before us, former President Trump has provided no basis for this court to override President Biden's judgment and the agreement and accommodations worked out between the Political Branches over these documents."

Millett provided five reasons why President Trump "failed to establish a likelihood of success," including that

- "President Biden's carefully reasoned and cabined determination that a claim of executive privilege is not in the interests of the United States;
- Congress's uniquely vital interest in studying the January 6th attack on itself to formulate remedial legislation and to safeguard its constitutional and legislative operations;
- the demonstrated relevance of the documents at issue to the congressional inquiry;
- the absence of any identified alternative source for the information; and
- Mr. Trump's failure even to allege, let alone demonstrate, any particularized harm that would arise from disclosure, any distinct and superseding interest in confidentiality attached to these particular documents, lack of relevance, or any other reasoned justification for withholding the documents."

Millett also reasoned that President Trump "failed to establish irreparable harm, and the balance of interests and equities weigh decisively in favor of disclosure" and that "[b]oth Branches agree that there is a unique legislative need for these documents and that they are directly relevant to the Committee's inquiry into an attack on the Legislative Branch and its constitutional role in the peaceful transfer of power."

Millett concluded by writing, "[O]ur Constitution divides, checks, and balances power to preserve democracy and to ensure liberty. For that reason, the executive privilege for presidential communications is a qualified one that Mr. Trump agrees must

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give way when necessary to protect overriding interests.. . . What Mr. Trump seeks is to have an Article III court intervene and nullify those judgments of the President and Congress, delay the Committee's work, and derail the negotiations and accommodations that the Political Branches have made. But essential to the rule of law is the principle that a former President must meet the same legal standards for obtaining preliminary injunctive relief as everyone else. And former President Trump has failed that task."

Millett added, "The events of January 6th exposed the fragility of those democratic institutions and traditions that we had perhaps come to take for granted. In response, the President of the United States and Congress have each made the judgment that access to this subset of presidential communication records is necessary to address a matter of great constitutional moment for the Republic. Former President Trump has given this court no legal reason to cast aside President Biden's assessment of the Executive Branch interests at stake, or to create a separation of powers conflict that the Political Branches have avoided."

In a footnote, Millett clarified that the "court's administrative injunction, entered November 11, 2021, will be dissolved in 14 days, reflecting the amount of time the former President's counsel requested to file a petition for a writ of certiorari and an accompanying motion for an injunction pending review with the Supreme Court."

The full ruling is available online at: https://z.umn.edu/TrumpThompsonruling.

Following the ruling, Thompson and Cheney praised the decision in a statement. "We applaud the Court's decisive ruling, which respects the Select Committee's interest in obtaining White House records and the President's judgment in allowing those records to be produced," they wrote.

Liz Harrington, a spokesperson for President Trump, said that the former president would appeal the case to the U.S. Supreme Court. "Regardless of today's decision by the the [*sic*] appeals court, this case was always destined for the Supreme Court. President Trump's duty to defend the Constitution and the Office of the Presidency continues, and he will keep fighting for every American and every future Administration," she tweeted.

On December 23, lawyers for President Trump filed a petition for *certiorari* with the Supreme Court. The petition is available online at: https://z.umn.edu/Trumppetition.

On December 30, the defendants filed their brief in opposition. The full brief is available online at: https://z.umn.edu/defendantbrief.

As the *Bulletin* went to press, the Court had not ruled on granting *certiorari* in the case.

On Dec. 29, 2021, *The New York Times* reported that the House Committee "agreed to delay or withdraw demands for hundreds of Trump White House Records at the request of the Biden administration," which argued that they should remain sealed. According to CBS News, the White House elected to shield certain documents in the interest of protecting national security and executive privilege.

In a letter to the Committee, White House counsel Jonathan Su wrote that President Biden "recognizes that Congress has a compelling need, in service of its legislative functions, to understand the circumstances that led to the insurrection that took place on January 6, and the extraordinary events surrounding it, in order to ensure nothing similar ever happens again.. . . The documents for which the Select Committee has agreed to withdraw or defer its request do not appear to bear on the White House's preparations for or of January 6, or on efforts to overturn the election or otherwise obstruct the peaceful transfer of power." The letter continued, "Accordingly, the Select Committee's agreement to withdraw or defer these documents, as well as the documents subject to the prior deferral, should not compromise its ability to complete its critical investigation expeditiously."

The Committee clarified in a statement that it had not withdrawn its request for "relevant records." Cheney added in a December 29 tweet that the Committee was still "actively litigating to obtain White House records Trump is trying to conceal." As the *Bulletin* went to press, the requested records had not been released to the Committee.

Meanwhile, several media outlets reported on Jan. 4, 2022 that the Committee sent a letter to conservative talk show host Sean Hannity seeking his cooperation with its investigation. The Committee received "dozens" of Hannity's text messages to and from former Trump White House chief of staff Mark Meadows indicating that the political commentator may have been aware of plans to violently contest the 2020 Presidential Election results.

The letter read, "The Select Committee now has information in its possession . . . indicating that you had advance knowledge regarding President Trump's and his legal team's planning for January 6th. It also appears that you were expressing concerns and providing advice to the President and certain White House staff regarding that planning. You also had relevant communications while the riot was underway, and in the days thereafter. These communications make you a fact witness in our investigation."

The letter continued, "The Select Committee has immense respect of the First Amendment to our Constitution, freedom of the press, and the rights of Americans to express their political opinions freely. For that reason, we do not intend to seek information from you regarding your broadcasts on radio or television, your public reporting or commentary, or your political views regarding any candidate for office. At the same time, we have a solemn responsibility to investigate fully the facts and circumstances of these events in order to inform our legislative recommendations. Our nation cannot let anything like January 6th ever happen again. Thus, we write today to seek your voluntary cooperation on a specific and narrow range of factual questions."

The full letter, which is signed by Thompson and Cheney and includes quotations from Hannity's text messages, is available online at: https://january6th.house.gov/sites/democrats.january6th.house.gov/files/2022-1-4.BGT%20and%20LC%20Letter%20to%20Hannity_Redacted.pdf. Hannity's attorney, Jay Sekulow, told CNN on January 4, "We are reviewing the committee's letter and will respond as appropriate."

In a Jan. 5, 2021 interview with the Associated Press (AP), Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley contended that the text messages "obviously raise[] ethical issues for Hannity.. . . But it also raises ethical issues for Fox. What do you purport to be? What do you aspire to be? You have to decide where your loyalties lie, whether your goal is to be a microphone for a particular political agenda or to serve the public interest."

— Scott Memmel
Teaching Assistant Professor
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Julian Assange Faces Extradition to United States Following United Kingdom Court Ruling

On Dec. 10, 2021, several media outlets reported that the High Court of Justice in London (UK) held that WikiLeaks founder Julian Assange can be extradited to the United States, reversing a January 2021 lower court ruling. *The Government of the United States of America v. Assange* [2021] EWHC 3313 (Admin) (Eng.).

WIKILEAKS

On May 23, 2019, the U.S. Department of Justice (DOJ) issued an indictment alleging 17 charges against WikiLeaks founder Julian Assange arising from purported violations of the Espionage Act, 18 U.S.C. § 793. The charges came in addition to a previous indictment that included one charge under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. The charges alleged that in 2010, Assange assisted former U.S. Army intelligence analyst Chelsea Manning in gaining access to classified documents published by WikiLeaks. (For more information on the indictment, see "Federal Prosecutors Charge Julian Assange With Seventeen Counts Under the Espionage Act, Prompting Renewed Concern for Journalists" in the Summer 2019 issue of the Silha *Bulletin*. For more background on WikiLeaks publishing the documents leaked by Manning, see "WikiLeaks' Document Dump Sparks Debate" in the Summer 2010 issue of the Silha *Bulletin* and "Manning Sentenced to 35 Years in Prison for Leaks" in the Winter/Spring 2013 issue. Finally, for more information on the commuting of Manning's sentence, see "President Obama Commutes Chelsea Manning's Sentence, Pardons Gen. James E. Cartwright, Takes No Action on Edward Snowden" in the Winter/Spring 2017 issue of the Silha *Bulletin*.)

On April 11, 2019, British police arrested Assange after Ecuador's President Lenin Moreno revoked political asylum and evicted Assange for "repeated violations [of] international conventions and daily-life protocols." Assange had been granted diplomatic asylum in the Ecuadorian embassy in 2012 after losing an appeal against extradition to Sweden, where he faced two sexual assault allegations. Westminster Magistrates' Court also found Assange guilty of breaching his 2012 bail conditions. On May 1, 2019, he was sentenced to 50 weeks in prison on the breached bail charges, and on July 18, he dropped his appeal against the jail term. On Nov. 19, 2019, Swedish prosecutors announced that they would not proceed with extradition to Sweden and were dropping the investigation into an allegation of rape previously made against Assange in 2010.

On Feb. 24, 2020, UK District Judge Vanessa Baraitser for the Woolwich Crown Court in southeast London began hearing opening arguments for the United States' extradition request. On April 27, 2020, Baraitser announced that the three-week trial planned for May could no longer take place due to the COVID-19 pandemic. On May 4, WikiLeaks announced that the evidence portion of the trial had been rescheduled for September 2020. (For more information on the background of the charges against Assange and his extradition hearing, see "Julian Assange Extradition Hearing Begins, Delayed Due to COVID-19 Pandemic; Chelsea Manning Released from Prison" in the Winter/Spring 2020 issue of the Silha *Bulletin*. For more information on the COVID-19 pandemic and how it raised several media law and ethics issues, see "Special Report: COVID-19 Pandemic Raises Media Law and Ethics Issues" in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

On Jan. 4, 2021, Baraitser rejected the United States' attempt to extradite Assange, finding that it "would be oppressive and I order his discharge," despite writing that she had "no reason to doubt that the usual constitutional and procedural protections will be applied to ensure that Mr. Assange receives a fair trial," and that she "accept[s] that oppression as a bar to extradition requires a high threshold. I also accept that there is a strong public interest in giving effect to treaty obligations and that this is an important factor to have in mind."

However, citing several expert opinions and examples of individuals committing or attempting to commit suicide in U.S. prisons, Baraitser concluded that she was satisfied that "in these harsh conditions, Mr. Assange's mental health would deteriorate causing him to commit suicide with the "*single minded determination*" of his autism spectrum disorder. I find that the mental condition of Mr. Assange is such that it would be oppressive to extradite him to the United States of America" (emphasis in original). The full ruling is available online at: https://www.judiciary.uk/wp-content/uploads/2021/01/USA-v-Assange-judgment-040121.pdf.

On Dec. 10, 2021, Lord Chief Justice Lord Burnett and Lord Justice Holroyde of the High Court of Justice Queen's Bench Division Administrative Court reversed Baraitser's ruling. The decision largely centered on "four assurances" provided by the United States, including that:

- Officials would not "impose Special Administrative Measures (SAMs) on Mr. Assange, pretrial or post-conviction."
- If Assange is found guilty in U.S. court, he would "be eligible, following conviction, sentencing and the conclusion of any appeals, to apply for a prisoner transfer to Australia to serve his U.S. sentence."
- Assange would "receive any such clinical and psychological treatment as is recommended by a qualified treating clinician employed or retained by the prison where he is held in custody."
- Assange would "not be held at the United States Penitentiary — Administrative Maximum Facility (ADX) in Florence, Colorado. If he is convicted and sentenced to a term of imprisonment, Mr[.] Assange will not be held at the ADX save that the United States retains the power to designate Mr Assange to ADX in the event that, after entry of this assurance, he was to commit any future act that then meant he met the test for such designation."

The assurances were made in "Diplomatic Note no. 74 dated 5 February 2021," according to the ruling.

Burnett and Holroyde rejected criticism and skepticism around the assurances, writing, "[W]e see no merit in the criticisms made of the individual assurances. The reality is that this court is being invited to reject the USA's assurances either on the basis that they are not offered in good faith or that they are for some other reason not capable of being accepted at face value. That is

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a serious allegation, particularly bearing in mind that . . . the United Kingdom and the USA have a long history of cooperation in extradition matters, and the USA has in the past frequently provided, and invariably fulfilled, assurances." They added, "There is no reason why this court should not accept the assurances as meaning what they say. There is no basis for assuming that the USA has not given the assurances in good faith."

Burnett and Holroyde then turned to "whether the assurances are sufficient to meet the concerns which led to the judge's decision and, if so, what course this court should now take." They found that Baraitser rejected the extradition request based on her concerns about the risks posed by SAMs and/or detained at the ADX. Burnett and Holroyde held that "[t]hat risk is in our judgment excluded by the assurances which are offered. It follows that we are satisfied that, if the assurances had been before the judge, she would have answered the relevant question differently. That being clear, we do not accept the submission on behalf of Mr[.] Assange that the case should go back to the judge for her to decide the relevant question afresh. That conclusion is sufficient to determine this appeal in the USA's favour."

Burnett and Holroyde briefly considered other arguments by Assange, but ultimately concluded that Assange could be extradited to the United States. The full ruling is available online at: https://www.judiciary.uk/wp-content/uploads/2021/12/USA-v-Assange-judgment101221.pdf.

In a Dec. 10, 2021 statement, Barry Pollack, an attorney representing Assange, wrote that Assange's attorneys would appeal the decision based on the United States' assurances to the UK's Supreme Court, within the requisite 14 days. "It is highly disturbing that a U.K. court has overturned a decision not to extradite Julian Assange, accepting vague assurances by the United States government. Mr. Assange will seek review of this decision by the U.K. Supreme Court," Pollack said. As the *Bulletin* went to press, the UK's top court had not ruled on the case.

WikiLeaks editor-in-chief Kristinn Hrafnsson said in a statement, "Julian's life is once more under grave threat, and so is the right of journalists to publish material that governments and corporations find inconvenient.. . . This is about the right of a free press to publish without being threatened by a bullying superpower."

In a Dec. 10, 2021 editorial, *The Guardian* called the ruling "not only a blow for [Assange's] family and friends, who fear he would not survive imprisonment in the US. It is also a blow for all those who wish to protect the freedom of the press." The editorial continued, "Regardless of Mr[.] Assange's wellbeing, the US should not be demanding his extradition, and the UK should not be granting it. He is charged under the Espionage Act, including with publishing classified material. The case against the 49-year-old relates to hundreds of thousands of leaked documents about the Afghanistan and Iraq wars, as well as diplomatic cables, which were made public by WikiLeaks working with the Guardian and other media organisations. They revealed horrifying abuses by the US and other governments which would not otherwise have come to light."

The editorial added, "No public interest defence is permissible under the Espionage Act. Campaigners in the US have warned that its use is a direct assault on the first amendment. And publishers outside it are equally at risk if Mr[.] Assange is extradited; the charges relate to acts which took place when he was not in the country." The full editorial is available online at: https://www.theguardian.com/commentisfree/2021/dec/10/the-guardian-view-on-the-us-pursuit-of-julian-assange-set-him-free.

Previously, in October 2021, several press freedom, human rights, and civil liberties groups, including the American Civil Liberties Union (ACLU), the Electronic Frontier Foundation (EFF), and the Committee to Protect Journalists (CPJ), sent a letter to the DOJ and U.S. Attorney General Merrick Garland reiterating their "profound concern about the ongoing criminal and extradition proceedings relating to Julian Assange, the founder of Wikileaks, under the Espionage Act and the Computer Fraud and Abuse Act."

The letter followed a Sept. 26, 2021 *Yahoo News* story describing an alleged Central Intelligence Agency (CIA) plot to kidnap and/or assassinate Assange during President Donald Trump's administration. *Yahoo News* reported that "[s]ome senior officials inside the CIA and the Trump administration even discussed killing Assange, going so far as to request 'sketches' or 'options' for how to assassinate him. Discussions over kidnapping or killing Assange occurred 'at the highest levels' of the Trump administration, said a former senior counterintelligence official. 'There seemed to be no boundaries.'" The September 2021 letter read, "The *Yahoo News* story only heightens our concerns about the motivations behind this prosecution, and about the dangerous precedent that is being set." The full *Yahoo News* story is available online at: https://news.yahoo.com/kidnapping-assassination-and-a-london-shoot-out-inside-the-ci-as-secret-war-plans-against-wiki-leaks-090057786.html.

The letter continued, "[T]he signatories to this letter have different perspectives on Mr. Assange and his organization. We are united, however, in our view that the criminal case against him poses a grave threat to press freedom both in the United States and abroad. We were disappointed that the Department of Justice appealed the decision by Judge Vanessa Baraitser of the Westminster Magistrates' Court to reject the Trump administration's extradition request."

The letter added that "journalists routinely engage in much of the conduct described in the indictment: speaking with sources, asking for clarification or more documentation, and receiving and publishing official secrets. News organizations frequently and necessarily publish classified information in order to inform the public of matters of profound public significance. We appreciate that the government has a legitimate interest in protecting bona fide national security interests, but the proceedings against Mr. Assange jeopardize journalism that is crucial to democracy." The full letter is available online at: https://www.eff.org/document/press-freedom-groups-assange-letter-doj.

— Scott Memmel
Teaching Assistant Professor
Silha *Bulletin* Co-editor

Project Veritas Raises Complicated First Amendment Issues

In fall 2021, James O'Keefe — a political activist who has drawn national attention for his publication of controversial hidden camera videos on his website, Project Veritas — was back in the spotlight after a Federal Bureau of Investigation (FBI) raid on his home. Media scholars and activists defended O'Keefe, contending that the raid was dangerous for journalism and the First Amendment. The Reporters Committee for Freedom of the Press (RCFP) requested that documents related to the raid be unsealed. However, the request was rejected by a federal judge in early December. Meanwhile, Project Veritas sought to enjoin *The New York Times* from reporting on the organization, prompting critics to note the hypocrisy of these competing views of the First Amendment.

FIRST AMENDMENT

O'Keefe has long raised legal and ethical questions for his work. He first gained notoriety in 2009 after releasing undercover videos showing a community organization group, the Association of Community Organizations for Reform Now (ACORN) advising a couple posing as a pimp and a prostitute on how to make their business legal. The couple was revealed to be O'Keefe and his associate Hannah Giles. In 2010, several of O'Keefe's accomplices were charged criminally after posing as telephone repairmen while attempting to enter the offices of then-U.S. Senator Mary Landrieu (D-La.). In 2011, O'Keefe posted a video of senior vice president of National Public Radio (NPR) Ron Schiller making negative comments about the "Tea Party" movement. (For more information on these stings, see *NPR Executives Resign after Hidden Camera Sting* in "Prank Phone Call, Hidden Camera Spur Ethical Controversies for News Media" in the Winter/Spring 2011 issue of the Silha *Bulletin*.)

In 2017, O'Keefe faced a civil lawsuit after posting a series of videos following a "sting operation" that infiltrated offices of Democratic National Committee vendor Democracy Partners, LLC. The lawsuit alleged trespass, unlawful interception of oral communications, and a breach of fiduciary duty for the Project Veritas employee who went undercover as an intern with Democracy Partners. As the *Bulletin* went to press, the lawsuit remained ongoing in the U.S. District Court for the District of Columbia. (For more information on this lawsuit, see *Political Operatives Target Hidden Camera Videographers in Civil Lawsuit* in "Controversial Undercover Video Makers Face Legal Action and Ethical Concerns" in the Summer 2017 issue of the *Bulletin*.)

The same year, O'Keefe also targeted *The New York Times* in his latest operation intended to target the mass media. He posted a video allegedly depicting a junior *Times* editor, Nick Dudich, mocking the idea of acting as an objective journalist. Dudich, who joined the *Times* in the spring of 2017 as an audience strategy editor, did not know he was being recorded, according to the *Times*. However, O'Keefe also encountered legal setbacks, including in November 2017 when *The Washington Post* published an extensive report describing how a woman who had made several false claims about then-Republican U.S. Senate candidate Roy Moore in interviews with the *Post* was actually an operative from Project Veritas seeking to discredit the newspaper. Amidst significant criticism from journalists and advocates, O'Keefe eventually admitted to being behind the operation, but maintained that Project Veritas' intention was not to plant a fake story. (For more information on O'Keefe's efforts to target *The New York Times*, as well as his setback in the case implicating *The Washington Post*, among other actions by Project Veritas, see "Undercover Video Maker James O'Keefe Continues Attacks on the News Media, Faces Setbacks in Some Legal Disputes" in the Winter/Spring 2018 issue of the Silha *Bulletin*.)

In 2020, O'Keefe published several videos claiming to provide evidence that U.S. Rep. Ilhan Omar (D-Minn.) and Minneapolis City Council member Jamal Osman were part of election fraud efforts surrounding the November 2020 elections. Several news outlets later discredited the videos. O'Keefe also drew controversy for publishing audio of himself calling in to a CNN editorial conference call and questioning the integrity of the outlet. (For more information on O'Keefe's 2020 videos, see *Project Veritas Faces Renewed Criticism. Following Disputed Election Fraud Claims and Targeting CNN Editorial Meetings* in "Misinformation Concerns Precede and Follow Presidential Election" in the Fall 2020 issue of the *Bulletin*.)

FBI Raids Home of Project Veritas Founder; Media Organizations Look to First Amendment

On Nov. 6, 2021, *The New York Times* reported that federal authorities had searched the Mamaroneck, N.Y., home of Project Veritas founder James O'Keefe on the same day. Media and civil liberty organizations subsequently raised First Amendment concerns about the investigation.

The raid on O'Keefe's home came the day after he announced in a statement on the Project Veritas website that the outlet was under investigation in relation to a diary reportedly stolen from Ashley Biden, daughter of President Joe Biden. *The New York Times* reported that the FBI carried out the court-ordered search on O'Keefe's home several days after searching the homes of two of O'Keefe's associates.

On November 10, lawyers for Project Veritas wrote a letter to the U.S. District Court for the Southern District of New York requesting that the court appoint a special master to review the contents of the cell phones the government seized from O'Keefe's home. According to the letter, Project Veritas received from "two previously-unknown sources" what was described as a copy of Ashley Biden's diary. "The extraordinary actions taken by the government, most significantly the use of search warrants to seize news-gathering materials, appear to be founded on the premise that the diary does belong to Ashley Biden," the letter said. "That fact, however, does not warrant the exercise of federal criminal authority to investigate and punish journalists who merely obtained the diary and possessed it temporarily."

According to the letter, the cell phones seized during the raid "contain vast amounts of information protected by the First Amendment, including materials related to on-going news investigations, whistleblower information, and donor information that implicates freedom of speech and association guarantees." The full letter is available online at: https://context-cdn.washingtonpost.

Project Veritas, *continued on page 8*

Project Veritas, *continued from page 7*

com/notes/prod/default/documents/e2fe0710-9b69-4091-b6ab-25a670ac0259/note/6b652036-bbee-4ac0-af22-aa5c-c2b20ab3.#page=1.

In a statement published on the Project Veritas website on Nov. 5, 2021, O'Keefe raised First Amendment concerns about the investigation. "When the FBI and the Southern District of New York seize reporter's notebooks, it is not just an attack on Project Veritas," the statement read. "It is an attack on every American and our sacred right to free speech and to a free press. The First Amendment is first for a reason: it guarantees all the other rights that follow, because it's about accountability."

On November 15, lawyers for Project Veritas sent another letter to the Southern District of New York requesting information about any leaks from the government to *The New York Times*. The attorneys wrote that the *Times* published "several Project Veritas legal compliance memoranda authored by Project Veritas' outside counsel." The lawyers alleged that the government leaked these documents after extracting them from O'Keefe's phone. The letter requested "entry of an order" that would require the government to "inquire and confirm on the record whether someone employed by or associated with the government leaked Project Veritas's attorney-client privileged memoranda to the New York Times." The full letter is available online at: https://assets.ctfassets.net/syq3snmxclc9/454qtKCUXZpG4c8zeu14ya/9ece331f76f1926c97b5a8c4635cd89f/11.15.20_O-Keefe.PV.Motion_re_Disclosure_of_Leaks__1_.pdf.

On November 22, attorneys for Project Veritas wrote another letter to the Southern District of New York. In the letter, the attorneys wrote that the government's argument that Project Veritas was "not engaged in journalism within any traditional or accepted definition of that word" reflected "hostility" and strengthened the need for a special master. The full letter is available online at: https://assets.ctfassets.net/syq3snmxclc9/zZuz9zAPx3RLxOOExY07j/0b1e21f5100edb56e34f2c1812669cc9/2021_11_22_DE_38_PV_Parties-_Reply_to_Response_regarding_Motion.pdf.

On Dec. 8, 2021, the Southern District of New York ordered a special master be appointed to the case. Judge Analisa Torres wrote the order, finding that the appointment of a special master was "warranted here" because it is "important that the procedure adopted . . . not only be fair but also appear to be fair." Because of the "potential First Amendment concerns that may be implicated by the review of the materials seized from Petitioners" the Court found that appointing a special master would help "protect the public's confidence in the administration of justice." Barbara S. Jones, a former judge in the Southern District of New York, was selected as the special master. Jones was set to review the materials extracted by the government and filter out those responsive to the search warrants. The order denied Project Veritas' request to "conduct a search for alleged leaks related to the Government's investigation." The attorneys did not "provide a legal basis for their request or allege that the Government violated any specific rule, law, or policy."

The full order granting a special master is available online at: https://assets.ctfassets.net/syq3snmxclc9/rCbdYG6ILm6VjeuW62z2F/f6dd4d7ffcf53a8c16c9a108adb4e78a/2021-12-08__DE_48__Order_on_Motion_to_Appoint_Special_Master.pdf.

A diverse group of stakeholders spoke out in support of this First Amendment argument. In a Nov. 22, 2021 article for *The Conversation*, Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley wrote that the FBI raid "sparked an unusual demonstration of support from the very establishment media that O'Keefe has spent his career targeting and trashing." She wrote that the outcome of the investigation will have serious ramifications for media. "If Project Veritas is found guilty of a crime, any journalist who transports leaked or 'stolen' information across state lines could be charged with violation of the law," Kirtley wrote. "It's unclear what that means today when so many documents are transmitted electronically." Arguing that the organization is not a member of the news media could have negative implications, too, she wrote. "[I]f the government narrowly defines 'the press' based on its political outlook or ethics, then no news organization is safe from attacks by future administrations," Kirtley added. "Either way, the mainstream media are holding their collective noses and supporting Project Veritas in its fight. It's a matter of principle, but also of self-preservation."

Project Veritas also drew measured support from the American Civil Liberties Union (ACLU). "Project Veritas has engaged in disgraceful deceptions, and reasonable observers might not consider their activities to be journalism at all," Brian Hauss, senior staff attorney with the ACLU's Speech, Privacy, and Technology Project, said in a Nov. 14, 2021 statement. "Nevertheless, the precedent set in this case could have serious consequences for press freedom. Unless the government had good reason to believe that Project Veritas employees were directly involved in the criminal theft of the diary, it should not have subjected them to invasive searches and seizures."

On Nov. 15, 2021, Committee to Protect Journalists (CPJ) U.S. and Canada Program Coordinator Katherine Jacobsen issued a similar statement. "While we do not endorse some of the tactics Project Veritas employs, the FBI's recent raids on the organization's founder and his associates represent a concerning overreach by law enforcement," Jacobsen said. "The government must provide a clear link between members of Project Veritas and alleged criminal activities before searching their homes for information about source material. Conducting raids without this kind of link sets a dangerous precedent that could allow law enforcement to search and confiscate reporters' unpublished source material in vague attempts to identify whistleblowers."

Senators Tom Cotton (R-Ark.) and Chuck Grassley (R-Iowa) each wrote letters to the U.S. Attorney General about the raid. Sen. Cotton wrote that he had "concerns about the origins" and motivations of this investigation, and concerns about the tactics used. He requested information about the crimes "predicating the search warrants," about the steps taken to comply with the Department of Justice (DOJ) regulations "governing obtaining information from journalists," and about communications "between officials from the Department of Justice and the White House concerning the investigation into the disappearance of Ashley Biden's diary." Cotton also wrote that court records showed the "reporters from the New York Times contacted James O'Keefe for comments very shortly after federal agents searched the home of an associate and O'Keefe's home." He requested "all communications between employees of the Department of Justice and the New York Times concerning the investigation

into the disappearance of Ashley Biden's diary."

Sen. Cotton's full letter is available online at: https://assets.ctfassets.net/syq3snmxclc9/5MQBxC7ufx35ZNm3zTkkzT/9751d825ade6d350ca48f25ce452199d/Tom_Cotton_letter_PDF.pdf.

Sen. Grassley wrote a letter stating the DOJ's "heavy-handed treatment of Project Veritas is notably different from the kid-glove and deferential treatment given to Hillary Clinton and her staff during its investigation into her mishandling of highly classified information." He decried the "brazen and inconsistent standards employed by the Department against Project Veritas" and requested information and records about the search warrant and investigation.

Sen. Grassley's full letter is available online at: https://assets.ctfassets.net/syq3snmxclc9/QyP6ZGYAqWsLOsghaU1cd/f3c100c86f5a59a2acaab114038902e4/grassley_to_justice_dept.fbiprojectveritas.pdf.

On November 18, several congressmen wrote an additional letter requesting further details about the investigation. Sen. Ron Johnson (R-Wis.), Rep. Jim Jordan (R-Ohio), and Rep. James Comer (R-Ky.) requested documents and information including "the factual and legal predicate for the FBI to conduct raids at the homes of James O'Keefe and other current or former journalists or employees of Project Veritas."

The full letter is available online at: https://assets.ctfassets.net/syq3snmxclc9/4lGjL35synIgi7quwyn1c8/976d1fad9a7407d91f25e729994431fc/2021-11-18_JDJ_JC_RJ_to_AG_Garland_re_FBI_raids_of_PV.pdf.

Federal Judge Denies Request to Unseal Documents Related to FBI Raid

On Dec. 7, 2021, the U.S. District Court for the Southern District of New York denied a request from the Reporters Committee for Freedom of the Press (RCFP) to access documents related to a search warrant served at the home of Project Veritas founder James O'Keefe. Judge Sarah L. Cave reasoned that the district court had, on Nov. 5, 2021, "found probable cause existed to believe that O'Keefe's residence contained evidence of federal crimes, including conspiracy to transport stolen property across state lines and conspiracy to possess stolen goods." The Federal Bureau of Investigation (FBI) executed the search warrant of O'Keefe's home the following day.

On Nov. 15, 2021, attorneys for RCFP filed a motion asking the Court to unseal "the search warrant application, supporting affidavit, return, and any other related judicial documents" filed in connection to the search warrant. In the motion, RCFP argued that the documents related to the search warrant were "judicial documents that the press and public have a presumptive right to inspect under the common law." The motion also argued that the "common law presumption of access" was "weighty." RCFP also argued that any countervailing factors like the danger of impeding law enforcement or judicial processes, the privacy interests of parties, and the risk of revealing "details of an ongoing investigations" should be handled via redactions instead of sealing documents.

The full motion is available at: https://www.rcfp.org/wp-content/uploads/2021/11/2021-11-15-RCFP-Letter-Request-to-Unseal-OKeefe-SW-App-Affidavit.pdf.

In her ruling, Cave described a "three-step process" for determining whether documents should be sealed in the Second Circuit. First, the court must decide if the requested document is in fact a "judicial document." Then, the court must "determine the weight of that [presumption of access]." Finally, the court will "balance competing considerations" against the presumption. Here, Cave held that the search warrant itself was "unquestionably" a judicial document and held that the supporting documents sought by the RCFP likely fit in this category as well.

Cave wrote that the presumption of public access for search warrants and search warrant materials was strong. She then weighed this against "countervailing factors," like the ongoing grand jury investigation and privacy interests of the "uncharged individuals" named in the materials. Cave also held that the public has "at least as great an interest in preserving the integrity and security of criminal investigations" as in obtaining access to judicial documents and held that the sealing of these documents is "likely not indefinite." Although the RCFP did not raise a First Amendment argument and instead looked to "common law" rights of access, Cave wrote that the controlling precedent in the Second Circuit declined to recognize a First Amendment right of access "in the context of search warrant materials in an ongoing criminal investigation."

The full order is available online at: https://storage.courtlistener.com/recap/gov.uscourts.nysd.569823/gov.uscourts.nysd.569823.47.0.pdf.

As the *Bulletin* went to press, RCFP had not appealed the decision.

Project Veritas Succeeds in Securing Prior Restraint Against *The New York Times*

In November 2021, Project Veritas succeeded in convincing a New York judge to enjoin *The New York Times* from publishing information related to Project Veritas' legal strategy. According to the Reporters Committee for Freedom of the Press (RCFP), the order was the "first prior restraint against *The New York Times* since the Pentagon Papers." Although the judge limited the order on Dec. 14, 2021, ten days later, he upheld the prior restraint against the *Times*. Media experts criticized the rulings and also contended that Project Veritas' motion was a hypocritical move from an organization that publicly claims to support the First Amendment.

In November 2020, Project Veritas sued the *Times* and individual reporters for defamation after the paper published several articles that referred to Project Veritas election fraud reporting as a "coordinated disinformation campaign." The suit was filed in the Supreme Court of the State of New York, County of Westchester. (For more information on O'Keefe's 2020 videos, see *Project Veritas Faces Renewed Criticism. Following Disputed Election Fraud Claims and Targeting CNN Editorial Meetings* in "Misinformation Concerns Precede and Follow Presidential Election" in the Fall 2020 issue of the *Bulletin*.)

On Nov. 11, 2021, *The New York Times* published an article that included excerpts of memorandums prepared by Project Veritas attorneys outlining the organization's newsgathering strategies. The memos, prepared by attorney Benjamin Barr, described how the organization could conduct undercover investigations without running afoul of federal law. The memos were several years old and unrelated to the ongoing defamation suit filed by Project Veritas against the *Times*.

On Nov. 17, 2021, attorneys for Project Veritas filed a motion with the Westchester County Clerk requesting that the Court require the *Times* to "remove from its website all references to or descriptions of the memoranda that

Project Veritas, *continued on page 10*

Project Veritas, *continued from page 9*

reveal Project Veritas' attorney-client privileged information," and to "return and/or immediately delete all copies of Project Veritas' attorney-client privileged materials." The full motion is available online at: https://iapps.courts.state.ny.us/nyscef/ViewDocument?docIndex=DtqrpL7kehRsiBaMT8I5JA==.

New York Supreme Court Justice Charles D. Wood entered an order on Nov. 18, 2021 requiring the *Times* to "immediately sequester, protect, and refrain from further dissemination or publishing any of Plaintiff Project Veritas' privileged materials."

Critics argued the order failed to defeat the heavy presumption against the constitutional validity of prior restraints established in *New York Times Co. v. United States*, 403 U.S. 713 (1971), a case decided by the U.S. Supreme Court allowing *The New York Times* and *The Washington Post* to publish stories including and based upon the then-classified Pentagon Papers. RCFP and 50 news organizations filed an *amicus* brief in the case on Nov. 22, 2021. "To conclude that a news organization like the Times can be prohibited by court order from gathering and reporting newsworthy information about an entity that has filed a lawsuit against it, merely because the parties are in litigation, is not only constitutionally intolerable, but would work a serious harm to the news media's ability to inform the public," the brief read.

The full brief is available online at: https://www.rcfp.org/briefs-comments/project-veritas-v-new-york-times/.

At the request of attorneys for the *Times*, Wood issued a clarification on Dec. 14, 2021. Nothing in the order "shall prohibit the New York Times from interviewing and lawfully obtaining information from any Project Veritas attorney," Wood wrote. "Nothing shall prohibit the New York Times from receiving attorney-client privileged material from any Project Veritas officer or person authorized by Project Veritas to waive its attorney-client privilege and disclose privileged material, and from publishing any such information and material so obtained." Wood also clarified that the order would not prohibit the *Times* "from publishing Project Veritas' attorney-client privileged information if such information or material becomes publicly available independent of any past, present, or future action by the New York Times."

On Dec. 23, 2021, Wood upheld the prior restraint against the *Times*. He ordered the newspaper to return to Project Veritas physical copies of any legal memorandums in its possession, as well as destroy any electronic copies. The order also prohibited the *Times*' from using the memos "for any purposes whatsoever." In his ruling, Wood acknowledged that "[t]he list of exceptions to prior restraints is short. The Supreme Court has held that only in exception cases, a prior restraint may survive constitutional scrutiny," citing a long line of Supreme Court precedent, including *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

> "To conclude that a news organization like the Times can be prohibited by court order from gathering and reporting newsworthy information about an entity that has filed a lawsuit against it . . . would work a serious harm to the news media's ability to inform the public."
>
> **— *Amicus* brief by the Reporters Committee for Freedom of the Press and 50 news organizations**

However, Wood held that "the court's protective order does not act as an impermissible prior restraint on the *Times*. As important as the First Amendment's protection against prior restraints is, on the present facts, the erosion of the attorney-client privilege is a far more imminent concern.. . . Steadfast fidelity to, and vigilance in protecting First Amendment freedoms cannot be permitted to abrogate the fundamental protections of attorney client privilege of the basic right of privacy."

Wood also acknowledged that the Supreme Court has held that the First Amendment protects the protection of lawfully obtained, truthful information, including in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). However, he "reject[ed] the Times' position that Project Veritas' attorney-client communications are a matter of public concern. Undoubtedly, every media outlet believes that anything that it publishes is a matter of public concern.. . . [However, a] client seeking advice from its counsel simply cannot be a subject of general interest and of value and concern to the public." The full ruling is available online at: https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=SgQ8IEENXxhU2D4NlHEZHw==&system=prod.

Following the ruling, A.G. Sulzberger, publisher of the *Times*, said in a statement that the newspaper would appeal the ruling. He wrote, "In addition to imposing this unconstitutional prior restraint, the judge has gone even further (and) ordered that we return this material, a ruling with no apparent precedent and one that could present obvious risks to exposing sources should it be allowed to stand." As the *Bulletin* went to press, an appellate court had not ruled in the case.

In a column published in *The Washington Post* on Nov. 19, 2021, media critic Erik Wemple noted the "irony" of Project Veritas claiming a First Amendment defense against the FBI raid and then suing for a prior restraint against the *Times*. "Project Veritas's leaders fancy themselves First Amendment purists, yet the actions they're now asking courts to authorize would leave that doctrine in tatters," he wrote.

Stephen J. Adler, chairman of the RCFP and Bruce D. Brown, executive director of the RCFP, echoed this sentiment in a December 15 *Washington Post* column. "Consider the implications if such a ruling became the norm," the column read. "Any company, organization, or private individual could sue a newspaper for defamation and then block the newspaper from reporting information that journalists have acquired independently on the grounds that it reveals something confidential the plaintiff would prefer to keep secret. Not only would that transform the civil court system into a general purpose media censor, but it would also invite frivolous lawsuits brought expressly to shut down reporting in the public interest."

— Claire Colby
Silha *Bulletin* Co-Editor

Lawsuits, Court Rulings, and Other Developments in Minnesota Raise Important Media Law Questions and Problems

In the summer and fall of 2021, Minnesota faced multiple free speech and government transparency issues. First, the U.S. Court of Appeals for the Eighth Circuit ruled that a camera ban in Bloomington parks violated the First Amendment as applied. Second, a Minnesota judge granted a preliminary injunction in a case stemming from police targeting the press at protests. Finally, the Minnesota State Patrol allegedly deleted emails and text messages directly after the protests that erupted after George Floyd's murder in 2020.

MINNESOTA

Eighth Circuit Rules Bloomington's Camera Ban Violates First Amendment as Applied

On Sept. 2, 2021, the U.S. Court of Appeals for the Eighth Circuit held that a Bloomington, Minn. city ordinance prohibiting photographing and recording children in public parks violated the First Amendment as applied to a woman who documented use of the park and nearby parking spaces by a nearby Islamic community center and charter school. *Ness v. City of Bloomington*, 11 F.4th 914 (8th Cir. 2021).

The case arose when plaintiff Sally Ness filed a lawsuit seeking a declaration that the city ordinance was unconstitutional. She also asked that a state harassment statute be declared unconstitutional, and sought injunctive relief and nominal damages, which were all dismissed. The disputed ordinance provides that in city parks, "[n]o person shall intentionally take a photograph or otherwise record a child without the consent of the child's parent or guardian." Bloomington, Minn., City Code § 5.21(23). Ness claimed that she recorded videos and took photographs of the park as a concerned citizen who disputed the joint use agreement governing the parking facilities and allowing the Islamic community center and nearby charter school to use the park. Ness challenged the constitutionality of the ordinance under the First Amendment.

On July 23, 2020, U.S. District Court for the District of Minnesota Judge Ann D. Montgomery dismissed Ness' complaint. *Ness v. City of Bloomington*, No. 19-2882 ADM/DTS, 2020 WL 4227156 (2020). Montgomery held that the ordinance was content-neutral and narrowly tailored to a government interest in protecting children's privacy. "Ness has also failed to plausibly allege that the City Ordinance, as applied to her, violates the First Amendment," Montgomery wrote. "Ness alleges the City's motivation in approving the City Ordinance was 'to silence Plaintiff Ness by prohibiting her from videotaping and photographing the activities of DAF and the Success Academy.' Taking this allegation as true, legislative motive is irrelevant if, as here, the ordinance is neutral on its face." Montgomery also said Ness' claim failed because she could collect the information she needed by filming from public sidewalks, public streets, and private property, without violating the statute.

> "Demonstrations in public parks and streets have swept across the nation, and the ability of the press and the public to photograph and record them and disseminate this information to the public serves a vital and constitutionally protected purpose."
>
> **— Reporters Committee for Freedom of the Press**

However, the Eighth Circuit unanimously reversed, directing entry of judgment for Ness on her claim that the ordinance was unconstitutional as applied because it is a content-based restriction of speech. Judge Steven Colloton, writing for the unanimous court, concluded that "even if we assume that the ordinance on its face does not aim at the suppression of speech, the ordinance operates to restrict speech in this case." Colloton described Ness' information gathering as a "step in the speech process" which allows her actions to be protected under the First Amendment.

Colloton continued, "We conclude that Ness's photography and video recording is speech.. . . Ness wants to photograph and record the asserted 'noncompliant and overuse of Smith Park' by the Center and Success Academy, and she wants to post those photographs and videos to an internet blog and a Facebook page 'in order to inform the public' about the controversy. Thus, her photography and recording is analogous to news gathering."

Colloton further held that the statute needed to survive strict scrutiny, meaning there was a compelling government interest and that the statute was narrowly tailored to that purpose. Colloton reasoned that the restriction is a content-based one, rather than a content-neutral time, place, and manner restriction. He further wrote that "to determine whether Ness's photography or recording in a park is proscribed by the ordinance, an official must examine the content of the photograph or video recording to determine whether a child's image is captured. Thus, the ordinance is content-based as applied to the facts of this case." The ordinance was not narrowly tailored and, therefore, failed to survive strict scrutiny, Colloton concluded, because it was overly broad by prohibiting Ness' photographs and videos when she did not intend to harass, intimidate, or exploit children.

The full ruling is available online at: https://ecf.ca8.uscourts.gov/opndir/21/09/211629U.pdf.

The Reporters Committee for Freedom of the Press (RCFP) welcomed the decision in a statement on Sept. 2, 2021. "Demonstrations in public parks and streets have swept across the nation, and the ability of the press and public to photograph

Minnesota, *continued on page 12*

Minnesota, *continued from page 11*

and record them and disseminate this information to the public serves a vital and constitutionally protected purpose," RCFP wrote. "These photographs and recordings inform the public in a richer, fuller way than words alone can convey. They enable the public to better understand current events, to engage in public debate on the issues raised by these events — such as the role of policing, the movement for racial justice, and law enforcement's response — and ultimately, to hold their elected officials accountable."

TechDirt staff writer Tim Cushing wrote on Sept. 17, 2021 that "[t]he First Amendment protects unsympathetic plaintiffs just as much as it does those able to obtain mass support for their arguments. This case . . . involves someone whose motives seem bigoted but whose actions were clearly covered by the Constitution.. . . Protecting speech doesn't mean only protecting speech you like."

Federal Court Grants Preliminary Injunction in Case Stemming from Police Targeting Members of the Press; Minnesota State Patrol Purges Texts and Emails after Summer 2020 Protests

On Oct. 28, 2021, Judge Wilhelmina M. Wright of the U.S. District Court for the District of Minnesota converted a temporary restraining order (TRO) into a preliminary injunction in a lawsuit filed by the American Civil Liberties Union (ACLU) of Minnesota on behalf of several members of the news media, among other individuals, who faced attacks and threats by police during racial justice protests and demonstrations. *Goyette v. City of Minneapolis*, No. 20-cv-1302 (WMW/DTS), 2021 WL 5003065 (D. Minn. 2021). Previously, in April 2020, Wright had issued the TRO, which prevented the law enforcement defendants from "arresting, threatening to arrest, or using physical force — including through use of flash bang grenades, non-lethal projectiles, riot batons, or any other means — directed against any person whom they know or reasonably should know is a Journalist . . . unless [law enforcement has] probable cause to believe that such individual has committed a crime." Meanwhile, in July 2021, Minnesota State Trooper Maj. Joseph Dwyer testified during the *Goyette* case that the Minnesota State Patrol had deleted text messages and emails following the protests surrounding the May 2020 death of George Floyd.

On May 25, 2020, Floyd, a 46-year-old Black man, died while in the custody of Minneapolis Police Department officers. On March 29, 2021, the trial of former Minneapolis Police Department (MPD) officer Derek Chauvin — the officer charged with second-degree murder, third-degree murder, and second-degree manslaughter after he pressed his knee into the neck of Floyd — began. On April 20, 2021, Chauvin was found guilty on all three counts.

Meanwhile, on April 11, 2021, a Brooklyn Center, Minn. police officer, Kimberly Potter, shot and killed Daunte Wright, a 20-year-old Black man, during a traffic stop. Potter claimed to have accidentally grabbed and used her gun rather than a taser. On Dec. 23, 2021, Potter was convicted of first- and second-degree manslaughter. First-degree manslaughter required that she used "such force and violence that death of or great bodily harm to any person was reasonably foreseeable." Second-degree manslaughter required a finding of "culpable negligence" creating "unreasonable risk, and consciously takes chances of causing death or great bodily harm to another."

In the course of these events, protests arose in the Twin Cities, during which journalists, photographers, and others faced arrests, use of force, and threats by law enforcement, whose personnel also issued broad dispersal orders, requiring members of the public and press alike to leave an area.

(For more information on the protests around the death of George Floyd, the incidents between the press and police, incidents between the press and demonstrators, and resulting lawsuits, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue of the Silha *Bulletin*, "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue. For more information on the protests surrounding Chauvin's trial and the death of Daunte Wright, see "Members of the Press Detained and Targeted with Use of Force by Law Enforcement Despite Court Order During Racial Justice Protests in April 2021" available on the Silha Center for the Study of Media Ethics and Law's website at: https://hsjmc.umn.edu/news/2021-04-18-members-press-detained-and-targeted-use-force-law-enforcement-despite-court-order.)

In June 2021, the ACLU of Minnesota filed a motion in the District of Minnesota seeking a temporary restraining order (TRO) to prohibit arrests, attacks, and threats by police during protests and demonstrations. The defendants included the City of Minneapolis and Minneapolis Chief of Police Medaria Arradondo (City Defendants), as well as Minnesota Department of Public Safety Commissioner John Harrington, in his individual and official capacity; Minnesota State Patrol Colonel Matthew Langer, in his individual and official capacity; and their agents, servants, employees, and representatives (State Defendants).

Two days later, Wright issued the TRO, which prevented law enforcement from arresting, threatening to arrest, or using physical force against members of the press unless the officer had probable cause to believe the individual had committed a crime. The order also expressly exempted journalists from dispersal orders, including during curfews from which members of the press were already exempt. (For more information on the background of the motion and Wright's granting of the TRO, see "Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order" in the Winter/Spring 2021 issue of the Silha *Bulletin*.)

On Oct. 28, 2021, Wright ruled on the plaintiffs' motion to convert the TRO into a preliminary injunction against the State Defendants. Wright explained that "[w]hen determining whether preliminary injunctive relief is warranted, a district court considers [four] factors: (1) the probability that the movant will succeed on the merits, (2) the threat of irreparable harm to the movant, (3) the balance between this harm and the injury that an injunction would inflict on other parties, and (4) the public interest," citing

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir. 1981).

First, Wright addressed the plaintiffs' claim "that they are likely to succeed on the merits of their claims alleging violations of the First Amendment and Fourth Amendment to the United States Constitution."

Regarding the First Amendment claim, Wright concluded that "the record evidence that has been developed since April 2021 does not warrant a different result now" compared to the issuance of the TRO. Wright provided several reasons why the plaintiffs were likely to succeed on their First Amendment claim, including first that the plaintiffs were "engaged in constitutionally protected news-gathering activities" while targeted by law enforcement.

Wright rejected the defendants' claim that the plaintiffs' activity ceased to be protected because the press failed to comply with lawful dispersal orders. First, "at least some of the Plaintiffs' protected First Amendment activities occurred outside the scope of *any* dispersal-order violations" (emphasis in original). Second, some of the orders did not apply to members of the press because the journalists were not participating in the unlawful assembly. Wright explained that "under Minnesota law, an individual is guilty of unlawful assembly only if the individual is a 'participant' in the unlawful assembly." Minn. Stat. § 609.705. Finally, the defendants failed to demonstrate an overriding interest in restricting "the press from that have been historically open to the press and the general public," namely public streets and sidewalks.

Wright noted that "the curfew orders exempt the press, which demonstrates that the state and local governments have concluded that press access to these events is both important and feasible." She also held that narrow tailoring of the restrictions on the press was "possible here, and the State Defendants offer no persuasive factual or legal argument as to why such narrow tailoring would be unfeasible."

Wright turned to the plaintiffs' assertion that law enforcement's "actions toward members of the press would chill a person of ordinary firmness from documenting protests and law enforcement's conduct in response." She found that the defendants did "not address this element of Plaintiffs' First Amendment claim." Wright also reasoned that "[a] person of ordinary firmness would be chilled" by the actions taken by law enforcement against the press during the protests in 2020 and 2021, including that "members of the press were directed by law enforcement to vacate protest areas, verbally and physically assaulted, struck by less-lethal projectiles and rubber bullets, pepper sprayed, and detained. In some instances, law enforcement officers confiscated or prohibited the use of cameras and other press equipment."

Wright added, "The record also reflects that several members of the press have wanted or intended to continue covering the protests but either fear for their safety or have been rendered physically unable to continue reporting because of injuries sustained as a result of law enforcement officers' tactics."

Wright further found that law enforcement had, in fact, "targeted" members of the press. She wrote, "The record reflects that, although many members of the press were clearly identifiable as such, the State Defendants singled them out in a variety of ways. The State Defendants told the press specifically that they needed to vacate the protest areas, pepper sprayed them, and hit them with less-lethal projectiles. Law enforcement officers targeted the press by threatening to 'arrest anyone who does not disperse in 10 minutes *including journalists*,' (emphasis added), and repeatedly ordering the press to leave, shouting messages such as: 'Media you need to disperse. Leave the area.'" Wright provided a series of examples demonstrating such actions by the police.

Wright next turned to the Fourth Amendment claim, that law enforcement "restrained [the plaintiffs] from moving freely throughout the areas where protests are occurring." Wright concluded that the plaintiffs were likely to succeed on their Fourth Amendment claim because officers "ordered members of the press to disperse, threatened them, arrested them, and subjected them to injury-inflicting force" even though the "Plaintiffs were neither participating in nor suspected of participating in any crime" and did not present "a threat to the safety of law enforcement officers or others." Wright added that "on April 16, 2021, *after* this Court issued the TRO in this case, these tactics continued" (emphasis in original).

Second, Wright addressed the threat of irreparable harm stemming from the defendants' actions. She concluded, like when she granted the TRO, that there were "several factors demonstrate[ing] the clear and present need for injunctive relief in this case: (1) the State Defendants' repeated conduct in contravention of Plaintiffs' constitutional rights; (2) the ongoing, albeit intermittent, protests in Minnesota pertaining to law enforcement officers' use of force; and (3) Plaintiffs' intention to continue their press coverage of the protests."

Wright continued, "The harm to Plaintiffs is no longer speculative or a mere possibility. Rather, the protests continued, and the harm inflicted by the State Defendants did not abate until the Court issued the TRO in this case. Moreover, the record reflects that little if any investigation or discipline has been carried out by the State Defendants in response to the alleged misconduct in this case, which suggests that similar misconduct could recur if the TRO is not converted into a preliminary injunction."

Third, Wright concluded that the "balance of harms" weighed in favor of the plaintiffs, reasoning that "[w]hen, as here, a plaintiff raises a legitimate constitutional question, the balance of hardships tips sharply in the plaintiff's favor." She added that "a well-tailored injunction that balances the freedom of the press with the government's ability to exercise its police power does not irreparably harm the government."

Wright acknowledged that law enforcement has a substantial interest in maintaining order and protecting the public. However, the defendants did "not present any evidence or persuasive argument that these important interests have been materially impeded by the TRO." She once more rejected the defendants' argument that "it is difficult to distinguish members of the press from other individuals during situations of chaotic unrest," emphasizing that law enforcement knowingly targeted members of the press given their press credentials or other identifiers.

Wright also found that the terms of the TRO were "carefully tailored to preserve law enforcement officers' ability to maintain order and

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Minnesota, *continued from page 13*

ensure public safety." And although she acknowledged that the TRO could "cause some inefficiencies, inconveniences, and other challenges for" law enforcement, such as requiring officers to differentiate members of the press from the public, "the United States Constitution requires inefficiency, sometimes by design, to limit abuses of power."

Fourth, Wright turned to "whether the public interest weighs in favor of granting a preliminary injunction." Here, Wright cited U.S. Supreme Court precedent emphasizing the important role of the press, including the Court's finding in *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940) that "[a]bridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."

Wright concluded that "[a]t stake here are Plaintiffs' First Amendment and Fourth Amendment rights, as well as the public's ability to learn about ongoing events of public importance. The potential harm arising from suppressing press coverage of the protests is great and the public interest favors protecting these First Amendment principles."

Fifth, Wright addressed the plaintiffs' request for two modifications to the TRO in converting it to a preliminary injunction: (1) broadening the injunction's geographic scope beyond Brooklyn Center, and (2) broadening the injunction's applicability to include those who are 'in active concert' with the State Defendants." Regarding the geography of the injunction, Wright found that the defendants had not objected to the modification. She granted the modification because members of the state patrol, among other law enforcement bodies, have jurisdiction outside Brooklyn Center, Minn.

Turning to the request to include those "in active concert" with the State defendants, Wright explained that "[u]nder [Fed. R. Civ. P. 65(d)(2)(C)], a nonparty with actual notice may be held in contempt [when] the nonparty aids or abets a named party in a concerted violation of a court order," citing *Indep. Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998). According to Wright, the State Defendants did "not dispute that Rule 65(d) authorizes the Court to enjoin those who are 'in active concert or participation with' the State Defendants," but instead argued that "that they are not in 'active concert' with other law enforcement agencies or liable for the conduct of other law enforcement agencies."

Wright concluded that she did not need to attempt "to predict, however, whether any particular law enforcement agency might violate this injunction in the future while 'in active concert or participation with' the State Defendants.. . . As such, the Court will include in the preliminary injunction the language authorized by Rule 65(d)(2)(C), but in doing so the Court expresses no opinion as to whether any particular entity or individual other than the State Defendants is bound by the injunction pursuant to Rule 65(d)(2)(C)."

Sixth, Wright turned to modifications proposed by the State Defendants, including that the press should not be fully exempt from general dispersal orders. Wright rejected this modification, finding that "the State Defendants' dispersal orders are inapplicable to members of the press for several reasons," echoing her reasoning for finding a likelihood that the plaintiffs could succeed on their First Amendment claims.

The State Defendants also requested that the injunction "require members of the press to identify themselves more clearly, visibly, and consistently than currently required by the TRO." However, Wright held that the TRO already "include[d] a non-exclusive list of relevant indicia that an individual is a member of the press, such as displaying press credentials or wearing distinctive clothing" and that it "also provides that the State Defendants will not be liable for unintentional violations of the injunction involving individuals who do *not* carry or wear press credentials or distinctive clothing" (emphasis in original).

Wright also emphasized once more that "many of the alleged incidents of misconduct in this case involved law enforcement officers actively disregarding clearly displayed press credentials, distinctive clothing, and other indicia that individuals were members of the press. Rather than an inability to identify members of the press, the record reflects many instances of law enforcement officers willfully disregarding the relevant identifiers. This demonstrates a problem of compliance, not a problem of clarity." Wright therefore concluded that "the State Defendants have not demonstrated why any modification or clarification of these aspects of the injunction is necessary."

Finally, Wright included the terms of the preliminary injunction, which provided that "Defendants Minnesota Department of Public Safety Commissioner John Harrington, in his individual and official capacity; Minnesota State Patrol Colonel Matthew Langer, in his individual and official capacity; their agents, servants, employees and representatives (collectively, the State Defendants); and all other persons who are in active concert or participation with the State Defendants, are hereby enjoined from: arresting, threatening to arrest, or using physical force — including through use of flash bang grenades, non-lethal projectiles, riot batons, or any other means — directed against any person whom they know or reasonably should know is a Journalist[,] . . . unless the State Defendants have probable cause to believe that such individual has committed a crime."

The injunction also prohibited the defendants from "using chemical agents directed against any person whom they know or reasonably should know is a Journalist, including but not limited to mace/oleoresin capsicum spray or mist/pepper spray/pepper gas, tear gas, skunk, inert smoke, pepper pellets, xylyl bromide, and similar substances, unless such Journalist presents an imminent threat of violence or bodily harm to persons or damage to property; and seizing or intentionally damaging any photographic equipment, audio-recording or video-recording equipment, or press passes in the possession of any person whom the State Defendants know or reasonably should know is a Journalist, or ordering such person to stop photographing, recording, or observing a protest, unless the State Defendants are lawfully seizing that person consistent with this Order."

The preliminary injunction also included a series of requirements for law enforcement if they seized a journalist's property in connection to a lawful arrest. Additionally, the

injunction identified "indicia of being a Journalist," including visual identification as a member of the press, such as by carrying a professional or authorized press pass or wearing a professional or authorized press badge or other official press credentials or distinctive clothing that identifies the wearer as a member of the press."

The full preliminary injunction, as well as Wright's order, are available online at: https://www.govinfo.gov/content/pkg/USCOURTS-mnd-0_20-cv-01302/pdf/USCOURTS-mnd-0_20-cv-01302-4.pdf.

In an October 28 interview with the Minneapolis *Star Tribune*, ACLU attorney Isabella Salomão Nascimento praised Wright's order. "There's an acknowledgment here by the court that you can't let your people run around and trample on people's rights with impunity," she said. "The court has accepted the evidence that we have presented."

Although the *Star Tribune* was not a plaintiff in the case, legal counsel Randy Lebedoff said, "We are very pleased with the result.. . . It should go a long way to ensuring that reporters stay safe when they are doing their jobs reporting on police activity during crisis situations."

Meanwhile, in July 2021, Maj. Dwyer testified that the Minnesota State Patrol deleted emails and text messages after the protests following Floyd's murder, prompting lawmakers, concerned citizens, and transparency advocates to question the motive behind such a move. Dwyer, who served as commander of the State Troopers' Mobile Response Team after Floyd's murder, testified during a hearing in *Goyette*.

Dwyer testified that while the deletion was not ordered by supervisors, it was considered standard practice for State Troopers to periodically delete their text messages and emails.

After Dwyer's testimony became public, the Minnesota Department of Public Safety issued a statement via Bruce Gordon, a spokesman for the department, in an email to *The New York Times* on Sept. 6, 2021, saying the State Patrol follows all data retention requirements. Later, the department disputed Dwyer's testimony in a court filing, saying his testimony was speculative. The department acknowledged Dwyer permanently deleted his text messages, but said the rest of the State Troopers only "soft deleted" the emails, meaning they allegedly still exist.

Government officials in Minnesota were skeptical of the State Troopers' practices. "At best, this is very poor decision making, considering the timing," said state Rep. Cedrick Frazier (DFL-New Hope). "At worst, it is the continuation of the type of behavior that breeds distrust."

Teresa Nelson, the legal director at the ACLU of Minnesota, expressed concern over whether the public would ever really know what happened. "It really is deeply disturbing to us that the State Patrol would do this and purge records that are going to give us a fuller picture of what happened during the George Floyd protests," Nelson said.

> "It really does look like the last desperate attempt of somebody to basically undermine public accountability.. . . There are state laws dealing with records retention, and records destruction. This is information that the public has a presumptive right to have."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley doubted the State Troopers' motives. "It doesn't pass the smell test for me," Kirtley said in an interview with 5 Investigates, produced by KSTP, the local ABC affiliate. "It really does look like the last desperate attempt of somebody to basically undermine public accountability.. . . There are state laws dealing with records retention, and records destruction. This is information that the public has a presumptive right to have."

As the *Bulletin* went to press, litigation in *Goyette* remained ongoing.

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COVID-19 Pandemic Continues to Affect Access to Courts

ACCESS

Nearly two years after the start of the coronavirus (COVID-19) pandemic, courts across the country continue to balance competing interests of safety, public access, and privacy. In September 2021, the U.S. Supreme Court announced it was returning to in-person arguments, replacing the phone-based oral arguments held beginning in spring 2020. Meanwhile, several state courts, including in Minnesota, continued to navigate questions related to court access. In Minnesota, attorneys representing a coalition of media organizations achieved victories in unsealing juror identities from the Derek Chauvin case, and securing media access to the trial of former police officer Kimberly Potter, although the jurors' identities were sealed in the case.

Supreme Court Returns to In-Person Oral Arguments, Restricts Public Access to Courtroom and Building as COVID-19 Pandemic Continues

On Sept. 8, 2021, the U.S. Supreme Court announced in a press release that justices would return to in-person arguments. Additionally, the Court announced that it would provide a live audio feed of the oral arguments in cases scheduled for October, November, and December, continuing a practice that began in response to the COVID-19 pandemic.

Previously, on April 13, 2020, the Supreme Court announced that in response to the COVID-19 pandemic, it would hear oral arguments in 10 cases by remote teleconference in May 2020, marking the first time the Court allowed oral arguments to be heard live outside the courtroom. The Court also stated that it would "provide[] a live audio feed of these arguments to news media," marking the first instance of the Court allowing the public and press to listen live to oral arguments outside the courtroom. These changes remained in effect through the summer of 2021. (For more information on the Supreme Court's response to the COVID-19 pandemic, see *Supreme Court Holds Oral Arguments Over the Phone, Livestream Proceedings Amidst COVID-19 Pandemic* in "Special Report: COVID-19 Pandemic Raises Media Law and Ethics Issues, Challenges, and Opportunities" in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

In its September 8 press release, the Supreme Court announced that it would "hear all oral arguments scheduled for the October, November, and December sessions in the Courtroom.. . . The Court anticipates providing a live audio feed of the October, November, and December oral arguments."

However, the Court also clarified that the courtroom would be closed to the public "out of concern for the health and safety of the public and Supreme Court employees." The press release read, "Courtroom access will be limited to the Justices, essential Court personnel, counsel in the scheduled cases, and journalists with full-time press credentials issued by the Supreme Court.. . . The Court will continue to closely monitor public health guidance in determining plans." The press release added that "[t]he Court building remains open for official business only and closed to the public until further notice."

The full press release is available online at: https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-08-21.

Those in favor of government transparency argued that the Supreme Court should allow remote public access to proceedings indefinitely. In September, the Project on Government Oversight, a nonpartisan government watchdog group, led an alliance of more than 80 media, disability rights, and government transparency organizations in writing an open letter to the Supreme Court to make live audio streaming permanent and accessible. "The demonstrated public interest in these audio broadcasts confirms that the time has come for regular, live access to the Court's proceedings," the letter read. "The public interest in keeping live audio access to oral arguments outweighs any potential logistical challenge in offering the same streaming opportunities when the Justices return to the Court in person." The full letter, and a full list of its supporters, are available online at: https://www.pogo.org/letter/2021/09/organizations-urge-supreme-court-to-make-live-audio-streaming-permanent-and-accessible/.

> "The public interest in keeping live audio access to oral arguments outweighs any potential logistical challenge in offering the same streaming opportunities when the Justices return to the Court in person."
>
> **— Letter by Project on Government Oversight and an alliance of more than 80 media, disability rights, and government transparency organizations**

Minnesota, Other State Courts Grapple with Court Access

In Minnesota, courts continued to balance public and press access to courts with pandemic safety and basic privacy concerns. Other states have considered expanding use of virtual/livestreamed court proceedings even after the pandemic.

On May 25, 2020, George Floyd, a 46-year-old Black man, died while in the custody of Minneapolis Police Department (MPD) officers. The trial of former MPD officer Derek Chauvin — the officer charged with second-degree murder, third-degree murder, and second-degree manslaughter after he pressed his knee into the neck of Floyd — began on March 29, 2021. On April 20, 2021, Chauvin was found guilty on all three counts. During the trial, Hennepin County District Judge Peter Cahill balanced concerns about public access and COVID-19 safety by allowing limited public access to the physical court room, but extensive access via livestreamed video footage. (For more information on the protests around the death of George Floyd, the incidents between the press and police, incidents between the press and demonstrators, and resulting lawsuits, see "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue of the Silha *Bulletin*, "Journalists Covering Fallout from George Floyd Death Take Legal Action;

Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue. For more information on the role cameras played in Chauvin's trial, see "Chauvin Trial Marks Key Moment in Minnesota Media Access to Court Proceedings During Pandemic," in the Summer 2021 issue of the Silha *Bulletin*.)

On Oct. 25, 2021, Cahill agreed to release the names and juror numbers of the 14 sworn and alternate jurors in the Chauvin trial. The decision came after a motion from lawyers representing a coalition of media organizations, including the Silha Center for the Study of Media Ethics and Law. Attorney Leita Walker, who represented the media coalition, wrote in the August 4 motion, "Identification of jurors is a central feature of our criminal justice system, not a flaw or afterthought, and the common refrain among laypersons that 'they did their duty, now leave them alone' ignores the full scope of a juror's responsibility." Walker acknowledged the weight of the responsibility, but wrote that "to ensure confidence in not only this particular verdict but also the criminal justice system writ large — and to continue to improve that system, including by understanding and addressing the sort of implicit biases that many feared might play an outsized role in this very case — the public must be able to scrutinize juror's answers to the questionnaires, ask them to share their insights into the prosecution, consider what mattered to them, and yes, even decide whether the jury reached the right verdict for the right reasons."

In his October 25 order, Cahill agreed that the State had "an interest in protecting all citizens from harassment and that the courts have an especially strong interest in ensuring Minnesota citizens can perform their civic duties, including jury service in criminal trials, without undue repercussions." In part because of the time that had passed since the trial, Cahill concluded that "there is simply no objective evidence from which this Court can conclude there is any present strong reason to believe that making the Chauvin jurors' names and juror questionnaires public information at this time, six months after the jury returned its verdicts, presents any external threats to the jurors' safety." The full media coalition motion and Cahill's order are available online at: https://mncourts.gov/StateofMinnesotav-DerekChauvin.

Advocates for judicial transparency supported identifying the jurors. In April, months before the juror names were released, executive director of Arizona State University's First Amendment Clinic Gregg Leslie told *USA Today* that keeping jurors' identities secret was part of a troubling trend. "It's been a slow and constant march toward this, and if in the end, no one knows who's on the jury, people can lose faith in the system and see it as a faceless machine," Leslie said.

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley wrote a feature in the Fall 2021 issue of the American Bar Association's *Litigation Journal* in support of public juries. Kirtley described how the long history of public trials in America was undermined by the rise of anonymous juries, which began with concerns about safety for jurors in organized crime trials but has since expanded. "Although anonymous juries may be justified in very limited and specific exceptions, a presumption of openness in court proceedings is, and should be, the rule and not the exception," Kirtley wrote. "They wield enormous power and should be subject to oversight, not only by the judiciary but by the public as well."

Days later, on October 29, lawyers for the media coalition filed a memorandum objecting to the denial of audiovisual coverage of former Brooklyn Center police officer Kimberly Potter's trial. On April 11, 2021, Potter shot and killed Daunte Wright, a 20-year-old Black man, during a traffic stop. Potter claimed to have accidentally grabbed and used her gun rather than a taser. According to the state's complaint, Potter was charged with second degree manslaughter. The state filed an amended complaint in September charging Potter with first degree manslaughter related to "reckless use/handling of a firearm." (For more information on the death of Daunte Wright, see "Members of the Press Detained and Targeted with Use of Force by Law Enforcement Despite Court Order During Racial Justice Protests in April 2021" available on the Silha Center for the Study of Media Ethics and Law's website at: https://hsjmc.umn.edu/news/2021-04-18-members-press-detained-and-targeted-use-force-law-enforcement-despite-court-order.)

In appealing the ban on audiovisual coverage, the media coalition cited the success of streaming the Chauvin trial, the public interest in the case, and the ongoing COVID-19 pandemic, which limited the number of people who could be in the courtroom. "If the Court is concerned about the safety of the trial participants and the general public, the court should make remote viewing of the trial possible, despite the objection of Ms. Potter to A/V Coverage. If it won't permit livestreaming of this trial, then it needs to open the courtroom up to substantially more members of the press and public than it is prepared to accommodate. To proceed in any other manner violates the First Amendment," the media coalition's motion read.

On Nov. 9, 2021, Hennepin County (Minn.) Fourth Judicial District Judge Regina M. Chu issued an order allowing audiovisual coverage of the proceedings, citing continued COVID-19 concerns. The decision came days after several news outlets reported that protesters outside Chu's home had demanded broadcast access to the trial. In the November 9 order, Chu "most emphatically" stressed that the decision was "made before the protest" and was "based solely on concerns for public health and safety given the ongoing pandemic."

Chu acknowledged that Potter had asked that her trial not be televised, citing the Sixth Amendment right to a fair trial. However, Chu held that allowing audiovisual coverage of the trial would not be an "automatic due process violation," nor would it compromise the jury's ability to judge a defendant fairly."

The order emphasized the "press and general public's First Amendment right of access at public trials." In a footnote, Chu wrote that "[p]arallel to the defendant's right to a public trial is the press and general public's First Amendment right of access to public trials," citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573, 580 (1980), among other cases. However, Chu wrote that she did not need to address the alleged constitutional violation under the First Amendment" set forth by the media coalition. She wrote that "[r]ather, the current state and trajectory of the COVID-19 pandemic necessitates a deviations from the Minnesota General Rules of Practice."

According to the order, video cameras during the trial would be "installed and operated" by a single media orga-

Court Access, *continued on page 18*

Court Access, *continued from page 17*

nization, who would be responsible for producing a livestream. The order contained several other provisions, including that "[a]udio and video recording, broadcasting, and livestreaming will be allowed only from Courtroom 1856, the trial courtroom, of the Hennepin County Government Center and only during trial sessions" and that "[u]p to three video cameras may be installed in the trial courtroom: one in the back of the courtroom facing the witness stand, one on the wall behind the jury box, and one on or near the bench facing the lectern where counsel examines witnesses. After trial begins, cameras will not be moved from their fixed positions."

The full order, motion, and other documents related to the Potter trial are available online at: https://www.mncourts.gov/media/StateofMinnesotavKimberlyPotter.aspx.

However, in August 2021, Chu ruled that the jurors in the trial would remain anonymous throughout the trial and deliberation. "At the conclusion of deliberations, jurors' names and some contact information shall be made public only by the Court and on a date designated by the Court in a subsequent written Order." The decision led press and information advocates to critique the practice, which had been employed in additional recent high-profile cases prosecuting Minneapolis police, including the trials of former Minneapolis officers Derek Chauvin and Mohamed Noor.

Potter's trial began on Dec. 8, 2021, where she faced first- and second-degree manslaughter charges. First-degree manslaughter required that she used "such force and violence that death of or great bodily harm to any person was reasonably foreseeable." Second-degree manslaughter required a finding of "culpable negligence" creating "unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." On Dec. 23, 2021, the jury concluded that Potter was guilty on all charges.

The jury was chosen the first week of December 2021, and consisted of seven women and seven men, including alternates. There were two Asian women and one Black woman on the jury. The jurors ranged in age from their 20s to their 70s. Chu cited Minn. R. Crim. P. 26.02 subd. 2 (2) in the anonymity order, which provides that the Court may restrict access to jurors' names and other identifying information.

Leita Walker, an attorney for a coalition of news media organizations, expressed concern over the lack of transparency posed by keeping the jurors anonymous. "It seems that Hennepin County judges are of the view that any time we're prosecuting a former police officer there's reason to have an anonymous jury," Walker said in an interview with MPR News on Aug. 11, 2021. "That's a troubling trend. I don't think it's consistent with the transparency requirements of our criminal justice system, and I think the media here will be evaluating its options to ensure that both the press and the public can thoroughly monitor the administration of justice."

> "Although anonymous juries may be justified in very limited and specific exceptions, a presumption of openness in court proceedings is, and should be, the rule and not the exception.. . . Jurors play a critical role in the criminal justice system. They wield enormous power and should be subject to oversight, not only by the judiciary but by the public as well."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

As the *Bulletin* went to press, Chu had not yet released the names of the jurors.

A June 2021 Thomson Reuters study of state, county, and municipal judges and court professionals found that 93% of respondents said they were involved in "conducting or participating in remote hearings in 2020." Additionally, several states have released "post-pandemic" recommendations for court operations. For example, in Arizona, "courts are encouraged to retain the sense of urgency and momentum recently achieved in mitigating access to justice impediments," according to a "Post-Pandemic Recommendations" report from an Arizona Supreme Court working group published June 2, 2021. The Arizona group recommended that courts "explore the continued use and expansion of technology to remotely conduct court proceedings" and "explore the livestreaming functionality of these platforms." The full Arizona report is available at: https://www.americanbar.org/content/dam/aba/administrative/judicial/2021-az-post-pandemic-rec.pdf.

In California, a working group from the Judicial Council of California recommended courts "expand and maximize remote access on a permanent basis for most proceedings," in part due to "increased transparency and access to court proceedings for the public and the media." The full report is available online at: https://newsroom.courts.ca.gov/sites/default/files/newsroom/2021-08/P3%20Workgroup%20Remote%20Access%20Interim%20Report%2008162021.pdf.

A draft report from the Michigan Supreme Court's Task Force on Open Courts, Media and Privacy recommended that many proceedings "can and should" continue to be conducted remotely and that even post-pandemic, "Michigan courts should continue to provide the public and the media access to court proceedings via livestream." The draft report did recommend that cases involving particularly sensitive topics, or cases where participants could be at risk for participating, should be held in person. The full report is available online at: https://www.courts.michigan.gov/4a47fd/siteassets/covid/covid-19/open-courts-task-force-draft-report-for-comment.pdf.

The full Thomson Reuters study is available online at: https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf?form=thankyou&gatedContent=%252Fcontent%252Fewp-marketing-websites%252Flegal%252Fgl%252Fen%252Finsights%252Freports%252Fimpacts-of-the-pandemic-on-state-local-courts.

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Federal Courts Continue to Disagree on "Ag-Gag" Laws

AG-GAG LAWS

Across the federal circuit courts, challenges to so-called "ag-gag" laws — laws limiting undercover recording at industrialized farming operations — have seen mixed success. In Kansas, the state's attorney general asked the Supreme Court to revisit a U.S. Court of Appeals for the Tenth Circuit decision striking down parts of the state's law. The Eighth Circuit upheld parts of an Iowa law that criminalized lying to gain entrance to animal facilities. That court also reinstated a challenge to an Arkansas law that criminalized recording on a nonpublic area of a commercial property.

Ag-gag laws differ by state, but generally impose civil or criminal liability on individuals or groups that expose cases of animal abuse or food safety violations at agricultural facilities. Advocacy groups and media organizations argue such laws chill protected First Amendment activities like undercover reporting on dangerous conditions or illegal practices. Ag-gag laws can also include agricultural disparagement laws, which provide a cause of action based on negative or false statements about the safety of food products. Since 2017, several federal courts, including those in Wyoming, North Carolina, Idaho, and Utah, have ruled in favor of animal rights and food activist groups in their lawsuits targeting ag-gag laws. (For more information on the ongoing conflict between journalism and ag-gag laws, as well as the federal court rulings, see "Federal Judge Finds Most of North Carolina's Ag-Gag Law Unconstitutional" in the Summer 2020 issue of the Silha *Bulletin*; "Federal Judge Strikes Down Iowa's 'Ag-Gag' Law; Coalition of Animal Rights Groups Challenges Nation's Oldest 'Ag-Gag' Law" in the Winter/Spring 2019 issue; "Fourth Circuit Allows Lawsuit Targeting North Carolina Ag-Gag Law to Continue; District Court Rules Wyoming Law Unconstitutional" in the Fall 2018 issue, "Minneapolis Legislature Introduces an 'Ag-Gag' Law; Federal Appeals Courts Strike Down Two States' Laws" in the Winter/Spring 2018 issue, *Journalists Face Evolving, Uncertain Legal Landscape* in "'Drone Journalism' Presents Possibilities But Faces Legal Obstacles" in the Fall 2014 issue, and "States Consider Banning Undercover Recording at Agricultural Operations" in the Summer 2011 issue.)

Kansas AG Asks for Supreme Court Review of Tenth Circuit Decision on Ag-Gag Law

On Nov. 17, 2021, Kansas attorney general Derek Schmidt petitioned the U.S. Supreme Court for *certiorari* after the U.S. Court of Appeals for the Tenth Circuit ruled in August that parts of the state's "ag-gag" laws violated the First Amendment.

The Kansas Farm Animal and Field Crop and Research Facilities Protection Act, Kan. Stat. Ann. §47-1827, prohibits photo and video recordings of animal facilities without the consent of the facility's owner and "with the intent to damage the enterprise conducted at the animal facility." The law, which is the oldest in the United States, was enacted in 1990. It also stipulates that consent is not effective if it is induced via deception.

According to Schmidt's petition for *certiorari*, circuits remain split as to whether the First Amendment prohibits states from "criminalizing trespass by deception at agricultural facilities." According to the petition, the Kansas law does not regulate speech but instead "criminalizes trespassing without effective consent." In the petition, Schmidt also argued that the intent requirement did not constitute viewpoint discrimination. "Kansas could have criminalized all trespass without effective consent at animal facilities, but the Legislature properly included an intent requirement to limit the Act to trespasses likely to cause the greatest harm — those undertaken with intent to damage the victim."

In a statement posted to the Kansas Attorney General's website, Schmidt said the law should protect agricultural property rights. "Kansas enacted this law to add an additional layer of protection regarding unauthorized access to agricultural facilities, and to help improve security measures against those who seek to disrupt the food supply," Schmidt said. "Animal agriculture is vitally important to our state's economic well-being. We are hopeful that the U.S. Supreme Court will recognize the need to provide clarity on the subject and afford Kansas agriculture producers protections available in our sister states."

The Kansas law was mostly struck down on Jan. 22, 2020 by Judge Kathryn H. Vratil of the U.S. District Court for the District of Kansas. Vratil held that portions of the statute "constituted content-based restrictions on speech that could not survive strict scrutiny review, a First Amendment standard requiring that the statute serve a compelling government interest and be narrowly tailored to achieve that interest." (For more information on the Kansas law and the district court ruling, see "Federal Courts Rule Iowa and Kansas 'Ag-Gag' Laws Violated First Amendment, Dismiss Lawsuit Challenging Arkansas' Statute" in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

On Aug. 19, 2021, Tenth Circuit judge Carolyn B. McHugh wrote the opinion striking down sections (b), (c) and (d) of the law in *Animal Legal Defense Fund v. Kelly*, No. 20-3082 (2021). The Animal Legal Defense Fund (ALDF), a "non-profit organization that seeks in part to expose wrongdoing at animal facilities," brought the suit.

According to McHugh, ALDF "conducts undercover operations through investigators who seek employment at animal facilities." Investigators do not falsify their qualifications but "they will not reveal their associations with ALDF or their purpose in seeking a job; if asked directly, the investigators will falsely state they were not sent by an animal rights organization." Once employed, investigators "wear hidden cameras, often in violation of posted notices forbidding recording." ALDF will then "provide information and recording images to the media and the public." ALDF did not conduct undercover investigations in Kansas because it feared "both it and its investigators would face criminal prosecution under the Act if it were to do so."

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McHugh said the law's provisions "involve speech rather than merely conduct because they regulate what may be permissibly said to gain access or control over an animal facility." Subsection (b) of the Act provides that "no person shall, without the effective consent of the owner, acquire or otherwise exercise control over an animal facility, an animal from an animal facility or other property from an animal facility, with the intent to deprive the owner of such facility, animal or property and to damage the enterprise conducted at the animal facility."

According to McHugh, the Act "operates in relevant part only when someone makes a false statement to obtain consent to gain control of property, and only when that control is with the intent to deprive the owner of the property or to damage the facility." McHugh wrote that "[t]here can be no question" that this subsection is "viewpoint discriminatory in operation." A person who "lies to acquire or exercise control over an animal facility intending to expose wrongdoing" violates the law, but a "person who tells the same lie to gain the same control intending to laud the facility or for neutral reasons does not."

McHugh then said that subsection (c), which proscribes video recording and photography, implicated the same type of viewpoint discrimination. She said that to the "extent the speech at issue is the recording, it may be unprotected because it occurs on the property of another." But because "a recording surreptitiously made to highlight the positive aspects of an animal facility" does not run afoul of the law, this prohibition represents viewpoint discrimination. "Even if Kansas may ban recordings on private property or trespass-through-deception, it may not limit the scope of the prohibition due to the favor or disfavor of the message." Because the state made "no attempt to show the sort of compelling governmental interest or narrow tailoring which would allow for viewpoint discrimination," the ruling affirmed the lower court's injunction.

McHugh also struck down subsection (d) of the act. The provision stated that "[n]o person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility, enter or remain on an animal facility if the person had notice that the entry was forbidden or received notice to depart but failed to do so." McHugh wrote that "the incorporation of deception in the phrase 'effective consent' results in speech being implicated." Because "the Act does not penalize all entry by deception" and only addresses "entry by deception with the intent to harm the facility," McHugh held that this subsection also represented viewpoint discrimination unsupported by a compelling governmental interest from the state.

The full opinion is available online at: https://www.rcfp.org/wp-content/uploads/2020/08/2021-08-19-Tenth-Circuit-opinion-in-ALDF-v.-Kelly.pdf. As the *Bulletin* went to press, the Supreme Court had not acted on the petition for *certiorari*.

Alan Chen, lead counsel for the plaintiffs, told *Courthouse News* on Aug. 19, 2021 that the decision represented a "big victory for free speech, for transparency in the animal agriculture industry, and for animals."

Eighth Circuit Partially Upholds Iowa's Ag-Gag Law, Allows Arkansas Challenge to Proceed

On Aug. 10, 2021, the U.S. Court of Appeals for the Eighth Circuit partially upheld Iowa's 2012 "ag-gag" law in *Animal Legal Defense Fund v. Reynolds*, No. 19-1364 (2021).

Iowa first passed an ag-gag law in 2012 when the state legislature amended Chapter 717A of the Iowa Code (Offenses Related to Agricultural Production) to include a provision titled "Agricultural production facility fraud." This provision stated that a person is guilty of agricultural production facility fraud if they obtain "access to an agricultural production facility by false pretenses" or if they make a "false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility." In January 2019, a judge from the Southern District of Iowa ruled that the law violated the First Amendment. In March 2019, months after the ruling, the Iowa legislature enacted a new ag-gag act, Iowa Code §717A.3B, which created the crime of "agricultural production facility trespass." (For more information on the Iowa laws, see "Federal Courts Rule Iowa and Kansas 'Ag-Gag' Laws Violated First Amendment, Dismiss Lawsuit Challenging Arkansas' Statute" in the Winter/Spring 2020 issue of the Silha *Bulletin*.) In 2021, the Iowa legislature enacted a new law, Iowa Code §727.8A, that classified unauthorized recording on any trespassed property as an "aggravated misdemeanor."

The 2012 law makes it a misdemeanor to obtain "access to an agricultural production facility by false pretenses" or to make a "false statement or representation as part of an application or agreement to be employed at an agricultural production facility." The Iowa lawsuit was brought by the Animal Legal Defense Fund (ALDF) alongside several other animal welfare groups. The plaintiffs' First Amendment claim alleged the law to be a "content-based restraint on constitutionally protected speech as a matter of significant public concern" that was "not narrowly tailored to a compelling government interest." The initial complaint — filed in the U.S. District Court for the Southern District of Iowa in 2017 — stated that the ag-gag law was "content-based on its face because it prohibits false pretenses and statements, but not true ones." The complaint also argued that the law was content-based because it applied "only to speech involving a single industry — agricultural production." and because it was passed with the legislative intent to eliminate undercover, employment-based investigations in factory farms and other agricultural production facilities." The complaint further alleged that the law "gagged critics of industrial agriculture by creating the viewpoint-based crime of 'agricultural production facility fraud'" and argued that it was "overbroad" under the First Amendment. The plaintiffs' original complaint, which sought an injunction, is available online at: https://ecf.iasd.uscourts.gov/doc1/07712587831.

In 2019, U.S. District Court for the Southern District of Iowa Judge James Gritzner granted the plaintiffs' request

for an injunction. Gritzner agreed with plaintiffs that the regulation was content-based on its face because it necessarily required enforcement authorities to examine the content of an individual's statement. In analyzing the facially content-based law, Gritzner applied strict scrutiny and concluded that any interests the state had in protecting property or biosecurity were "not compelling in the First Amendment sense." The full ruling is available online at: https://ecf.iasd.uscourts.gov/doc1/07712855937.

On appeal, however, Judge Steve Colloton, writing for the unanimous Eighth Circuit, affirmed in part and reversed in part. Colloton wrote that "intentionally false speech undertaken to accomplish a legally cognizable harm may be proscribed without violating the First Amendment." He agreed with Iowa's argument that the law was "consistent with the First Amendment because it prohibits exclusively lies associated with a legally cognizable harm — namely, trespass to private property." Because trespass to private property is a legally cognizable harm "knowingly false speech designed to cause that harm should lead to a similar conclusion." Colloton described trespass as "an ancient cause of action that is long recognized in this country" and held that "trespass by misrepresentation has a similar pedigree." He recognized that "falsity alone may not suffice to bring speech outside the First Amendment" but clarified that the statute required these false statements to be made intentionally.

However, Colloton partially struck down the "employment provision" of the statute. He wrote, "Given the breadth of the Employment Provision, it proscribes speech that is protected by the First Amendment and does not satisfy strict scrutiny." Colloton held that the law was overbroad in punishing all misrepresentations made during the hiring process, including trivial comments "not capable of influencing an offer of employment," like inflating one's attendance of sporting events to connect with an interviewer. He wrote, "Insofar as the State has a compelling interest in preventing false statements made to effect offers of employment, a prohibition on immaterial falsehoods is not actually necessary to achieve the interest." Colloton added that a "less restrictive" law would "proscribe only false statements that are material to a hiring decision."

The full opinion is available online at: https://www.courthousenews.com/wp-content/uploads/2021/08/iowa-ag-gag-ca8.pdf.

Rita Bettis Austin, American Civil Liberties Union (ACLU) of Iowa Legal Director, said in a statement on Aug. 10, 2021 that the organization was "disappointed" that the Court upheld the part of the statute that criminalized "obtaining access to an agricultural facility by false pretenses." Austin called the block of the "employment provision" a "significant partial victory for free speech."

Also on Aug. 10, 2021, ALDF sued in the Southern District of Iowa in connection to the 2021 version of Iowa's law, which "creates a new crime" for a person who trespasses and "knowingly places or uses a camera or electronic surveillance device that transmits or records images or data while the device is on the trespassed property."

The complaint further alleged that the law infringed on the plaintiff's First Amendment protected right to record. The complaint argued that "the First Amendment protects against the State's unjustified attempts to suppress speech," and that with this law, "the State has created a special crime for engaging in speech without the slightest justification, and where the law's history suggests its only purpose is to continue Iowa's unlawful campaign to prevent the public from learning the truth about what occurs at animal facilities." The complaint also alleged that because "the law restricts numerous speech activities beyond those of [the plaintiffs], its legitimate applications (if any) do not counterbalance its unconstitutional ones, and thus it is also overbroad and violates the First Amendment."

The full complaint is available online at: https://www.courthousenews.com/wp-content/uploads/2021/08/iowa-ag-gag-complaint-2021.pdf.

Meanwhile, on Aug. 9, 2021, Colloton reinstated a lawsuit challenging the Arkansas ag-gag law. *Animal Legal Defense Fund v. Vaught*, 8 F.4th 714 (2021). The lawsuit was brought by a coalition of advocacy groups including ALDF, Animal Equality (AE), the Center for Biological Diversity (CBD), and the Food Chain Workers Alliance (FCWA) against Peco Foods's chicken slaughterhouse and Prayer Creek Farm pig farm. The pig farm was owned by Arkansas state Rep. DeAnn Vaught (R-Horatio) and her husband Jonathan Vaught. Deann Vaught sponsored the 2017 law, several news outlets reported.

The Arkansas statute, Ark. Code Ann. §16-18-113(b), extends beyond animal facilities and prohibits "anyone who knowingly gains access to a nonpublic area of a commercial property" from conducting "an act that exceeds that person's authority." Plaintiffs argued that the law "chilled" their engagement in an activity protected under the First Amendment. The organizations alleged that they would have sent "undercover investigators to seek employment with the slaughterhouse and the farm, or with third parties who have access to the target facilities."

The case was initially dismissed by Judge James M. Moody, Jr. of the U.S. District Court for the Eastern District of Arkansas on Feb. 14, 2020. Moody held the plaintiffs did not establish Article III standing under the U.S. Constitution to bring the lawsuit because they had not alleged a sufficient "injury-in-fact." (For more information on the Arkansas ag-gag law, see *Federal Judge Dismisses Lawsuit Challenging the Constitutionality of the Arkansas Ag-Gag Law* in "Federal Courts Rule Iowa and Kansas 'Ag-Gag' Laws Violated First Amendment, Dismiss Lawsuit Challenging Arkansas' Statute" in the Winter/Spring 2020 issue of the Silha *Bulletin*.)

The Eighth Circuit "reached a different conclusion" and remanded the case for further proceedings. Colloton wrote that the plaintiffs "refrained from investigating due to the fear that Peco Foods and the Vaughts, as commercial property owners, will bring a lawsuit against them under the statute." The plaintiffs in this case alleged "specific and definite plans" to investigate Peco Food's chicken slaughterhouses and the Vaughts' pig farm. According to the plaintiffs, they planned to "send undercover investigators to seek employment with the slaughterhouse and the farm, or with third parties who have

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Ag-Gag Laws, *continued from page 21*

access to the target facilities." After becoming employed, "the investigators would collect information on the operation of the facilities by personal observation or through the use of recording devices." Because of the Arkansas law, the plaintiffs "refrained from investigating" over the threat of lawsuits. The plaintiffs argued "that they have been 'chilled' from engaging in activity that is protected by the First Amendment."

Colloton reviewed the district court's dismissal *de novo* to determine whether plaintiffs had sufficiently alleged Article III standing to sue in federal court. "To establish Article III standing, plaintiffs must show (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) that a favorable decision will likely redress the injury." Applying these factors, Colloton wrote that the plaintiffs adequately established the fundamentals of Article III standing. "First, the plaintiffs allege that, but for the statute, the lead organizations would send an investigator to gather information and take video and audio recordings in the facilities owned by Peco Foods and the Vaughts." The plaintiffs stated they would use this information in their advocacy. Colloton wrote that this plan "is arguably affected with a constitutional interest, because 'the creation and dissemination of information are speech within the meaning of the First Amendment.'"

Colloton also found that the plaintiffs' complaint "alleges an intention to engage in a course of conduct arguably proscribed by the Arkansas statute," and "sufficiently alleged a credible threat of enforcement." According to Colloton, the plaintiffs conducted similar investigations in the past and said they wanted to continue and were "fully prepared to go forward but for their fear of liability."

The defendants argued that, for the plaintiffs to establish an injury in fact, "they must be posed to publish information gathered from the facilities." Colloton wrote instead that "a plaintiff need not expose itself to liability in order to show an injury in fact, and that the statute's deterrent effect on the investigations is sufficient to establish an injury."

The full ruling is available online at: https://www.publicjustice.net/wp-content/uploads/2021/08/2021.08.09-Eighth-Circuit-Standing-Opinion.pdf.

David S. Muraskin, who represented the animal rights groups, told *Law360* on August 9 that the lawsuit represented "an important message not just to the Arkansas Legislature but all other legislatures that are considering these 'ag gag' laws as well."

— Claire Colby
Silha *Bulletin* Co-Editor

Silha Research Assistantships 2022-2023

The Silha Research Assistantships, based at the Silha Center for the Study of Media Ethics and Law at the School of Journalism and Mass Communication at the University of Minnesota, provide outstanding University of Minnesota law and graduate students with the opportunity to work on a variety of Silha Center projects. Research Assistants have helped research and write a comprehensive outline on global data protection and digital privacy law for the Practising Law Institute's annual Communications Law in the Digital Age conference, drafted comments on proposed regulations and rules before federal and state courts and administrative agencies, and prepared *amicus* briefs, including before the U.S. Supreme Court. In addition to undertaking scholarly research, Silha Fellows and Research Assistants are responsible for the writing, editing and production of the Silha Center's *Bulletin*.

Applicants for the Silha Research Assistantships should demonstrate strong legal research skills and excellent writing skills. Students pursuing a law degree or a concentration in legal scholarship are ideal. Applicants with an undergraduate journalism degree and/or prior experience in journalism are very strongly preferred. Applicants should also have an interest in media ethics.

Assistantships are usually awarded for one academic year (Fall and Spring semesters), but at least one position will begin in Summer 2022. Applicants seeking a Research Assistantship for Summer 2022 only will also be considered. Appointments range from a minimum of 10 hours to a maximum of 20 hours per week, and include a stipend and, during the academic year, partial tuition and health insurance benefits.

Applications for Summer 2022 and the 2022-23 academic year will be due on March 14, 2022.

For more information, please visit: http://silha.umn.edu/about/fellowships.html

Courts Consider Defamation Lawsuits Involving Right-Wing Radio Host, Politician, and Election Technology Companies

Throughout 2021, plaintiffs in defamation lawsuits had mixed results in federal and state court. On September 15, the U.S. Court of Appeals for the Eighth Circuit allowed a defamation lawsuit brought by Rep. Devin Nunes (R-Cal.) to continue, holding that the retweeting of an already-published story could constitute a republication for the purposes of defamation. Alex Jones, creator of the far-right outlet *InfoWars*, lost defamation lawsuits by default in Connecticut and Texas after his legal team failed to produce relevant documents. Jones was sued by several parents of children killed in the 2012 Sandy Hook Elementary School shooting for his claims that the shooting and resulting deaths were a "giant hoax." Finally, defamation claims brought by election-technology companies Smartmatic and Dominion Voting Systems continued to proliferate against right-leaning news outlets that claimed the organizations "rigged" the 2020 election.

DEFAMATION

Devin Nunes Defamation Suit Reinstated by Eighth Circuit

On Sept. 15, 2021, the U.S. Court of Appeals for the Eighth Circuit held that republication of a story via a tweeted hyperlink may be sufficient to prove "actual malice" — the standard created in *New York Times v. Sullivan*, 376 U.S. 254 (1964) requiring proof that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity — in a defamation case, partially reversing and remanding a lower court ruling dismissing a defamation lawsuit brought by Rep. Devin Nunes (R-Cal.). The case raised new questions about applying print-publication standards to online sites and has some journalism scholars worried.

Nunes sued journalist Ryan Lizza and Hearst Magazine Media, Inc., which at the time owned *Esquire Magazine*, after Lizza wrote an article about Nunes's family farm. On Sept. 30, 2018, Lizza published an article titled "Devin Nunes's Family is Hiding a Politically Explosive Secret." According to the Eighth Circuit's ruling, Nunes worked on his family's farm in California as a child and "later owned farmland with his brother." In 2006, "the Nunes family sold its farmland in California, and the Congressman's parents and brother moved to Sibley, Iowa, where his father purchased a dairy farm, NuStar Farms." Nunes said that the farm is operated by his family without his involvement, and that he had no financial interest in it.

According to the ruling, statements from Lizza's article "insinuate that the farm's use of undocumented labor is the reason that Representative Nunes and his family were hiding the family's move and their operation of a dairy farm." The article also accused Nunes of "improper conduct during his tenure as Chairman of the House Intelligence Committee." On Nov. 20, 2019, Lizza tweeted a link to his original article. The tweet read, "I noticed that Devin Nunes is in the news.. . . If you're interested in a strange tale about Nunes, small-town Iowa, the complexities of immigration policy, a few car chases, and lots of cows, I've got a story for you."

The tweet came after Nunes filed a defamation lawsuit against Lizza and Hearst in U.S. District Court for the Northern District of Iowa in September 2019, alleging common-law defamation and conspiracy. The lawsuit contended that the article falsely implied that Nunes "conspired or colluded with his family and with others to hide or cover-up' that the farm 'employs undocumented labor."

In 2020, the district court dismissed both counts for failing to state a claim, holding that the "individual statements and alleged implication were not defamatory as a matter of law," and that even if they were defamatory, Nunes did not adequately plead the "actual malice" standard required for a successful defamation claim. The district court also "ruled that the complaint does not state a plausible allegation that Lizza acted with actual malice by republishing the article on his Twitter account after the lawsuit was filed."

Judge Steven Colloton wrote the unanimous Eighth Circuit ruling, in which he agreed that the complaint was insufficient to allege actual malice with respect to the original publication.

However, he held that the tweet provided enough evidence of actual malice to allow the lawsuit to move forward. Colloton wrote that the tweet may qualify as a republication. "There is a distinction in defamation law between an original publication and a republication," Colloton wrote. The "single publication" rule holds that "any one edition of a book or newspaper, even if distributed to a multitude, constitutes one publication that may support only one cause of action," but also holds that "separate aggregate publications on different occasions" may provide new causes of action if the publication "reaches a new group." Colloton found that Nunes's complaint "adequately alleges that Lizza intended to reach and actually reached a new audience by publishing a tweet about Nunes and a link to the article."

Colloton also wrote that Lizza's tweet could provide grounds to reach the actual malice requirement. "A speaker who repeats a defamatory statement or implication after being informed of its falsity 'does so at the peril of generating an inference of actual malice," he wrote, quoting *Bertram v Mullin*, N.W.2d 884, 901 (Iowa 2014). Nunes filed his initial defamation claim on Sept. 30, 2019, and Lizza republished a link to the allegedly defamatory article several weeks later. "In November 2019, Lizza was on notice of the article's alleged defamatory implication by virtue of this lawsuit," Colloton wrote. "The complaint alleges that he then consciously presented the material to a new audience by encouraging readers to peruse his 'strange tale' about 'immigration policy," and promoting that 'I've got a story for you.'" Under this chain of events "the complaint sufficiently alleges that Lizza republished the article after he knew that the Congressman denied knowledge of the undocumented labor on the farm or participation in any conspiracy to hide it."

Colloton also held that the complaint "states a plausible claim for defamation by implication," with the original article. He applied a standard from *White v. Fraternal Order of Police*, 909 F. 2d 512, 520 (D.C. Cir. 1990) to find defamation by implication, writing, "To demonstrate that a defendant intended subjectively an implication, it is sufficient to show that 'the particular manner of language in which the true facts are conveyed, supplies . . . affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference'" (emphasis in original). Under this standard, Colloton wrote that "Nunes

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Defamation, *continued from page 23*

has plausibly alleged that Lizza and Hearst intended or endorsed the implication that Nunes conspired to cover up the farm's use of undocumented labor." The way "the article presents the discussion of the farm's use of undocumented labor permits a plausible inference that Lizza and Hearst intended or endorsed the implication," he wrote.

The full ruling is available online at: https://www.documentcloud.org/documents/21062739-nuneslizzaca8rlg091521.

In a Sept. 20, 2021 piece for *Bloomberg Law*, legal reporter Kyle Jahner wrote that the court was required to apply "print publication definitions to social media, where a single tweet can instantly put an old article in front of a new audience of millions." He continued, "If posting an old link or retweeting can be considered a new publication, it could create new liability for defamation if what the poster knows or should know has evolved since something was first published."

The ruling drew attention — and scrutiny — from observers who worried it may have negative effects on journalists. "The [Eighth] Circuit's decision to resurrect Nunes's case could have a chilling effect on discourse, particularly discourse surrounding lawsuit-happy politicians who have a motive to chill uncomplimentary speech," co-director of Loyola's Journalist Law School Jessica Levinson wrote in an MSNBC opinion article Oct. 31, 2021.

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley told *Bloomberg Law* on Sept. 20, 2021 that the opinion highlights the difficulty in applying print-publication definitions to online platforms. "This is not the final ruling in this case. But it is saying that, as a matter of law, the court is not buying the idea that a retweet is not a new publication," she said. "It is a very very tricky area and not very well parsed in the law at this point."

Alex Jones Found Liable by Default in Connecticut and Texas for Sandy Hook School Shooting Conspiracies

In fall 2021, judges in two states found right-wing radio host Alex Jones — the creator of the far-right website *InfoWar*s, which is known for spreading conspiracy theories, including claims that the school shooting was a hoax — liable by default in defamation cases brought by the families of eight people killed in the 2012 Sandy Hook Elementary School shooting. On Sept. 27, 2021, Travis County, Texas judge Maya Guerra Gamble issued default judgements for three families — parents Leonard Pozner and Veronique De La Rosa, Scarlett Lewis, and Neil Heslin — for abuse of the discovery process after Jones refused to cooperate with discovery requests and court orders. Similarly, on Nov. 15, 2021, Connecticut Superior Court, Waterbury District Judge Barbara Bellis found Jones liable by default.

The Texas case arose in 2018 when parents of two children killed in the 2012 Sandy Hook shootings filed two separate lawsuits against Jones, *InfoWars*, and *InfoWars* parent company Free Speech Systems, LLC. alleging that Jones' allegations that the shooting was faked were defamatory. In one lawsuit, Leonard Pozner and Veronique De La Rosa claimed that Jones used a technical glitch in a CNN interview with De La Rosa to allege that the shooting did not happen and that the plaintiffs were "liars and frauds." In a second lawsuit, Neil Heslin argued that Jones defamed him when citing a report prepared by one of Jones' employees that claimed it was impossible for Heslin to have held his dead son, despite Heslin's claims otherwise. (For more information on the case, see *Massachusetts Man, Sandy Hook Parents Sue Alex Jones for Defamation* in "Minnesota and Federal Courts Grapple with Defamation Questions; Right-Wing Radio Host Faces Several Defamation Lawsuits" in the Summer 2018 issue of the Silha *Bulletin* and *Defamation Suits Against Alex Jones Progress as Online Platforms Ban Jones' Content* in "Defamation Cases Continue for Right-Wing Radio Host and *Buzzfeed*; Former Political Candidates Bring Defamation Lawsuits" in the Fall 2018 issue.)

In fall 2018, Jones filed several motions to dismiss in three separate defamation lawsuits related to his claims that the Sandy Hook shooting was a "giant hoax." (For more information on the motions to dismiss, see *Defamation Suits Against Alex Jones Progress as Online Platforms Ban Jones' Content* in "Defamation Cases Continue for Right-Wing Radio Host and *Buzzfeed*; Former Political Candidates Bring Defamation Lawsuits" in the Fall 2018 issue of the Silha *Bulletin*.)

In her ruling, Gamble wrote that Jones acted "unreasonably and vexatiously failed to comply" with discovery orders. *The New York Times* reported Nov. 15, 2021 that in more than three years of litigation, Jones and his lawyers "failed to produce documents and take other actions ordered by the court" and racked up more than $100,000 in court sanctions.

Gamble held that Jones' conduct displayed a "flagrant bad faith and callous disregard for the responsibilities of discovery under the rules." According to the ruling, the discovery misconduct is "properly attributable to the client and not the attorney, especially since [Jones has] been represented by seven attorneys over the course of the suit." The court rejected lesser measures, such as "judicial admonishments, monetary penalties, and non-dispositive sanctions" because they "have been proven ineffective when previously ordered." According to the ruling, the court also considered Jones's "general bad faith approach to litigation, Mr. Jones' public threats, and Mr. Jones' professed belief that these proceedings are 'show trials.'" Jones was ordered to pay attorney's fees for each of the families. The full ruling is available online at: https://www.law360.com/articles/1427332/attachments/0.

On September 30, Norm Pattis, attorney for Alex Jones and *Infowars*, said in a statement posted on the *InfoWars* website that he was "distressed by what we regard as a blatant abuse of discretion by the trial court" and that he was "determined to see that these cases are heard on the merits."

The Connecticut lawsuit was brought by Erica Lafferty, whose mother Dawn Lafferty, principal of Sandy Hook Elementary School, was shot and killed. She was joined by more than a dozen other family members of children and educators killed during the shooting, and by a first responder depicted in news coverage of the shooting. According to the complaint, the "lawsuit is about holding Jones and other defendants accountable for the effects of their outrageous, malicious, and deeply hurtful lies."

The complaint included five counts against Jones, *InfoWars*, *InfoWars* guest Wolfgang Halbig, and several other organizations that disseminated Jones' and *InfoWars* content. Count one alleged invasion of privacy by false light. According to the complaint, the defendants, "as part of a campaign of harassment and abuse, broadcast numerous outrageous lies about the plaintiffs that represented such major misrepresentations of the plaintiffs' character, history, activities, or beliefs that serious offense may reasonably be expected to be taken by a reasonable person in their position." The plaintiffs are private individuals, and the "false light in which the defendants' statements placed the plaintiffs would be highly offensive to a reasonable person." Count two claimed that the defendants' statements constituted defamation and defamation *per se*. Count three alleged

intentional infliction of emotional distress and count four alleged negligent infliction of emotional distress. Count five claimed that the defendants violated Connecticut's Unfair Trade Practices Act by spreading lies about the families for profit. The full complaint is available online at: https://drive.google.com/file/d/12mHNXnFQo2n-H555yJxC5JIEEeAoxi_Fj/view.

According to the *CT Mirror*, Bellis held in her ruling from the bench that Jones's "failure to produce critical documents, their disregard for the discovery process and procedure and for court orders is a pattern of obstructive conduct that interferes with the ability of the plaintiffs to conduct meaningful discovery and prevents the plaintiffs from properly prosecuting their claims."

Chris Mattei, attorney for the families, told *Law360* on Nov. 15, 2021 that his clients were grateful for the ruling. "Mr. Jones was given every opportunity to comply, but, when he chose instead to withhold evidence for more than two years, the court was left with no choice but to rule as it did today," he told the publication in a statement.

According to several news outlets, juries in Connecticut and Texas will decide in 2022 how much Jones owes the families in damages. As the *Bulletin* went to press, the juries had not reached their conclusion on the damages.

Voting Technology Companies Continue to Allege Defamation

Throughout 2021, election technology companies Smartmatic and Dominion Voting Systems continued to bring defamation lawsuits against right-leaning media outlets that alleged they played a role in "rigging" the 2020 election.

In February 2021, Smartmatic filed a defamation lawsuit against Fox News. The lawsuit centered on 13 reports "stating and implying that Smartmatic had stolen the 2020 U.S. election." According to the complaint, the broadcasts included several main themes: that Smartmatic's election software was "used to steal the 2020 U.S. election by rigging and fixing the vote," that Smartmatic's technology sent the votes "to foreign countries for tabulation and manipulation," and that Smartmatic was "a Venezuelan company that was founded and funded by corrupt dictators from socialist and communist countries."

Smartmatic sought $2.7 billion "for the economic and non-economic damage caused by Defendant's disinformation campaign as well as punitive damages" and a declaration from the defendants "fully and completely" retracting the false statements. The full complaint is available online at: https://www.smartmatic.com/uploads/Smartmatic_Complaint_Against_Fox_Corporation.pdf.

In April 2021, Fox News moved to dismiss Smartmatic's suit. The motion argued that "when a sitting President claims an election was stolen and assembles a legal team to challenge it, the public has a right to know about those allegations." The motion further contended that the allegations were "inherently newsworthy because of who is leveling them and what they concern," and that seeking to collect billions in liability "goes beyond a chilling effect." The full motion is available online at: https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=PE2cE12_PLUS_pNdub9Km92yc9g==&system=prod.

On Nov. 3, 2021, Smartmatic — an election technology company — filed a lawsuit in the Superior Court of Delaware against Newsmax Media, Inc. and One America News Network (OANN) parent company Herring Networks, Inc., alleging that the networks defamed the company in their coverage of the 2020 presidential election.

According to the complaint against Newsmax, the company "published and/or republished false statements and implications during news broadcasts, in online reports, and on social media that Smartmatic participated in a criminal conspiracy to fix, rig, and steal the 2020 U.S. election." The complaint asserted these allegations "were defamatory because they exposed Smartmatic to public hate, contempt, ridicule, and disgrace, and because they induced an evil and unsavory opinion of Smartmatic and its business in the minds of a substantial number of the community." The complaint also alleged that Newsmax's coverage was "defamatory *per se* because they charged Smartmatic with a serious crime and were of a nature tending to injure Smartmatic in its trade, business, and profession." The full complaint is available online at: https://www.bloomberglaw.com/product/blaw/document/X1Q6OCT65TO2?documentName=1.pdf&search32=Sj5KWE4MyCvFk8rMbjFvVA%3D%3DRqdDGeKixB2sIeRIbAYX2nF-KLJtmAvdUIOYAFx4nA8mOJ36bKqu0NRB2zhOMc_271jHD2A0lqb9Ibhp1yJzFpsMXmJ1pvX6O6qeKd7EeKKuIpIV8ccZxWUbWWARwIU8&fmt=pdf.

Smartmatic's Nov. 3, 2021 complaint against Herring Networks — filed in the U.S. District Court for the District of Columbia — alleged defamation for false statements and implication and for "injurious falsehood for false statements and implications about Smartmatic's election technology and software." According to the complaint, "OANN published and/or republished false statements and implications during news broadcasts, in online reports, and on social media that Smartmatic participated in a criminal conspiracy to fix, rig, and steal the 2020 U.S. election." The complaint further alleged that OANN "doubled down" after receiving a retraction letter from Smartmatic that "identified many of the false and misleading statements published by OANN, explained the reasons the statements were false and misleading."

The full complaint is available online at: https://storage.courtlistener.com/recap/gov.uscourts.dcd.237087/gov.uscourts.dcd.237087.1.0_3.pdf.

In a statement published on Smartmatic's website, the company said the lawsuits were intentionally filed on the one-year anniversary of the election. "Despite claims to provide viewers with honest, unbiased reporting, these outlets victimized Smartmatic by spreading false information about the company following last year's election, all in their efforts to increase viewership and revenue," attorney for Smartmatic J. Erik Connolly said.

Meanwhile, on Nov. 8, 2021, Dominion Voting Systems Corporation sued Fox News leadership for defamation. The complaint, filed in the Superior Court of Delaware, alleged defamation *per se* by Fox Broadcasting Company and its parent company Fox Corporation. "After the November 3, 2020 Presidential Election, viewers began fleeing Fox in favor of media outlets endorsing the lie that massive fraud caused President Trump to lose the election," the complaint read. "They saw Fox as insufficiently supportive of President Trump, including because Fox was the first network to declare that President Trump lost Arizona. So Fox set out to lure viewers back — including President Trump himself — by intentionally and falsely blaming Dominion for President Trump's loss by rigging the election."

According to the complaint, "[a]t least two top executives from Fox Corporation, Rupert and Lachlan Murdoch, exert direct control over Fox News's programming decisions, including editorial control." The complaint alleged several "verifiably false yet devastating" lies that Fox broadcast about Dominion, including that Dominion "committed election fraud by rigging

Defamation, *continued on page 26*

Defamation, *continued from page 25*

the 2020 Presidential Election," that "Dominion's software and algorithms manipulated vote counts," that Dominion "is owned by a company founded in Venezuela to rig elections for the dictator Hugo Chavez," and that the company "paid kickbacks to government officials who used its machines in the 2020 election."

The complaint alleged that Fox News and Fox Broadcasting acted as Fox Corporation's agent in publishing false information and that "the defamatory broadcasts stem from the agency relationship." The full complaint is available online at: https://hamiltonps.app.box.com/s/pcjs5ijawo06dkkif57sjee05aaef1nh/file/883362796731.

The lawsuit against Fox Corporation and Fox Broadcasting contained similar claims as a March 26, 2021 complaint filed by Dominion against Fox News Network, LLC in the Superior Court of Delaware, as well as August 2021 lawsuits against Newsmax and OANN's parent company in the Superior Court of Delaware and the District of Columbia, respectively. The March 26 complaint targeted the news network, whereas the November suit took aim at Fox leadership.

The full March 26 complaint is available online at: https://hamiltonps.app.box.com/s/j42odhy4cxf1xjuw324o72zmx7v7oyn8/file/791755207455.

The full complaint by Dominion against Newsmax is available online at: https://www.documentcloud.org/documents/21039478-newsmax-complaint-1.

The full complaint against OANN's parent company is available online at: https://s3.documentcloud.org/documents/21039760/dominion-suit-oan-23431510r.pdf.

On Dec. 16, 2021, Superior Court of Delaware Judge Eric M. Davis denied Fox News Network, LLC's motion to dismiss the case, holding that the news network had not raised sufficient defenses to warrant dismissal of the case. In particular, Davis rejected Fox News' contentions that its reporting fell under the "neutral reportage" and "fair report" privileges. He concluded that "Dominion's well-pleaded allegations . . . support the reasonable inference that Fox's reporting was not accurate or dispassionate. The Court, reviewing the Complaint's allegations, notes that it is reasonably conceivable that Fox's reporting was inaccurate."

Davis also rejected the argument that Fox News personalities were simply stating opinion rather than facts. Davis wrote, "Accepting Dominion's allegations as true, Fox's statements were not opinions. So factual issues regarding whether a reasonable listener would consider Fox's statements to be opinion or fact preclude dismissal." He continued, "Fox's news personnel repeatedly framed the issue as one of truth-seeking and purported to ground interview questions in judicial proceedings and evidence. Reviewing the Complaint, the Court does not read Fox's statements as mere statements of opinion."

Davis further found that Dominion had adequately alleged actual malice, writing that "[a]t this stage, the Court finds that the Complaint alleges facts that Fox made the challenged statements with knowledge of their falsity or with reckless disregard of their truth." However, he noted that further briefing was needed to determine whether Dominion qualifies as a public figure or a private figure, as well as the possible application of New York's anti-SLAPP law." The full ruling is available online at: https://www.washingtonpost.com/context/ruling-on-fox-news-motion-to-dismiss-dominion-suit/428c5f4b-de3d-475c-b88c-5eef1b7875bc/?itid=lk_inline_manual_2. As the *Bulletin* went to press, Davis had not reached a final judgment in the case.

In a Dec. 17, 2021 commentary, *Washington Post* media critic Erik Wemple explained why Fox News' contention that it was simply reporting the other side of the story related to the presidential election. "[T]he Fox News motion to dismiss spelled the last gasp of 'both sides-ism,' the idea that the media's job is to place conflicting positions before the public and go home.. . . The problem with applying that principle to the months spanning the 2020 presidential election and the Jan. 6 Capitol riot is that one side was a 'big lie' — namely, that election fraud had robbed then-President Donald Trump of reelection."

Wemple continued, "Davis proved conscious of the tenuous argument that Fox News's lawyers had committed to paper, questioning whether 'both sides' of this matter really did get a fair hearing[.]. . . Though widely expected, the decision is a slap in the face for Fox News, whose heavy doses of outright false and innuendo-laden programming have often sheltered in the First Amendment.. . . Fox News now may be running out of First Amendment runway. There's no clear legal armor for co-opting the biggest lie in recent U.S. memory, encouraging its proponents (e.g. Sidney Powell and Rudolph W. Giuliani) to repeat it again and again, claiming that two little-known voting companies are part of the scheme — and then claiming the whole shebang is an act of journalism. That won't work."

Some media commentators argued that the expensive lawsuits could spell trouble for media outlets in the future. "If defamation suits, even valid ones, are successful, long-standing First-Amendment protections could be weakened; aggrieved subjects of news stories, especially those with deep pockets, may be encouraged to go after media companies of all kinds, not just hyperpartisan ones," media columnist Margaret Sullivan wrote in the *Washington Post* on April 1, 2021.

A column written by media lawyers Victoria Baranetsky and Alexandra Gutierrez for *Columbia Journalism Review* on March 30, 2021 echoed this point, and contended that other news organizations looking at these lawsuits might "decide that reporting on powerful or deep-pocketed organizations isn't worth the risk."

Meanwhile, on Dec. 2, 2021 Yale Law School's Media Freedom and Information Access Clinic, working with Protect Democracy and law firms from Missouri and Georgia, sued *The Gateway Pundit* on behalf of Georgia election workers Ruby Freeman and Wandrea Moss. The lawsuit, brought in the Circuit Court of St. Louis City, Mo., alleged defamation and intentional infliction of emotional distress. According to the complaint, this lawsuit "seeks to hold Defendants accountable for just some of their knowing lies — their false and endlessly repeated accusations that Ms. Freeman and Ms. Moss committed election fraud by, among other things, conspiring to empty the room where they were counting ballots of poll watchers, producing secret 'suitcases' full of illegal ballots, and running those ballots through vote counting machines multiple times." According to the complaint, the far-right website published a "campaign of lies" against the women that "not only devastated their personal and professional reputations but instigated a deluge of intimidation, harassment, and threats that has forced them to change their phone numbers, delete their online accounts, and fear for their physical safety." The full complaint is available at: https://law.yale.edu/sites/default/files/area/clinic/document/freeman_and_moss_v._hoft_et_al._petition_for_filing_2021.12.02.pdf. As the *Bulletin* went to press, the Circuit Court had not ruled in the case.

— Claire Colby
Silha *Bulletin* Co-Editor

Journalists Face Attacks and Threats at Jan. 6, 2021 Insurrection, Prompting Arrests and Investigations; *Capital Gazette* Gunman Receives Maximum Sentence

During the January 6 attacks on the U.S. Capitol building, protesters targeted and physically attacked several reporters, leading to arrests and other actions by the U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) during a year in which the United States was ranked 44th in the Reporters Without Borders (RSF) 2021 World Press Freedom Index. Meanwhile, in September 2021, the gunman responsible for the deadliest attack on an American newsroom received the maximum possible prison sentence.

REPORTERS IN DANGER

Protesters' Targeting of Journalists During January 6 Capitol Riots Prompt Arrests, Other Actions

On Sept. 1, 2021, the Federal Bureau of Investigation (FBI) requested public help identifying people who attacked a reporter during the Jan. 6, 2021 attacks on the U.S. Capitol building in Washington, D.C. The FBI's Washington Field Office released a video of two people assaulting a female reporter during the Capitol riots.

"The FBI is sworn to uphold the freedoms guaranteed by the First Amendment, including the freedom of speech, the freedom of the press, and the right to peaceful assembly," Assistant Director in Charge of the FBI's Washington Field Office Steven M. D'Antuono said in a statement posted to the FBI's website. "The FBI is grateful for the tips we have received from the public over the past seven months about violence at the U.S. Capitol on January 6, and we continue to request the public's help to identify individuals suspected of assaulting members of the media that day."

Former president Donald Trump spoke at the "March to Save America" rally in Washington, D.C. on Jan. 6, 2021, and his speech included several instances of anti-press rhetoric. He referred to the press as the "fake news media" and suggested that reporters in attendance would "not show the magnitude of th[e] crowd" attending the rally. He said that "The media is the biggest problem we have as far as I'm concerned, single biggest problem." Trump said that "Our media is not free. It's not fair." He called American news media "corrupt" and again referred to the press as "the biggest problem we have in this country."

According to the U.S. Press Freedom Tracker, a database of press freedom violations managed by the Freedom of the Press Foundation, law enforcement detained several journalists during the riots, including *Washington Post* video journalist Zoeann Murphy, who "was detained alongside a colleague while documenting the ongoing riots."

> "For the past four years, the Trump administration has lobbed attacks against individual and institutional news media. As the world has now witnessed, this rhetoric is not just a political diversion — it can embolden mobs to attack reporters who are simply trying to do their job of keeping the public informed."
>
> **— Carlos Martinez de la Serna, CPJ program director**

In the days immediately following the riots, news outlets also noted several instances of protesters and rioters attacking journalists covering the events. At least nine reporters were physically assaulted while covering the insurrection at the Capitol, Poynter reported in January 2021. Additionally, "Murder the media" was carved into a door of the Capitol building, and reporters covering the riot told Poynter that the attacks were "uniquely vicious" and targeting journalists. (For more information about the January 6 insurrection, including law enforcement actions targeting members of the press and several examples of attacks by protesters and rioters, see the Silha Center's special report "Events Surrounding the US Capitol Insurrection Raise Significant Media Law Issues and Questions" from Jan. 11, 2021 at: https://cla.umn.edu/story/events-surrounding-us-capitol-insurrection-raise-significant-media-law-issues-and-questions.)

In July 2021, *The Washington Post* reported that the U.S. Department of Justice (DOJ) and FBI had arrested five people "in connection with attacks on the media in a little more than a week." Katherine Jacobsen, a researcher at the Committee to Protect Journalists (CPJ), told the *Post* that bringing such cases "send[] a signal that journalists do play an essential role in our democracy." She said it was "heartening" that the DOJ took attacks against reporters seriously.

One of the people arrested was Sandra S. Weyer of Mechanicsburg, Pa. According to several news outlets, Weyer was charged with six counts in connection with the Capitol riot. Weyer filmed an attack on a *New York Times* photographer. According to *The Hill* on June 28, 2021, Weyer was allegedly seen encouraged the attack as well.

On July 7, 2021, Alan William Byerly was charged with "assaulting a federal officer, obstruction of law enforcement during civil disorder and violent entry and disorderly conduct on Capitol grounds," the Associated Press (AP) reported. Byerly was also accused of "attacking an AP photographer who was wearing a helmet-style gas mask and a lanyard with Associated Press lettering." Benjamen Scott Burlew of Miami, Okla. was charged on Aug. 24, 2021 after attacking AP photographer John Minchillo, the AP reported. Burlew was "accused of yelling at, grabbing, dragging and ultimately pushing Michillo over a low stone wall on the Capitol grounds."

USA Today published a database of all arrests related to the January 6 riots.

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Journalists Attacks, *continued from page 27*

The database is available online at: https://www.usatoday.com/storytelling/capitol-riot-mob-arrests/.

Carlos Martinez de la Serna, program director for CPJ, said violence against members of the press has "no place" in a democracy. "For the past four years, the Trump administration has lobbed attacks against individual and institutional news media," he said in a statement posted to the CPJ website in January. "As the world has now witnessed, this rhetoric is not just a political diversion — it can embolden mobs to attack reporters who are simply trying to do their job of keeping the public informed."

Capital Gazette Gunman Sentenced to Maximum Possible Prison Term

On Sept. 28, 2021, the *Capital Gazette* reported that Anne Arundel County (Md.) Circuit Court Judge Michael Wachs had sentenced the man who killed five *Capital Gazette* employees and injured two others in 2018 to the maximum allowable sentence. Jarrod Ramos was sentenced to "five life sentences without parole plus one life sentence plus 345 years" the Anne Arundel County State's Attorney's Office announced in a September 28 tweet. He was responsible for the deadliest ever attack on an American newsroom, according to several news outlets.

On June 28, 2018, Jarrod Ramos killed five *Capital Gazette* employees and injured two others. The victims included:

- Gerald Fishman, the editorial page editor for the *Capital Gazette* who had also been an editorial writer for the paper since 1992
- Rob Hiaasen, an editor and features columnist hired as the assistant editor of the *Capital Gazette* in 2010
- John McNamara, who held several jobs in the *Capital Gazette* newsroom for more than 20 years
- Rebecca Smith, a sales assistant at the *Capital Gazette* hired in November 2017
- Wendi Winters, a local news reporter for the *Capital Gazette*.

Several news outlets reported that Ramos had previously filed a defamation lawsuit against the *Capital Gazette* for the newspaper's reporting on his misdemeanor harassment charge. The lawsuit was later dismissed. (For more information on the 2018 shooting, see: *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 of the Silha *Bulletin*.)

Ramos pleaded guilty to "five counts of first-degree murder, one count of attempted first-degree murder, six counts of first-degree assault and 11 counts of using a firearm in a felony crime of violence" in October 2019, the *Capital Gazette* reported on Sept. 28, 2021. Ramos maintained that he was "not criminally responsible" and "sought an indefinite commitment to a state psychiatric hospital" rather than being sent to prison. The second phase of his trial, which addressed his "insanity defense" was delayed several times, in part because of the ongoing COVID-19 pandemic.

On July 15, 2021, after testimony from mental health experts, a jury found him to be criminally responsible. The defense "didn't meet its burden of proving by a preponderance of evidence that Ramos suffered from a disorder that made him lack the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law — the two prongs of Maryland's insanity standard," the *Capital Gazette* reported on the same day.

Judge Wachs called Ramos' crime a "cold blooded, calculated attack on the innocent employees of a small town newspaper," as reported by WTOP, a Washington, D.C.-based news radio station, on Sept. 28, 2021. The sentence included "25 years in prison for first-degree assault of the remaining five survivors of the attack; and 20 years each for 11 counts of use of a firearm in a crime of violence," WTOP reported.

Former *Capital Gazette* reporter Selene San Felice told reporters that there was "an immense amount of closure to be able to see them take him away forever," *The New York Times* reported Sept. 28, 2021.

— Claire Colby
Silha *Bulletin* Co-Editor

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Journalists Face Chaos and Crisis in Afghanistan

When Taliban fighters took over Kabul on Aug. 15, 2021, all journalists remaining in Afghanistan were at extremely high risk of retaliation from the Taliban, whether they were foreign nationals who provided assistance to Western commercial media organizations, journalists with the U.S. Agency for Global Media, or Afghanistan's own journalists.

REPORTERS IN DANGER

Foreign Nationals Who Assisted Western Commercial Media Organizations

In early August 2021, *The New York Times* reported that a refugee program with the U.S. State Department had been expanded, allowing Afghans employed by U.S. media organizations to be eligible for resettlement in the United States. Due to the danger many of these people faced from the Taliban, there was a rush to take advantage of that program and escape the country.

According to an August 19, 2021 *New York Times* report, the publishers of *The Times*, *The Wall Street Journal*, and *The Washington Post* banded together to help foreign nationals who had assisted Western journalists escape. By August 15, a number of bureaus had closed and the situation in Kabul had become chaotic; some of the foreign nationals who had helped Western journalists feared that Taliban forces would go door to door in search of them.

Although U.S. military forces had secured a portion of the Hamid Karzai International Airport, reaching the airport and gaining access to the terminal was nearly impossible. The *Times* reported that on August 15 that a group of more than 200 people connected to the *Times*, *Journal*, and *Post* traveled to the airport in hopes of leaving the country. They were greeted by scenes of mass confusion; later, when Taliban forces arrived, the situation grew even more dangerous, and the group left.

In reaction to these difficulties, the leaders of the *Times*, *Journal*, and *Post* reached out to diplomatic contacts in countries with embassies in Afghanistan, hoping to find safe harbor and transportation for their employees. "There were many plans and many efforts that either failed or fell apart," Michael Slackman, an assistant managing editor for the *Times* was quoted as saying in an August 19 *New York Times* article. "You'd have a plan at night and two hours later the circumstances on the ground would have shifted."

The newspaper publishers reached out to President Joe Biden's administration hoping to get help to evacuate their Afghan colleagues, resulting in discussions among White House officials, the Pentagon, and the State Department. *The New York Times* noted the following efforts to help journalists escape the country in its August 19 report:

- On August 17, 13 people from *The Washington Post* — including two Afghan employees and their families, together with an American correspondent — were able to leave on an American military transport headed for Qatar.
- On August 20, employees of the *Times* and their families made their way to the airport and finally made their way through a gate where they were assisted by two *Times* foreign correspondents, Mujib Mashal and Thomas Gibbons-Neff. Gibbons-Neff, a former Marine, had initially left Kabul, but later returned to stay at the American-occupied wing of the airport and help advise foreign nationals on how and when to best approach the terminal.
- Also on August 20, Almar Latour, the publisher of *The Wall Street Journal*, announced that 76 Afghan colleagues and their families were able to leave Afghanistan, and four more people were "en route to safety." Latour thanked the government of Qatar for its assistance, saying that the company appreciated "the efforts of U.S. government and military officials in a fluid and difficult situation." Qatar, which is home to a U.S. military base, has ties to both the United States and Afghanistan, and has a relationship with Taliban leaders.
- The same week, the government of Qatar agreed to help a group of 128 people from the *Times* make their way to safety.

On September 30, *USA Today* published a story about the escape of one of their freelance journalists, Fatema Hosseini, as an example of what journalists endured as they tried to leave Afghanistan. The story is available online at: https://www.usatoday.com/in-depth/news/world/2021/09/30/afghanistan-evacuation-fatema-hosseini-escape-taliban-checkpoints-kabul-airport/5822817001/.

Foreign Nationals Who Assisted the U.S. Agency for Global Media Also Stranded in Afghanistan

The U.S. Agency for Global Media (USAGM), which runs Voice of America (VOA) and Radio Free Europe/Radio Liberty (RFE/RL), also had staffers stranded in Afghanistan, according to an Aug. 26, 2021 article in the *Washington Monthly*. *The Washington Post* reported on Aug. 15, 2021 that approximately 600 employees, contractors, and family members were affiliated with the USAGM. Since 2016, four RFE/RL journalists had lost their lives in suicide bomb attacks, and many of them routinely received death threats from extremists, according to *The Washington Post*. On September 2, NBC News noted that a fifth journalist was also assassinated in 2020.

Although *The Washington Post* reported that RFE/RL journalists and their families repeatedly made their way to the Kabul airport, they never managed to get inside. At one point, Jamie Fly, RFE/RL's President, was on the phone with senior military officials who were trying to admit a group of RFE/RL journalists to the airport, but the orders never reached the U.S. soldiers guarding the gate where the journalists were waiting. The journalists returned to their homes.

Other attempts to gain safe passage for RFE/RL journalists included securing seats for them on a Czech airplane, but again, the journalists were refused admittance to the airport, *The Washington Post* reported. Another effort involved chartering three planes headed for Spain, but an attack on the airport in Kabul by the Islamic State forced the Pentagon to cancel all scheduled charters. Nevertheless, a military flight organized by the Ukrainian government was successful in departing Kabul, enabling an unspecified number of journalists to

Afghanistan, *continued on page 30*

Afghanistan, *continued from page 29*
escape, as reported by NBC News on Sept. 2, 2021.

The State Department told USAGM that their employees would be included with the remaining locally-employed U.S. government staff. But the August 31 deadline came and went, and USAGM employees never received a call to go to the airport, *Washington Post* columnist Josh Rogin reported.

The Washington Post noted that the RFE/RL believed that the Biden administration had assured the organization that its employees would be cared for. However, Rogin stated in his August 31 article that administration officials deny that any explicit promises were made. Fly told *The Washington Post*, "You would have expected that the United States government, which helped create a space for journalism and civil society in Afghanistan over the last 20 years, would have tried to do more over the last several weeks to assist journalists who made a decision that it was best for them to leave the country. But they consistently failed to do that."

The situation led 67 members of Congress to send a bipartisan letter to President Biden stating, "We stress to you that the 550 employees and their families are no different from journalists you have already doggedly worked to evacuate." Noting that the VOA journalists at the airport were desperate, the letter continued, "They have been and continue to be a target for the Taliban due to their association with the United States government." No further information regarding the fate of USAGM employees left in Afghanistan was available at the time the *Bulletin* went to press. A photo of the letter was posted on Twitter by *New York Times* media columnist Ben Smith. It is available online at: https://twitter.com/benyt/status/1430623797955149830/photo/1.

Afghanistan's Own Journalists Endangered with Taliban's Return to Power

The situation for Afghanistan's own journalists is equally fraught with danger. The journalists faced censorship, shutdowns, beatings, and arrests with the Taliban's return to power, as well as the announcement of "11 Journalism Rules" at a meeting with the media that the Taliban ordered must be followed. These actions have prompted concern by media advocates around the world.

According to a Sept. 11, 2021 article published by *The New York Times*, Afghan media outlets had blossomed after the Taliban was ousted in 2001. "Media and entertainment were more broadly transformed, as the United States financed television networks, newspapers and radio stations, helping them reach millions of Afghans throughout the country." In July 2021, the then-minister of information and culture, Qasim Wafayezada, reported that there were 248 television networks, 438 radio stations, 1,669 print outlets, and 119 news agencies active in the country.

> "Decreed without any consultation with journalists, [the Taliban's new media rules] are spine chilling because of the coercive use that can be made of them[.]. . . They establish a regulatory framework based on principles and methods that contradict the practice of journalism and leave room for oppressive interpretation, instead of providing a protective framework allowing journalists, including women, to go back to work in acceptable conditions. These rules open the way to tyranny and persecution."
>
> **— Christophe Deloire, RSF secretary general**

However, when the Taliban returned to power, "everything changed overnight for the media," Wafayezade said. Reality and music shows, along with Turkish and Indian soap operas have gone off the air, and Tolo News, Afghanistan's largest broadcaster, stopped producing a weekly political comedy program. Although there had been many female television presenters working across the country, at the time of *The New York Times* report, that number had dropped to four.

In a video posted by the Committee to Protect Journalists (CPJ), Arlene Getz, CPJ's Editorial Director, stated that the situation for Afghanistan's journalists is "The worst crisis CPJ has had to work with." The video is available online at: https://www.youtube.com/watch?v=5_KC37dzQdQ.

The New York Times reported on September 11 that journalists covering protests are rounded up along with protesters, then subjected to abuse. At least 19 journalists were detained on September 7 and 8; some were tied up and beaten with cables. They were told by Taliban guards, "You're lucky you have not been beheaded." The journalists included those with Tolo News, Ariana News, Pajhwok News Agency, and several freelance journalists.

The *Washington Monthly* wrote that the Taliban had posted armed soldiers outside the compound of Tolo News, and that there have been raids on the homes of at least six journalists during mid-August. Reporters Without Borders (RSF) noted that "hundreds" of journalists had gone into hiding or were trying to flee the country, and that approximately 100 media outlets had stopped operating. The media outlets that were continuing to operate were doing so in accordance with the conditions set up by the Taliban.

In addition to these restrictions and abuses, "11 Journalism Rules" were unveiled by Qari Mohammad Yousuf Ahmadi, the interim director of the Government Media and Information Centre (GMIC) at a meeting with Afghan media on September 19, according to RSF. The GMIC is the central point of contact for Afghan Government communications, according to the website, "Who Is Who In Afghanistan," available online at: http://www.afghan-bios.info/index.php?option=com_afghanbios&id=572&task=view&total=776&start=253&Itemid=2.

RSF noted that initially some of the rules might seem reasonable "as they include an obligation to respect 'the truth' and not 'distort the content of the information.' But in reality they

are extremely dangerous because they open the way to censorship and persecution."

According to the International Federation of Journalists (IFJ), the rules are binding and apply to all journalists and media organizations across Afghanistan. The rules forbid journalists and media outlets to publish or broadcast stories that are "contrary to Islam," invade privacy, or insult national figures. Media organizations and journalists are not to "distort news content;" they must "follow the principles of journalism;" "keep reporting balanced," and maintain neutrality. Other rules allow Taliban control of news output and to restrict content that has not been "officially confirmed" or that may be considered harmful to the public. Additional rules specify that news production must align with "Taliban ideology." Finally, all journalists and media must coordinate with the GMIC when reporting. The IFJ's report is available online at: https://www.ifj.org/media-centre/news/detail/category/press-releases/article/afghanistan-draconian-media-rules-set-to-further-strangle-media.html.

RSF secretary-general Christophe Deloire said of the Taliban's new rules, "Decreed without any consultation with journalists, these new rules are spine chilling because of the coercive use that can be made of them, and they bode ill for the future of journalistic independence and pluralism in Afghanistan. They establish a regulatory framework based on principles and methods that contradict the practice of journalism and leave room for oppressive interpretation, instead of providing a protective framework allowing journalists, including women, to go back to work in acceptable conditions. These rules open the way to tyranny and persecution."

On Aug. 16, 2021, RSF requested an "Arria formula" meeting of the United Nations Security Council to discuss the situation of journalists and the media in Afghanistan. According to RSF, an "Arria formula" meeting is one that does not comply with the Security Council's normal requirements, but would open discussion to government representatives, actors and experts. Leading Afghan journalists would be invited to address the Council and to appeal for an emergency plan for Afghan journalism. RSF said that the plan would include:

- Guarantees for the safety and protection of Afghan journalists and media wherever they might be;
- Help for journalists in Afghanistan who want to leave the county, including simplified procedures for obtaining visas and payment of travel costs;
- The creation of a fund to cover the immediate needs of Afghan journalists and media wherever they are located;
- Coordination and consultation with regard to the sustainability of Afghan media outlets and their possible transfer abroad;
- Assistance for Afghan organizations such as the Centre [*sic*] for the Protection of Afghan Women Journalists and the Afghan Journalists Safety Committee.

The full RSF report is available online at: https://rsf.org/en/news/rsf-seeks-un-security-council-meeting-plight-journalists-afghanistan.

In October 2021, the VOA reported that Zabihullah Mujahid, the Taliban's top spokesman and deputy minister of information and culture, said that press freedom is still alive and well. "Reporters can write and publish anything that is factual and not a mere accusation," Masood Farivar wrote in an October 12 report, but noted that "the Taliban have pursued a two-pronged media strategy, projecting a press-friendly image to the outside world by holding regular press conferences while clamping down, sometimes by force." The VOA article is available online at: https://www.voanews.com/a/how-the-taliban-control-afghan-media/6267846.html.

— Elaine Hargrove
Silha Center Staff

2021 Nobel Peace Prize Awarded to Two Journalists

On Oct. 8, 2021, the Norwegian Nobel Committee awarded the 2021 Nobel Peace Prize to two journalists — Maria Ressa of the Philippines and Dmitry Andreyevich Muratov of Russia — "for their efforts to safeguard freedom of expression, which is a precondition for democracy and lasting peace."

NOBEL PEACE PRIZE

The last journalist to win the Nobel Peace Prize was German Carl von Ossietzky, who received the Prize in 1935 for his criticism of Nazism in Hitler's Germany.

The Nobel Committee wrote in a Oct. 8, 2021 press release that Ressa was chosen because she "uses freedom of expression to expose abuse of power, use of violence and growing authoritarianism [in the Philippines]." Noting that Ressa is the CEO and co-founder of *Rappler*, a digital media company focusing on investigative journalism, the Nobel Committee continued, "Ressa has shown herself to be a fearless defender of freedom of expression." Ressa is also the author of two books: *From bin Laden to Facebook* and *Seeds of Terror*.

Rappler is known for documenting abuses by the administration of Philippine's President, Rodrigo Duterte, who took office in 2016. Duterte's ostensible anti-drug campaign has led to abuse, injustice, and "thousands of extrajudicial killings," according to a June 14, 2020 *Guardian* article. *The Guardian* reported that in June 2020, Ressa and a *Rappler* researcher, Reynaldo Santos Jr., were convicted of cyber libel and faced up to six years in prison; however both Ressa and Santos were freed on bail while their case was appealed, according to June 15, 2020 *Rappler* report. On Dec. 3, 2021, *Rappler* reported that the Philippines Court of Appeal's Special Seventh Division granted Ressa's request to travel to Oslo, Norway to accept the Prize on December 10, finding it to be "necessary and urgent."

Ressa is known for her criticism of social media, including in relation to the Jan. 6, 2021 insurrection in Washington, D.C. "Social media is a deadly game for power and money," Ressa said in her acceptance speech. "These destructive [social media] corporations have siphoned money away from news groups and now pose a foundational threat to markets and elections. These American companies controlling our global information ecosystem are biased against facts, biased against journalists. They are — by design — dividing us and radicalizing us. Without facts, you can't have truth. Without truth, you can't have trust. Without trust, we have no shared reality, no democracy, and it becomes impossible to deal with our world's existential problems: climate, coronavirus, the battle for truth."

> "I applaud the Nobel Committee for honoring Ressa and Muratov's incredible work and bringing greater attention to the increasing pressure on journalists, free press, and freedom of expression all around the world."
>
> **— President Joe Biden,**

The Nobel Committee wrote that Muratov "has for decades defended freedom of speech in Russia under increasingly challenging conditions." Muratov is one of the founders of *Novaya Gazeta*, an independent Russian newspaper, and has been its editor-in-chief since 1995. The Nobel Committee stated, "[*Novaya Gazeta*'s] fact-based journalist and professional integrity have made it an important source of information on censurable aspects of Russian society rarely mentioned by other media. Since its start-up in 1993, Novaya Gazeta has published critical articles on subjects ranging from corruption, police violence, unlawful arrests, and electoral fraud[.]"

In his acceptance speech, Muratov said that *Novaya Gazeta* is published on paper "So that people in prison can also read it since there is no internet in prison." The newspaper is known for its coverage of conflicts in the region, particularly in Chechnya and Eastern Ukraine, as well as its investigative reporting.

Masha Gessen, staff writer for the *New Yorker*, credited Muratov's "unceasing negotiations with the many men in and near the Kremlin who have the power — and, often, the desire — to shut *Novaya Gazeta* down," in a Nov. 15, 2021 article. She continued, "If one imagines a future in which Russia enjoys democracy and lasting peace, then Muratov, who has maintained a fragile sort of peace for a community that exercises freedom of expression in a profoundly unfree country, embodies the precondition for such a future."

Novaya Gazeta is also known for the reporters it has lost — six journalists and contributors between 2000 and 2009, including Anna Politkovskaya, who most notably reported on the situation in Chechnya. The Nobel Prize Committee observed, "[Muratov] has consistently defended the right of journalists to write anything they want about whatever they want, as long as they comply with the professional and ethical standards of journalism." (For more information on Politkovskaya's murder and the killings of other *Novaya Gazeta* reporters, see "Accused Politkovskaya Conspirators Acquitted" in the Winter 2009 issue of the Silha *Bulletin*; "Charges Filed in Politkovskaya Murder, Killer Still at Large" in the Summer 2008 issue; "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 issue, and "Famed Russian Reporter Murdered in Contract Killing" in the Winter 2006 issue.)

In his acceptance speech, Muratov noted contradictions in Russia's views on freedom of speech. He stated that although Putin supports the erection of a monument to Andrei Sakharov, a Soviet nuclear physicist who won the Nobel Peace Prize in 1975, Putin's regime "liquidated" Memorial, one of Russia's oldest human rights groups and an organization Sakharov chaired, in late December 2021. Established in 1989, Memorial "is a non-commercial organization studying political repressions in the USSR and in present-day Russia and promoting moral and legal rehabilitation

of persons subjected to political repressions," according to its website at: https://www.memo.ru/en-us/memorial/mission-and-statute/.

According to Amnesty International, "[Russia's] Prosecutor General's Office is claiming that, by not marking its publications with the toxic and stigmatizing 'foreign agent' label, International Memorial is in violation of the Universal Declaration of Human Rights.. . . The 'foreign agents' law is being weaponized to muzzle not only critics of the Kremlin but all independent voices entirely." On Dec. 28, 2021, Russia's Supreme Court ordered the closure of Memorial. The BBC reported the following day that the unidentified prosecuting attorney labeled Memorial a "public threat," saying that the organization focuses attention on Soviet crimes instead of highlighting the nation's "glorious past." The attorney further accused the group of "being in the pay of the West," the BBC reported.

In a December 1 interview with the Nobel Peace Center, Muratov said he will donate a portion of his half of the $1.15 million Nobel Prize money to a variety of charities that *Novaya Gazeta* has recently covered. Muratov also said that some of the money would be placed in a medical fund for *Novaya Gazeta* staff. In a December 9 *New York Times* article, Muratov said some of the money would also be designated to aid independent Russian media outlets that the current Russian administration has recently named "foreign agents," thereby hobbling their ability to inform the public. Muratov's interview is available online at: https://www.youtube.com/watch?v=RtiWft0ixeU.

Russian officials responded to the news of Muratov's award in a statement issued by Kremlin spokesperson Dmitry Peskov, who told reporters,: "[Muratov] persistently works in accordance with his own ideals, he is devoted to them, he is talented, he is brave."

President Joe Biden issued a statement congratulating the two journalists, stating, "I applaud the Nobel Committee for honoring Ressa and Muratov's incredible work and bringing greater attention to the increasing pressure on journalists, free press, and freedom of expression all around the world." The President's statement is available online at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/08/statement-by-president-joe-biden-congratulating-nobel-peace-prize-winners/.

> "The award of the Nobel Peace Prize to Maria Ressa and Dmitry Muratov is intended to underscore the importance of protecting and defending these fundamental rights. Without freedom of expression and freedom of the press, it will be difficult to successfully promote fraternity between nations, disarmament and a better world order to succeed in our time.
>
> **— Nobel Committee**

Committee to Protect Journalists (CPJ) Executive Director Joel Simon said, "Dmitry Muratov and Maria Ressa personify the values of press freedom and the reason it matters. These are journalists under personal threat, who continuously defy censorship and repression to report the news, and have led the way for others to do the same." He continued, "This Nobel Peace Prize is a powerful recognition of their tireless work, and that of journalists all around the world. Their struggle is our struggle."

The Nobel Committee added, "Free, independent and fact-based journalism serve to protect against abuse of power, lies and war propaganda. The Norwegian Nobel Committee is convinced that freedom of expression and freedom of information help to ensure an informed public. These rights are crucial prerequisites for democracy and protect against war and conflict. The award of the Nobel Peace Prize to Maria Ressa and Dmitry Muratov is intended to underscore the importance of protecting and defending these fundamental rights. Without freedom of expression and freedom of the press, it will be difficult to successfully promote fraternity between nations, disarmament and a better world order to succeed in our time. This year's award of the Nobel Peace Prize is therefore firmly anchored in the provisions of Alfred Nobel's will." The Nobel Committee's full press release is available online at: https://www.nobelprize.org/prizes/peace/2021/press-release/.

— Elaine Hargrove
Silha Center Staff

The Silha *Bulletin* is available online at the University of Minnesota Digital Conservancy.

Go to:
http://conservancy.umn.edu/discover?query=Silha+Bulletin
to search past issues

Federal Judge Rejects Motion to Dismiss by Newspaper in Case Pitting Racial Discrimination and First Amendment Claims

CIVIL RIGHTS

On Aug. 17, 2021, Federal District Judge J. Nicholas Ranjan denied a motion by PG Publishing Company (PG Publishing), which operates the *Pittsburgh Post-Gazette*, to dismiss a civil rights case brought by one of its former reporters, Alexis Johnson, who now works for *Vice News*. *Johnson v. PG Publishing Co.*, No. 2:20-cv-885-NR, 2021 WL 3634673 (W.D. Penn. 2021). Observers noted that the ruling could have broader implications for protecting reporters from racial discrimination despite First Amendment free press arguments.

The case arose on June 16, 2020 when Johnson, a Black reporter then working for the *Post-Gazette*, filed a lawsuit under the Civil Rights Act of 1866, 42 U.S.C. § 1981, against the newspaper in the Western District of Pennsylvania, alleging that the news outlet refused to allow her to cover protests over the May 2020 death of George Floyd. The newspaper's decision was attributed to a May 31, 2020 tweet by Johnson that included four photographs showing debris-strewn parking lots. The photos were accompanied by a message reading, "Horrifying scenes and aftermath from selfish LOOTERS who don't care about this city!!!…oh wait sorry. No these are pictures from a Kenny Chesney concert tailgate. Whoops." Three *Pittsburgh Post-Gazette* editors contended that the tweet "showed she could not cover the protests fairly and that therefore she would not be assigned to report on them."

In her complaint, Johnson first argued that the tweet was "posted on her private Twitter account" and was her "object[ion] to the racial bias exhibited by those members of society and public officials who equated property damage to human life." The complaint also alleged that Johnson had worked for the *Pittsburgh Post-Gazette* since October 2018 and had "often" been assigned "to cover social issues that manifested themselves in online social media platforms." Finally, the complaint contended that the *Post-Gazette* had "not treated reporters and journalists who have commented on bias toward whites in a similar manner."

The complaint alleged one count under the Civil Rights Act of 1866, 42 U.S.C. § 1981, for retaliation, arguing that the *Post-Gazette* "precluded and removed Johnson, and others from covering major stories involving race based protests and demonstrations in retaliation for opposing race discrimination and publically [*sic*] announcing her opposition to such practices." The complaint also alleged one count of race discrimination under 42 U.S.C. § 1981, arguing that the *Post-Gazette* precluded and removed Johnson from covering the protests "because of her race, and therefore[,] deprived Johnson of the same right to make and enforce contracts as is enjoyed by white citizens."

The full complaint is available online at: https://www.courthousenews.com/wp-content/uploads/2020/06/Post-Gazette-complaint.pdf. (For more information on the background of the case, other actions taken by the *Pittsburgh Post-Gazette*, and Johnson's lawsuit, see *Incidents Between Press and Police Amidst Protests Over George Floyd's Death Lead to Multiple Lawsuits, Reporter Sues Newspaper for Barring Her From Covering Protests* in "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue of the Silha *Bulletin*.)

On Oct. 16, 2020, PG Publishing filed a motion to dismiss, arguing that Johnson had failed to state "a plausible claim for discrimination or retaliation under 42 U.S.C. § 1981[.]" The motion also contended that "the First Amendment to the U.S. Constitution and article I, § 7 of the Pennsylvania Constitution bar both the imposition of liability on the Post-Gazette and the grant to Ms. Johnson of any of the relief sought." The complaint added that Johnson's request that the Western District of Pennsylvania "compel the Post-Gazette to assign her stories of her choosing, notwithstanding her public commentary on the matters to be covered" constitutes an "impermissible intrusion into the Post-Gazette's editorial decision-making and into application of its policies in support of journalistic integrity, and imposing any liability or granting any of the relief sought would violate constitutional protections affored [*sic*] the Post-Gazette." The full motion to dismiss is available online at: https://storage.courtlistener.com/recap/gov.uscourts.pawd.268276/gov.uscourts.pawd.268276.20.0.pdf.

On Aug. 17, 2021, Judge Ranjan rejected the motion to dismiss by PG Publishing, finding that Johnson stated plausible claims under 42 U.S.C. § 1981. Ranjan first rejected PG Publishing's claim that Johnson "hasn't sufficiently pled the existence of any protected activity, adverse action, causation, or denial of her contractual rights, to support her retaliation and discrimination claims." He held that "Johnson has pled sufficient facts to establish these legal requirements at this early stage.

Second, Ranjan turned to PG Publishing's argument "that under the First Amendment, it cannot be liable here because Ms. Johnson's lawsuit intrudes on PG Publishing's exercise of its editorial discretion as to the content of what it elects to publish." He explained that "while the First Amendment provides a publisher absolute discretion to refrain from publishing content," citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256-58 (1974), such "discretion does not extend to allow a publisher to make any and all discriminatory personnel decisions," citing *Associated Press v. NLRB*, 301 U.S. 103, 131–33 (1937).

However, in the present case, Ranjan concluded that "the parties appear to dispute several material facts, and the record is otherwise too undeveloped for the Court to presently decide [the First Amendment] issue." For example, Johnson alleged that the *Post-Gazette* editors "re-assigned her to cover less important and publicized news stories because of her race and protected activity." Conversely, the newspaper argued that Johnson "remained assigned to the same "beat," and was simply precluded from covering a few specific stories she had requested." Ranjan held that "[t]he clarification or resolution of this factual dispute is necessary before the Court can rule on PG Publishing's First Amendment defense." He therefore denied the motion to dismiss "without prejudice to PG Publishing raising its arguments, including its First Amendment argument, on a more factually developed record at summary judgment or trial," citing that "discovery is likely to refine both the claims and defenses in this case."

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Media Ethics Concerns Arise in Relation to Well-Known Media Figures

In 2021, the conduct of several high-profile journalists raised ethical questions, including becoming closely involved in ongoing events, withholding newsworthy information, and providing sources with access to and review of stories prior to publication. CNN's primetime host Chris Cuomo was fired after new information revealed he offered to use his journalistic ties to help investigate the sexual assault claims against his brother, Andrew Cuomo, the former Governor of New York. Katie Couric, a noted television journalist, admitted to withholding information relevant to the late U.S. Supreme Court Justice Ruth Bader Ginsburg's attitude about protesting Black athletes so as not to tarnish the Justice's image. Finally ESPN reporter Adam Schefter gave Bruce Allen, the former President of the Washington Football Team, prior review of a National Football League (NFL) story Schefter wrote that did not even quote Allen.

ETHICS

CNN Fires Chris Cuomo for Advising the Former New York Governor Regarding Sexual Assault Allegations

In early 2021, CNN anchor Chris Cuomo joined numerous strategy calls with his older brother, New York Gov. Andrew Cuomo, as the elder Cuomo faced multiple sexual assault allegations, according to *The Washington Post* on May 21, 2021. In August 2021, Andrew Cuomo resigned as governor, prompting commentators and ethics professionals to call for Chris Cuomo to do the same from CNN. Ultimately, on Dec. 4, 2021, after the former governor's team released documents detailing the extensive help Chris Cuomo provided to his brother for months, Chris Cuomo was finally suspended and subsequently fired from CNN.

> "As the adage has it, no one can serve two masters.. . . The CNN anchor who should have been serving the public was secretly putting family loyalty first by helping his brother navigate a political and public relations disaster."
>
> **— Jane Kirtley, Silha Center Director and Silha Professor of Media Ethics and Law**

Reportedly, Chris Cuomo advised Andrew Cuomo's team on the initial strategy calls that he should not resign from office and, instead, take a defiant stance. Chris cited "cancel culture" as a reason to hold firm against the allegations, according to the *Post*. The *Post* also reported that CNN later acknowledged in a statement from May 2021 that Chris' involvement in the strategy sessions was a mistake. "Chris has not been involved in CNN's extensive coverage of the allegations against Governor Cuomo — on air or behind the scenes," the network said. "In part because, as he has said on his show, he could never be objective. But also because he often serves as a sounding board for his brother.. . . However, it was inappropriate to engage in conversations that included members of the Governor's staff, which Chris acknowledges. He will not participate in such conversations going forward."

In that same statement, CNN said it would not discipline Chris for his actions. But *Newsweek* reported on Nov. 29, 2021 that, after further details were made public revealing Chris offered to find out through his sources whether more women were considering coming forward with accusations, CNN changed course and decided to discipline their primetime host. Initially, the outlet suspended Chris on November 29. His firing came a few days later, on December 4, when credible allegations of sexual assault against Chris Cuomo came to light, too.

In an on-air apology to viewers on May 20, 2021, Chris Cuomo said he had a unique obligation to journalistic integrity and to his family. "It was a mistake because I put my colleagues

Ethics, *continued on page 36*

PG Publishing, *continued from page 34*

The full ruling is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-pawd-2_20-cv-00885/pdf/USCOURTS-pawd-2_20-cv-00885-0.pdf. On Sept. 14, 2021, the Western District of Pennsylvania denied a motion by PG Publishing for an interlocutory appeal, meaning an appeal of the non-final trial court order by Ranjan rejecting the motion to dismiss the case. As the *Bulletin* went to press, no further developments had been announced in the case.

Following the ruling, Johnson posted two tweets, which read, "In February, my former employer filed a motion to dismiss my lawsuit against them claiming the decision to ban me from covering protests over a tweet about racial discrimination was protected under the First Amendment. Today, a judge dismissed that motion. The case will continue[.]. . . Just wanted to post an update because I get emails and DMs all the time from fellow journos or academics asking what's the latest in the case. That's all I have for now other than thank you again to everyone who has supported me thus far!"

In an August 2021 interview with Pittsburgh *City Paper*, University of Pittsburgh law professor Jerry Dickinson called Ranjan's decision "an important ruling" for Johnson and other journalists who face similar actions by their bosses. He also noted that the case weighed racial discrimination claims against First Amendment arguments, leading to potentially important implications. "It means the P-G can't short-circuit accountability by hiding behind the First Amendment for protection from its discriminatory actions," Dickinson said. "There are clearly enough facts in dispute that affords the case to move forward. The backdrop to this case was the Black Lives Matter movement and racial justice protests after the murder of George Floyd. We don't want the First Amendment weaponized against racial progress. That's dangerous."

— Scott Memmel
Teaching Assistant Professor
Silha *Bulletin* Co-editor

Ethics, *continued from page 35*

here, who I believe are the best in the business, in a bad spot," Cuomo said. But he went on to say he was still going to prioritize his family, and that he knows "where the line is" between his familial and professional obligations. The full video of the on-air apology is available online at: https://www.washingtonpost.com/video/politics/cnns-chris-cuomo-apologizes-for-advising-his-brother-gov-andrew-cuomo/2021/05/21/cca24081-fc6c-4531-bc3a-cf2bf7d37e2b_video.html.

CNN explained its initial reluctance to discipline Chris in a statement to *The Hill* on Nov. 30, 2021. "The New York Attorney General's office released transcripts and exhibits Monday that shed new light on Chris Cuomo's involvement in his brother's defense," CNN said. "The documents, which we were not privy to before their public release, raise serious questions. When Chris admitted to us that he had offered advice to his brother's staff, he broke our rules and we acknowledged that publicly. But we also appreciated the unique position he was in and understood his need to put family first and job second."

On Dec. 6, 2021, *The Wall Street Journal* reported that CNN President Jeff Zucker knew the extent of Chris Cuomo's involvement in advising his brother all along, despite the outlet's claims that the newly-released documents provided previously unknown information. According to *The Wall Street Journal*, a text message from a spokesperson for Chris said, "Mr. Cuomo has the highest level of admiration and respect for Mr. Zucker. They were widely known to be extremely close and in regular contact, including about the details of Mr. Cuomo's support for his brother. There were no secrets about this, as other individuals besides Mr. Cuomo can attest." CNN disputed this characterization of events.

Tom Jones, writing for *Poynter* on May 20, 2021, emphasized how egregious the Cuomo situation was even before the new details came out later in the year. "The host of a primetime show on one of the country's biggest and most influential cable news networks is advising one of the most powerful and influential politicians in this country on how to handle serious sexual misconduct allegations," Jones wrote. And when Chris Cuomo hosted Andrew Cuomo on CNN's primetime evening slot throughout the COVID-19 pandemic, Jones asserted, the network could have predicted the lines would get blurry. "CNN should've seen all this coming, and now it has to live with the consequences — which is some viewers not being able to trust a major personality on its network," Jones wrote.

Margaret Sullivan, a media columnist for *The Washington Post*, discussed her disagreement with Chris Cuomo's "family first" position in a column on Dec. 1, 2021. "Chris Cuomo and his CNN bosses have continually articulated this 'family first, job second' philosophy in recent months, although that logic is thoroughly misguided," Sullivan wrote. "In this case, I'd call it downright twisted. This was not about taking a leave of absence from your job as a teacher, let's say, to donate a lifesaving kidney to your brother. I hope we would all do that. No, this was about a high-powered media star using his considerable juice to blunt credible accusations of sexual assault and misconduct against the governor of New York. Power helping power, in the service of disrupting the investigation of potential crimes."

Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley wrote for *The Conversation* on Dec. 5, 2021, describing how Chris Cuomo's dual loyalties could not be reconciled. "As the adage has it, no one can serve two masters," Kirtley wrote. "The CNN anchor who should have been serving the public was secretly putting family loyalty first by helping his brother navigate a political and public relations disaster."

In an interview with the Associated Press (AP) on Nov. 29, 2021, Kirtley said journalists must understand they work for the public, not politicians. Kirtley added that if Chris Cuomo could not prioritize his journalistic obligations over his family, "Maybe it's time for him to find another line of work."

Katie Couric Withheld Late Justice Ruth Bader Ginsburg's Comments on Protesting Black Athletes

Katie Couric, former television network anchor and talk show host, revealed in her memoir released in October 2021, *Going There*, that she trimmed a segment she had recorded with the late U.S. Supreme Court Justice Ruth Bader Ginsburg in 2016 to omit portions where Ginsburg made critical comments about Black Lives Matter protesters. The omission caused media ethicists to question why Couric thought this would be acceptable, and whether by admitting it now Couric even understands the gravity of her decision.

On Sept. 18, 2020, Justice Ginsburg died of complications of metastatic pancreatic cancer. Justice Ginsburg, who was 87 years old, was revered as a crusader for women's rights and equality. (For more information on Justice Ginsburg's death and her First and Fourth Amendment jurisprudence, see "Justice Ginsburg Passes Away; Authored and Joined Key First and Fourth Amendment Majority and Dissenting Opinions" in the Fall 2020 issue of the Silha *Bulletin*.)

The clip Couric edited was recorded in October 2016 for *Yahoo News*, where Couric later worked. According to *The Daily Mail* on Oct. 13, 2021, the clip featured Justice Ginsburg saying that Black Lives Matter protesters, such as high-profile athletes like Colin Kaepernick who took a knee during the national anthem, showed "contempt for a government that has made it possible for their parents and grandparents to live a decent life, which they probably could not have lived in the places they came from . . . as they become older they realize that this was useful folly. And that's why education is so important." Couric wrote that she edited out the comments because they were "unworthy of a crusader for equality" like Ginsburg, according to *The Daily Mail*.

Many observers viewed the withholding as unethical. National Public Radio (NPR) reporter David Folkenflik discussed the controversy on the radio's flagship show, "All Things Considered" on Oct. 15, 2021. "I think it's wrong," Folkenflik said. "It's a mistake to let your own beliefs or personal feelings shade, I think, your coverage there. I do think that we've got to acknowledge we only know this because Couric wrote about it, and she wrote about it in a memoir in which she revisits a number of such episodes in which she says, you know, I wish I had done it differently. In this case, she says, would I have done it differently if it had been a conservative justice? And I think the answer is obviously yes."

Natalie Shure, writing for *The New Republic* on Oct. 15, 2021, took a harder line on Couric's behavior. "Withholding this footage was an obvious, almost canonical lapse in journalistic ethics — and a profound betrayal of the public," Shure wrote. "Couric concealed information about a far more important matter than Ginsburg's legacy: the nature

of the Supreme Court and the federal judiciary itself. What does it say about an institution that its ballyhooed liberal standard-bearer — whose lifetime appointment makes her democratically accountable to no one — casually denounces protests against racist state violence? And what does it say about the media and our political culture writ large that an individual justice was so revered that a major journalist suppressed her actual words to preserve her status as a legendary icon of the resistance? Nothing good, I suspect. But that's for the public to decide. Couric should have allowed it to do so."

Seth Arenstein, writing for *PR News* on Oct. 15, 2021, pointed out that Couric's motivations can best be understood from a promotional perspective. "Did Couric's publisher, Little, Brown & Company, selectively leak books so this tidbit could generate controversy, buzz and, hopefully, boost sales?" Arenstein wrote. "PR pros likely know the answer to that question."

ESPN Reporter Adam Schefter Gave Former President of the Washington Football Team Prior Review Before Publishing Story

In October 2021, ESPN reporter Adam Schefter came under fire after the release of email correspondence with Bruce Allen, the former president of the Washington Football Team, a member of the National Football League (NFL). The email was submitted as an exhibit in federal court and revealed that Schefter gave Allen prior review of a story and solicited feedback on changes to be made to it. Observers criticized Schefter, saying his failure to uphold accepted journalism ethics is indicative of some larger problems encountered in covering the NFL, and in Schefter's history of reporting.

According to the *Los Angeles Times* on Oct. 12, 2021, the email in question was from July 2011 when Schefter sent Allen a draft of a story about collective bargaining negotiations between the NFL and NFL Players Association (NFLPA). Among the topics discussed was the NFL potentially requiring players to stay in their respective locker rooms during the national anthem due to numerous players kneeling on the field during its playing. The story was published later that same day. In the email, Schefter wrote, "Please let me know if you see anything that should be added, changed, tweaked. Thanks, Mr. Editor, for that and the trust. Plan to file this to espn about 6 am."

Schefter's email to Allen was made public ten years later, in October 2021, after the *Los Angeles Times* reported that the email was part of a June 2021 court filing related to a lawsuit brought by Washington Football Team owner Daniel Snyder, in which he claimed that an India-based website defamed him by linking him without evidence to convicted sexual predator Jeffrey Epstein. Allen became entangled in Snyder's legal case when Snyder attempted to force Allen to disclose communications that might show Allen was a source of information for journalists, according to reporting from *The Washington Post* on Oct. 13, 2021.

Schefter released a statement saying the behavior exhibited in his email to Allen in 2011 was not typical of his usual practice as a journalist. "Just to clarify, it's common practice to verify facts of a story with sources before you publish in order to be as accurate as possible," Schefter said. "In this case, I took the rare step of sending the full story in advance because of the complex nature of the collective bargaining talks. It was a step too far and, looking back, I shouldn't have done it."

ESPN did not directly comment on the situation, but stood by Schefter, saying in a statement, "Without sharing all the specifics of the reporter's process for a story from 10 years ago during the NFL lockout, we believe that nothing is more important to Adam and ESPN than providing fans the most accurate, fair and complete story."

Observers pointed out that some unique aspects of sports coverage may encourage these kinds of ethical violations. Chris Broussard, on his sports podcast "The Odd Couple," said, "Guys make deals. I've even heard of guys, if there was a negative story about a source, [they] wouldn't write it."

Mike Sielski, a sports columnist at *The Philadelphia Inquirer*, pointed out in a Twitter thread on Oct. 13, 2021 that "[t]here are so many media entities with so much invested in covering the NFL a certain way, for football-centric audiences." Sielski added, "The likes of Adam Schefter . . . those insiders feeding us morsels of preapproved info . . . are not outside the NFL's culture. They inhabit it."

(In 2013, the Silha Center for the Study of Media Ethics and Law hosted a Spring Ethics Forum, "Tebow, Te'o and Tiger: Oh, My!," discussing ethical issues arising in sports journalism. For more information on the forum, see "Silha Spring Ethics Forum Discusses Issues Facing Sports Journalists" in the Winter/Spring 2013 issue of the Silha *Bulletin*.)

— Samantha Brunn
Silha Research Assistant

A video of the 36th annual Silha Lecture,
"The First Amendment & Diversity: A Marketplace Failure?"
Featuring: S. Jenell Trigg, Esq., CIPP/US
is available online at:
https://www.youtube.com/watch?v=7I64Ey0552Y

Florida and Texas Social Media "Censorship" Laws Blocked by Two Federal District Courts

In 2021, two laws in Florida and Texas ostensibly aimed at preserving free speech in social media were blocked by federal courts for violating the First Amendment and Section 230 of the Communication Decency Act, 47 U.S.C. § 230. Both laws were challenged by NetChoice and the Computer and Communications Industry Association (CCIA), two internet trade groups that represent the largest tech companies in America. Representatives from both the Florida and Texas governor's offices claimed the laws were written as a response to conservative voices being silenced on social media sites, despite evidence to the contrary. Legal commentators were generally supportive of the federal courts' move to block the laws, agreeing that the statutes were unconstitutional.

SOCIAL MEDIA

Florida "Social Media Censorship" Law Struck Down in Federal Court

In May 2021, Republican Florida Gov. Ron DeSantis signed into law Florida's SB 7072 "Stop Social Media Censorship Act," which prohibits social media companies from banning political candidates or "journalistic enterprises" from their platforms. On June 30, 2021, the law was blocked by the U.S. District Court for the Northern District of Florida Judge Robert Hinkle.

DeSantis proposed the bill after President Donald Trump was banned from several social media sites in the wake of the Jan. 6, 2021 attacks on the U.S. Capitol. (For more information on the insurrection and the media law issues and questions it raised, see "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" in the Fall 2020 issue of the Silha *Bulletin*.)

DeSantis signed the bill into law after it passed the Republican-majority Florida House of Representatives and Senate. As reported in *Vox*'s *Recode* on July 1, 2021, Florida's law would have fined social media platforms $250,000 per day for banning candidates for statewide office, and $25,000 for candidates for "other offices," such as local seats. It would also have provided both a private right of action and allowed the state to sue platforms alleging the law had been violated. Additionally, any content that was "by or about" a candidate could not be "shadow banned," or hidden or suppressed from the view of other users. The law applied only to social media platforms that had users in the state and had an annual revenue of $100 million or at least 100 million monthly active users globally, meaning the law would have captured only the largest platforms like Twitter and Facebook. Notably, social media platforms owned by any company that also owns a theme park in the state were exempt from the law, creating a carveout for The Walt Disney Co., an integral component of Florida's tourist economy.

The full bill is available online at: https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_s7072er.DOCX&DocumentType=Bill&BillNumber=7072&Session=2021.

On June 30, 2021, the law was blocked by Hinkle, who ruled SB 7072 did not promote a legitimate government interest in regulating speech and violates Section 230 of the Communications Decency Act (CDA), a law that gives websites discretion in publishing or excluding a variety of viewpoints. "The legislation now at issue was an effort to rein in social-media providers deemed too large and too liberal," Hinkle wrote. "Balancing the exchange of ideas among private speakers is not a legitimate governmental interest. And even aside from the actual motivation for this legislation, it is plainly content-based and subject to strict scrutiny."

Hinkle concluded that the law was also subject to strict scrutiny because it discriminates on its face among otherwise-identical speakers, apart from the size of the platform or whether they are owned by a theme park.

Additionally, Hinkle ruled that parts of the law were expressly preempted by Section 230. Hinkle wrote that, "deplatforming a candidate restricts access to material the platform plainly considers objectionable within the meaning of 47 U.S.C. § 230(c)(2). If this is done in good faith — as can happen—the Florida provision imposing daily fines is preempted by § 230(e)(3)." Not only that, Hinkle added, "The federal statute also preempts the parts of Florida Statutes § 501.2041 that purport to impose liability for other decisions to remove or restrict access to content."

The full injunction is available online at: https://storage.courtlistener.com/recap/gov.uscourts.flnd.371253/gov.uscourts.flnd.371253.113.0_1.pdf.

The Computer and Communications Industry Association (CCIA) praised the Florida court decision in a press release on June 30, 2021. "This decision upholding the Constitution and federal law is encouraging, and reaffirms what we have been saying: Florida's statute is an extraordinary overreach, designed to penalize private businesses for their perceived lack of deference to the Government's political ideology," said CCIA President Matt Schruers. "The court's ruling is a win for internet users and the First Amendment."

DeSantis' press secretary, Christina Pushaw, indicated the Florida Governor would appeal the ruling. "As Judge Hinkle seemed to indicate during this week's hearing on preliminary injunction, this case was always bound for the 11th Circuit and the appeals court will ultimately make its own decision on legal conclusions," Pushaw said. "Governor DeSantis continues to fight for freedom of speech and against Big Tech's discriminatory censorship." In July 2021, several media outlets reported that DeSantis' administration had appealed the ruling to the Eleventh Circuit U.S. Court of Appeals. As the *Bulletin* went to press, the court had not ruled in the case.

Federal Court Blocks Enforcement of Texas Social Media Law

Texas' HB 20, written in a similar vein as the Florida bill, also aimed to regulate social media companies' ability to remove users from their platforms, and designated social media sites as common carriers that are open for all to use as a public forum. On Dec. 1, 2021, U.S. District Court for the Western District of Texas Judge Robert Pitman granted an injunction pausing HB 20 enforcement.

State Rep. Briscoe Cain (R-Deer Park) proposed the legislation in response to President Donald Trump's removal from multiple social media platforms in January 2021. Republican Texas Gov. Greg Abbott signed the bill into law on Sept. 9, 2021.

As reported by *The Verge* on Dec. 1, 2021, the law bans social media platforms with more than 50 million monthly active users from removing or otherwise limiting content based on the user's viewpoint, effectively capturing only large sites like Facebook and Twitter. The law discourages content moderation, especially of controversial posts, and requires platforms to act quickly to remove illegal content. The law creates rules that require the social media platforms to publish detailed moderation reports, ostensibly to ensure that no particular viewpoint is moderated more heavily than others.

The law also asserts that social media sites are common carriers, which "are affected with a public interest, are central public forums for public debate, and have enjoyed governmental support in the United States; and social media platforms with the largest number of users are common carriers by virtue of their market dominance." According to the Legal Information Institute, a common carrier is defined as "a person or a commercial enterprise that transports passengers or goods for a fee and establishes that their service is open to the general public. Typical examples of common carriers include, a shipowner, railroad, airline, taxi service, etc." Common carriers can also include utility companies. In its 2015 Open Internet Order, the Federal Communications Commission (FCC) designated internet service providers (ISPs) as common carriers for net neutrality purposes, but that rule was reversed in 2017. (For more information on the FCC's repeal of net neutrality rules see "FCC Repeals Net Neutrality, Prompts Legal and Legislative Responses" in the Winter/Spring 2018 issue of the Silha *Bulletin*. For additional information about net neutrality more broadly, including the U.S. Court of Appeals for the D.C. Circuit's upholding of the net neutrality repeal, see "D.C. Circuit Upholds Net Neutrality Repeal But Prevents the FCC from Preempting States' Rules, Remands Key Issues to the Agency" in the Fall 2019 issue of the Silha *Bulletin*, "D.C. Circuit Upholds 'Net Neutrality' Rules" in the Summer 2016 issue, "New FCC Rules Spur Heated Debate about Net Neutrality Regulation" in the Winter/Spring 2015 issue, "D.C. Circuit Strikes Down FCC 'Net Neutrality' Rules" in the Winter/Spring 2014 issue, and "Debates Continue Over Net Neutrality as FCC Nears Decision on 'Open Internet'" in the Fall 2014 issue.)

The full bill is available online at: https://capitol.texas.gov/tlodocs/872/billtext/pdf/HB00020F.pdf#navpanes=0.

On Dec. 1, 2021, Pitman granted an injunction pausing HB 20 enforcement until the case brought by NetChoice and the Computer and Communications Industry Association (CCIA) concluded. He ruled that HB 20 interfered with social media platforms' editorial discretion and their First Amendment right to moderate the third-party content they disseminate, citing multiple Supreme Court cases that decided private companies have the discretion to publish certain types of content and not others, and cannot be compelled by the government to publish that with which they disagree.

Pitman further held that an injunction was beneficial because allowing platforms to continue "content moderation and curation will benefit users and the public by reducing harmful content and providing a safe, useful service." If the injunction were not issued, Pitman argued, users would be harmed by the lack of moderation. Additionally, Pitman contended that the reporting requirements for content moderation were "inordinately burdensome" given the number of users and posts on large social media platforms like Facebook and Twitter. Pitman also considered the legislative history of the statute. He concluded that because the legislature rejected an amendment that would have lowered the threshold for regulation of social media sites to include sites with fewer users, like conservative platforms Parler and Gab, "the record in this case confirms that the legislature intended to target large social media platforms perceived as being biased against conservative views," Pitman wrote.

The full injunction is available online at: https://www.documentcloud.org/documents/21124210-pitman-order.

CCIA praised the Texas court decision in a press release on Dec. 1, 2021. "This ruling upholds the First Amendment and protects internet users," said CCIA president Matt Schruers. "Without this temporary injunction, Texas's social media law would make the internet a more dangerous place by tying the hands of companies protecting users from abuse, scams, or extremist propaganda."

Renae Eze, Abbott's spokesperson, said the governor's office would work with State Attorney General Ken Paxton to appeal the ruling immediately. Further, Eze said, "Allowing biased social media companies to cancel conservative speech is hostile to the free speech foundation America was built on. In Texas, we will always fight to defend Texans' freedom of speech."

On Dec. 6, 2021, Texas filed a notice of appeal to the Fifth Circuit U.S. Court of Appeals. As the *Bulletin* went to press, the appellate court had not ruled in the case.

Many commentators supported the injunctions. John Villasenor, writing for *Brookings TechTank* on Nov. 9, 2021, argued that "A social media company clearly should have the right to block or remove racist and other hateful posts. That right shouldn't be undermined by handing the authors of those posts legal support allowing them to claim that their posts merely express a 'viewpoint' and thus must under Texas law be allowed on the platform."

Others urged caution, raising concerns about the marketplace of ideas. On July 9, 2021, Alan Rozenshtein, an Associate Professor of Law at the University of Minnesota Law School and writing as a senior editor at *Lawfare*, wrote, "It's tempting to crow over this setback for the law's supporters. But this would be a mistake. It should not be a partisan position that, in a free society, it is intolerable for any entity — whether the government or a private company — to control access to the public square. Whatever their downsides, government restrictions on content moderation, whether enacted or merely credibly threatened, may well be necessary to ensure the health of the digital commons. Ignoring that reality simply leaves the policymaking to those least responsible to do it."

— Samantha Brunn
Silha Research Assistant

Federal and State Legislation Focus on Journalists, Newsgathering, and Local Media Outlets

In the second half of 2021, legislation introduced or passed at the federal and state levels was aimed at a variety of issues involving news media ownership and journalistic practices. First, on July 29, three members of Congress introduced the Journalist Protection Act, which would impose new criminal penalties against individuals who cause or attempt to cause bodily injury to a journalist. Second, on July 20, the U.S. House of Representatives passed MEDIA Diversity Act of 2021, which requires the Federal Communications Commission (FCC) to consider market entry barriers for "socially disadvantaged individuals" in relation to media outlets and organizations. Meanwhile, on July 22, Sen. Gary Peters (D-Mich.) introduced the Broadcast VOICES Act, which would create a tax certificate program promoting diversity in broadcasting. Third, on September 12, the House Committee on Ways and Means included a portion of the Local Journalism Sustainability Act (LJSA) in its markup of the $3.5 trillion reconciliation infrastructure package. The portion of the LJSA included in the markup was the Payroll Credit for Compensation of News Journalists, which would provide temporary tax credits to local newspaper publishers. Finally, on October 9, California Gov. Gavin Newsom signed a bill providing journalists with access to certain areas otherwise closed by police.

JOURNALISM LEGISLATION

Journalist Protection Act Would Impose New Criminal Offenses Against Individuals Who Attack Journalists

On July 29, 2021, Rep. Eric Swalwell (D-Cal.), Sen. Richard Blumenthal (D-Conn.), and Sen. Bob Menendez (D-N.J.) reintroduced the Journalist Protection Act, which would impose new criminal offenses against individuals for intentional acts, or attempted acts, causing bodily injury to a journalist. The reintroduction of the legislation was met with praise by several press advocacy organizations, which contended that it provides necessary protections for journalists at a time of increased attacks of journalists by police and members of the public.

Initially introduced in March 2019, the Journalist Protection Act — H.R. 4857 in the U.S. House of Representatives and S. 2528 in the U.S. Senate —defines a "journalist" as "an individual who — (A) is an employee, independent contractor, or agent of an entity or service that disseminates news or information — (i) by means of a newspaper, nonfiction book, wire service, news agency, news website, mobile application or other news or information service (whether distributed digitally or otherwise), news program, magazine, or other periodical (whether in print, electronic, or other format); or (ii) through a television broadcast, radio broadcast, multichannel video programming distributor[,] or motion picture for public showing; *and* (B) engages in newsgathering with the primary intent to investigate an event or procure material in order to disseminate to the public news or information concerning a local, national, or international event or other matter of public interest" (emphasis added). The legislation defines "newsgathering" as "engaging in regular gathering, preparation, collection, photographing, recording, writing, editing, reporting, or publishing concerning a local, national, or international event or other matter of public interest."

> "As threats and violence against the media have multiplied more menacingly in recent years, the press needs and deserves greater protection.. . . The right and responsibility of journalists to hold accountable people in positions of power is absolutely fundamental to our democracy."
>
> **— Sen. Richard Blumenthal (D-Conn.)**

The legislation provides that an individual who commits "bodily injury to a journalist . . . shall be fined under this title or imprisoned not more than 3 years, or both." The legislation defines such an injury as "an act "(1) that causes bodily injury to an individual who is a journalist; (2) committed with knowledge or reason to know the individual is a journalist; and (3) committed— (A) while the journalist is taking part in newsgathering; or (B) with the intention of intimidating or impeding newsgathering by the journalist." The legislation includes a heightened penalty for "serious bodily injury to a journalist," namely a fine and/or imprisonment of up to six years.

The full text of the Senate bill, which is identical to the House version, is available online at: https://www.congress.gov/bill/117th-congress/senate-bill/2528/text?q=%7B%22search%22%3A%5B%22Journalist+Protection+Act%22%2C%22Journalist%22%2C%22Protection%22%2C%22Act%22%5D%7D&r=1&s=2. As the *Bulletin* went to press, neither the House nor the Senate version had passed.

In a July 29 press release, Rep. Swalwell emphasized the importance of the Journalist Protection Act. "Democracy depends on the ability of journalists to ask tough questions and report the truth without fear of violence or persecution," Rep. Swalwell said. "My bill will ensure that journalists are able to do their jobs without fear of harm."

Sen. Blumenthal similarly stated that "[a]s threats and violence against the media have multiplied more menacingly in recent years, the press needs and deserves greater protection.. . . The right and responsibility of journalists to hold accountable people in positions of power is absolutely fundamental to our democracy."

Sen. Menendez added, "The increasing threats and acts of violence against journalists are deeply alarming, and they need greater protection in order to do their jobs safely.. . . Our democracy and the American people rely on a free and independent press — a strong Fourth Estate — to keep the public informed and hold those in power accountable. Journalists perform a noble public service that the Framers understood was es-

sential to a well-functioning democracy. We need to do more to ensure they can do their jobs effectively without fear of being hurt."

The press release also cited the U.S. Press Freedom Tracker, a database of press freedom violations in the United States and around the world managed by the Freedom of the Press Foundation, which documented 427 physical attacks on journalists in 2020, more than in the three prior years combined. The full press release is available online at: https://swalwell.house.gov/media-center/press-releases/swalwell-blumenthal-menendez-reintroduce-bill-protect-journalists.

Several news advocacy organizations also supported the legislation. Radio Television Digital News Association (RTDNA) executive director Dan Shelley wrote on July 29, 2021 that the Journalist Protection Act "comes at a pivotal point for the future of the Fourth Estate. The journalist's job of seeking and reporting the truth has become dangerous. Today even the most routine stories are met with increased risk. Journalists across the country have reported physical and verbal assault, targeted equipment damage and being shot at while on the job.. . . The JPA is a necessary piece of legislation that acknowledges the dangers of the moment, and acts to create a safer future for the media industry."

In a statement on the same day, News Media Alliance president and CEO David Chavern was quoted as saying, "We rely on journalists, now more than ever, to provide us with critical news and information that helps ensure a safe, informed democracy. Reporters must be able to do their jobs safely and without fear of being attacked by those they are working to serve. We applaud Representative Swalwell and Senators Blumenthal and Menendez for their leadership in introducing the Journalist Protection Act, and we look forward to our journalists having a safer, more secure environment to continue the important work of reporting the news to their local communities."

(For recent examples of cases where journalists faced violence from the police and public, see *Federal Court Grants Preliminary Injunction in Case Stemming from Police Targeting Members of the Press* in "Lawsuits, Court Rulings, and Other Developments in Minnesota Raise Important Media Law Questions and Problems" on page 12 of this issue of the Silha *Bulletin*, "Journalists Face Attacks and Threats at Jan. 6, 2021 Insurrection, Prompting Arrests and Investigations; *Capital Gazette* Gunman Receives Maximum Sentence" on page 27 of this issue, "Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order" in the Winter/Spring 2021 issue, "Events Surrounding the U.S. Capitol Insurrection Raise Significant Media Law Issues and Questions" in the Fall 2020 issue, "Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy" in the Fall 2020 issue, "Journalists Covering Fallout from George Floyd Death Take Legal Action; Misinformation Underscores Lessons from 2020 Silha Spring Ethics Forum" in the Summer 2020 issue, and "Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd" in the Winter/Spring 2020 issue).

House Passes Legislation Requiring FCC to Consider Entry Barriers for Socially Disadvantaged Individuals; House Ways and Means Committee Includes Portion of Local Journalism Sustainability Act in Reconciliation Bill Markup

On July 20, 2021, the U.S. House of Representatives passed H.R. 1754, the Measuring the Economics Driving Investments and Access for Diversity Act of 2021 or MEDIA Diversity Act of 2021. The bill, which was introduced by Rep. Billy Long (R-Mo.) on March 10, 2021, requires the Federal Communications Commission (FCC) to "consider market entry barriers for socially disadvantaged individuals in the communications marketplace." As the *Bulletin* went to press, the U.S. Senate had not voted on the measure.

Meanwhile, on Sept. 12, 2021, the House Ways and Means Committee included a portion of the Local Journalism Sustainability Act (LJSA) in its markup of the House of Representatives then-$3.5 trillion spending bill pushed for by President Joe Biden's administration and many Democrat legislators. Although the LJSA was later removed from the budget reconciliation bill, which was cut to the $1.75 trillion "Build Back Better Act," it was put back into the act on Nov. 3, 2021.

Section 138517 of the LJSA initially included by the Committee was The Payroll Credit for Compensation of News Journalists, which would provide temporary tax credits to local newspaper publishers that employ and hire journalists. The portion read, "In the case of an eligible local newspaper publisher, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to the applicable percentage of wages paid by such publisher to local news journalists for such calendar quarter." The provision, which had the potential cost of about $1 billion, allowed for employment-tax credits up to $12,500 per quarter for print and/or digital local newspapers.

U.S. Rep. Suzan DelBene (D-Wash.) told *Editor & Publisher* that "it's an important piece to have" as part of the Committee markup. The full text of the provision, and the markup more broadly, is available online at: https://waysandmeans.house.gov/sites/democrats.waysandmeans.house.gov/files/documents/NEAL_032_xml.pdf?utm_source=marketingcloud&utm_medium=e-mail&utm_campaign=Free+Press+September+15%2c+2021_9_15_2021&utm_term=.

However, on Nov. 1, 2021, America's Newspapers, a newspaper advocacy organization, reported that the LJSA was taken out of the reconciliation bill the previous week amidst efforts between the White House and Congress to agree on compromise language decreasing the spending in the bill while still meeting President Biden's objectives. America's Newspapers CEO Dean Ridings wrote that "[w]hile there is still an opportunity to get the LJSA back in the reconciliation bill, there are many competing interests and not enough money to go around. Other measures that also were cut included two free years of community college, reduced prescription drug prices and paid family and medical leave."

In a Nov. 2, 2021 piece, Poynter Institute Media Business Analyst and Leader of News Transformation Rick Edmonds contended that "[l]etting the provision die would constitute a big missed opportunity. It would also mark legislators as vaguely cheering on local news from the sidelines rather than doing something."

But on Nov. 3, 2021, America's Newspapers announced that the LJSA was back in the Build Back Better Act "as a result of the strong support from the bill's sponsors and co-spon-

Legislation, *continued on page 42*

Legislation, *continued from page 41*

sors, members of the Ways and Means Committee, and House and Senate leadership." In a statement, Ridings said, "Our industry has really come together to support the LJSA. The net result is that communities across the U.S. will continue to receive the important news and information they need from their local newspapers, radio and TV stations. I've never been more proud to work for newspapers than today."

As the *Bulletin* went to press, Congress had not voted on the budget reconciliation bill.

The LJSA was most recently introduced in the House of Representatives in June 2021 by Rep. Ann Kirkpatrick (D-Ariz.). In addition to the proposed tax credits for publishers, the legislation includes a provision for tax credits for individuals subscribing to one or more local newspapers. Another provision provides a tax credit for advertising in local newspapers and local media more broadly. The full bill is available online at: https://www.congress.gov/bill/117th-congress/house-bill/3940/text.

California Law Allows Journalists Access to Protests Otherwise Closed By Police

On Oct. 9, 2021, the Associated Press (AP) reported that California Gov. Gavin Newsom signed Senate Bill No. 98 into law, which grants journalists access to certain areas otherwise closed by police. The new law provides that "[a] duly authorized representative of any news service, online news service, newspaper, or radio or television station or network may enter" some areas closed by police, namely those in which "peace officers close the immediate area surrounding any emergency field command post or any other command post, or establish a police line, or rolling closure at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment to the United States Constitution or Article I of the California Constitution."

The law imposes additional requirements when law enforcement takes such actions, including that "[a] peace officer or other law enforcement officer shall not intentionally assault, interfere with, or obstruct the duly authorized representative of any news service, online news service, newspaper, or radio or television station or network who is gathering, receiving, or processing information for communication to the public."

The law also provides that "[a] duly authorized representative of any news service, online news service, newspaper, or radio or television station or network that is in a closed area described in this section shall not be cited for the failure to disperse, a violation of a curfew, or [resisting arrest in] violation of paragraph (1) of subdivision (a) of Section 148, for gathering, receiving, or processing information. If the duly authorized representative is detained by a peace officer or other law enforcement officer, that representative shall be permitted to contact a supervisory officer immediately for the purpose of challenging the detention, unless circumstances make it impossible to do so."

> "We have seen a surge in egregious acts of violence and obstruction made against members of the press across the country[.]. . . This law will provide critical protections for the press as they attend and report on First Amendment events like protests, marches, rallies, and demonstrations."
>
> **— Sen. Mike McGuire (D-Sacramento)**

The law includes some exceptions. It "does not prevent a law enforcement officer from enforcing other applicable laws if the person is engaged in activity that is unlawful." The law also "does not impose, and shall not be used as the basis for, criminal liability." The full text of the law is available online at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB98.

The AP noted that California law already allows reporters to access places like wildfires and other disaster scenes.

Sen. Mike McGuire (D-Sacramento), the author of the bill, emphasized the importance of the bill, saying in a statement, "There's no doubt about it, California now has some of the toughest protections in place for journalists compared to any other state in America. We have seen a surge in egregious acts of violence and obstruction made against members of the press across the country and right here at home in the Golden State.. . . This law will provide critical protections for the press as they attend and report on First Amendment events like protests, marches, rallies, and demonstrations."

McGuire continued, "California is leading the way to ensure the freedom of the press and the First Amendment are protected and held to the highest standard. I'm grateful to Gov. Newsom for his signature and to the hundreds of journalists and Guild Members who mobilized across the state along with the California News Publishers Association and the California Broadcasters Association, to ensure SB 98's success."

Conversely, the California Police Chiefs Association (CPCA) contended that the law will "unduly penalize officers for carrying out their critical mission of protecting the public." The California State Sheriffs' Association (CSSA) similarly contended that "[e]ven if simply carrying forward similar provisions that relate to disasters, we note that the dangers associated with allowing nearly unfettered access to an emergency command post are significantly different when dealing with assemblies of people rather than natural or manmade disasters."

According to the AP, Newsom vetoed a similar measure in September 2020. In a letter explaining his decision to do so, Newsom wrote that "[l]aw enforcement agencies should be required to ensure journalists and legal observers have the ability to exercise their right to record and observe police activities during protests and demonstrations.. . . But doing so shouldn't inadvertently provide unfettered access to a law enforcement command center." The full letter is available online at: https://www.courthousenews.com/wp-content/uploads/2020/09/SB-629.pdf. The legislation, Senate Bill No. 629, which was revised by Senate Bill No. 98, is available online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB629.

— Scott Memmel
Teaching Assistant Professor
Silha *Bulletin* Co-editor

36th Annual Silha Lecture Addresses Marketplace of Ideas Theory Amidst Political, Economic, Social, and Technological Changes

On Oct. 26, 2021, S. Jenell Trigg, the chair of Washington, D.C.-based law firm Lerman Senter PLLC's Privacy, Data Security and E-Commerce practice, argued during the 36th Annual Silha Lecture that "we are currently in a debate regarding the importance and value of free speech and protecting democracy. Some say there is no democracy without free speech, but after the 2020 presidential election, the insurrection on the nation's Capitol [on Jan. 6, 2021], [and] recent developments, some too close to home, I'm not sure anymore.. . . I've started to question whether the longstanding theory of marketplace of ideas is still relevant in today's digital age."

SILHA CENTER EVENTS

Approximately 150 attendees from throughout the United States and abroad attended Trigg's lecture, "The First Amendment and Diversity: A Marketplace Failure," which was held in a virtual format because of the ongoing COVID-19 pandemic.

Articulated by John Milton, John Stuart Mill, Justice Oliver Wendell Holmes, and others, the "marketplace of ideas" theory posits that ideas and arguments should be allowed to compete in a free market, where, hopefully, truth and "good" speech prevail. In *Abrams v. United States*, 250 U.S. 616 (1919), Justice Holmes contended that "the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [people's] wishes safely can be carried out. That at any rate is the theory of our Constitution."

Following an introduction by Hubbard School of Journalism and Mass Communication Director Elisia Cohen and Silha Center Director and Silha Professor of Media Ethics and Law Jane Kirtley, Trigg first described her background, including her experiences as a broadcast television sales and marketing executive at several major market television stations and at the Federal Communications Commission (FCC), where she served on the staffs of two Commissioners and at the FCC Bureau/Office level.

Trigg emphasized that she is "a strong supporter of the First Amendment" and that she "fully understand[s] the First Amendment was designed not to protect the speech we like, but to protect the speech we don't." Trigg also noted that she is "a longstanding supporter of diversity . . . particularly diversity in the media," which was one of "the main reasons she went to law school" at The Catholic University of America, Columbus School of Law. Trigg added, "I believe that there is a strong correlation between diversity in the media, the First Amendment, and today's state of the marketplace of ideas as it exists or not." For more information on Trigg's background, visit: https://www.lermansenter.com/attorneys/s-jenell-trigg/.

Second, Trigg noted growing concerns about the future of the news media, including "increasing threats and attacks [against] journalists and media around the world." Such threats and attacks come in many forms, according to Trigg, including verbal threats, physical assaults, arrests and criminal investigations, "fake news" statutes and regulations, access rights to information, and civil challenges.

Third, Trigg discussed three "influential developments" that "have changed our consumption of news, as well as our trust in the news and media industry and, therefore, have impacted the marketplace of ideas." Citing the "consolidation of news and information sources," she noted how the number of sources of news and information has expanded significantly since 1981, including the introduction of cable news, streaming video services, search engines, social media platforms, and much more.

However, Trigg contended that at the same time, ownership is now consolidated, citing the statistic that in 1983, 50 companies owned 90% of media outlets. In 2021, eight companies own 90% of media organizations with "more mergers on the horizon." "Although there are considerably more sources for news and information than ever before, there are less owners, less truly independent and antagonistic voices and, therefore, less diverse viewpoints. This is a natural consequence of [media] consolidation," she argued.

Trigg added that other developments only further undermine the marketplace of ideas, including the blurring of facts and opinion. She said, "There used to be a time when it was forbidden to mix opinion and news. Decades ago, you could clearly delineate the difference between news, opinion, editorial content, and entertainment. It is not so easy anymore." Trigg further argued that "not disclosing the difference between fact and opinion is one of the criticisms the public has of the news media, why trust in the press and media has declined and continue to erode."

Trigg also noted that "where Americans get their news also has an impact on the marketplace of ideas." She cited a Pew Research Center study that found that 52% of Americans "prefer to get news on a digital platform," with 35% preferring television.

The second "influential development" Trigg raised was the "increased use of and reliance on impersonal communications/devices." She observed there have been "advancements in technology . . . that changed what we do and how we communicate. These devices and platforms allow us to communicate and interact with anyone in the world and get news and information at very little cost at our choosing 24/7. This is a very good thing. Media platforms are a crucial part of the mainstream modern ecosystem; they've expanded freedom of expression, as well as access to news and information across the globe. Again, that's a good thing."

However, Trigg argued that "there is a bad side to online engagement and use of communications and high-tech devices," including that "[w]hile we can engage with anyone online, we often make such connections and interact with other people at an arms-length basis, on an impersonal level." She continued, "We rarely communicate in person. We tweet, text, IM, email, and ping. We can be anonymous online when sending threatening or hurtful messages or inflammatory content at least to the recipient. Such content and messages are instantly disseminated around the world and reposted, liked, [and] recirculated well beyond the closed circle of family, friends, and associates where we don't even know the initial origin. We can avoid getting to know each other beyond being a Facebook friend. We can avoid being held accountable for our actions."

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The result, according to Trigg, is that "[w]e have not only lost diversity, we have lost civility. We say things on Facebook, Twitter, and other online media that we would have never said in person, much less out loud. We can hide behind a fake online identity and attack real people." Such messages lead to several additional negative effects, including self-harm and suicide, especially by teenagers.

The third and final "influential development" Trigg cited was the rise of "advanced technology that collects, tracks, [and] analyzes personal information to predict individual behavior and uses such information to generate revenue and engagement." She posed several questions to the audience, stating, "[B]efore you repost that news story or information, or engage in a communication, are you sure that it came from another human and it was not sent by a bot? Are you sure that the video or content is real? Or is it a deepfake? Would you know that your personal information, online activities, and social networking can be tracked, controlled, and manipulated by advanced technology and that your use of the internet is not as anonymous as you thought?" She added, "The internet knows everything about you."

Trigg contended that the internet, specifically "what is called behavioral targeting or behavioral profiling, has had a major influence on the failing of the marketplace of ideas for news and information." She noted that "gathering data about consumers' gender, age, location, purchasing, viewing, reading, and listening habits [and] analyzing that data for advertising and marketing purposes is not new and is perfectly acceptable; it is how the advertising industry works." However, "concerns and issues arise particularly online when the collection of data is not based on general categories anymore, but is based on your individual behavior," including political and other beliefs. Trigg contended that the collection and use of individual's personal information can be, and is, "used to tailor messages that c[an] persuade a particular person to attend a political event or vote for a political candidate," among other examples of "abuse of user's personal information."

Trigg added that harms arising from the internet "can manifest in the real world," citing examples like the Jan. 6, 2021 insurrection at the U.S. Capitol, targeted harassment and death threats, and more. Trigg said, "This speech is not free. We are all paying for it."

Ultimately, Trigg concluded that "[w]e did not get here overnight.. . . [I]t's not just one event, one person, or one development that brings us to a crossroads today. A series of individual developments have contributed to a failing of the marketplace of ideas. The foreseen outcomes and inadvertent consequences of these developments have collectively converged into a perfect storm resulting in today's First Amendment crisis."

> "I'm hopeful. I'm very hopeful.. . . As long as we have people who are honest and will speak the truth, I'm hopeful that we can gain a little bit of this marketplace of ideas back."
>
> **— S. Jenell Trigg, Washington, D.C.-based law firm Lerman Senter PLLC's Privacy, Data Security and E-Commerce Practice Chair**

Finally, Trigg provided a series of "next steps," stating "I'm hopeful. I'm very hopeful. As long as we have journalists and reporters and committed news people across the board in all media who want to get at the truth. As long as we have citizens that put their own body at risk like Darnella Frazier, who was the 17-year-old who recorded the murder of George Floyd by the police [on May, 25 2020]. As long as we have people that are honest and will speak the truth, I'm hopeful that we can gain a little bit of this marketplace of ideas back. I still have hope that we can recover from these failings and, at minimum, restore civility in our daily discourse with each other."

Trigg offered "a few things for each of us to consider," including:

- "Evaluate and improve personal media consumption habits/sources
- Put more local into 'local news'
- Increase diversity in ownership, management and decision-makers
- Distinguish between news and opinion and improve digital literacy
- Prevent/prohibit use of new technology for discriminatory, biased and anti-competitive practices and increase accountability
- Provide transparency in use of profiling and predictive analytics."

Trigg concluded by stating, "So the bottom line is there is a role for each of us. And in closing, I ask: can you imagine what our collective future will be if we continue on the same path of polarization and demonization of the press and the media? Can our political system and election process sustain more attacks and, if so, for how long? Can we afford not to find new ways to foster and improve the marketplace of ideas, civility, and being informed and respectful about diverse viewpoints?"

During a Q&A session moderated by Kirtley, Trigg responded to several questions from webinar attendees, including whether and how social media should be regulated given "the very real dangers of an unregulated social media community." Trigg responded, "That's where the rubber meets the road: how do we get where we need to be without violating the First Amendment, as well as a host of other constitutional issues?. . . If we can generate more trust, I'm hoping that people will turn to different media and get back offline and maybe start to watch other sources or look at other sources."

In response to another question asking how we can best regain the marketplace of ideas, Trigg emphasized the "next steps" she provided and added, "[T]here's no one silver bullet. We have to be more respectful of people who disagree with us and try to look past that disagreement and see them and still respect their opinions. We don't respect different opinions anymore. We've lost not just diversity, we've lost civility. But at the same time, at a personal level, we need to look at what our own media practices are. If we, and everyone on this webinar, looked at a different media source, went to a different page, or watched a different news source[,] . . . we will have started to increase the marketplace of ideas."

A video of the lecture is available online at: https://www.youtube.com/watch?v=7I64Ey0552Y. Silha Center activities, including the annual Silha Lecture, are made possible by a generous endowment from the late Otto and Helen Silha.

— Scott Memmel
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