

Minnesota Supreme Court Expands Rules for Camera Access to Criminal Proceedings

On March 15, 2023, the Minnesota Supreme Court announced new rules for audio and visual coverage of criminal proceedings in district courts. Beginning on Jan. 1, 2024, judges will have expanded discretion to decide on a case-by-case basis whether to allow audio and visual coverage of the case without the consent of parties. The new rules come after the judiciary grappled with issues of public access to court proceedings in the wake of the COVID-19 pandemic, and Minnesotans watched the high-profile trials of former police officers Derek Chauvin and Kim Potter unfold via livestream.

On June 18, 2021, the Minnesota Supreme Court issued an order to the Advisory Committee for Criminal Procedure directing the committee to review Rule 4 of the General Rules of Practice for the District Courts, which governs coverage of criminal proceedings, and “consider whether the requirements set forth in that rule for audio and visual coverage of criminal proceedings should be modified or expanded.” Previously, Rule 4 permitted journalists to record most criminal proceedings only after the prosecution, defense, and judge all agreed. Minn. Gen. R. Prac. 4.01 *et seq.* According to the order, “audio and video coverage of all court proceedings, including some criminal proceedings” was a “critical component of public access during the COVID-19 pandemic.” The order came after Hennepin County District Judge Peter Cahill allowed limited audio and video recording, broadcasting, and livestreaming of the trial of former Minneapolis police officer Derek Chauvin in spring 2021. (For more information on the media access implications of the Chauvin 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 June 30, 2022, the Minnesota Supreme Court Advisory Committee on Rules of Criminal Procedure issued a report recommending against expanded access. According to the report, “the public defender, prosecutor, and victim organizations and representatives” opposed “any expansion” of Rule 4. Media representatives advocated for camera coverage “at every stage of a criminal case” and argued that coverage “increases public access, promotes transparency, and fosters public trust and confidence in the judicial

system.” The June 30 report stressed the importance of “judicial discretion” and stated that the Committee opposed “any rules that would require coverage of certain cases or under certain circumstances.” (For more information on the June 30 report and surrounding debates, see *Minnesota Supreme Court Advisory Committee Does Not Recommend Expanding Access to Cameras in Courts* in “Minnesota Journalists Face Barriers to Reporting from Courts, Law Enforcement” in the Summer 2022 issue of the *Silha Bulletin*.) On July 6, 2022, the Supreme Court opened a period of written public comment on the report. On Sept. 20, 2022, the Court held a public hearing with media representatives and the chair of the advisory committee.

The March 30, 2023 order, written by Minnesota Supreme Court Chief Justice Lorie S. Gildea, stated that the Court “thoroughly considered the recommendations of the committee, the public comments, and research materials on rules governing visual and audio coverage in courtrooms across the country.” The order amended Rules 4.01 and 4.02(d)-(e) to “remove the requirement of party consent and give district courts broader discretion to allow visual and audio coverage of criminal trials before a verdict is reached and pair those changes with clear guardrails to mitigate risks associated with expanded visual and audio coverage.” This expansion is “consistent with a majority of the public comments submitted” which favored expanding Rule 4. Public commenters “advocated in favor of more transparency, greater public trust, and broader accessibility” and noted that “most other states have allowed more expansive use of visual and audio coverage of criminal proceedings, some for several decades.”

According to the order, Minnesota’s amended rules “will remain more restrictive than many other states.” The amended rules do not authorize coverage of *voir dire* or other pretrial proceedings. Additionally, “the coverage of minor witnesses or minor defendants is never allowed” and “coverage that may reveal the name or identity of a juror is not allowed.” The order acknowledged “serious and legitimate concerns raised by the committee and some public commenters about the risks and challenges accompanying broader visual and audio coverage of criminal

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trials,” but concluded that the modifications to the rules “provide important protections against those risks.”

The new rules also “authorize district court judges to impose additional limitations, beyond those specified in the rules, on visual and audio coverage of certain portions of, or participants in, criminal trials on a case-by-case basis.” The amended rules specify that “a hearing held remotely using video technology is not considered livestreaming and any recording or broadcasting of such hearings is prohibited unless specifically authorized by the presiding judge.” Judges may now authorize audio and visual coverage “unless there is a substantial likelihood that coverage would expose any victim, or witness who may testify at trial, to harm, threats of harm, or intimidation.” In determining whether to grant a request for audio or visual coverage, a judge may consider

COVER STORY

“any relevant factors, including but not limited to (1) the positions of the parties and the wishes of the victim(s); (2) the level of public interest in the trial; (3) the necessity of coverage to safeguard the defendant’s right to a public trial or the public’s right of access to criminal trials; (4) the existence of security issues, courtroom or courthouse facility limitations, or public health concerns that would merit restricting observing from the physical courtroom; (5) courtroom or courthouse facility limitations that would render coverage impractical; (6) the positive or negative impact of recording and reproduction on the dignity and decorum of the trial proceedings; and (7) the effect of recording and reproduction on transparency, public education, and public trust and confidence in the proceeding or the judicial system.” The new rules bar coverage of cases involving sexual or domestic violence. The modified rules also preclude coverage for cases in treatment courts, including drug courts and veterans courts, unless participants are “nearing graduation and consent to visual and audio coverage” for “stories in the public interest.”

According to the order, the Minnesota District Judges Association urged the Court to “ensure that district court judges retain the ability to exercise discretion over visual and audio coverage on a case-by-case basis.” The Court stated that the adopted rule amendments “allow precisely that.” The order also acknowledged concerns raised by victim advocate groups that “expanding coverage may discourage victims from reporting crimes and retraumatize survivors.” Like the previous rules, the amended rules will “continue to prohibit coverage of victims themselves in both the pre-guilty and post-guilt phases of a criminal trial unless the victim consents to the coverage.” Unlike the previous rules, the modified rules “include an absolute prohibition of coverage of minor victims” and add an “express requirement” that the court “consider the ‘wishes of the victim(s)’ in determining whether to allow visual or audio coverage.”

The order also noted that “allowing visual and audio coverage may impose additional complications and financial costs” but stated that many of these costs “will be borne by the media.” To the degree that the new rules would impose additional costs on district courts, “the modified language in the rule asks district court judges to consider those additional costs as related to facility limitations, when deciding whether or not to grant a request to allow visual or audio coverage.” The order also recognized “the

possibility that any changes to how we conduct criminal trials in Minnesota may have a disproportionate adverse impact on certain groups of people based on race, gender, economic status, or other characteristics.” The Court was unable to find “definitive research on the impact of visual and audio coverage of criminal trials on persons based on their race, gender, or economic status” but stated it was “committed to monitoring the impact of these modified rules on criminal defendants and crime victims based on race, gender, economic status, and other characteristics, and providing transparent reporting on those impacts.” The order concluded by stating that the new rules will “promote transparency and confidence in the basic fairness that is an

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— Leita Walker,
First Amendment Attorney

essential component of our system of justice in Minnesota and protect the constitutional rights and safety of all participants in criminal proceedings in the State.”

Associate Justice Anne McKeig dissented from the order. According to her dissent, it was “difficult to support expansion of camera access in the courtroom when the practitioners who regularly encounter these rules do not support expansion.” The Minnesota District Judges Association, the Minnesota County Attorney’s Association, the Minnesota Alliance on Crime and the Minnesota Coalition Against Sexual Assault also opposed expansion, McKeig wrote. McKeig wrote that she was concerned about the “tangential but tremendous impact increased camera access could have on certain third parties” including “victims’ families, defendants’ families, and families of civil litigants.” Camera access could “negatively impact these third parties because, regardless of the type of case, the court process typically involves disclosure of deeply personal, embarrassing, or hurtful details involving the parties to a case and their families.” Third parties “typically have no autonomy over the information shared” but still need to “deal with the fallout from the sensitive information’s disclosure.” McKeig also noted a concern related to the “lack of information on how the rule changes may impact communities of color” who are “disparately punished by the American criminal justice system.”

McKeig also raised concerns about increased costs associated with high-profile trials — the Chauvin trial “reportedly cost Hennepin County ‘about \$3.7 million for employee salaries, courthouse security, victims’ services,’ and other expenses.” Recent successes in livestreaming trials out of the Fourth Judicial District and Hennepin County are unlikely to translate to the rest of the state as these districts are “unique in the time, staffing, and monetary resources they have available.” She acknowledged that “increasing transparency and public confidence in the justice

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system” are “both legitimate and compelling interests” but concluded by stating that these interests “do not have to be vindicated by expanding camera access in the courtroom, especially given the lack of data on the impact this change would have” and the “lack of support for expansion of camera access by judges, prosecutors, the defense bar, and victim advocates.” The order, and McKeig’s dissent, are available online at: <https://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Special%20Releases/ADM10-8049,-ADM09-8009.pdf>.

Minnesota Chief Public Defender Bill Ward told the Minneapolis *Star Tribune* on March 15, 2023, that attorneys worried about how these rules would affect defendants. “I don’t think that justice is a spectator sport,” Ward said. “Certainly people have their rights to view and it is a very transparent process by going to the courthouse and watching how things unfold. And ultimately, if people just watch snippets and parts, because it’s televised that way, they’re not seeing the entirety of what happened.” Artika C. Roller, executive director of the Minnesota Coalition Against Sexual Assault, shared a statement with KSTP on March 15. “The allowance of cameras often amplifies the backlash victims/survivors experience for

seeking justice. In addition, allowing cameras may discourage people from seeking support and speaking out about their sexual assault,” Roller said. “We live in a society that continues to place the burden on victims of sexual violence to prove that the violence was not their fault, and this change has the potential to increase that burden. We are disappointed in the decision.”

Press freedom advocates celebrated the decision. Leita Walker, a First Amendment attorney who

trial, she said. “It gives the press an opportunity to bring cameras in and to normalize them and to show that the sky does not fall. In fact, confidence and trust in the system grows when you let people watch the justice system.” First Amendment attorney Mark Anfinson told the *Star Tribune* on March 15, 2023, that he believed the change would benefit the court system. “It should be more visible, people should see this,” he said. “The people’s confidence in the courts will increase

“I really cannot say enough about what a giant step forward this is for Minnesota.”

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

when they are able to get a sense of the full spectrum of criminal court proceedings.” Jane Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center, told KSTP on March

has represented a coalition of media entities including the Silha Center, told the *Star Tribune* on March 15, 2023, that there was “no evidence” that allowing cameras in court has been a problem in the 35 other states that have allowed broadcasting of trials in the past 40 years and that she thought the amended rule would “show judges here in Minnesota that it’s not a problem here either.” The ruling allows for judicial discretion and does not guarantee camera access at every

15, 2023, that she would have preferred a presumption that audio and visual coverage of all proceedings would be allowed, but that the order represented a “huge breakthrough” in a state that has vehemently opposed expanded access. “I really cannot say enough what about what a giant step forward this is for Minnesota,” Kirtley said.

— CLAIRE COLBY
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Dominion Lawsuit Against Fox Sparks Debate About Boundaries of Actual Malice

Dominion Voting Systems' defamation lawsuit against the Fox Corporation and its subsidiaries, settled on the eve of trial on April 18, 2023, dominated news coverage of the media throughout the first months of the year, with Fox's internal communications

DEFAMATION

raising questions about gaps between what the news organization said in private and what it put on air. The case ended with a massive settlement just before opening statements at trial, a financial boon for Dominion and a move that may have limited public accountability for Fox. Meanwhile, North Carolina's attorney general withstood criminal liability for libel by challenging the statute in question as unconstitutional, and CNN and anchor Jake Tapper beat a defamation lawsuit for former U.S. Rep. Devin Nunes on jurisdictional grounds. Influential Florida Gov. Ron DeSantis advocated for limiting press protections statewide while his allies in the legislature worked behind the scenes to make it a reality. Finally, a New York judge dismissed a lawsuit filed by former President Donald Trump against *The New York Times*.

Fox Settles to Avoid High-Stakes Defamation Trial with Dominion Voting Systems

On April 18, 2023, Dominion Voting Systems settled its defamation lawsuit with Fox News Network and Fox Corporation, more than two years after the Fox coverage of the 2020 United States presidential election that led to it. *US Dominion v. Fox News Network*, No. N21C-03-257 (Del. Super. Ct. March 26, 2021).

The agreement came after the jury had been sworn in and before opening statements. "The parties have resolved their case," Judge Eric M. Davis said before excusing the jury, according to multiple reports. According to Dominion, Fox agreed to pay \$787.5 million, one of the largest settlements in a defamation case, according to a report from *The New York Times* the same day. It is less than half of the \$1.6 billion for which Dominion initially sued.

Fox was not required to formally apologize to Dominion or address

its false voter fraud claims on air as part of the settlement, according to multiple reports. It did, however, make a statement on the matter, saying, "We are pleased to have reached a settlement of our dispute with Dominion Voting Systems. We acknowledge the Court's rulings finding certain claims about Dominion to be false. This settlement reflects FOX's continued commitment to the highest journalistic standards. We are hopeful that our decision to resolve this dispute with Dominion amicably, instead of the acrimony of a divisive trial, allows the country to move forward from these issues."

Dominion CEO John Poulos used more pointed language in a press conference, saying, "Fox has admitted to telling lies about Dominion that caused enormous damage to my company, our employees, and the customers that we serve. Nothing can ever make up for that. Throughout this process, we have sought accountability and believe the evidence brought to light through this case underscores the consequences of spreading lies. Truthful reporting in the media is essential to our democracy. Dominion, our employees, our people, our partners are grateful to the court for allowing us the process for the truth to come out."

University of Utah Professor RonNell Anderson Jones told *The Guardian* in an April 18 report that the timing of the settlement after extensive discovery of Fox's internal communications reflected its motivation not just to secure compensation but to ensure that Fox faced public accountability. Still, she added, "I'd expected, given the wider public lesson that Dominion said it wanted to teach in this case, that it would have insisted on more acknowledgment or apology in the settlement."

Silha Center Director Jane Kirtley said in the same report, "I'm not saying it shouldn't change things at Fox. But they seem so convinced that their approach to news is the right one — some would call it arrogance — that I can't imagine that they feel chastened." Kirtley wrote about why she thinks the outcome is positive for all media outlets in an essay for *The Conversation*, available online at: [https://theconversation.com/why-fox-news-settlement-with-dominion-voting-](https://theconversation.com/why-fox-news-settlement-with-dominion-voting)

[systems-is-good-news-for-all-media-outlets-204095](https://theconversation.com/why-fox-news-settlement-with-dominion-voting-systems-is-good-news-for-all-media-outlets-204095)

Dominion sued Fox News Network, the network's parent company Fox Corporation, and subsidiary Fox Broadcasting in Delaware state court in March 2021. The complaint alleged that Fox television broadcasts that accused Dominion of election fraud had libeled the company. "After the November 3, 2020, Presidential Election, viewers began fleeing Fox in favor of media outlets endorsing the lie that massive fraud caused President [Donald] Trump to lose the election," the complaint read. The complaint also alleged "verifiably false yet devastating" lies that the network broadcast about Dominion, including that Dominion rigged the 2020 Presidential Election, manipulated vote counts through its software and algorithms, is owned by a company founded in Venezuela to rig elections for late President Hugo Chávez, and paid kickbacks to government officials who used its machines.

The complaint argued that Fox News acted as Fox Corporation's agent in publishing false information and that the defamation stems from the agency relationship. The full complaint is available online at: <https://hamiltonps.app.box.com/s/pcjs5ijawo06dkkif57sjee05aaef1nh/file/883362796731>. In June 2022, Judge Davis denied Fox Corporation's motion to dismiss the claims against it, finding that Dominion's allegations supported a reasonable inference that Rupert and Lachlan Murdoch, Fox Corporation's chair and CEO, respectively, "either knew Dominion had not manipulated the election or at least recklessly disregarded the truth when they allegedly caused Fox News to propagate its claims about Dominion." However, he granted Fox Broadcasting's motion to dismiss. (For more information on the court's ruling, see *Delaware Judge Allows Defamation Case Against Fox Corporation to Continue Over Election Misinformation* in "State, Federal Courts Grapple with High-Profile Defamation Cases" in the Summer 2022 issue of the *Silha Bulletin*.)

Exhibits released on March 7, 2023, exposed internal communications among

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Fox executives and on-air personalities about the presidential and other elections and the network's coverage of them. Specifically, they showcased Rupert Murdoch as a committed partisan worried about the damage that Trump's election claims could cause for Republicans. In the lead up to the 2021 U.S. Senate runoff elections in Georgia, Rupert Murdoch wrote that Fox News "should concentrate on Georgia, helping any way we can." When Trump's lawyer Rudy Giuliani made false claims about the election in a press conference, Murdoch wrote, "Really crazy stuff. And damaging. Might even lead to a double loss in Georgia." Republicans ultimately did lose both races, with Murdoch writing two days later, "Fox News very busy pivoting . . . We want to make Trump a non person." On other occasions, he mused that Trump was going "increasingly mad" and that efforts to convince state legislatures to overturn results in key swing states could lead to unprecedented riots. He wrote of Fox News opinion hosts Sean Hannity and Laura Ingraham, who propagated election falsehoods, "Maybe Sean and Laura went too far. All very well for Sean to tell you he was in despair about Trump, but what did he tell his viewers?"

Hannity stood by his coverage of election misinformation in his Aug. 31, 2022, deposition, saying, "We produce news and information that is truthful that most other newscasts wouldn't put out there." However, although he questioned the legitimacy of the election on air, he privately decried the news division for debunking such claims. "'News' destroyed us," he texted colleague Steve Doocy. "You don't piss off the base." Similarly, Ingraham called several Fox News reporters "vicious liberals" and texted Hannity and fellow primetime host Tucker Carlson about her anger with the network. "We are officially working for an organization that hates us," she wrote.

Carlson, for his part, directed much of his ire at the former president, privately texting members of his staff that he "truly [couldn't] wait" until he could stop covering Trump, adding, "I hate him passionately." Carlson also said of Trump's administration in a text, "We're all pretending we've got a lot to show for it, because admitting what a disaster it's been is too tough to digest. But come on. There really isn't an upside to Trump."

Still, he fretted about ratings if the network were to challenge Trump. When Fox News reporter Jacqui Heinrich accurately fact-checked a Trump tweet about Dominion mentioning Hannity's show, Carlson texted Hannity in the group chat with Ingraham, "Please get her fired. Seriously. . . . It's measurably hurting the company. The stock price is down. Not a joke." Although Carlson occasionally pushed back against unfounded fraud claims on air, he more often amplified them by claiming he was just raising questions about them. He privately came across as more certain, writing to his producer about a Trump-allied lawyer, "Sidney Powell is a liar." He was the only Fox opinion star to directly challenge Powell on air, according to a Feb. 20, 2023, NPR report.

Powell was a primary purveyor of conspiracy theories about how Dominion helped to rig the election for Biden. She appeared at least a dozen times on Fox programs, according to the NPR report. On Nov. 7, 2020, Fox News host Maria Bartiromo invited Powell onto her show after Powell emailed her a memo outlining alleged fraud by Dominion. Bartiromo replied at the time that she endorsed the memo, but when later deposed, she agreed within a Dominion attorney that the email was "nonsense." Ingraham wrote to Carlson and Hannity one week after Powell's appearance that she "is a bit nuts." Hannity, who interviewed Powell on his show without challenging her claims, later said in a deposition, "[T]hat whole narrative that Sidney was pushing, I did not believe it for one second."

Dominion's lawsuit focused heavily on Fox Corporation's role in the spread of election misinformation, including that of Lachlan Murdoch, Rupert's son. Following the election, Lachlan Murdoch maintained close contact with Fox News executives to establish a role in its coverage. He testified in a deposition that he gave "specific direction on both the tone and narrative of Fox's news coverage." This appeared to be corroborated by an email to Fox News CEO Suzanne Scott about a Trump rally, in which he wrote, "So far some of the side comments are slightly anti, and they shouldn't be. The narrative should be this is a huge celebration of the president." Dominion claims that the Murdochs decided in a post-election meeting to allow Fox hosts to air election conspiracies that they knew were untrue.

The case invoked the actual malice

standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which requires public figures to prove that defendants knowingly made false statements or made statements with reckless disregard for their truth or falsity. Judge Davis in January 2023 found Dominion to be a "limited" public figure, thus requiring it to prove actual malice. However, even though the parties reserved the right to argue whether New York law applies due to the state's close relationship to their claims, Davis declined to approve the heightened standard in New York's anti-SLAPP (Strategic Litigation Against Public Participation) law. This caused unease among First Amendment scholars, as Supreme Court Justices Clarence Thomas and Neil Gorsuch have signaled their willingness to revisit the actual malice standard in light of a changed media landscape. Kirtley told *The Christian Science Monitor* in a March 2, 2023, report, "I wish this case would settle. I'd rather it never had an opportunity to go to the Supreme Court." She expounded on this view in an April 18, 2023, essay in *Smerconish* before the settlement was announced, available online at: <https://www.smerconish.com/exclusive-content/dominion-v-fox-news-a-referendum-on-the-future-of-journalism/>

Judge Davis ruled on some of the legal issues in a March 31, 2023, opinion. First, the court granted summary judgment in favor of Dominion on the element of falsity, meaning that in proving defamation at trial, Dominion no longer had an obligation to prove that Fox's statements were false. It only had to prove that Fox knew they were false or acted in reckless disregard of whether they were false. In making his decision, Davis cited a series of evidence including forensic audits, state certifications, and statements from officials. "The evidence developed in this civil proceeding demonstrates that is CRYSTAL clear that none of the Statements relating to Dominion about the 2020 election are true," he wrote.

Davis also granted summary judgment in favor of Dominion on the elements that the alleged defamation was "of and concerning" Dominion and that Fox News Network was responsible for publishing the statements. However, on the issue of actual malice, he did not grant summary judgment. "Dominion grouped the Statements into four types, proffered evidence explaining

who it believes is responsible for the publication of each broadcast, and supported its claim that those individuals acted with actual malice with ample evidence,” he wrote. “[Fox News Network] and [Fox Corporation] have offered evidence supporting their claims, contending that implicated individuals did not reach the level of involvement necessary to constitute responsibility for the publication and that the individuals did not act with actual malice.” Therefore, he found that there were “genuine issues of material fact” to be determined by a jury.

Davis then found that the statements were defamatory *per se* under New York law because they charged Dominion “with fraud, deception, or other misconduct in its business.” Thus, Dominion had no obligation at trial to prove that the statements were defamatory. This also allowed him to rule that Dominion was at the very least entitled to nominal damages, which are awarded when a legal right has been violated but there is no resulting loss or harm.

Davis closed by shutting down Fox’s claims to defenses including the privilege for opinion. He wrote that “it is reasonably conceivable that viewers of the [Fox News Network] show segments and tweets of FNN hosts would not view the Statements as merely opinions of the hosts, but either as actual assertions of fact, or implications that the hosts knew something that the viewers do not . . .”

Fox said in court filings that the opinions or skepticism of some employees does not indicate a network-wide policy of misinformation. Fox itself does not even agree as to the distinction between journalism and opinion on its network. According to a March 20 report in *The Washington Post*, although Hannity said on his show that he is not a journalist, Lachlan Murdoch later said that Hannity and his fellow opinion hosts fit the definition. This could have proved crucial in determining liability, Kirtley said in the report. “Recklessness for a journalist might be a different standard than recklessness for a pundit,” she said.

Fox also might have argued that inviting guests does not constitute approval of their opinions, but rather just an open mind. Kirtley told *The Christian Science Monitor* that this argument could be undermined by Fox continuing to broadcast falsehoods despite Dominion’s claims that it sent

3,600 emails to the network to correct the record. “If this had happened once, we never would have had this lawsuit,” Kirtley said. “It’s the fact that it went on repeatedly” and that Fox hosts “knew what these people were going to say.”

Kirtley also expressed concerns to NPR in a March 6, 2023, report about how a Dominion victory at trial could have led to more such cases and have an adverse effect on the news media at large. “No matter how much I might personally deplore what Fox is alleged to have done, I worry a lot more about the longer-term ramifications,” she said. A verdict against Fox would have led to “a scramble by other news organizations to distance themselves from Fox’s techniques and Fox’s editorial decisions. But the problem is that by lifting the veil on the editorial decision-making process, we are now going to see all news organizations called into question going forward.”

Ultimately, pretrial evidence proved extremely negative for Fox, and it probably expected that it would only get worse at trial, Kirtley told Bloomberg TV on April 18. “I hope they take away from it. . . the very strong public reaction to what pretrial discovery showed about their . . . sort of cavalier attitude about truth and falsity, and their ready admission, at least internally, that some of the people that they were hosting were not telling the truth and that they knew they weren’t telling the truth. . . . They seemed to be motivated to such a great extent by ratings and revenues,” she said. “Now, there’s nothing wrong with being a for-profit company and thinking about that in the course of your decision making. . . . But journalists cannot jettison their standards simply to make a buck. . . . [T]hat’s something that Fox, and frankly everybody who’s a for-profit media organization, has to think about.”

Meanwhile, Fox continues to face an even more financially dangerous \$2.7 billion lawsuit from another voting systems company, Smartmatic. *Smartmatic USA Corp. v. Fox Corporation*, 2022 WL 685407 (N.Y. Sup. 2022). On March 8, 2023, Fox’s motion to dismiss the case was denied. (For more information on the lawsuit, see *New York Judge Rules that Much of Smartmatic Defamation Case Against Fox News Can Continue* in “Courts Continue to Grapple with Defamation Cases Involving Sarah Palin, Former President Trump, and Election Misinformation” in

the Winter/Spring 2022 issue of the *Silha Bulletin*.)

On April 8, 2023, counsel for the plaintiff, for Fox and for former host Lou Dobbs filed a letter with Federal District Judge Louis L. Stanton stating that they had agreed to settle a defamation case brought by Venezuelan businessman Majed Khalil. *Khalil v. Fox Corp. et al.*, No. 1:21-cv-10248 (S.D.N.Y. Dec. 2, 2021). According to the initial complaint, Dobbs suggested on air that Khalil was “COO of the election project” and that he “executed an electoral 9-11,” referring to a conspiracy theory that Venezuelan officials committed election fraud with Dominion and Smartmatic.

North Carolina A.G. Beats Back “Likely Unconstitutional” Criminal Libel Law

North Carolina Attorney General Josh Stein secured a win when a federal appeals court ruled that a 90-year-old criminal state libel law is “likely unconstitutional.” *Grimmett v. Freeman*, 59 F.4th 689 (4th Cir. 2023).

The case stemmed from North Carolina’s 2020 election for attorney general, when Stein, a Democrat, ran against Republican Jim O’Neill. During the campaign, Stein’s campaign paid for the production of an ad in which Juliette Grimmett, one of the plaintiffs, said, “[W]hen I learned that Jim O’Neill left 1,500 rape kits on a shelf leaving rapists on the streets, I had to speak out.” O’Neill lodged a complaint to the State Board of Elections (the Board) alleging a violation of state law that makes it a Class 2 misdemeanor “for any person to publish or cause to be circulated derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election.”

The Board investigated the claim and recommended that no charges be filed, but a local district attorney nonetheless requested that the investigation continue and later notified Stein’s campaign of plans to present charges to a state grand jury. The next day, Stein’s campaign filed suit in federal district court seeking a ruling that the law is unconstitutional. The court denied the campaign’s motion for a preliminary injunction, which would have prevented the district

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attorney from using the law to prosecute anyone over the commercial pending a final ruling from the court, writing that “plaintiffs are unlikely to succeed on the merits of their constitutional claim.” Stein’s campaign appealed.

A three-judge panel for the United States Court of Appeals for the Fourth Circuit held instead that the law is probably unconstitutional for two reasons. It first found that the statute “appears to criminalize at least some truthful statements.” Judge Toby J. Heytens wrote in the opinion that the North Carolina Supreme Court had found the word “derogatory” to include truthful statements in a similar statute enacted at the same time. Additionally, the court found “textbook content discrimination” in limiting the scope of the statute to protect political candidates. “Under this statute, speakers may lie with impunity about businesspeople, celebrities, purely private citizens, or even government officials so long as the victim is not currently a ‘candidate in any primary or election,’” Heytens wrote.

The court found not only that the plaintiffs had shown they were likely to succeed, but that “it is difficult to imagine them losing.” The ruling sets aside the district court’s decision and leaves in place a temporary injunction granted by the appeals court in August 2022. This prevents grand jury proceedings from moving forward while the case returns to the district court. Stein’s attorney, Press Millen, said Stein was grateful that the Fourth Circuit agreed that “North Carolina’s political libel statute violates core First Amendment principles,” per a February 13 Associated Press report.

One day after the ruling, the district attorney announced that her office would no longer pursue criminal charges, as the injunction prevents doing so within the two-year statute of limitations for misdemeanor offenses in North Carolina. Back in district court, Stein and the other plaintiffs filed a motion for summary judgment on March 2, which would close the case in favor of the plaintiffs without trial. They argued that the Fourth Circuit had dismantled the statute under which they would have been prosecuted and left the district court with nothing left to decide. “In light of the Fourth Circuit ruling, there is really nothing left to be done in the district court apart from entering a judgment in favor of the

plaintiffs,” Millen told *Law360* for a March 2 report.

Stein has announced that he is running for governor of North Carolina in 2024.

Nunes’s Defamation Lawsuit Against CNN, Tapper Dismissed on Jurisdictional Grounds

On March 1, 2023, a Florida federal judge dismissed a lawsuit brought by former U.S. Rep. Devin Nunes (R-Calif.) against CNN and anchor Jake Tapper over coverage of Nunes’s response to an attack on Rep. Nancy Pelosi’s (D-Calif.) husband. *Nunes v. Cable News Network, Inc.*, No. 8:22-cv-02659 (M.D. Fla. Nov. 19, 2022).

U.S. District Court Judge Susan C. Bucklew of the Middle District of Florida held that it would violate due process for the court to assert jurisdiction over Tapper, writing that he and CNN “did nothing relevant to this action in Florida.”

On October 28, an assailant with a hammer attacked Paul Pelosi at his home, causing a skull fracture and injuries to his right arm and hands requiring surgery. The incident spawned conspiracy theories of a sexual relationship between Pelosi and his alleged attacker, David DePape. In an October 31 monologue, Tapper highlighted two posts involving Nunes. One was directly posted by Nunes and showed a Halloween image of a monster with a blunt object protruding from its arm along with the caption, “At least this guy has his clothes on.” The other, reposted by Nunes, altered the movie poster from the gay romantic comedy “Bros” to include a hammer along with the caption, “When Nancy’s out of town.” According to a federal criminal complaint, the assailant was looking for the former House Speaker. “It’s hard to fathom the kind of mind that heard of a tragedy, like what happened to 82-year-old Paul Pelosi, and decides to traffic in this filth. What is wrong with these people?” Tapper asked on his broadcast.

The lawsuit stated, “The clear defamatory gist of the statements is that plaintiff refused to condemn the violent attack on Paul Pelosi, and, instead, justified the violence and mocked or made fun of the attack, and lied and suggested that the encounter between Mr. Pelosi and Mr. DePape was sexual in nature. The statements imply, infer and insinuate that plaintiff has a depraved mind and that he acted immorally,

fraudulently, unprofessionally, spread lies about Paul Pelosi, and disparaged and defamed Paul Pelosi.” Nunes, who has made a habit of suing news networks and reporters, sought a jury trial, compensatory and punitive damages, and interest starting from the date of Tapper’s comments pursuant to Florida law.

Instead, CNN and Tapper’s motions to dismiss the case were granted without even a hearing. Florida has a long-arm statute allowing nonresidents to be sued in the state if the alleged conduct stems from the defendant’s activities in the state or if the defendant has ongoing contacts there. Bucklew found that neither applied to the case. Tapper is a Washington, D.C. resident and CNN’s Chief Washington Correspondent. He reported the segment from Washington with production from employees in either Washington or New York City. The segment covered reactions from “prominent individuals” to the attack on Pelosi, which took place in California.

“Nothing Tapper discussed in the Segment pertained specifically to Florida, and Tapper never traveled to Florida in relation to the Segment,” Bucklew wrote. “Nunes merely alleges he suffered harm in Florida because he works there.” Nunes is a California resident who resigned from the House of Representatives effective Jan. 1, 2022, to become CEO of the Trump Media and Technology Group, which is based in Florida. Nunes argued that he “suffered the brunt of the harm to his reputation” in Florida, but Bucklew found this to be irrelevant, as the statute pertains to defendants’ ties to Florida, not plaintiffs’. She pointed to other court cases in which a nationwide broadcast available for viewing in a certain state was not enough to establish jurisdiction.

(For more information on defamation lawsuits brought by Nunes, see *Devin Nunes Defamation Suit Reinstated by Eighth Circuit* in “Courts Consider Defamation Lawsuits Involving Right-Wing Radio Host, Politician, and Election Technology Companies” in the Fall 2021 issue of the *Silha Bulletin*.)

DeSantis, Florida House Seek to Undermine Press Protections

Republican Florida Gov. Ron DeSantis continued his crusade against the news media by holding a roundtable event on defamation law on Feb. 7, 2023, in which he promoted a new bill that would limit press protections in the state.

DeSantis used the forum to call upon the state legislature to pass legislation weakening the protections provided to media organizations against defamation lawsuits. He framed it as a strengthening of protections against average people: “When the media attacks me, I have a platform to fight back. When they attack everyday citizens, these individuals don’t have the adequate recourses to fight back. In Florida, we want to stand up for the little guy against these massive media conglomerates.”

However, much of the panel discussion concerned *New York Times Co. v. Sullivan*, the landmark 1964 case establishing the actual malice standard for defamation. 376 U.S. 254 (1964). *Sullivan*, which only concerns public officials and not the average member of the public, requires showing that the defendants either knowingly made false statements or acted with reckless disregard for the truth. “How did it get to be this doctrine that has had really profound effects on society?” DeSantis asked.

Sullivan has come under increased scrutiny as Supreme Court Justices Clarence Thomas and Neil Gorsuch have expressed interest in revisiting the standard. Additionally, Justice Elena Kagan wrote in a 1993 law review article that the holding “allows grievous reputational injury to occur without monetary compensation or any other effective remedy.” However, the Court has repeatedly declined to revisit the case to date. (For more information on the *Sullivan* standard, see *Supreme Court Again Declines to Review “Actual Malice” Standard for Defamation Suits* in “State, Federal Courts Grapple with High-Profile Defamation Cases” in the Summer 2022 issue of the *Silha Bulletin*; *Justices Thomas and Gorsuch Call for Reevaluation of New York Times v. Sullivan Standard* in “Special Report: U.S. Supreme Court Rulings and Opinions Raise Numerous Freedom of Speech and Press, Privacy Issues and Questions” in the Summer 2021 issue, and “Justice Thomas Calls for Supreme Court to Reconsider the Actual Malice Standard” in the Winter/Spring 2019 issue.)

A bill introduced by Republican State Rep. Alex Andrade (R-Pensacola) and endorsed by DeSantis appears to be aimed at testing the courts once again. H.B. 991 (Fla. 2023). Possibly its most striking language explicitly rejects the *Sullivan* standard: “A public figure

does not need to show actual malice to prevail . . . when the allegation does not relate to the reason for his or her public status.” Under *Sullivan* and its progeny, the relevant consideration is simply whether one is a public official or figure, and not the relationship between this status and the allegation. Additionally, the bill states that judges and/or juries should infer actual malice when allegations are “inherently implausible” or “[t]here are obvious reasons to doubt [their] veracity.” The bill is available online at: <https://z.umn.edu/FloridaBillHB991>.

The bill also limits protections specifically geared toward journalists. It would remove reporters’ right to refuse to identify anonymous sources for the purpose of defamation cases, as well as stating that when reporters refuse to identify an anonymous source, “plaintiffs need only prove that the defendant acted negligently.” The bill also states, “An allegation that the plaintiff has discriminated against another person or group because of their race, sex, sexual orientation, or gender identity constitutes defamation per se,” meaning that falsehood alone makes such a statement defamatory, not the intent of the speaker.

“The bill is an aggressive and blatantly unconstitutional attempt to rewrite defamation law in a manner that protects the powerful from criticism by journalists and the public,” Joe Cohn, the legislative and policy director at the Foundation for Individual Rights and Expression, said in a February 22 *Reason* report. “And it really champions the rights of the powerful and public figures in particular as compared to the rights of ordinary people to raise questions and lodge criticisms.”

Florida’s House Civil Justice Subcommittee approved the bill on March 15 despite claims that it is unconstitutional. According to a March 15 CBS Miami report, First Amendment lawyer Carol LoCicero said it “runs afoul of United States Supreme Court case law,” adding, “We want you to understand that the House bill hurts every speaker. It doesn’t just hurt . . . what’s been referred to as the ‘legacy media.’ It hurts people from all points of view. It hurts individuals. Frankly, it hurts politicians as they’re campaigning for office and making statements about their opponents.”

Andrade responded with a defense of his bill, saying, “What this bill will

provide is opportunities for people who’ve been rightfully harmed by a false statement that hurt their reputation to seek justice and not be concerned and not have to spend egregiously enormous amounts of money to seek justice to provide that they were defamed with actual malice somehow because they’re arbitrarily listed as public figures.”

DeSantis’s event espoused many of the ideas present in H.B. 991. His panelists included Libby Locke, a defamation lawyer currently representing conservative activist organization Project Veritas in its lawsuit against CNN; Nick Sandmann, a former Kentucky high school student whose confrontation with a Native American elder while he wore a MAGA hat at the Lincoln Memorial went viral; and Carson Holloway, a fellow at the conservative think tank Claremont Institute’s Center for the American Way of Life. (For more information on Sandmann, see *Covington Catholic High School Student Sues Washington Post and CNN for Defamation* in “Federal Judge Dismisses Defamation Lawsuit Against *BuzzFeed* News; News Organizations Face Significant Defamation Lawsuits and Settlements” in the Winter/Spring 2019 issue of the *Silha Bulletin* and *Federal Judge Dismisses \$250 Million Lawsuit Against The Washington Post* in “Minnesota Supreme Court, Sixth Circuit, and Eastern District of Kentucky Rule in Notable Defamation Cases” in the Summer 2019 issue.)

“The thumb seems to be on the scale for the media in these lawsuits and that’s because of what the Supreme Court did in *New York Times v. Sullivan* back in 1964,” Holloway said. “The actual malice standard is an invention of the Supreme Court inconsistent with the way the Founders thought about libel and freedom of speech.”

Despite high-profile criticism of the *Sullivan* standard, cautious optimism remains among experts about its future. Emily Hockett of the Reporters Committee for Freedom of the Press wrote on March 6, 2023, “Reporters Committee reviewed all of the opinions by Trump-appointed judges that cited *Sullivan* and did not see an appetite for reconsidering the standard. . . . We are confident that the core holding of *Sullivan*—one that ensures accountability journalism can flourish—is secure . . .”

Wall Street Journal's Evan Gershkovich Charged with Espionage by Russian Authorities

On March 30, 2023, Agence France-Press (AFP) reported that American journalist Evan Gershkovich had been arrested on March 29 by Russian Security services while on a reporting trip in Yekaterinburg, Russia, 800 miles east of Moscow. Gershkovich, who was assigned to the Moscow bureau of *The Wall Street Journal*, was in Russia on a journalist visa and carried press accreditation issued by the Russian Foreign Ministry, according to *The Wall Street Journal*.

ENDANGERED JOURNALISTS

According to *The Washington Post*, a news outlet in Yekaterinburg, *Vecherniye Vedomosti*, reported that an unidentified eyewitness saw “plainclothes security agents remove a person from a Yekaterinburg restaurant on Wednesday and place [Gershkovich] in a minivan, which drove away.” The eyewitness further stated that a sweater had been pulled over the man’s face as he was led to the vehicle. *The Washington Post* reported that Russia’s Federal Security Bureau (FSB) issued a statement reading: “The [FSB] stopped the illegal activities of the correspondent of the Moscow

bureau of the American newspaper *The Wall Street Journal*, Evan Gershkovich, born in 1991, who is suspected of spying for the American government. It was established that Gershkovich, acting at the request of the American side, collected information constituting a state secret about the activities of the Russian military-industrial complex. The foreign national was detained in Yekaterinburg while attempting to obtain classified information.” Russia’s state-owned news agency TASS reported that FSB investigators had opened a criminal case against Gershkovich under Article 276 of the Russian Criminal Code, which deals with charges of espionage.

William E. Butler, Distinguished Professor of Law at Penn State, wrote in an April 19, 2023 article for *The Conversation* that the definition of espionage in Article 276 was broadened in a July 14, 2022 amendment. According to Butler, “Under the revised version of Article 276, espionage now constitutes ‘the transfer, collecting, stealing, or keeping for the purpose of transfer to a foreign State, international or foreign organization, or of their representative, of information comprising a state secret. If such an act was committed

by a foreign citizen or a stateless person — that is, a person having no citizenship — then it constitutes espionage, the code provides.” Butler noted that Gershkovich is the first journalist “believed” to be charged under the amended definition. Butler’s article is available at: <https://z.umn.edu/TheConversationWilliamEButler>. ConsultantPlus, an organization offering reference materials dealing with the Russian legal system, posted the text of Article 276, available at: <https://z.umn.edu/Article276Wording>.

On March 30, Gershkovich was seen being escorted into a vehicle after appearing in a Moscow court. *The Washington Post* reported that Russian officials did not offer any evidence for the accusation, and that Gershkovich’s lawyer, Daniil Berman, was barred from the hearing. *The Washington Post* reported that TASS stated that Gershkovich denied the charges against him, but those charges were not disclosed.

According to a March 30 *Washington Post* article, senior Russian government officials “endorsed” the allegations against the reporter. Kremlin spokesman Dmitry Peskov was quoted as saying,

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New York Judge Dismisses Trump’s Lawsuit Against *The New York Times*

On May 3, 2023, a New York trial court judge dismissed Donald Trump’s claims against *The New York Times* for their reporting on his tax practices and ordered the former president to pay the publication’s attorneys’ fees for violating the state’s anti-SLAPP law. *Trump v. Trump*, No. 453299/2021 (Sup. Ct. N.Y. Cnty. May 3, 2023).

Trump had sued his niece, Mary L. Trump, *The New York Times*, three reporters, and various unnamed parties related to the publication of a 2018 article, “Trump Engaged in Suspect Tax Schemes as He Reaped Riches from His Father.” Trump claimed that by soliciting information from his niece while she was bound by a settlement agreement with confidentiality provisions, the reporters and *The New York Times* were liable for tortious interference with contract,

aiding and abetting tortious interference with contract, unjust enrichment, and/or negligent supervision. Trump demanded \$100 million in damages.

Judge Robert R. Reed of the New York Supreme Court in Manhattan found that the claims failed as a matter of constitutional law. “Courts have long recognized that reporters are entitled to engage in legal and ordinary newsgathering activities without fear of tort liability — as these actions are at the very core of protected First Amendment activity.” The full opinion is available at: <https://s3.documentcloud.org/documents/23796793/trump-v-trump-decision.pdf>.

Reed also ordered Trump to pay the parties’ costs and attorneys’ fees as required by New York’s law against SLAPPs (strategic lawsuits against public participation). The law, enacted in 1992 in response to a rise in lawsuits intended to intimidate or silence, was initially limited to cases brought by

plaintiffs seeking entitlements from the government. It was expanded in 2020 to include claims related to any “lawful conduct in furtherance of the exercise of the constitutional right of free speech” in connection with the public interest. “The revised anti-SLAPP law was specifically designed to apply to lawsuits like this. In fact, among other reasons, plaintiff’s history of litigation — that some observers have described as abusive and frivolous — inspired the expansion of the law.” Reed rejected Trump’s argument that the law is limited to defamation claims.

In response to the ruling, Trump lawyer Alina Habba said in a statement, “We will weigh our client’s options and continue to vigorously fight on his behalf,” according to a report from *The Guardian* on May 3.

— LUKE SRODULSKI
SILHA CENTER RESEARCH ASSISTANT

“As far as we know, [Gershkovich] was caught red-handed. I don’t know the details.”

The Wall Street Journal has set up a page devoted to coverage concerning Gershkovich’s arrest and the proceedings against him at: <https://www.wsj.com/topics/person/evan-gershkovich>. On that page, *The Wall Street Journal* responded to the charges against Gershkovich saying, “The Wall Street Journal vehemently denies the allegations from the FSB and seeks the immediate release of our trusted and dedicated reporter, Evan Gershkovich.”

The Wall Street Journal further noted in an April 4 article that “Russia’s state-run media had called [Gershkovich’s] arrest confirmation that the U.S. is engaged in the war in Ukraine and is sending undercover agents into Russia’s hinterlands to gather information about its armaments production.” In a March 30 story, *The Wall Street Journal* further stated that “[S]ince joining the Journal [Gershkovich] has covered a variety of Russia-related topics, including the recent visit by Chinese leader Xi Jinping to Moscow, close associates of Mr. Putin and tensions between Kremlin officials and Yevgeny Prigozhin, the founder of the paramilitary group Wagner.”

The Wagner Group, according to a Jan. 23, 2023 BBC report, is a Russian paramilitary organization, consisting of 50,000 mercenaries, many of whom have been drawn from prisons. “It is openly recruiting in Russian cities, on billboards, and is being named in Russian media as a patriotic organisation,” Samuel Ramani, of the Royal United Services Institute think tank, told the BBC. The United States has designated the Wagner Group as a “transnational criminal organization” for its operations in Syria, Libya and the Central African Republic, among others. “[The Wagner Group is] committing atrocities and human rights abuses in Ukraine and elsewhere,” United States national security spokesman John Kirby told reporters on January 27. (See *March 18 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share “Fake News” Regarding Military Volunteers and Mercenaries* in “Russian War in Ukraine Continues to Challenge Journalists” on page 32 of this issue of the *Silha Bulletin*.)

The New York Times reported on March 30 that White House press secretary Karine Jean-Pierre issued a statement saying that the Biden administration had contacted the

Russian government and was “deeply concerned,” and that the targeting of American citizens by Russian authorities was “unacceptable.” She continued, “We condemn the detention of Mr. Gershkovich in the strongest terms. We also condemn the Russian government’s continued targeting and repression of journalists and freedom of the press.” She added a warning to any Americans considering travel to Russia and advised Americans currently in Russia to leave “immediately.”

On March 31, a group of 38 news editors sent a letter to Anatoly Antonov, the Russian Ambassador to the United States. The letter was coordinated by the Committee to Protect Journalists (CPJ), and was signed by *The Wall Street*

“Let this statement send a clear message: Journalism is not a crime.”

— Linda Thomas-Greenfield
U.S. Ambassador to the United Nations,
regarding statement for Gershkovich's release

Journal, *The New York Times*, the BBC, *The Washington Post*, and the CPJ. The letter included a denial by *The Wall Street Journal* that Gershkovich had been involved in any wrongdoing. The letter further called for Gershkovich’s immediate release, and immediate access to a lawyer provided by *The Wall Street Journal*, to confirm Gershkovich’s well-being and to allow him to communicate with his family. The letter is available at: <https://cpj.org/2023/03/cpj-media-organizations-and-partners-call-for-release-of-us-journalist-evan-gershkovich/>.

On April 3, *The New York Times* reported that Alexei Melnikov, the secretary of Moscow’s public oversight commission, which “monitors human rights in pretrial detention centers,” said that he had been able to visit Gershkovich in Moscow’s Lefortovo Prison. Melnikov stated that Gershkovich “seemed cheerful and made jokes during their conversation,” and was allowed to read books.

On April 10, the U.S. State Department declared Gershkovich as wrongfully detained, shifting the case to its Special Presidential Office of the Wrongfully Detained Envoy for Hostage Affairs. This expanded the department’s authority to exert pressure on the host country, to monitor intelligence, build diplomatic

coalitions, exert media pressure and fight for regular consular access, according to *The Wall Street Journal*. The State Department’s statement is available at: <https://www.state.gov/russias-wrongful-detention-of-journalist-evan-gershkovich/>.

On April 13, *The Wall Street Journal* reported that Roger Carstens, the special presidential envoy for hostage affairs, appeared on morning television news programs on U.S.-based broadcast networks ABC, CBS, NBC and others, demanding that Russian officials allow American Embassy officials to visit Gershkovich. “The Russians owe us a consular visit and we have yet to have consular access to Mr. Gershkovich, and the Russians owe us that by international

law and by consular convention,” Carstens said during an interview with CNN.

On April 17, TASS reported that Lynne Tracy, U.S. Ambassador to Russia, said that

she had visited Gershkovich at Lefortovo. Tracy later posted on Twitter: “I visited WSJ’s Evan Gershkovich today at Lefortovo Prison — the first time we’ve been permitted access to him since his wrongful detention more than two weeks ago. He is in good health and remains strong. We reiterate our call for his immediate release.”

On April 17, *The Wall Street Journal* reported that more than 40 countries had signed a statement criticizing Gershkovich’s detention and protesting Russia’s intimidation of the media. The statement, which the United States circulated at the United Nations (U.N.), calls on Moscow to “release those they hold on political grounds, and to end the draconian crackdown on freedom of expression, including against members of the media.” Linda Thomas-Greenfield, U.S. Ambassador to the United Nations, said the countries that signed the statement are “calling on Russia to immediately release Evan Gershkovich.” She continued, “Let this statement send a clear message: Journalism is not a crime,” she told *The Wall Street Journal*. The statement is available at: <https://usun.usmission.gov/joint-statement-delivered-by-ambassador-linda-thomas-greenfield-at-the-un-security-council->

Gershkovich, continued from page 11

stakeout-on-russias-crackdown-on-media-freedom/.

On April 18, *The Wall Street Journal* reported that Gershkovich's detention has been upheld. CNN reported that the Moscow City Court issued a statement which read: "On April 18, 2023, the Moscow City Court upheld the decision of the Lefortovsky District Court of Moscow dated March 30, 2023 against Evan Gershkovich, who is suspected of committing a crime under Art. 276 of the Criminal Code of the Russian Federation." CNN's story is available at: <https://www.cnn.com/2023/04/18/europe/evan-gershkovich-appeals-detention-russia-intl/index.html>.

Although the hearing was closed, Ambassador Tracy was allowed to attend, together with one of Gershkovich's attorneys from ZKS law firm, Maria Korchagina. The attorneys had been retained by Dow Jones & Company, the parent company of *The Wall Street Journal*. Information about the ZKS law firm is available at: https://www.zks-law.ru/storage/zks_structure/header/74d4ca05-9c16-4346-888d-894a96c1a626/dd909395-5709-48a5-bb0f-07302073484b.pdf/.

Korchagina told the court, "Our client does not admit guilt and is ready to prove it."

At the hearing, *The Wall Street Journal* reported that his attorneys requested that Gershkovich "be transferred to house arrest, agree to constraints on his movements, or granted bail." According to *The Wall Street Journal*, Dow Jones was willing to guarantee bail of about \$600,000. However, the Moscow court refused to grant the appeal. Tatyana Nozhkina, another attorney from ZKS representing Gershkovich, said the firm is planning to make another appeal of Gershkovich's pretrial detention.

On April 26, Axios reported that the publishers and editors at *The Wall Street Journal*, *The Washington Post* and *The New York Times* planned to run a joint letter as a full-page, color advertisement in all three of their papers that day, urging support from the Biden Administration in fighting for Gershkovich's release.

The ad will run for free in the national editions of all three papers, Axios reported, and would be signed by *Wall Street Journal* editor in chief Emma Tucker as well as publisher and Dow Jones CEO Almar Latour; *Washington*

Post executive editor Sally Buzbee, as well as publisher and CEO Frederick J. Ryan, Jr.; *New York Times* executive editor Joseph Kahn as well as publisher and chairman A.G. Sulzberger. A copy of the ad is available at: <https://www.axios.com/2023/04/27/wsj-wapo-nyt-leaders-joint-ad-release-gershkovich>.

Gershkovich's Case in the Russian Court System

An April 4 article in *The Wall Street Journal* described the legal process that Gershkovich will likely face, stating that "As in the U.S. and other Western legal systems, Mr. Gershkovich is guaranteed

"What [Gershkovich] was doing was incredibly important. . . . It helps no one if Russia remains a black box."

— Polina Ivanova
Financial Times Correspondent

a defense lawyer in Russia. But in practice, there is no promise of when his lawyer will be allowed to talk to him. When they do talk, their conversations will be closely monitored." Russian law also "guarantees defendants the right to a jury trial open to public scrutiny." Espionage cases are typically the exception to that rule, however, meaning that Gershkovich will probably be tried in secret in front of a judge. Decisions by judges in espionage cases are "subject to influence from the executive branch, the armed forces, and other security forces, particularly in high-profile or politically sensitive cases," according to a recent State Department report *The Wall Street Journal* cited regarding Russia's human rights practices, noting that "fewer than 1% of defendants win an acquittal in Russian criminal trials."

"On paper, it's a court system with all sorts of pretense to modernity, but the reality is less encouraging," Tom Firestone, a former resident legal adviser to the U.S. Embassy in Moscow told *The Wall Street Journal*. "It's basically an instrument of state control." *The Washington Post* noted that if convicted, Gershkovich will likely receive a sentence of 20 years in prison.

Life For Prisoners in Lefortovo Prison

According to TASS, Moscow's Lefortovsky District Court approved Gershkovich's pretrial arrest until May

29, meaning that he would be held in Lefortovo Prison until that date. *The Washington Post* called Lefortovo one of Russia's most secure prisons. It is used to hold those accused of serious crimes, such as treason, terrorism and espionage. *The Wall Street Journal* reported that "Lefortovo has since the late Czarist era held thousands of accused spies, dissidents, writers, rebels, and all other manner of political prisoners and hardened criminals. Soviet detainees in other prisons would recall their guards issuing a warning, 'If you keep on being stubborn, we'll send you to Lefortovo.'"

The New York Times reported on March 31 that living conditions there are "considered above average by Russian prison standards," and that "prisoners typically share a cell with only one person and hot water is

available." *The New York Times* further noted that Gershkovich will probably have access to a television set, but it will only provide access to the "main" Russian networks. Gershkovich may also have access to the prison library, and the opportunity to order books through a Russian bookstore online. He may also be able to receive packages and other mail, and could be able to receive e-mails through the prison service's website. Ivan Pavlov, a Russian lawyer who has defended clients in espionage and treason cases, told *The New York Times* that lawyers usually are given the chance to meet with their clients only once every few weeks, making isolation at Lefortovo "a real challenge."

Gershkovich's Background

According to *The Wall Street Journal*, Gershkovich's parents were Jewish immigrants to the United States, his father from Odessa and his mother from St. Petersburg. As an adult, Gershkovich traveled to Moscow and mastered Russian. One of his colleagues, Nataliya Vasilyeva, told *The Wall Street Journal* in a March 31 story, "He knew he was American but he also felt very much at home. He traveled around Russia, he felt he was a Muscovite."

The New York Times reported that Gershkovich began his career at that newspaper as a news assistant where he handled reader e-mails for the public editors Margaret Sullivan and Liz Spayd,

then worked at the newsroom's Reader Center from September 2016 until September 2017. He then took a job with *The Moscow Times* where he worked as a reporter. In 2020, Gershkovich worked for AFP, covering Russia and Ukraine before taking the job at *The Wall Street Journal*. In January 2022, Gershkovich was hired as the *Journal's* Moscow-based correspondent, his "dream job," unidentified friends told the *Times*.

Current State of Journalists in Russia

Many Western journalists had stopped operating in Russia after the start of Russia's war against Ukraine brought with it laws limiting what information could be disseminated.

But "in recent months," some Western journalists had returned, according to *The Wall Street Journal*, citing an unidentified CPJ report. Gulnoza Said, the CPJ's program coordinator for Europe and Central Asia, told *The Wall Street Journal*, "Some [journalists] returned because it was important for them to continue reporting from inside Russia." Despite the charges Russian officials had brought against Gershkovich, Peskov said that the Kremlin had no plans to shut down *The Wall Street Journal's* Moscow bureau. "Those that are carrying out normal journalistic activity, if they have valid accreditation, then of course they will continue to work," Peskov said in a March 31 *New York Times* story.

Nevertheless, Gershkovich's arrest may have changed the landscape in Russia for journalists. Said told *The New York Times*, "It's very clear that no foreign correspondents are going to be spared from this repression. The world is losing that window into Russia, and the Russian people are losing one of the very few platforms where they can be heard." She added, "Until [Gershkovich's arrest], there was a hope among foreign journalists working in Russia that . . . crackdowns on independent reporting would not extend to them. But with [Gershkovich's] very serious charges, it is clear that any foreign correspondent could be a victim." She continued, "The situation was frozen, and now it got worse. Everybody working in Russia knew it may happen, but everyone was hoping it would not."

Polina Ivanova, a *Financial Times* correspondent who covers Russia and Ukraine, told *The New York Times* that she initially met Gershkovich in Moscow

in 2017. She said they often discussed the risks involved in covering Russia, and that Gershkovich was committed to reporting about what was going on beyond Moscow. "[Gershkovich] always understands Russia with an extreme amount of insight and nuance and depth and that is based on the fact that he's lived and breathed this story for the past five years," Ivanova told the *Times*. "And that's what makes this all so painful because he really cares so much about what is happening in the country." She continued, "What he was doing was incredibly important. . . . It helps no one if Russia remains a black box." (For more information about Russia's measures to curb journalistic efforts, see: "Latvian Regulator Revokes the License of Russian Independent Broadcaster TV Rain" in the Fall 2022 issue of the *Silha Bulletin*; "Russian War Against Ukraine Results in Continued Challenges to Media" in the Summer 2022 issue; "War in Ukraine Raises Issues of Misinformation and Concerns Regarding Media Bias" in the Winter/Spring 2022 issue; "Numerous Journalists Endangered and Killed Covering the War in Ukraine" in the Winter/Spring 2022 issue, and "Russian War in Ukraine Results in Numerous Challenges to International Media" in the Winter/Spring 2022 issue.)

Gershkovich Could be a Potential Pawn in a Hostage Transfer

Yaroslav Shirshkov, who *The Washington Post* identified as "a local advocate and critic of the war in Ukraine" and who had met Gershkovich in Yekaterinburg, said that their conversations had revolved around local people's opinions on current events. "[Gershkovich] behaved as a professional journalist, a very highly professional journalist, and he observed all the rules, and he acted exclusively as a journalist," Shirshkov said. When asked if Gershkovich might have been arrested as a potential hostage to exchange, Shirshkov told *The Washington Post*, "I think that [Gershkovich was arrested] to kind of replenish their so-called exchange fund."

Tatiana Stanovaya, a senior fellow at the Carnegie Russia Eurasian Center, told *The New York Times* that with Gershkovich's reporting on the Russian military likely "attracted the attention of Russian security services . . . [and that] they probably saw an opportunity to gain a new negotiating chip" to use to negotiate release for Russians

held prisoners in the United States in exchange for Americans detained by Russian authorities. "I think that [Gershkovich's arrest] will attract a lot of attention politically in the United States so that the authorities will have to react." She further noted that Gershkovich's arrest "puts the Kremlin in an advantageous position."

However, TASS reported that any discussion of a prisoner exchange can only come after there is a ruling in Gershkovich's case. Russian Deputy Foreign Minister Sergey Ryabkov told TASS, "Anyone's exchanges can only be considered after a court verdict with concrete charges. As for a [potential] swap, we have a special channel for that, and the special services have been handling this and they will continue to do so."

Court proceedings regarding Gershkovich could be expedited if there may be a "real prospect" of a prisoner exchange, according to *The New York Times*. There has been speculation that any negotiations for a prisoner exchange could include not only Gershkovich, but also another imprisoned American, Paul Whelan, a former Marine who was also charged with espionage in 2018. Whelan is currently serving a 16-year sentence, begun in 2020.

According to a March 31, 2023, *New Yorker* article, the last time an American journalist was charged with espionage in Russia was in 1986 when *U.S. News & World Report* correspondent Nicholas Daniloff was arrested and held in Lefortovo. Two weeks later, Daniloff was released in exchange for Gennady Zakharov who had been caught in a Federal Bureau of Investigation (FBI) sting operation in New York. The *New Yorker* article speculated that the Russians are hoping to arrange a similar exchange with Gershkovich, perhaps involving Vadim Krasikov, an assassin working for the FSB who is currently being held in a German prison, or an undercover spy couple identified as "Maria and Ludwig" who are awaiting trial in Slovenia. However, Russian policy is not to trade anyone until they are convicted, the *New Yorker* concluded.

A list of Gershkovich's work is available at: <https://www.evangershkovich.com/writing>.

— ELAINE HARGROVE
SILHA CENTER STAFF

U.S. Journalists Face Threats, Violence at Home

In the first months of 2023, reporters in the United States faced attacks from several directions. In Florida, two reporters were shot — one fatally — while reporting on a homicide. In New York, U.S. Attorney General Merrick Garland unsealed an indictment for three men charged with a “murder for hire” plot to kill an Iranian-American journalist. In Ohio, a reporter was arrested for reporting live from a press conference, but the charges were later reversed.

ENDANGERED JOURNALISTS

Reporters Shot, One Killed in Pine Hills, Fla.

Spectrum News 13 journalists Dylan Lyons and Jesse Walden were shot while reporting on a homicide in Pine Hills, Fla. on Feb. 22, 2023, according to the *Orlando Sentinel*. Lyons was fatally wounded, and Walden was critically injured but has since been released from the hospital, according to WFTV9 reporting.

According to Spectrum News 13, Orange County, Fla. Sheriff John Mina identified the suspect as Keith Melvin Moses. Moses was charged with the murder of a 38-year-old woman on the morning of Feb. 22, 2023. Lyons and Walden were shot while reporting on the homicide in the afternoon of the same day. Later — on the same afternoon — Moses shot and killed a 9-year-old girl and shot her mother in a home near the incident, according to Spectrum News 13. Moses was charged with three counts of first-degree murder and two counts of attempted murder, according to Spectrum News 13 reporting on Feb. 28, 2023. Moses entered a not guilty plea on March 10, according to Orange County court records. The court has not yet set a date for trial, according to online court records.

Mina told *Newsweek* on Feb. 23, 2023 that it was “hard to determine” whether Moses intentionally targeted Lyons and Walden as members of the media, but press organizations widely shared messages condemning the violence.

“We are deeply saddened by the loss of our colleague and the other lives senselessly taken today,” Spectrum News parent company Charter Communications said in a statement shared to Twitter on Feb. 22, 2023. “Our thoughts are with our employee’s family, friends, and co-workers during this very difficult time.” Bruce Shapiro, executive director of the Dart

Center for Journalism and Trauma, told *The New York Times* on Feb. 23, 2023 that the death was part of a “new and alarming” trend of violence against local reporters in the U.S. “In the past, we’ve thought of physical danger as something that accompanies war or high-risk investigative reporters. This is different,” Shapiro said. “What we’re now seeing around the country is local newsrooms feeling and experiencing more danger.”

Society of Professional Journalists (SPJ) national president Claire Regan said the attack “underscores the dangers journalists face every minute of every day,” according to a statement posted to the SPJ website on Feb. 23, 2023. “Journalists covering war zones are embedded with troops to keep them safe. But journalists covering their own communities don’t have those protections. It is always a shock when journalists become victims while covering their own communities,” she said. “I hope Dylan’s loss and Jesse’s injuries strengthen appreciation for what we do to keep the public informed. We emphasize the importance of new organizations doing everything they can to keep their journalists in the field safe.” The full statement is available at: <https://www.spj.org/news.asp?ref=1923>.

Reporters Committee for the Freedom of the Press Executive Director Bruce D. Brown similarly reflected on violence against journalists in the U.S. in a statement posted to Facebook on Feb. 23, 2023. “We are devastated by the death of Spectrum News 13 reporter Dylan Lyons, who was fatally shot while reporting at the scene of a homicide investigation,” Brown said. “The Reporters Committee joins the journalism community in mourning his death and sends our deepest condolences to his family, friends, and colleagues, as well as to the loved ones of the other individuals who were killed in related shootings that day. . . . Every day, journalists across the country go out into the field to do the essential work of bringing information to their communities. We are sadly seeing journalism become an increasingly dangerous profession in the United States, and it should not be this way.”

In an article posted by the University of Miami School of Communication on Feb. 28, 2023, Professor Antonio Mora said the incident raised concerns about the safety of reporters. “I’m really concerned these days, especially at local news stations,

where you have people going out as multimedia journalists by themselves,” Mora said. “There are situations where they have no one else looking out for them.”

In a statement posted on the Committee to Protect Journalists (CPJ) website on Feb. 22, 2023, U.S. and Canada Program Coordinator Katherine Jacobsen decried the violence. “We are appalled by the killing of a Spectrum 13 journalist in Orange County, Florida, and we stand in solidarity with the newsroom,” Jacobsen said. “It is deeply disturbing that a journalist was killed while covering the gun violence that has become a sickening reality of living in the United States. Reporters must be able to cover the news without having to fear for their lives.” The full statement is available at: <https://cpj.org/2023/02/cpj-appalled-by-killing-of-journalist-reporting-on-florida-shootings/>.

According to the CPJ, Lyons was the second U.S. journalist killed in a six-month period, after the Sept. 22, 2022 death of *Las Vegas* (Nev.) *Review-Journal* investigative reporter Jeff German. (For more information about Jeff German’s death, see *Las Vegas Reporter Murdered; Police Arrest Government Official, Seek Review of Reporter’s Files* in “Two American Journalists Killed in Connection with Their Work; Western Journalists Covering Protests in China Detained,” in the Fall 2022 issue of the *Silha Bulletin*.)

Three Charged in Murder-For-Hire Plot Against Iranian-American Journalist

U.S. Attorney General Merrick Garland announced on Jan. 27, 2023 that federal charges had been filed in the U.S. District Court for the Southern District of New York against three men alleged to have participated in a “murder for hire” plot targeting Masih Alinejad, an Iranian journalist living in Brooklyn, N.Y., according to *Courthouse News*. According to the Associated Press (AP), Alinejad worked “for years as a journalist in Iran” and has “long been targeted by its theocracy after fleeing the country following its disputed 2009 presidential election and crackdown.” The AP reported that Alinejad is a “prominent figure on Farsi-language satellite channels abroad that critically view Iran,” who became a U.S. citizen in October 2019.

According to the indictment, Rafat Amirov, Polad Omarov, and Khalid Mehdiyev were “members of an Eastern

European criminal organization” with “ties to Iran.” The charges “arise out of an ongoing investigation into the Government of Iran’s efforts to assassinate, on U.S. soil, a journalist, author, and human rights activist who is a U.S. citizen of Iranian origin.” Alinejad “has publicized the Government of Iran’s human rights abuses; discriminatory treatment of women; suppression of democratic participation and expression; and use of arbitrary imprisonment, torture, and execution to target its political opponents; and has sought to mobilize public opinion in Iran and around the world to bring about changes to the regime’s law and practices, including in connection with the continuing protests against the regime across Iran.” According to the indictment, Omarov and Amirov were leaders in the criminal organization who paid Mehdiyev \$30,000 in cash to “carry out the plot” against Alinejad. Mehdiyev “surveilled” Alinejad and her family and “devised schemes to lure [her] out of [her] house,” and was arrested for a traffic violation near her home in July 2022 while carrying an “AK-47-style assault rifle” with an “obliterated serial number.” The men are charged with murder-for-hire, conspiracy to commit murder-for-hire, money laundering conspiracy, and unlawful possession of a defaced firearm. The indictment is available online at: <https://www.courthousenews.com/wp-content/uploads/2023/01/amirov-omarov-mehdiyev-superseding-indictment.pdf>.

“The victim in this case was targeted for exercising the rights to which every American citizen is entitled,” Garland said during a press conference on Jan. 27, 2023, according to *Politico*. “The victim publicized the Iranian government’s human rights abuses, discriminatory treatment of women, suppression of democratic participation and expression, and use of arbitrary imprisonment, torture and execution.” Though Alinejad was not identified in the indictment, she confirmed to the AP on Jan. 27, 2023 that she was the intended target of the plot. “I’m not scared,” she told the AP. “I want to tell you that the Iranian regime thinks by trying to kill me, they will silence me, or silence other women. But they only strengthen me, make me more powerful to fight for democracy and give voice to brave women who are facing guns and bullets in the streets to get rid of the Islamic Republic.”

Reporter Arrested at Ohio Press Conference; Charges Later Dropped

NewsNation reporter Evan Lambert was “pushed to the ground, handcuffed and arrested for trespassing” while covering a news conference about the derailment of a train carrying hazardous materials in East Palestine, Ohio, on Feb. 8, 2023, according to the Associated Press (AP). The charges were later dropped, according to a statement from the Ohio Attorney General.

According to *The New York Times*, Lambert was covering a press conference with Ohio Gov. Mike DeWine at the time of the arrest. The press conference was initially scheduled for 3 p.m. but was delayed for two hours, which interfered with Lambert’s live shot. Mike Viqueira, Washington bureau chief of *NewsNation*, told *The New York Times* that Lambert quietly filmed his live shot in the school gymnasium as the press conference began. Police officers told Lambert to stop talking, but he continued talking as he finished his live report, according to the AP. After Lambert concluded the live report, officers “surrounded him, pushed him to the ground, and handcuffed him” before bringing him to the Columbiana County Jail, according to the Committee to Protect Journalists (CPJ). Lambert was charged with disorderly conduct and criminal trespassing and held in jail for several hours.

“I’m doing fine right now. It’s been an extremely long day,” Lambert said after his release, according to the AP. “No journalist expects to be arrested when you’re doing your job, and I think that’s really important that that doesn’t happen in our country.”

Gov. DeWine did not authorize or order the arrest, according to the Press Freedom Tracker. “It has always been my practice that if I’m doing a press conference, someone wants to report out there and they want to be talking back to the people back on channel, whatever, they have every right to do that,” DeWine told reporters after the arrest. “If someone was stopped from doing that, or told they could not do that, that was wrong.”

Press freedom advocates decried the arrest. CPJ’s U.S. and Canada program coordinator Katherine Jacobsen said it was “outrageous” that law enforcement would “arrest and charge a journalist for simply doing his job” and broadcasting from a press conference. “East Palestine law enforcement should immediately

drop all charges against NewsNation correspondent Evan Lambert and thoroughly investigate why he was arrested in the first place,” Jacobsen said in a statement posted to the CPJ website on Feb. 9, 2023.

In a statement posted Feb. 9, 2023, the Society of Professional Journalists condemned the arrest. “It is imperative reporters remain free to keep the public informed without interference from law enforcement,” SPJ National President Claire Regan and SPJ Vice-President Ashanti Blaize Hopkins said in a statement. “Journalism is not a crime and we urge East Palestine PD to drop all charges against Mr. Lambert immediately and issue a public apology for his arrest.” The statement is available online at: <https://www.spj.org/news.asp?ref=1920>.

Bruce Brown, executive director of the Reporters Committee for Freedom of the Press, said that the arrest was “yet another deeply concerning instance of law enforcement violating the First Amendment rights of journalists,” according to *Deadline* on Feb. 15, 2023. “It’s unreasonable for law enforcement to prohibit press from reporting at a PRESS conference by public officials. In this country, we have constitutional protections that guarantee press freedom, and yet, we repeatedly see law enforcement disregarding these protections.”

Ohio Attorney General Dave Yost announced in a statement posted Feb. 15, 2023, that the criminal charges filed against Lambert were dismissed. “My office has reviewed the relevant video and documentary evidence and is dismissing the charges against Evan Lambert as unsupported by sufficient evidence,” Yost said in a statement. “While journalists could conceivably be subject to criminal charges for trespassing in some situations, this incident is not one of them. The reporter was lawfully present at a press conference called by the Governor of the state. His conduct was consistent with the purpose of the event and his role as a reporter.” The full statement is available at: <https://www.ohioattorneygeneral.gov/Media/News-Releases/February-2023/Charges-Dismissed-for-NewsNation-Reporter-in-East>.

— CLAIRE COLBY
SILHA BULLETIN EDITOR

U.S. Supreme Court Considers Section 230, Free Expression, Anti-Discrimination, and True Threats

In the 2022-23 term, the Supreme Court heard cases regarding Section 230 reform, whether public business owners can utilize their First Amendment rights to discriminate against customers, and whether an objective or subjective intent requirement is necessary to prove speech to be truly threatening. Commentators warned these cases could have “profound” implications for the First Amendment and free speech rights. Notably, however, the Court chose not to hear the case of

U.S. SUPREME COURT

Novak v. City of

Parma, which hinged on whether law enforcement should receive qualified immunity for arresting a man who parodied his local police department on Facebook.

Gonzalez v. Google: The Court Confronts Section 230

In deliberating in the case of *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021), the Court will consider whether Google and other interactive computer service providers should be immune from liability for the third-party content they provide to potentially interested users, as determined by the service providers’ algorithm(s), under Section 230(c)(1) of the Communications Decency Act (CDA), 47 U.S.C. § 230. Experts and commentators are split on how liability should be assigned, with some suggesting amending the scope of Section 230 is integral to an ever-changing internet, and others suggesting the risks associated with publication on the internet are an inextricable part of the concept of a free and open internet, and thus liability should not be assigned to social media platforms.

As Amy Howe reported for *SCOTUSblog* on Feb. 21, 2023, “The case was filed by the family of Nohemi Gonzalez, a 23-year-old American woman who was studying in Paris when she was killed in an ISIS attack there in 2015. Their lawsuit alleges that Google, which owns YouTube, violated the Antiterrorism Act’s, [18 U.S.C.S. § 2331-39], ban on aiding and abetting terrorism by (among other things) recommending ISIS videos to

users through its algorithms, thereby aiding ISIS’s recruitment.”

Google contends that Section 230 provides immunity from claims that treat them as a publisher. “Section 230 bars claims that seek to hold websites liable for activities that publishers traditionally perform, like selecting, editing, and disseminating third-party content. Section 230 does not protect only 1990s-style chat rooms that permit users to post whatever they want,” the company contended in its brief in opposition to *cert* in front of the Court.

A copy of Google’s brief in opposition is available at: <https://z.umn.edu/GoogleGonzalezbrief>.

At oral argument on Feb. 21, 2023, some of the justices, including Justice Kavanaugh and Justice Coney Barrett, were skeptical that they were the best body to answer the questions at issue here. As Amy Howe reported for *SCOTUSblog* on February 21: “Justice Elena Kagan suggested that even if Section 230 is not well suited to address the current needs of today’s internet, such a task was best left to Congress, rather than the Supreme Court. ‘These are not, like, the nine greatest experts on the internet,’ Kagan observed.”

Phil Weiser, Colorado’s State Attorney General, advocated for the Court to focus on the liability issue presented by platform algorithms across the internet, and that the algorithms should be held accountable. “If you end up with an interpretation of Section 230 that says, ‘Algorithms that feed content are also protected,’ that will make our cases harder,” Weiser said in an interview with *The Washington Post* on Feb. 10, 2023. “There’s no two ways about it. Law enforcement that addresses actions by algorithms is a critical tool. To the extent that algorithms are themselves causing harm, they should be subject to enforcement.”

In an *amicus* brief, the ACLU advocated for immunity for platforms and their algorithms. “Platforms have no choice but to prioritize some content over other content, and because this is an inherent aspect of publishing online, they should be immune from liability for the substance of that content under Section 230 which provides that platforms may not be treated as the publisher of third-party content for

liability purposes,” the ACLU wrote. “Every time one does a Google search, Google ‘recommends’ content by the order it lists its responses. The same is true for YouTube, which recommends similar videos based on a user’s choice of what to watch. If that sort of generic algorithmic recommendation is sufficient to deprive platforms of immunity, Section 230 will be rendered meaningless. And in the absence of immunity, platforms will be incentivized to censor lawful content or to feature only speech of little interest or value to users, contrary to the goals of Section 230.”

The ACLU’s *amicus* brief is available at: <https://z.umn.edu/ACLUSection230AmicusBrief>.

Adi Robertson, writing for *The Verge* on Feb. 21, 2023, pointed out the difficulties posed by the case. “Introducing liability to these algorithms raises all kinds of hypothetical questions,” Robertson wrote. “Should Google be punished for returning search results that link to defamation or terrorist content, even if it’s responding to a direct search query for a false statement or a terrorist video? And conversely, is a hypothetical website in the clear if it writes an algorithm designed deliberately around being ‘in cahoots with ISIS,’ as Justice Sonia Sotomayor put it?... Getting the balance wrong here could make basic technical components of the internet — like search engines and URL generation — a legal minefield.”

The Supreme Court vacated the lower court’s judgment on May 18, 2023, remanding the case back to the 9th Circuit. *Gonzales v. Google LLC*, 598 U.S. ___ (2023).

303 Creative LLC v. Elenis: Where Speech Rights and Anti-Discrimination Interests Collide

In the case of *303 Creative LLC v. Elenis*, No. 21-476 (S. Ct. 2023), the Court will consider whether a commercial provider can evade compliance with a public accommodations law based on a sincerely held religious belief. Experts noted the conservative majority Court seems inclined to rule for the plaintiff in her ability to deny her public business

services to LGBTQ+ couples.

Lori Smith, a Colorado website designer, with the help of the Alliance Defending Freedom (ADF), a Christian legal advocacy group that works to expand Christian practices within public schools and in government, challenged a state law that bars businesses that are open to the public from discriminating against any member of the LGBTQ+ community or announcing their intent to do so. Smith argued that subjecting her to the law would violate her right to free speech, as she claims to want to expand her website design business to create wedding websites only for heterosexual couples due to her religious beliefs. Importantly, no LGBTQ+ couple has asked Smith to create a wedding website at all, which implicates standing and ripeness issues in the case. The challenge hinges on the question of whether business owners such as Smith, or a wedding cake baker, for example, are indeed artists engaged in expressive conduct. Colorado countered that not only is the case not justiciable due to the ripeness and standing issues, but exempting Smith from the law would “upend” antidiscrimination law in the country.

The U.S. Court of Appeals for the 10th Circuit held that the Colorado public accommodations law, Colorado’s Anti-Discrimination Act (CADA), satisfies strict scrutiny, and thus permissibly compels Smith’s speech. The 10th Circuit also held that CADA is a neutral law of general applicability, and that it is not unconstitutionally vague or overbroad. *303 Creative LLC v. Elenis*, No. 19-1413 (10th Cir. Jul. 26, 2021).

Smith appealed to the Supreme Court, and oral arguments were held on Dec. 5, 2022. As Amy Howe wrote for *SCOTUSblog* on Dec. 5, 2022: “At the oral argument, Justice Sonia Sotomayor asserted that a ruling for Smith would be the first time that the Supreme Court had ruled that ‘commercial businesses could refuse to serve a customer based on race, sex, religion, or sexual orientation.’ But Chief Justice John Roberts countered that the Supreme Court has never approved efforts to compel speech that is contrary to the speaker’s belief, and his five conservative colleagues signaled that they were likely to join him in a ruling for Smith.”

Hila Keren, Paul E. Treusch Professor of Law at Southwestern Law School,

writing for *Slate* on March 9, 2022, previewed the case and expressed dismay at the potential repercussions. “Our Constitution not only promises freedom of speech; it also guarantees equal access to the market, without fear of rejections or a painful exposure to humiliating signs,” Keren wrote. “Therefore, even a court controlled by a conservative supermajority must balance citizens’ needs and interests. It also should recognize how the pending petition to expand speech protections threatens to revive a segregated marketplace.”

Elie Mystal, writing for *The Nation* on Dec. 6, 2022, noted the oral arguments in the case focused heavily on hypotheticals where the “government could be allowed to force artists to say things they don’t believe if Smith doesn’t win.” He continued, “But all of the tortured hypotheticals in the world couldn’t account for the fact that the free speech analysis doesn’t stop where ADF and the conservatives want it to,” Mystal wrote. “Smith argues, in essence, that she’s allowed to engage in content-based discrimination: She can’t be compelled to say ‘gay marriages are cool.’ But she doesn’t simply want to be able to discriminate through the content she creates; she also wants to be able to discriminate against LGBTQ people. She wants to be able to deny gay people the ability to frequent her business. That’s discrimination based not on content but on an immutable characteristic of some of her potential customers.”

Southern Methodist University law professor Dale Carpenter, in an op-ed for the *Boston Globe* on Dec. 16, 2022, asserted that the American marketplace can permit such discrimination through an abundance of consumer choice. “Since *Obergefell v. Hodges*, the 2015 Supreme Court decision declaring a fundamental constitutional right of gay couples to marry, there have been hundreds of thousands of same-sex weddings in the United States. Only a tiny portion have encountered wedding service providers who decline to take photographs, arrange flowers, or bake cakes because of objections to same-sex marriages,” Carpenter wrote. “The nation’s tradition of pluralism under the First Amendment can accommodate the few expressive providers who object to same-sex marriages without impairing the very real need to protect gay people in the public marketplace.”

The National Women’s Law Center, in an *amicus* brief, called on the Court to uphold CADA as it regulates conduct in the public market. “Public accommodations laws such as CADA target conduct, not speech, when they prohibit discrimination in the marketplace. CADA’s Public Accommodations Clause requires a commercial actor who seeks to offer goods or services for sale to the public make that product or service available to all, without regard to the protected characteristics of potential customers. Commercial businesses may ‘choose the products [they] sell[], but not the customers [they] serve[], no matter the reason,’” citing Justice Kagan’s concurrence in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 138, 1733, (2018).

The *amicus* brief is available at: <https://nwlc.org/resource/nwlc-files-supreme-court-amicus-brief-supporting-legal-protections-for-lgbtq-customers/>.

Counterman v. Colorado: Ruling Could Hinder Newsgathering Efforts

On April 19, 2023, the U.S. Supreme Court heard arguments in a case that free press advocates argue “threatens important journalism.”

The case concerns Billy Raymond Counterman, who was found guilty in state court of stalking a woman over the course of two years. *Counterman v. Colorado*, No. 22-138 (Aug. 11, 2022). Counterman used Facebook to send unsolicited messages to a local musician, referred to as C.W., at both her personal and professional accounts. Some messages suggested that he was physically surveilling her, such as, “Was that you in the white Jeep?” Others contained aggressive comments such as “Die” and “Fuck off permanently.” C.W. never responded to the messages and blocked him multiple times before contacting Colorado police.

Counterman was sentenced to 4.5 years in prison under Colorado’s anti-stalking statute. The law states that a person commits stalking if he knowingly “[r]epeatedly follows, approaches, contacts, places under surveillance, or makes any form of communication with another person . . . in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person, . . . to suffer serious

emotional distress.” Colo. Rev. Stat. Ann. § 18-3-602(1)(c). Importantly, courts in Colorado have held that prosecutors do not have to prove that the defendant intended to make a threat, known as subjective intent. Instead, they only need to show objective intent to prove “true threats,” meaning that a reasonable person would have perceived the communications as threats. True threats are not protected by the First Amendment.

When Counterman appealed to the Colorado Court of Appeals, he argued that subjective intent is necessary to show a true threat. The court held instead in 2021 that the objective approach in § 18-3-602(1)(c) is constitutional and that Counterman’s messages were true threats unprotected by both the federal and the state constitution. The opinion pointed to a Colorado Supreme Court ruling from the year before which deferred to the nation’s highest court: “In the absence of additional guidance from the U.S. Supreme Court, we decline today to say that a speaker’s subjective intent to threaten is necessary for a statement to constitute a true threat for First Amendment purposes.” Less than one year later, the Colorado Supreme Court denied Counterman’s petition to review his case.

In his petition for *certiorari* asking the U.S. Supreme Court to take the case, Counterman argued that the high court should decide whether it is enough to show that an objective reasonable person would regard a statement as a threat of violence for it to be a true threat unprotected by the First Amendment. He pointed to *Virginia v. Black*, a 2003 case striking down a Virginia law that made cross burning illegal. 538 U.S. 343 (2003). The Court in *Black* held that true threats “encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence.” In the years that followed, appeals courts split on whether a true threat requires proof of objective or subjective intent. The court took on a case with very similar facts in 2015 but opted not to address the First Amendment question. *Elonis v. United States*, 575 U.S. 723 (2015). (For more information on *Elonis*, see “Supreme Court Considers Whether Facebook

Posts Can Constitute “True Threats” in the Fall 2014 issue of the *Silha Bulletin*.)

Counterman’s petition noted that only two federal circuit courts (out of 11) use the subjective approach, requiring proof that the defendant intended to make a threat. “This case presents an ideal vehicle to resolve this recurring question,” the petition said. He cited the circuit split as one of four reasons to grant the petition, arguing that it is problematic for constitutional rights to depend on where a person is brought to court. Second, he argued that the objective standard is inconsistent with First Amendment principles. “The notion that one could commit a ‘speech crime’ by accident is chilling: Imprisoning a person for negligently misjudging how others would construe the speaker’s words would erode the breathing space that safeguards the free exchange of ideas,” he wrote. Third, he cited the prevalence of the issue and the urgency of providing clarity. Finally, he noted the straightforward, uncomplicated nature of the case as a reason for the Court to address the issue. The full petition is available at: <https://z.umn.edu/CountermanPetitionSCOTUS>.

Colorado, conversely, argued that the case is a poor vehicle for resolving the question of whether an objective standard is enough to show a true threat. It said that Counterman’s “admissions that he engaged in multiple acts of physical surveillance” would allow the Court to convict him without even addressing the First Amendment question. It then pointed out that the circuit split is lopsided and that Colorado is on the majority’s side. Finally, it challenged Counterman’s portrayal of *Black*, arguing that just because true threats “encompass” situations where there is subjective intent does not mean that they are limited to those situations. The statute, it said, is fully in line with Supreme Court precedent. “Colorado’s context-driven analysis ensures that speech cannot be treated as an unprotected true threat based on the content of the expression alone,” it wrote. The full opposition brief is available at: <https://z.umn.edu/CountermanOppositionBrief>.

After the Court agreed to take the case, the Reporters Committee filed an *amicus* brief on March 1, 2023, urging the Court to reverse the lower court’s decision. “The press must be able to pursue its work without concern that reporting intended to

promote public deliberation will be misconstrued — or pretextually mischaracterized — as an effort to threaten or harass,” it wrote. The full brief is available at: <https://z.umn.edu/ReportersCommitteeCountermanBrief>

The Reporters Committee first argued that even the prospect of meritless threat or harassment prosecutions can curtail important journalism. It pointed to the practice of contacting sources. Steps like contacting one’s friends or family or waiting outside an office building to speak with them might be considered offensive or intrusive absent context, and indeed, reporters have been accused of harassment and stalking for doing their jobs. An objective standard “would force journalists to think twice before making a determined effort to obtain comment; reporting a speaker’s incendiary — but newsworthy — hyperbole; or publishing personal information relevant to evaluating the conduct of public officials,” the Reporters Committee wrote. “That chilling effect, in ‘limiting the stock of information from which members of the public may draw,’ would offend the core purposes of the First Amendment.”

Second, it argued that the First Amendment’s press protections require proof of intent to threaten, and that to the extent that *Black* left the question of an intent standard open, the Court should clarify “that only *intentional* threats are criminally punishable consistently with the First Amendment.” In legal areas like incitement or defamation, the Court has put in place high standards of proof to protect journalism, and the Reporters Committee posited that the area of true threats should be no different.

Matt Ford, writing for *The New Republic* on Feb. 15, 2023, enumerated the wide-reaching consequences of the potential shift in intent standards. “How the court decides this case could have a significant impact on how and when police and prosecutors pursue violent threats in a digital age,” Ford wrote. “Requiring them to prove a defendant’s intent could make it substantially more difficult to prosecute cases where context is king, with implications for the prevalence of violent threats as a whole. Without the intent standard, however, future defendants could risk facing charges for statements they may not have meant as threats.”

The Court heard oral arguments on April 19, 2023. Several of the justices posed hypothetical examples to consider the implications of ruling one way or another. Justice Samuel Alito proposed the example of a married writer who writes a fictional story about murdering their spouse. Each reader, including the writer's spouse or neighborhood, could interpret the words differently and potentially consider them threatening. "This is a problem with internet communications," Alito said. "They go out to sometimes a vast and unknown audience."

Justice Sonia Sotomayor compared the example to Eminem, whose songs have included fantasies about murdering his now ex-wife. She argued that if there is no subjective intent standard, a defendant is at the mercy of whatever the jury thinks is the standard for communicating with others. Counterman's attorney, John Elwood, responded by saying that people with minority viewpoints tend to be parties in free speech cases because they are often viewed as threatening by those who are unfamiliar with them. Sotomayor answered, "So more of a reason that you have to let in people to explain the basis of their intent, correct, or their knowledge?" Elwood agreed.

During otherwise serious discussions, brief laughter occasionally broke out, including when Elwood recounted that his mother told him the same thing Counterman messaged C.W. — "Drop dead" — virtually every day of his childhood. Justice John Roberts commented on the Counterman message, "Staying in cyber life is going to kill you," and was met with laughter when he said, "I can't promise I haven't said that."

Colorado Attorney General Philip Weiser argued that viewing the statements in context, which his state's objective standard allows him to do, distinguishes them from when they stand alone. "[T]he threat here is when you put them all together," he said. "When you take one of these out of context or put it into a different context, it means something different."

The Court is expected to announce its decisions before the end of the current term in June 2023. These rulings will be covered in the Summer 2023 issue of the *Silha Bulletin*.

Novak v. City of Parma: What Protections Are Afforded to Parody Speech?

In a petition for *certiorari* filed in the case of *Novak v. City of Parma*, 33 F.4th 296 (6th Cir. 2022), the Court was asked to consider whether law enforcement is entitled to qualified immunity for arresting an individual based solely on speech parodying the government.

"Parody has a unique capacity to speak truth to power and cut its subjects down to size. Its continued protection under the First Amendment is crucial to preserving the right of citizens to effectively criticize the government."

— *The Babylon Bee's amicus brief*

Anthony Novak created a satirical Facebook page parodying the Parma, Ohio Police Department. Then, as Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley wrote for *The Conversation* on Feb. 28, 2023, "Citing a state law making it a crime to use a computer to disrupt police operations, the police searched Novak's apartment, seized his phone and laptop and jailed him for four days. A jury acquitted him of the felony charge in August 2016. Novak then filed a lawsuit against the police, arguing that they had violated his First Amendment rights. The law enforcement officials replied that they were entitled to 'qualified immunity,' a legal doctrine protecting government employees from liability for conduct that has not been clearly established as unconstitutional."

(Kirtley's essay is available at: <https://z.umn.edu/KirtleyConversationOnionArticle>.)

The satirical press, including *The Onion* and *The Babylon Bee*, filed *amicus* briefs in support of Novak, urging the Court to take up the case and affirmatively extend First Amendment protections to parody once and for all. *The Onion*, in its brief, urged that the 6th Circuit's ruling in the case "threatens to disembowel a form of rhetoric that has existed for millennia, that is particularly potent in the realm of political debate, and that, purely

incidentally, forms the basis of *The Onion's* writers' paychecks."

The Babylon Bee, in its brief, echoed *The Onion's* arguments. "The Onion may be staffed by socialist wackos, but in their brief defending parody to this Court, they hit it out of the park. Parody has a unique capacity to speak truth to power and to cut its subjects down to size. Its continued protection under the First Amendment is crucial

to preserving the right of citizens to effectively criticize the government."

However, the Court chose not to grant *certiorari* in the case on Feb. 21, 2023.

(Copies of *The Onion* and *The Babylon Bee's* *amicus* briefs

are available at: <https://z.umn.edu/NovakCaseOnionBrief> and <https://z.umn.edu/NovakCaseBabylonBeeBrief>.)

In her essay, Kirtley asserted the Court's denial was a missed opportunity to expand the protections to satire and parody first granted in the case of *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988), which "established that the legal tradition protecting robust criticism of public figures and government operations must extend to satirical cartoons and parody, however 'caustic' they may be," Kirtley wrote. "Refusing to review Novak's case is a missed opportunity for the Court to consider and decide once and for all whether the First Amendment protects satire and parody. And that's no joke."

(For more information on the Falwell case, see "Spring Symposium Marks the 30th Anniversary of *Hustler Magazine, Inc. v. Falwell*, Discusses History, Purpose, and Impact of Political Cartoons" in the Winter/Spring 2018 issue of the *Silha Bulletin*. Additionally, the symposium website is available at: <https://stateofoursatiricalunion.umn.edu/>.)

— SAMANTHA BRUNN
SILHA CENTER RESEARCH ASSISTANT

— LUKE SRODULSKI
SILHA CENTER RESEARCH ASSISTANT

Federal Government Continues Push to Regulate and Break Up Online Monoliths

The first part of 2023 saw continued efforts by the Biden Administration to rein in Big Tech, from the U.S. Department of Justice (DOJ) and U.S. Federal Trade Commission (FTC) antitrust lawsuits to proposed legislative packages that have stalled

BIG TECH

in Congress. Additionally, Congress has been considering a federal ban on the social media app TikTok, owned by Chinese corporation ByteDance, ostensibly based on national security issues raised by the app's notoriously invasive algorithms and data privacy mining.

U.S. Department of Justice Targets Google in Antitrust Suit

On Jan. 24, 2023, the DOJ filed an antitrust suit against Google, alleging the company's advertising business should be broken up because it monopolizes the online ad industry by forcing publishers to use their platform and boxing out competitors. Some antitrust experts applauded the move while others suggested the suit will not have as great an effect on Google's overall competitiveness as might originally be expected.

Eight state attorneys general from California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia joined the DOJ's suit against Google, which is the first antitrust case pursued by President Joe Biden's DOJ. According to *The Washington Post* on Jan. 24, 2023, "The suit seeks to force Google to sell off much of its advertising technology products, which enable the buying, selling and placement of ads across Google Search, YouTube, and millions of other websites. The company's advertising network brought in \$7.9 billion for the company in the third quarter of 2022, about the same as all of Google's revenue from YouTube."

After the suit was filed, U.S. Attorney General Merrick Garland said in a statement: "Today's complaint alleges that Google has used anticompetitive, exclusionary, and unlawful conduct to eliminate or severely diminish any threat to its dominance over digital advertising technologies. No matter the

industry and no matter the company, the Justice Department will vigorously enforce our antitrust laws to protect consumers, safeguard competition and ensure economic fairness and opportunity for all."

In a blog post, Google's Vice President of Global Ads Dan Taylor criticized the Biden Administration for penalizing a service that greatly influences the American economy. "Antitrust cases shouldn't penalize

"No matter the industry and no matter the company, the Justice Department will vigorously enforce our antitrust laws to protect consumers, safeguard competition and ensure economic fairness and opportunity for all."

— U.S. Attorney General Merrick Garland

companies that offer popular, efficient services, particularly in difficult economic times," Taylor wrote. "And they shouldn't force companies to reverse 15-year-old investments that they have nurtured and worked hard to make successful, especially when those investments were already reviewed by regulators and allowed to proceed."

The Editorial Board of *The Washington Post*, in an editorial published on Feb. 11, 2023, applauded the Biden Administration's "straightforward" antitrust enforcement, which may have a better chance of success than past suits. "When most Americans think of Google, they think of a search-engine behemoth, and of course, they're right," the Editorial Board wrote. "Yet, unlike another DOJ case brought under the previous administration, the latest lawsuit doesn't focus on the power the company holds over what we look for on the internet. Instead, it focuses on what we don't go looking for and see anyway: advertisements. The argument is relatively straightforward: Google dominates this market by playing a key role in the technology at every point along the 'ad stack.' . . . By operating within traditional antitrust frameworks but nudging at their edges, the Justice Department will end up encouraging

everyone to confront the status quo's capabilities and its limits alike. In that sense, win or lose, it may have brought the most valuable tech competition case yet."

But other commentators, such as Herbert Hovenkamp, an antitrust professor at the University of Pennsylvania Law School, noted it is very difficult for the federal government to get courts to order companies to divest in these cases — meaning

the suit, even if successful, may have a smaller overall impact. "There's a lot of headwinds here, including a fairly conservative judiciary, so we'll just have to see what happens," he said in an interview with *The*

Washington Post on January 24.

Google's response to the DOJ's Complaint was due on March 27, 2023; however, on February 17, 2023, Google filed a Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a), seeking to move the civil action to the Southern District of New York. But on March 14, 2023, United States District Court for the Eastern District of Virginia, Alexandria Division, denied Google's Motion. *United States v. Google LLC*, No. 1:23-cv-108 (E.D. Va. Mar. 14, 2023). The case will be heard sometime in 2024.

FTC Files Suit Against Microsoft, Considers Amazon

At the end of 2022, the FTC filed an antitrust lawsuit against Microsoft to block its merger with Activision Blizzard, an American video game holding company. On Feb. 3, 2023, *The Wall Street Journal* reported that the FTC is poised to file another antitrust suit against Amazon sometime this year. Both moves were hailed by commentators as necessary to restrain Big Tech monopolies.

In a press release, the FTC said the potential merger "would enable Microsoft to suppress competitors to its Xbox gaming consoles and its rapidly growing subscription content

and cloud-gaming business.” Sony, one of Microsoft’s top competitors, in a statement sent to *GamesIndustry*, argued that if the merger were to go through, Microsoft could make the popular video game “Call of Duty” an Xbox or PC exclusive, effectively cutting Sony off from the game series entirely.

In the FTC’s complaint, the agency accused Microsoft of backtracking on assurances given to European Union antitrust regulators back in 2021 when they acquired Bethesda Softworks, a gaming development creator. Despite the assurances, Microsoft made some of Bethesda’s games exclusive to its gaming ecosystem.

Then, in February 2023, news broke that the FTC was poised to sue Amazon. According to *Bloomberg* on Feb. 3, 2023, the FTC has been investigating Amazon for several years. “An investigation into the e-commerce giant’s retail business, which started in 2019 under the Donald Trump administration, later expanded into recent acquisitions, such as the \$8.45 billion MGM studio deal, and cancellation policies related to Amazon’s Prime service,” *Bloomberg* reported.

According to *Politico* on March 20, 2023, the legal action the FTC takes against Amazon may include a challenge to the company’s \$1.7 billion acquisition of robot vacuum maker iRobot, and will probably cover alleged violations of the Children’s Online Privacy Protection Act pending in at least two open privacy investigations, one involving Amazon’s Ring camera and security system business, and the other its Alexa voice assistant. Additionally, “The FTC is pursuing a so-called ‘dark pattern’ probe into the difficulty customers have unsubscribing from Prime and other services. Dark patterns are deceptive tactics used by websites to trick users into doing things like subscribing to a more expensive service than they intended. It is also conducting a deceptive advertising probe into the ‘Amazon Choice’ label the company gives certain products on its marketplace. The FTC is investigating how that label is used to promote products that appear in search results, including whether it is pay-to-play. Amazon maintains it is not.”

Notably, current FTC Chair Lina Khan published a student Note in a

2017 *Yale Law Journal*, “Amazon’s Antitrust Paradox.” Josh Sisco, writing for *Politico* on March 20, 2023, observed, “Any suit against Amazon would be a high-profile move by the agency under chair Lina Khan, a Big Tech skeptic who rose to prominence with a 2017 academic paper specifically identifying Amazon as a modern monopolist needing to be reined in.”

Commentators were sympathetic to the FTC’s efforts to enforce antitrust law, which was a central platform of President Biden’s campaign. Tim Geigner, writing for *Techdirt* on Feb.

“[F]rankly, it's not hard to see the regulators' point on all of this. Microsoft's messaging has sucked, this acquisition is enormous, and the only thing to placate anyone worried about this stifling competition in the marketplace would be taking Microsoft's latest promises at their word.”

— Tim Geigner, *Techdirt*

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Others, like Blair Levin and Larry Downes, writing for the *Harvard Business Review* on Feb. 17, 2023, said that regardless of whether one supports the FTC actions or not, the litigation could have wide-ranging repercussions. “The government’s focus on big technology companies including Microsoft, Google, and Meta offers a free education for all business leaders on the current state of global antitrust and growing tension among regulators. While the timing and trajectory of reform, both in the U.S. and elsewhere, may not be clear, efforts to enforce existing law and to expand it wherever possible has become the global order of the day. Ignore it at your peril.”

Antitrust Legislation Package Stalls in Congress

Earlier this year, Congress had the opportunity to consider two antitrust

bills prompted by the House Antitrust panel’s 16-month investigation into anti-competitive actions from the biggest players in American Tech. However, despite having the necessary votes in the House, the bills never came to the floor for a vote.

According to reporting from *The Washington Post* on Feb. 26, 2023, “The bipartisan antitrust package, years in the making, would have rewritten the rules of the online economy to prevent companies such as Google, Apple, Amazon and Facebook from using their platforms to boost their own products

or restrict clients from rival platforms. Spearheaded by Reps. David N. Cicilline (D-R.I.) and Ken Buck (R-Colo.), it also earned the backing of midsize tech firms, including Yelp and Sonos.”

But, after tech lobbyists brought concerns to legislators over

the package, Democratic leaders failed to bring it to a floor vote, effectively squashing the package’s promise. Subsequently, Cicilline announced he would be stepping down from his position as Representative to lead the Rhode Island Foundation, the state’s largest philanthropic organization.

In an interview with *The Hill* on March 19, 2023, Cicilline said he was hopeful the legislation may be taken up again in the near future. “There’s still really strong bipartisan support for that whole package,” Cicilline said. “We had the votes in the last Congress. My sense is we have the votes in this Congress, too. I think what will make it a little more challenging for the next couple of years is the Republican House leadership’s opposition to these bills.”

Congress Weighs TikTok Ban; DOJ and FBI Investigate TikTok’s Surveillance of Journalists

On Feb. 14, 2023, TikTok CEO Shou Zi Chew visited lawmakers, journalists, and think tanks on Capitol Hill to discuss concerns over the app just days after Democratic Senate Leader Chuck Schumer (D-N.Y.) called attention

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to the national security risks TikTok poses and said a federal ban might be appropriate. Chew testified in front of the House Energy and Commerce Committee a month later, on March 23, saying in his opening statement that “the bottom line is this: [TikTok’s] American data [is] stored on American soil, by an American company, [and] overseen by American personnel.”

Legislators largely seemed to remain unconvinced that TikTok is not a threat, though. “I don’t think there’s anything they can say,” said Sen. Brian Schatz (D-Hawaii), in an interview with *The Washington Post* on Feb. 15, 2023. “It’s all about what they do, and what they do is pretty alarming.”

Notably, TikTok’s top competitor, Meta, parent company of Facebook and Instagram, has helped fund a media and lobbying campaign to portray TikTok as a foreign-owned threat to American youth, according to the aforementioned *Post* report. Chew contends the campaign is helping to proliferate misinformation on the actual mechanisms of TikTok’s data privacy practice and algorithms.

But lobbying campaign aside, TikTok’s reputation is also on the line when it comes to surveilling journalists in particular. According to a March 16, 2023 *Forbes* report, “the DOJ Criminal Division, Fraud Section, working alongside the Office of the U.S. Attorney for the Eastern District of Virginia, has subpoenaed information from ByteDance regarding efforts by its employees to access U.S. journalists’ location information or other private user data using the TikTok app. According to two sources, the FBI has been conducting interviews related to the surveillance. ByteDance’s use

of the app to surveil U.S. citizens was first reported by *Forbes* in October, and confirmed by an internal company investigation in December.”

In response to *Forbes*, ByteDance spokesperson Jennifer Banks said, “We have strongly condemned the actions of the individuals found to have been involved, and they are no longer employed at ByteDance. Our internal investigation is still ongoing, and we will cooperate with any official investigations when brought to us.”

Despite these issues, free speech advocates warned a total ban on the social media app would violate the First Amendment. “The government can’t

“To justify a TikTok ban, the government would have to demonstrate that privacy and security concerns can’t be addressed in narrower ways. The government hasn’t demonstrated this, and we doubt it could.”

— Jameel Jaffer,
Executive director, Knight First Amendment Institute,
Columbia University

impose this type of total ban unless it’s necessary to prevent extremely serious, immediate harm to national security. There’s no public evidence of that type of harm, and a ban would not be the only option for addressing that harm if it did exist,” said Jenna Leventoff, senior policy counsel at the ACLU, in a press release on March 23, 2023. “Selective bans of entire platforms would cut off the flow of information, art, and communication that social media provides, interfering with communities and connections users in

the United States have with each other and with people around the world. In fact, many Americans on TikTok are using TikTok at this very moment to organize political action against an unconstitutional ban. This kind of political speech on TikTok is at the very core of what the First Amendment protects.”

Jameel Jaffer, executive director at the Knight First Amendment Institute at Columbia University, expressed similar concerns in a press statement on March 22, 2023. “The First Amendment protects Americans’ right to access social media platforms of their choice,” Jaffer said. “To justify a TikTok ban, the government would have to demonstrate that privacy and security concerns can’t be addressed in narrower ways. The government hasn’t demonstrated this, and we doubt it could. Restricting access to a speech platform that is used by millions

of Americans every day would set a dangerous precedent for regulating our digital public sphere more broadly. Banning or restricting access to social media is a hallmark of authoritarian regimes, and we should be very wary about giving the U.S. government that kind of power.”

— SAMANTHA BRUNN
SILHA CENTER RESEARCH ASSISTANT

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AT WWW.SILHA.UMN.EDU/RESOURCES

Federal Courts Hear Cases with Widespread Implications for Press Freedom and Access

A citizen journalist in Texas was arrested for asking a police officer a question about information that had not been made public, and she sued various public officials for First, Fourth, and Fourteenth Amendment violations. Now the case will be heard *en banc* by the entire Fifth Circuit Court of Appeals. Meanwhile, free press advocates are pushing for a ruling in favor of unsealing documents related to warrants to obtain personal electronic communications. Finally, the U.S. Supreme Court is gearing up to hear a case on whether criminal threats require proof of the speaker's intent. It is a case that does not explicitly involve the press, but advocates again warn of the case's implications for journalists.

FEDERAL COURTS

Fifth Circuit Hears Case on Journalist's Arrest for Interviewing Police

All 16 judges of the U.S. Court of Appeals for the Fifth Circuit convened in January 2023 to hear a case on the arrest of a citizen journalist in Laredo, Texas.

The case considers whether Priscilla Villarreal was unconstitutionally arrested for a state law violation of "misuse of official information." Villarreal, known as La Gordiloca ("the crazy fat lady"), reports on local crime, events, government, and more by live streaming from the scene with "colorful — and often unfiltered — commentary," according to court filings. She previously had a job supervising wrecking crews before a 2015 incident in which she recorded a deadly hostage situation that unfolded in her neighborhood, according to a Jan. 6, 2023, report by *The Texas Tribune*. The video went viral, and she has since surpassed 200,000 followers on Facebook.

In 2017, a local Border Patrol officer died by suicide, and Villarreal published his name after obtaining it from a janitor working near the scene and corroborating it with a Laredo police officer. She did the same a month later with the name of a family involved in a deadly car crash, corroborating the

information with the same officer. She said that police then began to harass her, including by falsely claiming that she is a five-time convicted felon and by threatening to take her phone as "evidence" while she reported on a crime. Villarreal had made similar posts in the past without legal ramifications. However, six months after her reports, Laredo Police arrested her for violating Sec. 39.06(c) of the Texas Penal Code, which forbids soliciting or receiving information "with intent to obtain

"If freedom of the press guarantees the right to publish information from the government, then it surely guarantees the right to ask the government for that information in the first place."

— Judge James Ho,
U.S. Court of Appeals, Fifth Circuit

a benefit" from a public servant if the information has not been made public and if the source has access to the information by means of their position. The arrest warrant alleged that Villarreal asked for the names and conditions of the victims and published them before they were made public. The statute is available at: <https://statutes.capitol.texas.gov/docs/pe/htm/pe.39.htm>.

Villarreal turned herself in to police in December 2017, according to a Jan. 25, 2023, *Courthouse News* report. According to *The Texas Tribune's* report, the district attorney for Webb County, which encompasses Laredo, had never prosecuted anyone under Sec. 39.06(c). Villarreal filed a *habeas corpus* petition, arguing that she had been unlawfully detained. On March 28, 2018, a judge held that the statute was unconstitutionally vague, and Villarreal's charges were dropped.

On April 8, 2019, Villarreal sued the City of Laredo, Webb County, and various police and prosecutors for retaliation and interference with Plaintiff's First Amendment-protected activity, unlawful arrest and detention in violation of the Fourth and Fourteenth Amendments, and deprivation of equal protection under the Fourteenth Amendment, among other claims. The

U.S. District Court for the Southern District of Texas approached the case as a balancing test between the constitutional rights of citizens and the power of government, specifically in the form of qualified immunity. Qualified immunity protects public officials from lawsuits for violations of constitutional rights unless the right was clearly established and the official did not act reasonably in light of the law. "Although the Court recognizes the profound importance of the rights guaranteed

to citizens, such as Plaintiff in this case," Magistrate Judge John A. Kazen wrote in a May 8, 2020 opinion, "the Court has ultimately determined that Plaintiff has not been able to overcome

the claims of qualified immunity and other arguments raised by Defendants' Motions." The full opinion is available at: <https://www.courthousenews.com/wp-content/uploads/2023/01/judge-kazen-order-granting-motion-to-dismiss-priscilla-villarreal-lawsuit.pdf>.

However, the case did not end there. On Nov. 1, 2021, a three-judge panel from the Fifth Circuit ruled 2-1 in favor of Villarreal to revive the lawsuit. In doing so, it reversed the district court's decision to dismiss the First, Fourth, and Fourteenth Amendment claims, as well as her claim of a conspiracy to violate her constitutional rights. The full opinion is available at: <https://www.courthousenews.com/wp-content/uploads/2021/11/villarreal-laredo-ca5.pdf>.

The court first held that the arresting officials were not shielded by qualified immunity, as the doctrine does not protect those who commit a patently obvious violation of the Constitution. "This is not just an obvious constitutional infringement — it's hard to imagine a more textbook violation of the First Amendment," Judge James Ho wrote. He added that if the First Amendment protects the right to curse at a public official — which the

Federal Courts, continued from page 23
Supreme Court has found to be true — then it also includes the right to politely ask officials questions as Villarreal did. “If freedom of the press guarantees the right to publish information from the government,” Ho wrote, “then it surely guarantees the right to ask the government for that information in the first place.” Ho wrote that qualified immunity does not hold up when a public official tries to hide behind a clearly unconstitutional statute.

The court also reversed the dismissal of Villarreal’s Fourth Amendment wrongful arrest claim. Even when officers obtain an arrest warrant from a judge, Ho wrote, they may still be in violation of the Fourth Amendment if “it is obvious that no reasonably competent officer would have concluded that a warrant should issue.” Any reasonably well-trained officer would have understood that arresting Villarreal for asking a question would violate the First Amendment, so her claim for wrongful arrest should not have been dismissed.

The court also reversed the dismissal of her claim that the Laredo Police Department had selectively enforced the statute against her in violation of the Fourteenth Amendment. “Villarreal’s complaint sufficiently alleges that countless journalists have asked LPD officers all kinds of questions about nonpublic information,” Ho wrote. “Yet they were never arrested.” Specifically, the department had never before arrested anyone under the statute used against Villarreal.

For the same reasons as it reversed the dismissal of the First, Fourth, and Fourteenth Amendment claims, the court did the same with Villarreal’s claim of a conspiracy to violate her constitutional rights.

However, the court upheld the district court’s dismissal of Villarreal’s claims that the City of Laredo should be liable. It agreed that she failed to identify an official policy or custom aimed at retaliation toward journalists. Although she alleged widespread practices of city officials and employees retaliating against her, it was not widespread enough to constitute a policy or custom that would make the city liable. The court noted that Villarreal did not allege that city employees retaliated against, investigated, or arrested anyone besides her because of their speech.

It also upheld the dismissal of Villarreal’s claim that the defendants retaliated against her to curtail her practice of her First Amendment rights. The court found that because Villarreal continued to report “consistent with the highest traditions of fearless journalism,” her treatment did not amount to retaliation under Fifth Circuit law. Ho acknowledged, however, that other circuits may have “good reason” for interpreting the law based on whether an ordinary person’s exercise of free speech would be curtailed by

“This Court should affirm that the American press can do the simple, and fundamentally important, democratic task for which Villarreal was arrested: ask questions of the government.”

— Media organizations’ *amicus* brief, *Villarreal v. City of Laredo, Texas, et al.*

the retaliation, rather than that of the specific plaintiff.

“It is not a crime to be a journalist,” Ho ultimately wrote. “As the Institute for Justice rightly observes, the position urged by the City of Laredo in this case is ‘dangerous to a free society,’ for [i]t assumes that the government can choose proper and improper channels for newsgathering — indeed, that the government can decide what is and is not newsworthy.”

The ruling did not last for long. In October 2022, the Fifth Circuit vacated it and granted the defendants’ petition for a new hearing *en banc* in front of all 16 active judges on the court. During oral arguments in January 2023, Villarreal faced pushback from outspoken Judge Edith Jones, according to the *Courthouse News* report. She noted that a judge signed the arrest warrant and that the criminal complaint clearly outlined the elements of the alleged criminal offense.

Republican Texas Attorney General Ken Paxton appeared to take this stance as well by intervening in the case in support of upholding the dismissal of Villarreal’s claims. By contrast, media organizations pushed for the court to follow Ho’s order.

“This Court should affirm that the American press can do the simple, and fundamentally important, democratic task for which Villarreal was arrested: ask questions of the government,” they

wrote. The full brief is available at: <https://www.courthousenews.com/wp-content/uploads/2023/01/press-groups-amicus-brief-in-priscilla-villarreal-case.pdf>.

As the *Bulletin* went to press, the Fifth Circuit had not yet ruled on the case.

Silha Center Backs Appeal to Access Search Warrant Materials

On Feb. 7, 2023, the Silha Center and other media organizations joined an *amicus* brief in support of

the Reporters Committee for Freedom of the Press’s (“Reporters Committee”) appeal to unseal search warrant materials.

Reporters Comm. for Freedom of the Press v. United States, No. 22-

03326 (8th Cir. Feb. 7, 2023).

The case relates to the Stored Communications Act (SCA), a 1986 federal law that allows the government to obtain electronic communications held by service providers, such as emails. 18 U.S.C. §§ 2701 *et seq.* To gain access to these communications, the government must secure a search warrant. According to the Reporters Committee, requests for such warrants “have increased over the years, affecting thousands of people.” The government seeks warrants from federal district courts, and both the warrants and court records are routinely sealed, preventing public access. The Reporters Committee maintains that there is no statutory basis for sealing these documents and adds that in most federal jurisdictions, neither the press nor the public knows the number of SCA warrant applications, how many are granted or denied, the types of records being sought, or the basis for requesting them.

“The extent to which court records reflecting judicial authorization for the government to use statutory surveillance powers are routinely hidden from public view is an affront to the public’s common law and First Amendment rights to access court documents and proceedings,” said Katie Townsend, legal director for the Reporters Committee. “The Reporters Committee is committed to increasing

transparency in such matters so that the public can understand how courts consider and decide whether the government can obtain individuals' electronic communications. Such transparency is essential to public oversight of the government's use of its surveillance authority and to ensuring trust in the judicial process."

The Reporters Committee for Freedom of the Press, a nonprofit organization that provides legal resources to protect journalists, initially sued in the U.S. District Court for the District of Minnesota. *In re Reporters Comm. for Freedom of the Press to Unseal Certain Surveillance Orders & Related Materials*, No. 20-MC-0082, (D. Minn. Oct. 11, 2022). It sought to challenge the district's sealing practices and require unsealing of SCA warrant applications, supporting materials, and court orders related to inactive investigations. Rather than address the Reporters Committee's arguments about sealing SCA warrant documents, the court dismissed the case, finding that the Reporters Committee lacked standing to bring the case.

Standing is a legal doctrine that requires, in part, that the plaintiff has suffered an injury in order to sue. Judge Patrick J. Schiltz held that the Reporters Committee's interest in the case was not concrete enough to meet the standard. "The only interest that the Committee asserts here is an interest in observing and understanding the work of federal trial courts — an interest the Committee itself describes as being shared with 'all members of the public and the press,'" Schiltz wrote. "Such an interest is exactly the kind of generalized, abstract interest in the proper application of law that the Supreme Court has repeatedly held does *not* suffice to establish injury-in-fact." He also wrote that the Reporters Committee failed to explicitly state how it would use the records if they were unsealed. The full opinion is available at: <https://www.rcfp.org/wp-content/uploads/2020/12/2022-10-11-In-re-amended-application-of-RCFP-to-unseal-certain-surveillance-orders-Order-of-dismissal.pdf>.

On Nov. 4, 2022, the Reporters Committee appealed to the U.S. Court of Appeals for the Eighth Circuit. Megan Graham of the UC Berkeley School of Law, representing the Reporters Committee, wrote in a brief for the court that courts have repeatedly recognized any member

of the public or press's right to unseal court filings. As a result, she argued, proving "injury-in-fact" in order to establish standing to sue only requires denial of access to a record that the plaintiff is "arguably entitled to inspect." Graham also wrote that Supreme Court precedent makes clear that standing does not require the Reporters Committee to detail how it plans to use the documents it wants unsealed. "The district court's erroneous decision . . . if

"The extent to which court records reflecting judicial authorization for the government to use statutory surveillance powers are routinely hidden from public view is an affront to the public's common law and First Amendment rights to access court documents and proceedings."

— Katie Townsend,
Legal director,
Reporters Committee for Freedom of the Press

not corrected by this Court, would strike a serious — if not fatal — blow to the ability of members of the public and press to vindicate their presumptive right to access judicial records and proceedings under the First Amendment and common law." Graham wrote. The full brief is available at: <https://www.rcfp.org/wp-content/uploads/2020/12/2023-01-27-Opening-brief-of-appellant-RCFP.pdf>.

In February, the Silha Center joined Courthouse News Service, Gannett Co., Minnesota Public Radio, and other organizations in signing onto an *amicus* brief seeking reversal of the district court's ruling. The brief, filed by the law firm Davis Wright Tremaine LLP, contended that court records including SCA warrant documents are important to the signatories' stories and that they rely on the Reporters Committee and others to advocate for their access to records.

In their main argument, the media organizations first wrote that the press and public have a presumptive right to access court records, stemming from First Amendment press protections. They argued that this presumptive right applies to search warrant records because they are important to the public's understanding of the criminal justice system. "By reporting on law

enforcement surveillance tactics and judicial authorization thereof, the press enables public scrutiny of government conduct, further justifying access to these records," they wrote.

Next, the organizations argued that the Reporters Committee is uniquely positioned to push for broad access to the records being sought. As an advocacy organization, it can collaborate and negotiate with the government on systemic changes to

records access. Because the District of Minnesota's policies are system rather than specific, the organizations argued, the Reporters Committee is better suited to bring such a case than an individual publication seeking a certain court record.

Lastly, the media organizations argued that the district court incorrectly held that the Reporters Committee did not suffer an injury sufficient to establish standing. "[T]he Reporters Committee's injury is not merely the violation of the [right to access court records]; it is the lack of access to information that the 'proper application of the law' would remedy," they wrote. By holding that standing only applies to those seeking specific records, they argued, the court ignored that the press often will not know of newsworthy information until materials are unsealed. Limiting their right to such materials will make accessing crucial information, and thus reporting on it, more difficult.

The American Civil Liberties Union and Electronic Frontier Foundation also filed an *amicus* brief the same day. No other documents related to the case have been filed since February.

— LUKE SRODULSKI
SILHA CENTER RESEARCH ASSISTANT

Minnesota Professor Embroiled in National Controversy Over Free Speech, Academic Freedom

A small liberal arts college in Minnesota drew national scrutiny for its handling of an incident in which a professor displayed images of the Prophet Muhammad in violation of the beliefs of some Muslims. In an Oct. 6, 2022 lecture, Hamline University adjunct professor Erika López Prater included two paintings of the Prophet Muhammad in slides displayed during her world art history class, the Minneapolis *Star Tribune* reported on Jan. 9, 2023. López Prater said in the syllabus that she would depict religious figures including Jesus Christ, the Buddha, and the Prophet Muhammad and told the *Star Tribune* that she spent “at least a couple minutes” explaining why she felt the art was significant and preparing students for the images.

FREE SPEECH

Many Muslims have strongly held religious beliefs that prohibit depictions of the Prophet Muhammad, *The New York Times* explained Jan. 8, 2023. Aram Wedatalla, president of Hamline’s Muslim Student Association, was enrolled in the class. Wedatalla told the *Star Tribune* that the warning was inadequate and that she was offended by the depictions. She went on to file a complaint with Hamline administrators. Wedatalla told *The New York Times* that the “trigger warning” demonstrated that Lopez Prater knew that the images would be offensive. On Nov. 7, 2022, David Everett, Hamline’s vice president for inclusive excellence, sent an email to all university employees stating that displaying the images was “undeniably inconsiderate, disrespectful and Islamophobic,” *The New York Times* reported. Miller sent an e-mail to students stating that respect for Muslim students “should have superseded academic freedom,” *The New York Times* reported. López Prater told the *Star Tribune* that she alerted her department chair of the incident and received an e-mail several weeks later that the university would no longer offer the class she had planned to teach during the Spring 2023 semester. According to a statement posted by Hamline University President Fayneese Miller on Jan. 11, the “decision not to offer [López Prater] another class was made at the unit level

and in no way reflects her ability to adequately teach the class.”

On Jan. 17, 2023, Miller and Hamline Board of Trustees chairwoman Ellen Watters issued a joint statement, saying the criticism caused the university to “review and reexamine” their actions,” the St. Paul *Pioneer Press* reported. “Hamline is a multi-cultural, multi-religious community that has been a leader in creating space for civil conversations. Like all organizations, sometimes we misstep,” the statement

“Although we strongly discourage showing visual depictions of the Prophet, professors who analyze paintings for an academic purpose are not the same as Islamophobes who show such images to cause offense.”

— Council on American-Islamic Relations statement

said. “In the interest of hearing from and supporting our Muslim students, language was used that does not reflect our sentiments on academic freedom. Based on all that we have learned, we have determined that our usage of the term ‘Islamophobic’ was therefore flawed. We strongly support academic freedom for all members of the Hamline community.”

On Jan. 24, 2023, a majority of full-time Hamline University faculty voted to formally ask Miller to resign over her handling of the incident, the *Star Tribune* reported. “We are wounded, we are hurt, our reputation’s been insulted, and so we have a lot to demonstrate that we’re the institution that people have known over the years,” Jim Scheibel, a Hamline professor and faculty council president told the *Star Tribune* on Jan. 24, 2023. On Apr. 3, 2023, Miller announced that she planned to retire in summer 2024 “primarily for personal reasons,” the *Star Tribune* reported.

On Jan. 18, 2023, López Prater filed a lawsuit in Ramsey County District Court alleging religious discrimination, breach of contract, and defamation. According to the complaint, the Minnesota Human

Rights Act’s prohibition on religious discrimination “also extends to situations where an employee suffers an adverse employment action because the employee is not of a particular religion or because of a discriminatory customer preference.” Hamline “had an expectation that López Prater would conform to the specific beliefs of a Muslim sect that believes it is forbidden to portray the image of Muhammad. López Prater did not conform to Hamline’s expectation and instead showed two world-renowned artistically and historically significant images of Muhammad to her art history class,” the complaint stated. The university “subjected López Prater to several adverse employment

actions” including failing to renew her contract and publicly denouncing her actions “because she is not Muslim, did not conform her conduct to the specific beliefs of a Muslim sect, and because she did not conform her conduct to the religion-based preferences of Hamline that images of Muhammad not be shown to any Hamline student.”

The complaint also alleged that Hamline’s conduct constituted a breach of contract because the faculty handbook “provided López Prater a guarantee of academic freedom in her teaching so long as the material was related to her subject.” Teaching the “historical paintings containing images of the Prophet Muhammad” was “plainly related to the subject of her class,” the complaint said. López Prater also alleged defamation for statements made by Hamline officials claiming that her conduct was “undeniably inconsiderate, disrespectful, and Islamophobic” and that the decision to display the conduct was “an act of intolerance.” The case was later moved to U.S. District Court for the District of Minnesota because López Prater entered into a “Collective Bargaining Agreement for Certain Undergraduate Adjunct Faculty” that

mandated any employment-related suits be brought in federal court, according to a notice of removal filed March 2, 2023.

Muslims split in their reaction to the incident. Jaylani Hussein, executive director of the Minnesota chapter of the Council on American-Islamic Relations, called the display of these images Islamophobic and said that “in reality, a trigger warning is an indication that you are going to do harm,” during a news conference on Jan. 11, 2023, the *Sahan Journal* reported. The national Council on American-Islamic Relations issued a statement on Jan. 13, 2023 disagreeing as to whether displaying the images was Islamophobic. “Although CAIR never hesitates to call out Islamophobia, we never use the word Islamophobia lightly. It is not a catch-all term for anything that we find insensitive, offensive or immoral. To determine what constitutes an act of anti-Muslim bigotry or discrimination, we always consider intent, actions and circumstances,” the statement read. “Although we strongly discourage showing visual depictions of the Prophet, professors who analyze paintings for an academic purpose are not the same as Islamophobes who show such images to cause offense. Based on what we know up to this point, we see no evidence that former Hamline University Adjunct Professor Erika López Prater acted with Islamophobic intent or engaged in conduct that meets our definition of Islamophobia.” The full CAIR statement is available online at: <https://z.umn.edu/CAIRHamlineStatement>.

Professors and advocates for academic freedom condemned Hamline’s decision not to extend López Prater’s contract. Christine Gruber, professor of Islamic art in the History of Art Department at the University of Michigan, defended the teaching of these paintings in a Dec. 22, 2022 article for *New Lines Magazine*. “Hamline

administrators have labeled this corpus of Islamic depictions of Muhammad, along with their teaching, as hateful, intolerant and Islamophobic. And yet the visual evidence proves contrary: The images were made, almost without exception, by Muslim artists for Muslim patrons in respect for, and in exaltation of, Muhammad and the Quran. They are, by definition, Islamophilic from their inception to their reception.”

Carleton College history professor Amna Khalid similarly defended López

“What administrators at Hamline fail to realize is that in privileging this particular version of Islam, which looks to theology for sanction, they have reinforced the very version that is the product of colonial codification.”

— Amna Khalid,
Professor, Carleton University

Prater’s decision to display the art in an article for *The Chronicle of Higher Education* on Dec. 29, 2022. “In choosing to label this image of Muhammad as Islamophobic, in endorsing the view that figurative representations of the Prophet are prohibited in Islam, Hamline has privileged a most extreme and conservative Muslim point of view,” she wrote. “In dismissing the instructor for alleged ‘Islamophobia,’ Hamline has revealed its reductive and simplistic view of Islam, Islamic societies, and Islamic art. In an age when administrators are eager for faculty members to decolonize their syllabi, Hamline’s position is a kind of arch-imperialism, reinforcing a monolithic image of Muslims propounded by the cult of authentic Islam. What administrators at Hamline fail to realize is that in privileging this

particular version of Islam, which looks to theology for sanction, they have reinforced the very version that is the product of colonial codification.”

Jeremy Young, senior manager of free expression and education at PEN America, issued a statement calling Hamline University’s decision not to renew López Prater “one of the most egregious violations of academic freedom in recent memory.” “Not only is an art history professor well within their rights to show medieval and Renaissance

Islamic artworks in class, but the professor apparently took added care to create a positive pedagogical experience for the students — placing the images in a historical context, allowing students to opt out of viewing them, and

thoughtfully exploring the history and diversity of Islamic art and thought. Non-renewing a professor’s contract under these circumstances is academic malpractice of a type that chills speech among all faculty, particularly contingent faculty who cannot rely on the status of tenure to protect their academic freedom.” (For more information about academic freedom and free speech issues related to depictions of the Prophet Muhammad, see “Silha Center Co-Sponsors Panel Discussion on Free Expression in Wake of Attacks” in the Winter/Spring 2015 issue of the *Silha Bulletin*.)

— CLAIRE COLBY
SILHA BULLETIN EDITOR

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Former President Trump Involved in Lawsuits Regarding Access, Copyright, and Defamation

In the years since former President Donald Trump left office, he has continued to draw attention for his involvement in media law issues. In March and April 2023, media organizations fought for access to documents and court proceedings related to Trump's criminal charges. In

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his use of interview recordings in an audiobook. Finally, in May 2023, a jury found Trump liable for defamation in a suit arising from statements he made about writer E. Jean Carroll after he left office, though an additional lawsuit about claims made while he was in office is ongoing.

Media Organizations Fight for Access to Historic Criminal Proceedings

On March 31, 2023 former President Donald Trump became the first current or former U.S. president to face criminal charges. Media organizations fought to immediately unseal the indictment and for access to the courtroom during his arraignment and faced mixed results.

On March 31, 2023, CNN reported that it had joined *The New York Times*, *The Washington Post*, and *The Wall Street Journal* in requesting that the Manhattan District Court unseal the grand jury indictment charging Trump immediately. "No higher values are served by keeping the indictment under seal," the letter said. "Aside from the fact that a former president is not a flight risk, maintaining the indictment under seal, despite the public disclosure of its existence, only fuels speculation as to its contents. Full disclosure of the indictment will enhance both the general public's and the parties' right to an accurate public understanding of the charges. As such, former President Trump's indictment should be unsealed without delay." In the same March 31 request, CNN reported that the media coalition asked for a "limited number of photographers, videographers, and radio journalists to be present at the arraignment." The news organizations "stand ready to work cooperatively with the Court to ensure that the public have an opportunity to observe this

monumental and historical proceeding," the request stated. If the court did not grant the motion to unseal the indictment immediately, CNN reported on April 2, 2023 that it was expected that the indictment would be unsealed April 4, 2023, when Trump appeared in court.

According to an order by New York Judge Juan Merchan released on April 3, 2023, the Court contacted attorneys for the media organizations and for Trump to solicit additional information about concerns regarding access to the arraignment. The April 3 order did not discuss unsealing of the indictment. "That this indictment involves a matter of monumental significant cannot possibly be disputed," Merchan wrote. "Never in the history of the United States has a sitting or past President been indicted on criminal charges. Mr. Trump's arraignment has generated unparalleled public interest and media attention. The populace rightly hungers for the most accurate and current information available. To suggest otherwise would be disingenuous. Understandably, the News Organizations aim to fulfill their responsibilities and argue that obtaining the broadest possible public access helps advance that mission. Unfortunately, although genuine and undoubtedly important, the interests of the News Organizations must be weighed against competing interests."

Merchan then considered whether allowing access to the arraignment would "interfere with the fair administration of justice; whether the coverage would interfere with law enforcement activity; the objections of the Defendant; and limitations related to the physical structure of the courtroom." Merchan allowed five pool photographers into the jury box for "several minutes" prior to "the commencement of the arraignment." According to the order, physical space in the courtroom would be granted to members of the press on a "first-come first-served basis" and two overflow rooms would allow for remote viewing of the arraignment. The order banned the use of any electronic devices, including cellphones and laptops, in the courtroom. The full order is available online at: <https://www.documentcloud.org/documents/23741065-trump-access-040323>.

org/documents/23741065-trump-access-040323.

Trump's attorneys opposed the request for broader access and said that allowing broader media access would "create a 'circuslike' atmosphere" and be inconsistent "with Trump's presumption of innocence," *The Washington Post* reported on April 3, 2023.

The indictment, written by Manhattan District Attorney Alvin Bragg, was released publicly on April 4, 2023. "During and in furtherance of his candidacy for President, the Defendant and others agreed to identify and suppress negative stories about him," the indictment stated. According to the indictment, Trump made a deal with American Media, Inc. (AMI), a media company "that owned and published magazines and supermarket tabloids including the *National Enquirer*" to identify and suppress negative stories about Trump, a practice known as "catch and kill." In "October or November of 2015," the AMI CEO worked with Trump's lawyers to negotiate and sign an agreement to pay a former Trump Tower doorman \$30,000 to acquire exclusive rights to a story he was attempting to sell about Trump allegedly fathering a child out of wedlock. The indictment traces "a \$130,000 hush-money payment that his fixer, Michael D. Cohen, made to the porn star, Stormy Daniels, in the final days of the 2016 campaign," *The New York Times* reported on April 4, 2023. "The payment, which Mr. Cohen said he made at Mr. Trump's direction, suppressed her story of a sexual liaison with Mr. Trump." The full indictment is available online at: <https://int.nyt.com/data/documenttools/read-trump-indictment/7db5e99723374b48/full.pdf>.

On April 4, 2023, Trump pleaded not guilty to thirty-four felony counts related to falsification of business records.

The next in-person hearing is scheduled for Dec. 4, 2023, *The New York Times* reported on April 5, 2023.

Trump Sues Journalist Over Release of Audio Files

Former President Donald Trump filed a copyright lawsuit against journalist and author Bob Woodward

and his publisher, Simon & Schuster, Inc. in the U.S. District Court for the Northern District of Florida on Jan. 30, 2023. In the complaint, Trump alleged that Woodward's use of audio clips from interviews with him in an audiobook violated Trump's copyright interests. According to the complaint, Woodward interviewed Trump nineteen times between December 2019 and August 2020 for Woodward's book, *Rage*. The complaint alleged that Woodward "repeatedly informed" Trump that these interviews were "for the sole purpose of a book." On Oct. 25, 2022, Woodward released more than eight hours of raw interviews with Trump in an audiobook titled *The Trump Tapes: Bob Woodward's Twenty Interviews with President Donald Trump* without Trump's permission. According to the complaint, "Trump's voice is one of the most recognizable voices in the world and hearing his words from his mouth or as directly articulated by him, is much more valuable and marketable and valuable than Woodward's interpretation of the interviews in *Rage*." Trump was credited as an author and narrator on several online book sites, according to the complaint. Trump "made Woodward aware on multiple occasions, both on and off the record, of the nature of the limited license to any recordings, therefore retaining for himself the commercialization and all other rights to the narration."

In the complaint, Trump's lawyers argued that Woodward appeared "to have had no intention to release an audiobook when initially recording President Trump" and only did so after the "complete and total failure of *Rage*." Trump's lawyers also alleged that the audiobook "selectively omitted" portions of the interviews. The complaint also argued that Woodward, his publisher, and his publisher's parent company, Paramount, were unjustly enriched by profiting from the audiobook without compensating Trump. Trump's lawyers also claimed promissory estoppel, breach of contract, and breach of the covenant of good faith and fair dealing against Woodward for his representations that the interview recordings "would be utilized for the publication of a single written book." The complaint also alleged that Woodward, Simon & Schuster, and Paramount each violated the Florida Deceptive and Unfair

Trade Practices Act by publishing the recordings without Trump's consent and failing to pay him. Fla. Stat. §501.201, *et seq.* 65. According to the complaint, Trump requested a jury trial and nearly \$50 million in damages.

On Jan. 30, 2023, Woodward and Simon & Schuster released a joint statement saying that the suit was meritless, according to the Associated Press. "All these interviews were on the record and recorded with President Trump's knowledge and agreement," the statement said. "Moreover, it is in the public interest to have this historical record in Trump's own words. We are confident that the facts and the law are in our favor."

Copyright experts questioned the strength of Trump's case. Intellectual property lawyer Lloyd J. Jassin told *Insider* on Feb. 1, 2023 that the document filed was a "press release designed as a complaint." Jassin opined that there was "no detriment" to Trump "other than injury . . . to his ego and image." In an article published Feb. 24, 2023 for *JDSupra*, entertainment lawyer Scott Hervey said that "best practice" would have been to have Trump sign an express release but that the "failure of Woodward to obtain a written release doesn't mean that Trump owns the copyright in the recording." Hervey wrote that there is precedent establishing that interviewees may not hold copyright in the interview. "To qualify as an author under the Copyright Act, one must supply more than mere direction or ideas," he wrote. Under this framework, "it's questionable whether Trump has any copyright interest in the audio tapes at all."

Jessica Silbey, an intellectual property law professor at Boston University, told *Bloomberg* on Feb. 3, 2023 that "Woodward, not Trump, would be the author" as Woodward directed the work. She said Trump was "not even a co-author" because co-authorship "requires mutual agreement to be jointly anchoring a work." Additionally, Silbey said that the fact that Trump was president at the time of the interviews worked against finding protectible copyright because "the federal government cannot own a copyright in its work." She said that "even if the interview was [Trump's] copyrighted work, which is dubious, he was a federal government actor being interviewed as president of the United States, so that's public domain."

On April 3, 2023, Woodward and his codefendants filed a motion to dismiss the case. According to the motion, Trump's complaint set forth "meritless causes of action." The motion argued that Trump "did not have a copyright registration" for any of the interviews and that "Woodward is the sole author and copyright owner" of the recordings. Furthermore, Trump "cannot claim an ownership interest in his contributions" to the interviews because his contributions constitute a government work unprotectable by copyright. Even if Trump did have a copyright interest in the interviews, the motion argued that including the interviews in the audiobook was "fair use."

In a memorandum of law supporting the motion to dismiss, Woodward's attorneys emphasized that Trump's contributions are "non-copyrightable government works under the Copyright Act." The Copyright Act "states that 'copyright protection . . . is not available for any work of the United States Government,' which is defined as any 'work prepared by [1] an officer or employee of the United States Government [2] as part of that person's official duties.'" 17 U.S.C. §101, 205. As the memorandum clarified, "the work of government representatives — including the President — is common property that exists to benefit the public, not an emolument to be exploited for personal gain." Presidents have long "relied on journalists to communicate their views to their constituents" but "[n]o President before or since Donald Trump has ever claimed to own a copyright in presidential interviews or demanded royalties for their republication." Trump's complaint "ignores Woodward's role as the author," the memorandum claimed. Woodward "edited the Interviews for clarity, succinctness, and sound quality, and authored original content, including 227 'commentaries' offering critical context." According to the memorandum, Woodward frequently added context in the audiobook when "Trump said something inaccurate or misleading" during the interview. "Copyright ownership 'vests initially in the author or authors of the work'" and the memorandum argues that Woodward was the "dominant author" because he initiated the project

and directed the interviews and subsequent book. The memorandum also noted that Woodward consistently reminded Trump that he was being recorded during the interviews “for history” and at “no point did President Trump object to being recorded, claim to own the Interviews, or state Woodward was prohibited from using them after publishing his next book.” Trump “continued to speak to Woodward after *Rage* was substantially complete — three Interviews occurred after Woodward has submitted initial manuscripts and a fourth after ‘the book was done.’” Additionally, the audiobook includes interviews with “many executive branch officials other than President Trump.”

In the memorandum, Woodward’s attorneys argued that even if Trump did own a copyright interest in the interviews, Woodward’s use of the interview tape in his audio book was a fair use under the Copyright Act. “The Copyright Act provides that ‘the fair use of a copyrighted work’ for ‘purposes such as criticism, comment [or] news reporting . . . is not an infringement of copyright.’” 17 U.S.C. §107. The memorandum argues that “Woodward’s use of the Interviews is classic news reporting, using President Trump’s actual words and tone as the foundation for the [audiobook’s] extensive comments and criticism.” The memorandum also argued that the claims brought under the state law were preempted by federal copyright law. “No matter how President Trump labels his claims, their underlying foundation remains the same — claiming an exclusive, private right to control and be compensation for the dissemination of interviews with journalists he conducted as part of his presidential duties,” the memorandum states. “That is precisely what the Copyright Act forbids.”

Trump’s attorney, Robert David Garson, told *Law360* on April 4 that Woodward’s argument that the interviews served the public interest was “errant nonsense.” Garson continued, “Why didn’t he donate [the recording] to any government archives and let any other reporter use these recordings, if he would have wanted to do that? He’s only saying this now because he’s being asked for an accounting.”

First Amendment experts raised concerns about implications of the lawsuit. Art Neill, director of the New Media Rights Program at California Western School of Law, told *Insider* on Feb. 1, 2023 that a judge would likely be reluctant to establish a precedent that would significantly hinder

“A sitting president knowingly sat down for recorded interviews with one of the most accomplished journalists of our age and talked about matters of great public interest. Filing a lawsuit over publishing those interviews turns the First Amendment on its head.”

— Seth D. Berlin,
Media attorney, Ballard Spahr LLP

newsgathering. “A decision in his favor would create more friction, day to day, for journalists who would have to go even further in terms of thinking about what kind of contracts and releases they’re going to get signed by sources,” Neill said.

Ballard Spahr media attorney Seth D. Berlin told *Insider* on Feb. 1, 2023 that finding in Trump’s favor would set concerning precedent. “A sitting president knowingly sat down for recorded interviews with one of the most accomplished journalists of our age and talked about matters of great public interest,” Berlin said. “Filing a lawsuit over publishing those interviews turns the First Amendment on its head.”

Barbara McQuade, a University of Michigan law professor and former U.S. attorney, suggested to *Newsweek* on Jan. 31, 2023 that the lawsuit may have been filed as an intimidation tactic. “The lawsuit may instead be intended to provide political talking points portraying himself as a victim of the media,” McQuade said. “Aggressive use of lawsuits can also be a way of deterring others from publishing unflattering news.”

Jury Rules Against Trump in Defamation Trial; Second Suit Postponed Indefinitely

On March 20, 2023, District Judge Lewis A. Kaplan of the U.S. District Court for the Southern District of New York announced that one of two defamation suits filed by writer E. Jean

Carroll against former President Donald Trump would be delayed indefinitely.

According to a March 20, 2023 CNN report, Carroll filed two defamation suits against Trump for comments he made about her rape allegations. The first trial, originally scheduled for April 10, 2023, addressed comments made

while Trump was in office. *Carroll v. Trump*, 20-cv-7311 (S.D.N.Y. Sept. 8, 2020). The second, scheduled for April 25, 2023, concerned comments made after Trump left office. *Carroll v. Trump*, 22-cv-10016 (S.D.N.Y. Nov. 11, 2022). The lawsuits arise from

allegations made by Carroll in 2019 that between the fall of 1995 and the spring of 1996, Trump raped her in a department store fitting room in New York City. Carroll made public these allegations in an excerpt published in *New York Magazine* of her then-forthcoming book. Trump issued a series of public statements claiming that “people should pay dearly for such false accusations,” that he had “no idea who this woman is,” and that she was “not [his] type.” (For more information on the underlying allegations at issue in this case, see *Trump Granted Partial Victory in Effort to Dismiss Case over Comments Made While President* in “Courts Face Varied Questions in Notable Defamation Cases” in the Fall 2022 issue of the *Silha Bulletin*.)

On Oct. 12, 2022, Trump posted on Truth Social that “E. Jean Carroll is not telling the truth, is a woman who I had nothing to do with, didn’t know, and would have no interest in knowing her if I ever had the chance,” the complaint alleged. “Now all I have to do is go through years more of legal nonsense in order to clear my name of her and her lawyer’s phony attacks on me,” he wrote. The full complaint in the second suit is available at: <https://ecf.nysd.uscourts.gov/doc1/127132389341>.

The initial suit, which addressed Trump’s conduct while in office, is complicated by questions of immunity for federal government actors. Carroll initially filed suit in the New York State Supreme Court, a state trial court, in November 2019, but the

case was removed to the U.S. District Court for the Southern District of New York after the Department of Justice intervened and certified that Trump had acted “within the scope of his office as President” when making the public statements about Carroll. The government then moved under the Westfall Act (which modified the Federal Tort Claims Act to guarantee sovereign immunity for acts by federal employees within the scope of their employment by replacing them as defendants with the U.S. government) to substitute the U.S. for Trump as a defendant in the action. The Southern District of New York held that Trump was not an “employee of the government” under the Westfall Act because he was not an officer or employee of the executive branch but rather its head. Even if he were a government employee, the Southern District of New York held that he was not acting within the scope of his employment when making the statements. The decision was appealed to the U.S. Second Circuit Court of Appeals. On Oct. 27, 2023, a divided panel of Second Circuit judges overruled the part of the Southern District of New York’s holding that held Trump was not a government employee for purposes of sovereign immunity. *Carroll v. Trump*, No. 20-03978 (2nd Cir. Oct. 25, 2022). The court deferred on ruling as to whether Trump was acting in his official capacity when he made the statements about Carroll and asked the District Court of Columbia Court of Appeals to resolve this question. On April 13, 2023, the District Court of Columbia Court of Appeals declined to determine the answer to the issue.

On March 17, 2023, lawyers for Carroll and Trump filed a joint motion asking the court to combine the two defamation suits. According to the order, filed by Carroll’s lawyer Roberta A. Kaplan, trying the cases together would reduce costs, increase efficiency, and avoid the risk of inconsistency between rulings. The “same factual question is ‘central’ to both actions” and evidence relating to this question is “relevant to both cases,” Kaplan wrote. The full filing is available online at: <https://www.documentcloud.org/documents/23716805-trump-carroll-trial-filing>.

In a one-page ruling on March 20, 2023, Judge Kaplan denied

the motion. “The parties overestimate both the judicial economy benefits that would be achieved and the risk of inconsistent ruling that would be eliminated by consolidation,” he wrote. Both sides are waiting for the ruling from the District Court of Columbia Court of Appeals, and a trial for the case involving allegations made while Trump was in office “conceivably could prove unnecessary” if the D.C. court ruled in Trump’s favor. Approving a motion to consolidate the cases would “be in tension with the deference to the Second Circuit and the District of Columbia Court of Appeals that this Court believes appropriate in the circumstances,” he wrote. The full order is available online at: <https://storage.courtlistener.com/recap/gov.uscourts.nysd.590045/gov.uscourts.nysd.590045.91.0.pdf>.

On April 13, 2023, in an *en banc* ruling, the District of Columbia Court of Appeals ruled that it did not have the authority to determine whether Trump was acting within the scope of his employment when he made the statements about Carroll during his time as president. Such a question is typically reserved for a factfinder, normally a jury. “[U]nder our case precedents, whether an employee was acting within the scope of employment is ordinarily a fact-intensive question for the factfinder, and as such is not subject to determination as a matter of law in resolving a motion to dismiss or a motion for summary judgment,” the opinion stated. The court uses a two-pronged test to determine whether an employee’s “tortious conduct” was within the scope of their employment. First, the court asks if the conduct “occurs substantially within the authorized time . . . limits” for employment. Second, the court considers whether the conduct “occurs substantially within the authorized . . . space limits” of the employment. Under the Restatement (Second) of Agency §228(1)(c), an employee’s conduct must also be “actuated, at least in part, by a purpose to serve the master.” According to the April 13, 2023 opinion, this purpose element is “an inquiry into the employee’s state of mind to determine whether the employee was, in fact, motivated by a purpose to serve their employer” and the D.C. Court focuses on “the subjective state of mind of the tortfeasor-employee.” After identifying

the relevant standards employed by the D.C. Court, the order then stated that to the degree Second Circuit requested it to “define the scope of employment of the President of the United State” it “decline[d] to do so.” That question is “a fact-intensive question for the factfinder and cannot be resolved as a matter of law in either party’s favor on the record before us.” The order left “for the Second Circuit or Southern District of New York to resolve whether the former President was acting within the scope of his employment” when he made statements about Carroll while in office. The full order is available at: <https://www.law360.com/articles/1567173/attachments/0>.

On May 9, 2023, a jury found Trump liable for sexual abuse and defamation but rejected Carroll’s rape claim. *The New York Times* reported the same day that the jury found that statements made by Trump on Truth Social in October 2022, calling Carroll’s case a “complete on job” and a “Hoax and a lie.” Were false and defamatory, and awarded Carroll \$5 million.

According to *The New York Times*, the jury awarded Carroll \$2 million in compensatory damages and \$20,000 in punitive damages for the sexual abuse claim, \$2.7 million in compensatory damage for the defamation claim, and \$280,000 in punitive damages for the defamation claim.

Trump’s lawyers called no witnesses and he did not appear at the trial, *The New York Times* reported. On May 10, 2023, *The New York Times* reported that Trump doubled down on his claims that Carroll lied. “I have no idea who this woman, who made a false and totally fabricated accusation, is,” Trump said in a post on Truth Social on May 10. “Hopefully justice will be served on appeal!”

Stephen Gillers, a legal ethics professor at New York University School of Law, told *The New York Times* on May 10 that Trump’s continued statements could constitute grounds for an additional suit. “He doesn’t get carte blanche to defame her because she sued him once and collected and won,” Gillers said. Carroll’s earlier case, which stems from statements made by Trump while he was in office, is still pending.

— CLAIRE COLBY
SILHA BULLETIN EDITOR

Russia's War in Ukraine Continues to Challenge Journalists' Ability to Cover the Conflict

Beginning with the Winter/Spring 2022 issue, the *Silha Bulletin* has monitored the effects of the war in Ukraine on the media.

(See “Russian War in Ukraine Results in Numerous Challenges to International Media in the Winter/Spring 2022 issue

WAR IN UKRAINE

of the *Silha Bulletin*; and “Russian War in Ukraine Results in Continued Challenges to International Media” in the Winter/Spring 2022 issue). This issue describes, in chronological order, recent efforts to limit the free flow of information about the war by both Russia and Ukraine, from efforts by the Ukrainian army to limit access to the front lines to the enactment of new restrictive Russian laws. We also report on efforts to silence reporters from Denmark and Russia, as well as the assassination of a prominent pro-war Russian blogger.

January 4, 2023 — Danish Journalist's Ukraine Credentials Reinstated After August Revocation

On Aug. 22, 2022, Matilde Kimer, an award-winning journalist with the Danish Broadcasting Corporation (DR), received an email informing her that her accreditation with Ukraine's Ministry of Defense had been revoked without explanation by order of the Ukrainian Security Service (SBU), the Committee to Protect Journalists (CPJ) reported on Dec. 22, 2022. Kimer was accused of violating Ukrainian Armed Forces' (UAF) Commander-in-Chief's order No. 73, which lays out requirements regarding how Ukrainian military forces and the media must interact with one another, including what information may or may not be revealed. The order, dated March 2, 2022, is available at: <https://www.mil.gov.ua/content/zmi/ORDER%2073-English.pdf>. (See story below: *Feb. 27, 2023 — Ukrainian Armed Forces Introduces Restrictions on Coverage Areas* for recent changes to Order No. 73.)

Kimer, who has worked as a DR correspondent since 2009 in multiple countries including Russia and Ukraine,

had Instagram and Facebook pages that were filled with content ranging from “official addresses by Russian President Vladimir Putin and the 2018 World Cup in Russia to daily life in Russian-occupied areas of Ukraine, including Donetsk and Crimea,” the CPJ reported on December 22. Niels Kvale, DR's foreign editor, contacted Denmark's foreign ministry for help in getting Kimer's accreditation reissued; as a result, a meeting between Kimer and the SBU was arranged for December 8 through the Danish Embassy in Kyiv, according to the CPJ.

A Dec. 22, 2022 CPJ report detailed Kimer's meeting with an SBU representative identified merely as “Oleg” who told Kimer that some of her social media posts proved she had pro-Russian sentiments. He cited several of her posts, including a May 2017 Facebook post showing a military parade in the Donetsk People's Republic (DPR). Images from that post included a St. George's ribbon, which is a Russian memento commemorating the end of World War II, thought by many to be comparable to the poppy British and Canadian people wear to honor the memory of those who died during the World War I and in subsequent conflicts. Nevertheless, Oleg claimed the appearance of the ribbon in Kimer's post constituted “illegal soviet propaganda,” suggesting that she was biased in favor of the Russians.

Oleg further accused Kimer of being “somehow” involved with DPR officials since she had been able to obtain interviews with them, but did not provide examples of her work that proved such connections. Oleg then told Kimer that it would be difficult to restore her credentials, but suggested that she write “good stories” about Ukraine. He further suggested she use SBU-approved photos and videos “for a couple of months before having her accreditation reassessed.”

Kimer told CPJ that she responded, “Thank you very much for that offer, but as an independent journalist I cannot publish stories about something I did not witness, about people I did not talk to. This is not journalism. This is working in communication.’ And then the meeting ended.”

CPJ noted that Ukraine's ambassador to Denmark, Mykhailo Vydoynyk, told the Danish daily newspaper *Politiken*, “We are certainly not trying to pressure her to report anything she doesn't want to or limit her journalistic activities. We just want journalists to comply with the rules.”

On Dec. 20, 2022, the European Federation of Journalists published a statement where, together with the Danish Union of Journalists, they condemned the revocation of Kimer's credentials and called for them to be restored.

“I am outraged by this attack on the free press,” Tine Johansen, president of the Danish Union of Journalists wrote. “If a country insists on labeling itself a democracy, it has to protect the independence of media. We all have a huge need for talented journalists to be our eyes and ears on the ground in Ukraine, and obviously the Ukrainian authorities have to respect that.” The statement is available at: <https://z.umn.edu/DUJKimerStatement>.

On Jan. 4, 2023, DR reported that Kimer's credentials had been reinstated by Ukrainian authorities, but without explanation. “I don't know, because we haven't received any explanation — just as we didn't get an explanation either when the press accreditation was canceled,” Kvale said. “I hope and believe, however, that is it because the case has been investigated and Matilde's and our journalism have been looked at and seen that there is no way to put a finger on Matilde Kimer's integrity, independence and credibility as a journalist.”

January 26, 2023 — News Outlet *Meduza* Outlawed by Russia in an Attempt to Silence Independent News

Meduza, an online news outlet which operates out of Riga, Latvia and describes itself as “an international publication released in Russian and English,” was designated by the Russian Prosecutor General's Office as an “illegal, undesirable organization” whose “activities pose a threat to the foundations of the Russian Federation's constitutional order and national security,” according to an article

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warplanes . . . had carried out the attack even though the Russian defence [*sic*] ministry had denied it.” She was charged for committing the criminal offense of spreading “knowingly false information,” the BBC reported. According to Amnesty International, she has been sentenced to six years in jail and is barred from any “journalistic activity” for five years upon her release. *Sibir.Realii*, a project of Radio Free Europe/Radio Liberty, reported on February 15 that she will be sent to an unspecified penal colony.

According to Amnesty International, Ponomarenko was charged under an amendment to Article 207.3 of the Russian Criminal Code, which prohibits disseminating false information about the Russian Armed Forces. The amendment was adopted in March 2022, and calls for sentences of up to 15 years in prison for people who distribute “false news” about the Russian military and makes it illegal to call the action against Ukraine an “invasion.” Instead, it must be referred to as a “special military operation” by Russian journalists working in Russia. According to *The Moscow Times*, nearly 150 people have been tried under the new amendment since its passage, and which has resulted in “hundreds of independent journalists and Kremlin critics” leaving Russia to avoid being charged under the new law. The State Duma — Federal Assembly of the Russian Federation — published information about the amendment at: <http://duma.gov.ru/news/53773/>. ConsultantPlus, an organization offering reference materials dealing with the Russian legal system, posted the text of Article 207.3, available at: <https://z.umn.edu/Article2073Wording>. (For more information about the amendment to Article 207.3, see *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; Novaya Gazeta Editor Attacked* in “Russian War Against Ukraine Results in Numerous Challenges to International Media” in the Winter/Spring 2022 issue of the *Silha Bulletin*.)

On February 15, *Sibir.Realii* reported that Ponomarenko was initially detained in a pre-trial detention center in Barnaul. In a letter to *Sibir.Realii*, Ponomarenko stated

that she suffered from claustrophobia, made worse by the conditions of her cell where windows were “tightly sealed,” she wrote. “It is impossible to get used to the crypt [cell] in my case. Life in the crypt is the biggest difficulty.” *Sibir.Realii* reported that Ponomarenko attempted suicide in September 2022, and then transferred to house arrest in November; however, in January 2023 she was returned to the pre-trial detention center in Barnaul due to unspecified “violations.” According to the BBC, Ponomarenko has compared her conditions in detention to “torture.”

Nevertheless, according to a February 15 report by Radio Free Europe/Radio Liberty, Ponomarenko told the court the day before her sentencing, “Patriotism is love for the motherland. And love for the motherland should not be manifested in the encouragement of crime. Corruption is a crime. Attacking a neighbor is a crime. There will never be a winner in the slaughter of two brothers, believe me. I do not differentiate Ukrainians from Russians. I feel sorry for every drop of blood shed for no reason.”

“No totalitarian regime has ever been as strong before its collapse,” she concluded.

Marie Struthers, Amnesty International’s Director for Eastern Europe and Central Asia said, “Maria Ponomarenko’s sentence shows that in Russia telling the truth, denouncing a war crime and demanding justice for the killing of civilians, has itself become a grave offence [*sic*] punishable by many years in prison. Her sentence is yet another example of injustice and the cynicism of the authorities in Russia, which are disturbingly routine. The authorities are trying to lock up all those who disagree with them and intimidate others to stay silent and look the other way rather than risk years behind bars.”

(For more about the recent changes to Russian law restricting speech, see *March 18, 2023 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share Fake News Regarding Military Volunteers and Mercenaries*, below, and *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; Novaya Gazeta Editor*

Attacked in “Russian War Against Ukraine Results in Numerous Challenges to International Media” in the Winter/Spring 2022 issue of the *Silha Bulletin*.)

Feb. 27, 2023 — Ukrainian Armed Forces Introduces Restrictions on Coverage Areas

The Ukrainian Armed Forces (UAF) created three zones for accreditation: green zones, where accredited journalists can work without restrictions; yellow zones, where accredited journalists may work only when accompanied by a designated military officer; and red zones, which cover all frontline fighting and where journalists are not permitted to work under any conditions. According to a March 31 article by Voice of America (VOA), the new regulations mean that journalists are denied access to more than 50 communities in Ukraine where frontline fighting is taking place.

The Committee to Protect Journalists (CPJ) reported on March 19 that the Ukrainian army’s Operational Command East published the new rules, and on March 20, the Operational Command South issued “similar regulations.” However, North and West operational commands did not release similar rules, perhaps as a result of criticism received from media groups.

On March 22, the International Press Institute (IPI) reported that Ukrainian army representatives said the restricted areas designated as red and yellow zones would be reviewed at least once a week.

Journalists world-wide protested the zoning restrictions.

Oksana Romanyk, head of the Institute of Mass Information (IMI), an independent, non-profit, non-governmental organization based in Ukraine, whose mission is to promote a positive impact of media on Ukrainian civil society, said that the regulations basically ban reporters from the fighting at Ukraine’s frontline. “Everybody is shocked,” she told CPJ. On March 31, she told VOA, “We do not think that [the restrictions are] connected with the desire to make the work of journalists safer. It is, rather, connected with the desire to make everything work like the army.”

Carlos Martinez de la Serna, CPJ’s program director in New York, told the VOA, “Ukrainian authorities must ensure that members of the press

can keep doing the crucial work of covering Russia's invasion of the country, and refrain from adopting rules that stifle war reporting. Military authorities should consult with local journalists and press groups to craft regulations that keep reporters safe while allowing them to work freely.”

Jeanne Cavalier, the Eastern Europe expert for Reporters Without Borders (RSF), told VOA on March 31, “It’s worrying that such a decision can be made to restrict the access of journalists. It’s in [Ukraine’s] interest to facilitate reporting the war.”

March 6 — Journalist Convicted for Spreading Disinformation about the Army

Initially charged with spreading disinformation about the army in March 2022, Andrey Novashov was the first journalist convicted under a Russian law passed in 2022, *Meduza* reported on March 6. According to a March 6 Reuters report, Novashov is a reporter with *Sibir.Realii*, a project of Radio Free Europe/Radio Liberty. The Committee to Protect Journalists (CPJ) reported that Novashov posted local news about the Siberian city of Kemerovo, including protests against Russia’s war in Ukraine and covered human rights violations in Russian prisons, as well as the persecution of human rights defenders in Russia. According to a March 8 Council of Europe report from its Safety of Journalists Platform, Novashov was convicted by the Rudnichny District Court of Prokopyevsk for eight months of community service and prohibited to post content online for a year, *The Moscow Times* reported. (For more about the recent changes to Russian law restricting speech, see *March 18, 2023 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share Fake News Regarding Military Volunteers and Mercenaries*, below, and *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down*; *Novaya Gazeta Editor Attacked* in “Russian War Against Ukraine Results in Numerous Challenges to International Media” in the Winter/Spring 2022 issue of the *Silha Bulletin*.)

According to CPJ, Novashov had reposted an eyewitness account of the siege of Mariupol on the Russian social media platform VKontakte, similar to

Facebook. The original article was written and posted on Facebook by Victoria Ivleva, a journalist who is affiliated with Russian independent newspaper *Novaya Gazeta*, according to Justice for Journalists, a London-based nonprofit which monitors attacks against journalists worldwide. Ivleva is known for her activism and her award-winning photography. In 1992, she won first place in World Press Photo contest in the Science and Technology category

“Ukrainian authorities must ensure that members of the press can keep doing the crucial work of covering Russia's invasion of the country, and refrain from adopting rules that stifle war reporting.”

— Carlos Martinez de la Serna
Committee to Protect Journalists
Program director, New York

for her pictures of Chernobyl. Her photos are available online at: <https://www.worldpressphoto.org/collection/photo-contest/1992/victoria-ivleva/1>.

Reuters reported that Novashov was also charged for four additional stories he had posted which allegedly discredited the Russian army. CPJ reported that Novashov denied the charges and considered the case fabricated and retaliation for his reporting. *The Moscow Times* reported that in his closing statement Novashov told the court, “I refuse to label black and white. From the very beginning of the so-called military operation I considered it a crime against the Ukrainian people. Everything that is said in the posts that I am being accused of [publishing] is true.”

March 7, 2023 — Student Blogger Sentenced for Disseminating False Information About Russian Forces in Ukraine

On March 7, Amnesty International reported that on the same day, the Timiryazevsky District Court of Moscow found Dmitry Ivanov, an IT student at Moscow State University (MSU), guilty of “disseminating knowingly false information about the Russian Armed Forces motivated by political or ideological hatred” under Article 207.3(2) of the Russian Criminal Code, sentencing him to 8 ½ years in prison.

According to a March 7 report by British television news channel and telecommunications company Sky News, Ivanov had founded a Telegram channel for students at MSU. He was charged based on a number of posts where he called the Russian action in Ukraine a “war” instead of a “special operation,” and writing about “Russian forces attacking civilians and civilian infrastructure in Ukraine.” Sky News further reported that Ivanov’s posts “accused Russia of committing war

crimes in the Kyiv suburbs of Bucha and Irpin and targeting the Zaporizhzhia nuclear power plant,” though most of Ivanov’s other posts were reposted from other sources. In addition to his prison sentence, Ivanov will be

forbidden to “have any presence on the internet” for four years after he is released.

On March 15 Open Democracy, an independent international media platform located in the United Kingdom, reported that Ivanov’s conviction was predictable. “Proving guilt in a case of so-called false information is quite simple. The investigation takes the official reports of the Russian Ministry of Defence [*sic*] as a basis, and, if something contradicts them, it is considered to be untrue.” The Open Democracy report further stated that witnesses for the prosecution “[claimed] that they had accidentally seen the content of Ivanov’s Telegram channel and voluntarily contacted the police. This was almost certainly not the case. These witnesses were likely to have been found by the police themselves and forced to give evidence. During the trial, these ‘witnesses’ appeared afraid to make mistakes, reading their testimonies off pieces of paper.” Open Democracy further noted that proof that “Ivanov’s link to [his] Telegram channel had been proven by examination of his mobile phone.” But Ivanov had refused to provide his password, making it difficult for authorities to access his phone. The

Open Democracy article is available at: <https://www.opendemocracy.net/en/odr/dmitry-ivanov-sergei-smirnov-russia-ukraine-jailed/>.

Sky News reported that Ivanov could be seen on Telegram postings “shrugging his shoulders” and “smiling and laughing” as his sentence was read. Throughout the proceedings, Ivanov “maintained his innocence and stood by his original comments,” Sky News reported. In his final statements to the court, Sky News reported that the charges against him “were absurd” and “shouldn’t exist at all.”

In an interview with Sky News, Ivanov said, “You must understand that Russia is not Putin. We didn’t vote for him and he did not ask us about starting this war with our closest neighbors. I know that tens of millions of people here in Russia are against this criminal war. Lots of us have friends and relatives in Russia and we feel their pain.”

Amnesty International’s Russia Director, Natalia Zviagina, said in its March 7 report, “Dmitry Ivanov’s case is another demonstration of the brutal repression of anti-war dissent by Russian authorities. It shows that anyone who alleges Russian forces have committed war crimes will pay for it behind bars.” She continued, “Dmitry Ivanov is a prisoner of conscience. He and all those prosecuted and convicted for speaking out against Russia’s invasion of Ukraine should be immediately and unconditionally released, and all charges against them dropped.” Referring to the laws Russia amended since the war in Ukraine began which affect freedom of speech in Russia, she added, “The articles criminalizing criticism of Russia’s invasion of Ukraine should be repealed as violating the right to freedom of expression.” (For more about the recent changes to Russian law restricting speech, see *March 18, 2023 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share Fake News Regarding Military Volunteers and Mercenaries*, below, and *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; Novaya Gazeta Editor Attacked in “Russian War Against Ukraine Results in Numerous Challenges to International Media”* in

the Winter/Spring 2022 issue of the *Silha Bulletin*.)

March 18, 2023 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share “Fake News” Regarding Military Volunteers and Mercenaries

Russian news agency TASS reported that on March 18, Russian President Vladimir Putin signed a law making it illegal to slander anyone participating in the war against Ukraine, including mercenary soldiers and volunteers. “[T]he public discrediting of all participants in the special military operation, including volunteer units, organizations and individuals facilitating the Russian Armed Forces’ missions, will now be punishable under the law,” the new legislation read, according to TASS.

On March 14, the State Duma released a statement saying that the new law amended Article 207.3.3 of the Code of Administrative Offenses, adding liability for discrediting volunteer formations, organizations or individuals who perform tasks for the RF Armed Forces. Fines under this article amount to up to approximately \$650 for individuals and up to approximately \$6,500 for organizations. Anyone who is charged under the new amendment more than once a year is subject to criminal punishment. According to amendments to Part 1 of Article 207.3 and part 1 of Article 280.3 of the Criminal Code of the Russian Federation, punishment is increased for such offenses from three to five years. The punishment under Part 2 of Article 280.3 of the Criminal Code of the Russian Federation (repeated defamatory or false statements that result in “dangerous consequences”) was also increased, from five to seven years in prison. The maximum term of imprisonment is up to 15 years, and fines are up to a little more than \$61,000. The State Duma statement is available at: <http://duma.gov.ru/news/56548/>. ConsultantPlus, an organization offering reference materials dealing with the Russian legal system, posted the text of Article 207.3, available at: <https://z.umn.edu/Article2073Wording>, and Article 280.3 at <https://z.umn.edu/Article2803Wording>.

According to a March 18 *Meduza* article, the amendments originated when Wagner Group founder

Evgeny Prigozhin suggested banning “public actions aimed at discrediting volunteers.” The Wagner Group, according to the BBC, is a Russian mercenary group, consisting of 50,000 members, many of whom have been drawn from prisons. The United States has designated the Wagner Group as a “transnational criminal organization” for its operations in Syria, Libya and the Central African Republic, among others. *Wall Street Journal* reporter Evan Gershkovich had been collecting information about the Wagner Group as part of his reporting on Russia. (For more information, see “*Wall Street Journal’s Evan Gershkovich Charged with Espionage by Russian Authorities*” on page 10 of this issue of the *Silha Bulletin*.)

Despite his support for the new amendments, Prigozhin said that they should not apply to “people” criticizing their military commanders, according to a March 1 Reuters report where he discussed mercenaries belonging to the Wagner Force. Such criticism, Prigozhin stated, “[is] necessary for the open and responsible fulfillment of [commanders’] responsibilities.” Prigozhin has accused senior military commanders of starving Wagner Group fighters in an act of retaliation against him; however, the Russian defense ministry has denied those accusations.

As the amendment moved through the Russian legislative process, the International Press Institute’s Deputy Director Scott Griffen observed on March 15 that “This law is the latest step in Russia’s efforts to build a parallel reality inside the country by silencing independent reporting on the truth of Russia’s war on Ukraine. Legislation on ‘fake news’ and ‘discreditation’ of the [Russian] army has already been wielded as a weapon against the free press and other critical voices. One year after Russia’s mass crackdown on the press in relation to the war began, the government is cracking down further.” (For more about the recent changes to Russian law restricting speech, see *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down; Novaya Gazeta Editor Attacked in “Russian War Against Ukraine Results in Numerous Challenges to International Media”* in the Winter/Spring 2022 issue of the *Silha Bulletin*.)

April 2, 2023 — Russian Pro-War Blogger “Vladlen Tatarsky” Killed in St. Petersburg

Maksim Fomin, a blogger who supported Russia’s war against Ukraine and who was best known by his pen name Vladlen Tatarsky, was killed April 2 in an explosion at a St. Petersburg cafe, where he had been speaking at the invitation of pro-war group Cyber Front Z, the BBC reported. *The Moscow Times* reported that videos taken at the time show Tatarsky accepting a box from a woman who Russian officials identified as Daria Trepova. The box contained a statuette that exploded shortly after Tatarsky accepted it.

The New York Times characterized Tatarsky as “a prominent figure in an increasingly vocal and influential movement of hawkish, ultranationalist figures who broadly support the Kremlin’s war against Ukraine, but often criticize how the war is conducted,” and who “advocated erasing Ukraine as an independent nation.” The BBC reported that Tatarsky fought with Russian forces when Russia invaded Ukraine in February 2022, helping to launch combat drones and build fortifications. In addition, he commented on the war on social media and Russian state media. Tatarsky had more than 500,000 followers on the messaging app Telegram, according to the BBC.

As for Tatarsky’s alleged assassin, *The Moscow Times* identified Trepova as being “a well-known figure among St. Petersburg feminists and opposition activists [but] little is known about her actual political views.” Russian authorities claimed that she is “an active supporter of [Russian opposition leader Alexei] Navalny,” but *The Moscow Times* stated that Navalny’s supporters have denied links to her or to the attack that killed Tatarsky.

According to *The Moscow Times*, Trepov’s Twitter account was deleted “days” before the attack on Tatarsky, which she allegedly used to connect with Roman Popkov, a Russian journalist and political activist based in Kyiv. *The Moscow Times* reported that Popkov was identified by “Kremlin-linked media” and that Popkov had recruited Trepov to give the statuette to Tatarsky. But Popkov denied the claims, writing on Telegram, “I gave no orders to [Trepov] and didn’t introduce her to any Ukrainian agents.”

According to the BBC, Ukrainian presidential advisor Mykhailo Podolyak stated that the explosion that killed Tatarsky was a sign of domestic terrorism and evidence that Russian political infighting is on the rise.

The Moscow Times reported that on April 3, Russian President Vladimir Putin awarded Tatarsky the Order of Courage. Tatarsky’s funeral took place in Moscow on April 8 where, according to Reuters, “hundreds” attended.

Trepov’s pending trial is expected to be held behind closed doors, *The Moscow Times* reported on April 10.

(For about the effects of the war in Ukraine on media, see: “Latvian Regulator Revokes the License of Russian Independent Broadcaster TV Rain” in the Fall 2022 issue of the *Silha Bulletin*; “Russian War Against Ukraine Results in Continued Challenges to Media” in the Summer 2022 issue; “War in Ukraine Raises Issues of Misinformation and Concerns Regarding Media Bias” in the Winter/Spring 2022 issue; “Numerous Journalists Endangered and Killed Covering the War in Ukraine” in the Winter/Spring 2022 issue, and “Russian War in Ukraine Results in Numerous Challenges to International Media” in the Winter/Spring 2022 issue.)

April 11, 2023 – RusNews Journalist Roman Ivanov Arrested

According to an April 11 report by *The Moscow Times*, Russian authorities have opened three criminal investigations against journalist Roman Ivanov after detaining him in Korolyov, a city near Moscow. Ivanov worked for RusNews, a news organization that describes itself as being “on the side of truth.” It appears most active on its YouTube channel at <https://www.youtube.com/@RusNewsMedia>.

According to an April 12 story in *Novaya Gazeta Europe*, all of the fake news charges against Ivanov come under Article 207.3.2.d of Russia’s Criminal Code which an April 13 Committee to Project Journalists (CPJ) noted “bans disseminating false information on the basis of ‘political, ideological, racial, national, or religious hatred.’” According to *Novaya Gazeta Europe*, the charges were made on the basis of an article Ivanov had posted on the Russian social media platform Vkontakte in October 2022, together with two war-related posts — one in April 2022 and

another in March 2023 — that he had uploaded to his Telegram channel, Chestnoe Korolyovskoe. The CPJ reported that Ivanov’s laptop, phones, and video cameras were all confiscated by Russian authorities.

A video of Ivanov appearing for sentencing was posted online by RusNews and is available at: <https://www.youtube.com/watch?v=pmOGnCQe4TU>. At that appearance, he was ordered detained until June 10. The CPJ reported that Ivanov’s laptop, phones, and video cameras were all confiscated by Russian authorities. ConsultantPlus, an organization offering reference materials dealing with the Russian legal system, posted the text of Article 207.3, available at: <https://z.umn.edu/Article2073Wording>.

CPJ noted that Ivanov had been detained in Korolyov for seven days during September 2022 for covering an anti-mobilization protest in that city. He was fined approximately \$225 and released. CPJ reported that the fine was later overturned.

Maya Vinokour, a New York University professor who specializes in post-Soviet media, told Voice of America (VOA) that although she found Ivanov’s arrest “grotesque and horrible,” she was not surprised. “Certain organizations are being specifically targeted in a way that seems very planned out,” Vinokour told VOA, and that those organizations likely want “to send the message that entire organizations are on the chopping block. There is no safe way to dissent.”

(For more about the recent changes to Russian law restricting speech, see *March 18, 2023 — Vladimir Putin Signs Law Making It Illegal to Discredit or Share Fake News Regarding Military Volunteers and Mercenaries*, above, and *March 4 — Russian Federation Passes Law Regarding False News; Various Websites and News Organizations Shut Down*; *Novaya Gazeta Editor Attacked* in “Russian War Against Ukraine Results in Numerous Challenges to International Media” in the Winter/Spring 2022 issue of the *Silha Bulletin*.)

— ELAINE HARGROVE
SILHA CENTER STAFF

Media Ethics Roundup: Fox's Election Coverage; NYT's Backlash for "Inflammatory" Reporting; Risks Associated With the Rise of AI

In the first few months of 2023, media ethics issues have emerged from coverage of highly-politicized news issues.

First, a settlement was reached in the high-profile defamation case against Fox News Network brought by Dominion Voting Systems, an election

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voting system technology company whose machines were used to tally votes in the 2020 election, which brought focused attention on the mechanics of news reporting. Dominion alleged the "baseless claims of fraud" Fox reported throughout the aftermath of the 2020 election destroyed its reputation for electoral integrity with much of the voting public. But media commentators and experts contended that despite the serious claims Dominion raised in its suit, if it had proceeded and gone in Dominion's favor, it could have chilled news reporting. Separately, *The New York Times* recently faced widespread criticism for its reporting on transgender individuals, especially coverage debating the propriety of medical care for trans children. Commentators argued the *Times* reporting endangers a vulnerable population by creating controversy, while others asserted the reporting is necessary to inform the public. Finally, the rising prominence of ChatGPT and similar artificial intelligence (AI) technologies has led experts to consider the ethical implications on the practice of journalism in the 21st century.

Fox Defamation Suit Leads to Renewed Attention to Reporting Ethics

New revelations in *Dominion Voting Systems v. Fox News Network, LLC*, including internal communications made public in legal filings, demonstrate that many of the network's producers, stars and executives — including owner Rupert Murdoch — knew the claims they were broadcasting were false, prompted discussion of the potential ramifications if the case were to succeed. A trial in the case was set to begin on April 18, 2023, but shortly

before the trial began the parties reached a settlement of \$787.5 million to be paid by Fox to Dominion. Leading up to the trial, experts warned that if Dominion prevailed it could create a "slippery slope" that could threaten future news reporting.

The \$1.6 billion defamation lawsuit stemmed from Fox's reporting and editorial commentary which featured inflammatory statements and allegations made by former President Donald Trump and his surrogates. The case hinged on whether Fox's editorial decision-making process met the actual malice standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *Sullivan* requires a showing of "actual malice," meaning that a statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not," in cases brought by public officials, which the Supreme Court later extended to public figures.

Fox argued that their reporting and commentary were protected from the defamation claims because the news organization was merely reporting the existence of the allegations. Erin Murphy, one of the senior figures on Fox's defense team, told National Public Radio (NPR) in an interview on March 6, 2023: "We err on the side of speech because the more and more speech you have, the better chance of having people actually getting the opportunity to point out what's right and what's wrong," Murphy said. "And that's why we don't suppress the speech that we don't think is right."

But Dominion asserted that the First Amendment's protections do not apply to defamatory statements. "As long-settled law makes clear, the First Amendment does not shield broadcasters that knowingly or recklessly spread lies," Dominion's legal team said in a statement.

Commentators cautioned that fine lines must be navigated in this ethical dilemma. Director of the Silha Center and Silha Professor of Media Ethics and Law at the University of Minnesota Jane Kirtley described her concerns in an interview with NPR on March 6, 2023: "No matter how

much I might personally deplore what Fox is alleged to have done, I worry a lot more about the longer term ramifications," Kirtley said. "To simply say Fox is a bunch of liars — that they shouldn't be allowed to get away with this and their wild speculations should not be reported and should not be protected — I just think that that is a slippery slope. ... [Were Fox to lose,] there would be a scramble by other news organizations to distance themselves from Fox's techniques and Fox's editorial decisions. But the problem is that by lifting the veil on the editorial decision-making process, we are now going to see all news organizations called into question going forward."

By contrast, Amy Davidson Sorkin, writing for *The New Yorker* on March 27, 2023, took a different tack. She noted the case will especially call into question the legal standard for actual malice in reporting, as established by *Sullivan*. "[A] Fox victory has the potential to be profoundly disruptive, too, because it would suggest that almost nothing could meet the actual-malice test," Davidson Sorkin wrote. "Such an outcome could in its own way undermine *Sullivan*, by making it seem meaningless — an empty promise of recourse. That result could itself push the Court to an even broader reconsideration of press freedom. *Times v. Sullivan* has been vital to the press's ability to bring criticisms of those with power to light. If the decision instead becomes synonymous with the idea that ordinary people can be defamed with impunity, it cannot long survive. And it is worth saving."

Others expressed skepticism over the case's potentially wide-reaching implications. Charles Glasser, professor of journalism and media law at New York University, said in an interview with NPR on March 6, 2023, "Even if Dominion makes their case and convinces a jury to shovel truckloads of Fox's money to [the election tech company], nothing in this case presents a meaningful threat to the First Amendment. It really comes down to the facts about how the story was crafted and disseminated."

The breadth of evidence in the case is “unusual,” according to legal experts interviewed by Yahoo News on March 7, 2023. “It’s just so rare to have such contemporaneous evidence of a defamation defendant’s state of mind when the statements are being made,” Enrique Armijo, a First Amendment scholar and professor at Elon University School of Law, told Yahoo News. “It’s pretty bad when you have someone in the news department saying, ‘This person is crazy,’ and then interviewing that person on the air.”

Samuel Freedman, a professor at Columbia Journalism School, agreed the case features very unique circumstances, and pointed out how these cases normally arise out of honest mistakes. “It’s really rare, to my knowledge, to have a major news organization, or what claims to be a news organization, willingly broadcast what it knew to be lies,” Freedman told Yahoo News. “It’s an egregious violation of journalism ethics. ... [Typically,] maybe there was sloppy reporting, maybe the verification wasn’t done carefully enough. Maybe even some self-interested actor successfully planted information with a news organization. But none of those apply here.” (For more information on the legal implications of this case, see “Dominion Lawsuit Against Fox Brings Defamation into Mainstream Conversation” on page 5 of this issue of the *Silva Bulletin*.)

The Society of Professional Journalists (SPJ) released a statement on the case on March 29, 2023, voicing their support for the Fox journalists who have been caught in the crossfire of this ethics dilemma. “We support journalists at Fox who have refused to take part in narratives of falsehoods,” SPJ said. “Some media companies have found footing in pandering to target audiences on all sides of our cultural and political divides. Appealing to confirmation bias and manufacturing outrage with deceptive posturing for profit, popularity or power while turning away from facts is a cynical and hypocritical strategy. It is unconscionable and an insult to the tens of thousands of American journalists, including many at Fox, who understand their obligation to serve the public interest, not the bottom line.”

Steven Roberts, a journalism professor at George Washington University, said the consequences for

journalists cannot be overstated. “From an ethical and professional perspective, Carlson and Fox are not journalists at all, but partisan propagandists,” Roberts wrote for the *New Braunfels Herald Zeitung* on April 20, 2023.

“And yet, when it comes to libel law, Fox is a news organization. And when its lawyers argue that a defeat in the Dominion case ‘would have grave consequences for journalism across this country,’ anyone who cares about a free and unfettered press should take that warning very seriously.”

After the settlement was announced, media experts such as Tom Jones, writing for Poynter on April 19, 2023, noted the case marks a loss for the public, because it won’t receive an apology. “Critics of Fox News wanted their pound of flesh. They wanted to see Fox News pay for its lies, and not just by writing a check,” Jones wrote. “They wanted to see the network embarrassed and humbled. They wanted to see hosts such as Tucker Carlson and Maria Bartiromo look into the camera and grovel by saying, ‘We lied to you. The 2020 election was not rigged. Dominion did not switch votes. The election was fair and square. I’m sorry. Please forgive us.’ But that won’t happen. The settlement does not include Fox News offering any on-air apologies.” On April 24, 2023, *The New York Times* reported that Tucker Carlson was “parting ways” with Fox News. Carlson’s communications, including a text message with another Fox News employee in which he stated that he “hate[d] [Trump] passionately” became public as part of the lawsuit. Only one of the twenty allegedly defamatory broadcasts at issue in the lawsuit came from Carlson, CNN reported on April 24, 2023.

Others, like Erik Wemple, a media critic for *The Washington Post*, expressed dismay that the settlement means the public will remain in the dark as to the extent of Fox’s lies. “Documents made public in the course of the litigation showed that Fox News’s relationship with its audience tortures the ideal of an America that runs on a shared set of facts,” Wemple wrote on April 18, 2023. “When Fox News bosses observed that its loyal viewers were fleeing to other networks peddling election lies, they grew worried that their two-decade-long ratings dominance was in jeopardy. So, they fine-tuned the coverage to indulge

some conspiracy-theorizing. The upshot is that Fox News was able to keep its audience both sizable and ill-informed. The settlement might only perpetuate that dynamic. The full depravity of the network’s 2020 election coverage will never have to be disclosed to viewers on the only cable-news outlet they trust.”

Media columnist Jane Martinson, writing for *The Guardian* (UK) on April 19, said that it was unclear how much the settlement would hurt Fox. She noted that the settlement spared Fox presenters from having to apologize on-air for their role in spreading lies. “Such apologies could hurt Fox where it matters, by potentially driving its pro-Trump viewers, who continue to believe in electoral fraud, to even more outrageous rightwing U.S. TV network rivals such as Newsmax and One American News Network.”

On April 20, 2023, *New York Times* opinion columnist David French questioned whether the settlement contributed to a “system whereby wealthy institutions can essentially build in their corruption as a cost of doing business.” He argued that the settlement did not result in true accountability. “Accountability occurs when the people responsible for misconduct — and not merely their corporate bank accounts — experience proportionate consequences for their actions.” He wrote that Fox has also failed to publicly apologize for the misconduct and deflected blame for the misinformation to Trump and his legal team. “The end result is that Fox has paid an immense price for its lies, but it recognizes that its true vulnerability isn’t in its bank account but in its audience,” French wrote. “It can absorb huge financial losses so long as those losses are fleeting. It cannot prosper if it loses its audience. Shielding its audience from the truth is easily worth almost \$800 million to a company that made \$1.2 billion in net income last year and is sitting on \$4 billion in cash reserves.”

***New York Times* Coverage of Transgender Issues Draws Criticism**

On Feb. 15, 2023, more than 900 *New York Times* writers and contributors signed an open letter to the publication’s associate manager for standards, asserting they have “serious

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concerns about editorial bias in the newspaper's reporting on transgender, non-binary, and gender nonconforming people."

The letter cited a number of examples of the coverage in question, including a feature article by Katie Baker, entitled "When Students Change Gender Identity and Parents Don't Know." The letter writers allege the article "misframed the battle over children's right to safely transition." "The piece fails to make clear that court cases brought by parents who want schools to out their trans children are part of a legal strategy pursued by anti-trans hate groups," they wrote. "These groups have identified trans people as an 'existential threat to society' and seek to replace the American public education system with Christian homeschooling, key context Baker did not provide to Times readers."

The letter closed by saying the writers and contributors took serious issue with the message the *Times* coverage sent. "Some of us are trans, non-binary, or gender nonconforming, and we resent the fact that our work, but not our person, is good enough for the paper of record," they wrote. "Some of us are cis, and we have seen those we love discover and fight for their true selves, often swimming upstream against currents of bigotry and pseudoscience fomented by the kind of coverage we here protest. All of us daresay our stance is unremarkable, even common, and certainly not deserving of the Times' intense scrutiny."

In a statement to NPR, *Times* spokesperson Charlie Stadtlander, defended the reporting singled out in the letter. "Our journalism strives to explore, interrogate and reflect the experiences, ideas and debates in society — to help readers understand them," Stadtlander said. "Our reporting did exactly that and we're proud of it."

The letter is available online at: <https://nytletter.com/>.

Billy Binion, writing for *Reason* on Feb. 16, 2023, criticized the letter writers for having, in his view, a narrow conception of what questions should be asked and answered in reporting. He cited an example to illustrate his point: "Marci Bowers, a transgender woman and reconstructive surgeon, observed . . . that transgender girls

who stave off male puberty, and thus prevent full penile development, may struggle to orgasm in their adult lives after having bottom surgery. 'Sexual satisfaction is a huge thing,' she said. 'You've got to talk about it.' Some of the most elite journalists in the country, however, appear to not want to talk about it. They want to treat these topics as black and white in a profession that is supposed to be dedicated to investigating the gray."

Chase Strangio, writing for MSNBC on Feb. 22, 2023, said the *Times*' stance is premised on a faulty argument. "[T]he simple reality is just because something can be debated doesn't mean it should be," Strangio said. "And when something as essential to survival as whether health care for a group of people is legitimate becomes the subject of widespread debate, those so-called debates have very significant material consequences. . . . There is a through line from how we are covered by journalists to how we are treated by lawmakers, but it doesn't start in the media and it doesn't end in legislatures. We all have the power to transform what we think and how we see each other. Being transgender is a beautiful gift — that should be held with grace and care. I wouldn't change it for anything. And I just hope that, in time, we will be seen in all our divinity and expansiveness, instead of through the dehumanizing, patronizing lens of the people currently debating and describing us."

AI Poses New Risks to Ethics in Journalism

Since ChatGPT's release in November 2022, considerable attention has been paid to the myriad risks associated with the technology, especially regarding the ethical use of it. Some newsrooms have begun to employ AI in their editorial processes, from basic fact checking to editorial review to even a handful that have used it to generate news articles. Experts and commentators warned the ethical questions posed by the use of such powerful technology must be carefully considered by journalists, especially in the ways AI reinforces human biases.

ChatGPT and other AI interfaces effectively boil down to being immense databases of existing human knowledge. As Emily Bell wrote for *The Guardian* (UK) on March 3, 2023: "What these systems are incredibly

good at is emulating human prose, and predicting the 'correct' words to string together. These 'large language models' of AI applications, such as ChatGPT, can do this because they have been fed billions of articles and datasets published on the internet. They can then generate answers to questions."

Concerns over AI's abilities are easily found. According to Ezra Klein, in a column for *The New York Times* on April 16, 2023, those concerns are found even among AI's creators. "Among the many unique experiences of reporting on A.I. is this: In a young industry flooded with hype and money, person after person tells me that they are desperate to be regulated, even if it slows them down. In fact, especially if it slows them down," Klein wrote. "What they tell me is obvious to anyone watching. Competition is forcing them to go too fast and cut too many corners. This technology is too important to be left to a race between Microsoft, Google, Meta and a few other firms. But no one company can slow down to a safe pace without risking irrelevancy. That's where the government comes in — or so they hope."

Klein noted there is hope to reign in AI's potential. "[T]he good news is that new [regulatory] proposals are being released almost daily," Klein wrote. "The Future of Life Institute's policy recommendations are strong, and I think the A.I. Objectives Institute's focus on the human-run institutions that will design and own A.I. systems is critical. But one thing regulators shouldn't fear is imperfect rules that slow a young industry. For once, much of that industry is desperate for someone to help slow it down."

While AI has the potential to make it much easier for journalists to transcribe interviews or quickly read datasets, it also has the potential to exacerbate existing biases that exist in the data they draw from. Bell expanded upon her concerns that AI is representative of an ongoing problem at the intersection of newsgathering and tech. "It seems incredible to some of us in the 'ethics crowd' that we have learned nothing from the past 20 years of rapidly deployed and poorly stewarded social media technologies that have exacerbated societal and democratic problems rather than improved them," Bell wrote. "We seem to be being led by a remarkably similar group of homogeneous and wealthy

technologists and venture funds down yet another untested and unregulated track, only this time at larger scale and with even less of an eye to safety.”

Journalism schools, too, have had to determine where AI fits into a 21st century curriculum. Sarah Grevy Gotfredsen, writing for the *Columbia Journalism Review* on April 13, 2023, described the calculus J-Schools have had to make. “Journalism departments are reckoning with how to approach the new AI technology. For a field that values accuracy and facts while also wanting to streamline job efficiency, this is a delicate dance,” Gotfredson wrote. “Chatbots such as ChatGPT, Microsoft’s Bing and Google’s Bard have faced criticism for messing up key historical facts, fabricating sources, and citing misinformation about each other. Used ignorantly or maliciously, they can

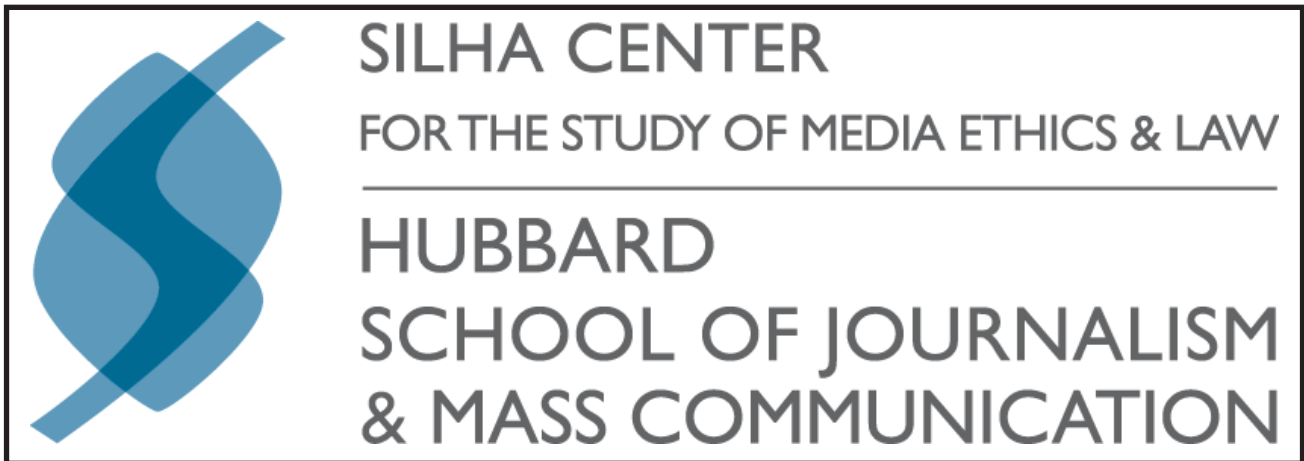
be super-spreaders of disinformation and conspiracy theories.”

Francesco Marconi, a computational journalist and previous R&D Chief at *The Wall Street Journal*, argued journalism should ride the AI wave in real time. “The news industry must be actively engaged in the AI revolution,” he said in an interview with Reuters on March 23, 2023. “In fact, media companies have an opportunity to become a major player in the space – they possess some of the most valuable assets for AI development: text data for training models and ethical principles for creating reliable and trustworthy systems.”

Jenna Burrel, writing for Poynter on Feb. 9, 2023, argued that journalists should not overestimate AI’s capabilities, though. “One thing we learn in scholarship on the history of

technology is that there are very often outrageous expectations set for tech at its invention. Airplanes will bring about world peace. Movies will make schools obsolete. We have the advantage of being able to look to that history and see that in fact, no technology is inevitable and that the march of progress (while relentless) takes many, many unexpected turns along the way,” Burrel wrote. “Journalists are well-positioned to help fight the hype. Don’t let these tools dazzle you beyond reason. Don’t anthropomorphize them. Ask hard questions about what they’re purported to do. That, of course, has always been the journalist’s job — and despite AI’s influence, it’s one that’s not going anywhere.”

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