

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

PEN AMERICAN CENTER, INC.,

*Plaintiff,*

v.

DONALD J. TRUMP, in his official capacity as  
President of the United States,

*Defendant.*

Civil Action No. 18-cv-9433-LGS

***AMICUS CURIAE* BRIEF OF TENURED PROFESSORS IN SUPPORT OF PLAINTIFF  
PEN AMERICAN CENTER, INC.'S OPPOSITION TO DEFENDANT  
DONALD J. TRUMP'S MOTION TO DISMISS THE AMENDED COMPLAINT**

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## STATEMENT OF INTEREST<sup>1</sup>

*Amici* are tenured professors at universities in the United States. They have no personal interest in the outcome of this case, but have a professional interest in seeing First Amendment jurisprudence develop in a manner that restrains the United States President from deploying tactics to stifle the press for the purpose of hobbling the checks and balances against his consolidation of power. As experts in their field, they have studied numerous countries where democratically elected, populist leaders have undermined the free press to engineer “back-sliding” away from democracy and towards autocracy. These leaders have used a “playbook” against the press, which we now see President Donald J. Trump using in his effort to suppress critical press coverage. Based on their expertise, *Amici* fear that if the judiciary does not exercise its power as a co-equal branch of government, the United States will be set upon a path similar to nations where democracy is in decline.

## INTRODUCTION

Thomas Jefferson once wrote, “were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”<sup>2</sup> While that may have been hyperbole, his point that democracy cannot exist without a free press was not hyperbolic and remains equally true today. The Constitution’s drafters understood that press liberty is an essential component of a democracy, operating as an independent check on government because it “serve[s] the governed, not the

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<sup>1</sup> No person other than the *Amici* and their counsel made a financial contribution to the brief. The views expressed herein by the *Amici* are the views of the *Amici* themselves and do not represent the views of their respective institutions. The identities of the *Amici* are set forth in Appendix A.

<sup>2</sup> *From Thomas Jefferson to Edward Carrington, 16 January 1787*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-11-02-0047> (last visited May 6, 2019).



governors.”<sup>3</sup> A free press illuminates where society’s problems lie and communicates that critical information to the public. It is no coincidence, then, that the First Amendment of the United States Constitution provides that “Congress shall make no law . . . abridging the freedom . . . of the press.”

The press has played a key role in keeping the American government accountable, often to the irritation of those in power. After the Civil War, the *New York Times* unearthed the leader of the New York City Democratic political machine Boss Tweed’s connections to the criminal underworld,<sup>4</sup> and the *New York Sun* reported on the “Credit Mobilier” scandal of the Grant administration.<sup>5</sup> In the 1950s, the press helped shape public opinion that forced the government to put an end to Senator Joseph McCarthy’s communist investigations, revealing the falsity of his frivolous charges against Army officials.<sup>6</sup> In 1971, the Nixon Administration obtained a court order barring the *New York Times* and the *Washington Post* from publishing the Pentagon Papers, which included government documents detailing American involvement in the Vietnam War.<sup>7</sup> The Supreme Court reversed that order, with Justice Black writing that the First Amendment abolished government censorship of the press “so that the press would remain forever free to censure the Government,” and that the “press [is] protected so that it [can] bare

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<sup>3</sup> See *supra* note 3.

<sup>4</sup> Editorial, *The Man Who Helped Stop Boss Tweed*, N.Y. TIMES, Aug. 17, 2011, <https://www.nytimes.com/2011/08/18/opinion/the-man-who-helped-stop-boss-tweed.html?auth=log>.

<sup>5</sup> Robert Mitchell, *Buying ‘Friends in this Congress’: The Smoking Gun that Triggered a Political Scandal*, WASH. POST, July 18, 2017, [https://www.washingtonpost.com/news/retropolis/wp/2017/07/18/buying-friends-in-this-congress-the-smoking-gun-that-triggered-a-political-scandal/?utm\\_term=.e3a5fd224523](https://www.washingtonpost.com/news/retropolis/wp/2017/07/18/buying-friends-in-this-congress-the-smoking-gun-that-triggered-a-political-scandal/?utm_term=.e3a5fd224523).

<sup>6</sup> Fred Dews & Thomas Young, *Ten Noteworthy Moments in U.S. Investigative Journalism*, BROOKINGS (Oct. 20, 2014), <https://www.brookings.edu/blog/brookings-now/2014/10/20/ten-noteworthy-moments-in-u-s-investigative-journalism/>.

<sup>7</sup> See David W. Dunlap, *1971 | Supreme Court Allows Publication of Pentagon Papers*, N.Y. TIMES, June 30, 2016, <https://www.nytimes.com/2016/06/30/insider/1971-supreme-court-allows-publication-of-pentagon-papers.html>.

the secrets of government and inform the people.”<sup>8</sup> The connection between a free press and democracy was concisely summarized by “the most trusted man in America,” Walter Cronkite: “Freedom of the press is not just important to democracy, it is democracy.”<sup>9</sup> But freedom of the press—and with it, democracy—exists only so long as it is protected by the very government that the press so often criticizes. Freedom of the press does not exist without laws and democratic institutions, such as an independent judiciary, that serve as a bulwark against attacks on the First Amendment.

Time and again we have seen power-hungry leaders of other countries chip away at the freedom and independence of the press, threatening their citizens’ access to critical information. These democratically elected leaders know that they must neutralize or coopt the press to eliminate a check on the government and pave the way for them to increase their power and cause their countries to “back-slide” into autocratic regimes. These leaders also know that the suppression of the press and the transformation from democracy to autocracy does not occur overnight. Rather, these democratically elected leaders follow a “playbook” pursuant to which they slowly and methodically (i) undermine the public’s trust in the press, (ii) block access to press organizations viewed as critical of the regime, (iii) harm the interests of the owners of disfavored press organizations, and (iv) punish or otherwise censor disfavored journalists and press organizations. History shows that when democratic leaders employ this playbook in a systematic effort to control the press, their countries do not remain democracies for long.

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<sup>8</sup> *New York Times Co. v. United States*, *supra*, 403 U.S. at 717.

<sup>9</sup> See Clara Anne Graham, Opinion, *Freedom of the Press is Democracy at its Finest*, USA TODAY, Nov. 12, 2017, <https://www.news-press.com/story/opinion/contributors/2017/11/12/freedom-press-democracy-its-finest/836149001/>.

Unfortunately, we are now seeing this playbook employed somewhere else—the United States. From the early days of his presidential campaign to the conduct of his press secretaries, from his speeches at “Make America Great Again” rallies to his bellicose tweets, President Trump has shown contempt for press organizations and members of the media who fact-check his public statements and question his policies and decisions. He employs the same tactics that “strong-man” leaders in other countries have relied upon to muzzle the press, consolidate power and undermine democracy. He sows distrust in the media, punishes those who criticize him, and provides favored access to those who do not. If these tactics go unchecked, the United States could undergo the same back-slide from its democratic foundations that has taken place in other countries. Although the First Amendment protects the press from government interference, its protections cannot be taken for granted, and are only as strong as the judiciary’s willingness to stop government officials from trampling on the freedom of the press.

## DISCUSSION

### **I. The Autocratic Playbook: Democratically Elected Leaders Intimidate and Retaliate Against the Media as an Integral Part of Their Strategies to Accrue and Maintain Power**

The world experienced a burgeoning of democracy beginning in the late 1970s that extended into the 21st century with financial, military, and political support from established democratic nations and supranational organizations.<sup>10</sup> The first wave of democratization was accelerated by the easing of Cold War-related tensions, and the fall of the Berlin wall in 1989 and the collapse of the Soviet Union in 1991 paved the way for an even greater global embrace of democracy. The period between 1988 and 2005 saw nearly one-half of the world’s nations

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<sup>10</sup> Drew Desilver, *Despite Concerns About Global Democracy, Nearly Six-in-Ten Countries Are Now Democratic*, PEW RESEARCH CTR. (Dec. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/12/06/despite-concerns-about-global-democracy-nearly-six-in-ten-countries-are-now-democratic/>.

become democracies.<sup>11</sup> Unfortunately, democracy peaked in the mid-2000s, and there has been a reversal in the levels of liberal democracy in all regions of the world. Indeed, the global decline in democracy has occurred primarily in the more democratic regions of the world, including Western and Eastern Europe, North America, Latin America and the Caribbean.<sup>12</sup>

Since the mid-2000s, the world has experienced a decline in both the number and strength of democratic governments.<sup>13</sup> *Coups d'état* and blatant election fraud presented the greatest threat to democracies during, and the years immediately following, the Cold War.<sup>14</sup> Not so today, as democracies now face a much more pervasive threat—“back-sliding” engineered by heads of state who see democratic checks and balances as a threat to their own power. These leaders implement a series of incremental steps, most of which are legal or may appear innocuous, that bend democratic institutions to systemically favor incumbency.<sup>15</sup> These aspiring autocrats know that they need to thwart opposition and stifle criticism by intimidating and retaliating against the media, thus eliminating an important check on their power.

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<sup>11</sup> *Freedom in the World 2019*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat> (last visited April 24, 2019).

<sup>12</sup> See Anna Lührmann & Matthew Wilson, *One-third of the World's Population Lives in a Declining Democracy. That Includes the United States*, WASH. POST, July 4, 2018, [https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/03/one-third-of-the-worlds-population-lives-in-a-declining-democracy-that-includes-americans/?utm\\_term=.53c68fadf597](https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/03/one-third-of-the-worlds-population-lives-in-a-declining-democracy-that-includes-americans/?utm_term=.53c68fadf597); Staffan I. Lindberg, *The Nature of Democratic Backsliding in Europe*, CARNEGIE EUR. (July 24, 2018), <https://carnegieeurope.eu/2018/07/24/nature-of-democratic-backsliding-in-europe-pub-76868>; Nancy Bermeo, *On Democratic Backsliding*, J. DEMOCRACY, Jan. 2016, at 5; Ted Piccone, *Latin America's Struggle with Democratic Backsliding*, BROOKINGS, Feb. 2019, [https://www.brookings.edu/wp-content/uploads/2019/01/FP\\_20190226\\_latina\\_america\\_piccone.pdf](https://www.brookings.edu/wp-content/uploads/2019/01/FP_20190226_latina_america_piccone.pdf); *Freedom of the Press 2017*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/freedom-press-2017> (last visited Apr. 4, 2019); see also *Freedom in the World 2019*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2019/> (last visited April 24, 2019) (“*Freedom in the World* has recorded global declines in political rights and civil liberties for an alarming 13 consecutive years. . . . The end of the Cold War facilitated a wave of democratization in the late 20th century, but a large share of countries that made progress during that time were unable to maintain it.”).

<sup>13</sup> See *supra* note 11.

<sup>14</sup> Nancy Bermeo, *On Democratic Backsliding*, J. DEMOCRACY, Jan. 2016, at 5, 6–7.

<sup>15</sup> See *id.* at 14; *Freedom of the Press 2017*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/freedom-press-2017> (last visited Apr. 4, 2019).

Attacks on the press have hit their marks in Europe, Asia, Africa, and the Americas, causing irreparable harm to the formerly independent institutions of democratic nations. The democratically elected leaders who launch these attacks all draw from the same “autocratic playbook.” Scholars such as ourselves have spent years trying to better understand this playbook, which is now being employed in a once unimaginable way—by the President of the United States. The autocratic playbook is comprised of four categories of tactics by which democratically elected regimes chip away at an independent press: (A) sowing public distrust of the independent media; (B) limiting independent media’s access to the government; (C) threatening and/or harming the business interests of the owners of media organizations; and (D) punishing or threatening to punish individual reporters or news organizations for critical coverage of the government. These tactics—if left unchecked by independent institutions such as the courts—inevitably lead to a back-slide away from democratic government.

**A. Part One: Plant the “Seeds of Distrust”**

Democratically elected populists with autocratic tendencies delegitimize the independent media by planting the “seeds of distrust” amongst the public in order to erode support for media institutions. The examples are as numerous as they are disturbing:

- In Ecuador, Rafael Correa, the democratically elected President from 2007 through 2017, suggested that the media were “more unpleasant than pancreatic cancer,” “savage beasts,” and “liars.”<sup>16</sup>
- In the Philippines, democratically elected President Rodrigo Duterte openly denounces as “fake news” press coverage of his drug war, whose unbridled law-enforcement raids and extrajudicial killings have claimed the lives of as many as 7,000 Filipinos.<sup>17</sup>

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<sup>16</sup> Kevin Stankiewicz, *When Journalists Aren’t Trusted, Corruption Often Follows*, QUILL, Mar. 14, 2018, <https://quill.spjnetwork.org/2018/03/14/media-trust-journalism-attacks-viktor-orban/>.

<sup>17</sup> See Editorial, *Duterte’s Autocratic Regime Cracks Down on a Vital Voice in Manila*, WASH. POST, Feb. 15, 2019, <https://www.washingtonpost.com/opinions/global-opinions/dutertes-autocratic-regime-cracks-down-on-a-vital->

- In Brazil, democratically elected President Jair Bolsonaro routinely employs the phrase “fake news,” including at a joint press conference with President Trump. President Trump added, “I’m very proud to hear the president use the term ‘fake news.’”<sup>18</sup>
- In Hungary, Prime Minister Viktor Orban employs harsh rhetoric to undermine the credibility of the Hungarian press by linking journalists to unpopular groups perceived as outsiders, such as immigrants, Jews and “globalists.”<sup>19</sup> In July 2017, Orban proclaimed at his party’s annual jamboree, “[w]e must stand our ground against the Soros mafia network and bureaucrats in Brussels, and will have to go to battle against the media they operate in the coming months.”<sup>20</sup> Orban was referring to George Soros, a Jewish Hungarian-American businessman who funded the Open Society Foundations (“OSF”), which has poured approximately \$400 million into Hungary to promote, among other democratic principles, independent journalism.<sup>21</sup>
- In Poland, Jaroslaw Kaczynski, chairman of the governing Law and Justice (“PiS”) party, warned his supporters that the government must “undertake the repolonization of media” so as to “not allow ourselves to be terrorized either here or eventually in the European Union.”<sup>22</sup>
- In Russia, Prime Minister Vladimir Putin encourages an environment of hostility toward media outlets and journalists unaffiliated with the state or government-friendly “Oligarchs.”<sup>23</sup> Putin routinely employs incendiary rhetoric aimed at

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voice-in-manila/2019/02/15/2863617a-2fc9-11e9-8ad3-9a5b113ecd3c\_story.html; *Philippines, Events of 2017*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2018/country-chapters/philippines> (last visited April 24, 2019).

<sup>18</sup> Erik Wemple, Opinion, *President Trump, our ‘Fake News’ Ambassador*, WASH. POST, Mar. 19, 2019, <https://www.washingtonpost.com/opinions/2019/03/19/alongside-brazilian-president-trump-hails-fake-news-bond/>.

<sup>19</sup> See Zoltan Sipos, *Hungary: Prime Minister Viktor Orban Wages Campaign Against Critical Journalists*, INDEX ON CENSORSHIP (Sept. 27, 2017), <https://www.indexoncensorship.org/2017/09/viktor-orban-campaign-against-journalists>; accord U.S. Dep’t of State, *Hungary 2017 Human Rights Report*, <https://www.state.gov/documents/organization/277417.pdf> (last visited May 6, 2018).

<sup>20</sup> Zoltan Sipos, *Hungary: Prime Minister Viktor Orban Wages Campaign Against Critical Journalists*, INDEX ON CENSORSHIP (Sept. 27, 2017), <https://www.indexoncensorship.org/2017/09/viktor-orban-campaign-against-journalists>.

<sup>21</sup> See Daniel Nolan, *Crackdown Prompts Soros’s Open Society to Quit Budapest*, THE GUARDIAN, Apr. 20, 2018, <https://www.theguardian.com/world/2018/apr/20/crackdown-prompt-soros-open-society-budapest-viktor-orban>.

<sup>22</sup> Jan Cienski, *Polish Media Veers Back to Pre-1989*, POLITICO (July 11, 2016), <https://www.politico.eu/article/polish-tv-viewers-turn-off-tune-out-drop-out-poland-kaczynski/>.

<sup>23</sup> The phrase was first coined in the mid-1990s following the collapse of the Soviet Union and during Yeltsin’s presidency, when Russia’s wealthiest business magnates manipulated the newly privatized Russian economy for their own gain. See Joshua Yaffa, *How Bill Browder Became Russia’s Most Wanted Man*, NEW YORKER, Aug. 13, 2018, <https://www.newyorker.com/magazine/2018/08/20/how-bill-browder-became-russias-most-wanted-man>. The

media outlets that have ownership interest based in the United States or the European Union, including calling them “traitors,” “foreign agents,” and the “fifth column.”<sup>24</sup>

- In Turkey, the Justice and Development Party (“AKP”) led by President Recep Tayyip Erdogan, has displayed unprecedented hostility toward independent journalists and the institutions that employ them. Erdogan’s speeches draw on “nationalist, emotive rhetoric designed to build a connection with the audience” while painting an image of the press and opposition parties as “terrorists.”<sup>25</sup>

These are but a few examples of leaders attacking the independent press in order to foment distrust and pave the way for more aggressive anti-press measures. By undermining public trust in the press, these democratically elected leaders are able to operate without fear that the “fourth estate” will provide a meaningful check on their power. After all, if the public does not trust the press, then the government will act without any concern for how it is covered by the press.

## **B. Part Two: Control the Content of Media Coverage**

The second tactic in the autocratic playbook is to limit journalists’ access to information and to control the news that reaches citizens. Leaders employ several methods to reach this goal.

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term “Oligarch” refers to a class of rich Russian businessmen who, despite owning private businesses and not being elected or appointed to any government position, “are close to the seat of power in Russia.” The oligarchic class is undefined; but most, if not all, of Russia’s wealthiest businessmen are considered Oligarchs due to the “close relationship between private wealth and public power.” The United States Treasury Department dubbed the 96 wealthiest Russian businessmen “Oligarchs” under the pertinent sanctions list. Z. Byron Wolf, *Russia’s Oligarchs Are Different from Other Billionaires*, CNN (Apr. 6, 2018), <https://www.cnn.com/2018/04/06/politics/oligarch-russia-billionaires-government-putin-sanctions/index.html>.

<sup>24</sup> U.S. Dep’t of State, Russia 2017 Human Rights Report, <https://www.state.gov/documents/organization/277455.pdf> (last visited May 6, 2018).

<sup>25</sup> *Smart Power Rhetoric: One Reason for Erdogan’s Re-election*, EURO. COUNCIL ON FOREIGN REL. (June 28, 2018), [https://www.ecfr.eu/article/commentary\\_smart\\_power\\_rhetoric\\_erdogans\\_reelection](https://www.ecfr.eu/article/commentary_smart_power_rhetoric_erdogans_reelection); Ece Toksabay & Ali Kucukgocmen, *Erdogan’s Election Rivals Struggle to Be Heard in Turkey’s Media*, REUTERS (June 20, 2018), <https://www.reuters.com/article/us-turkey-election-media/erdogans-election-rivals-struggle-to-be-heard-in-turkeys-media-idUSKBN1JG23Z> (quoting an Erdogan ally who heads Radio and Television Supreme Council—a state agency—as stating “[t]errorist organizations are carrying out an image campaign against Turkey using propaganda aimed at Europe to say that there is no press freedom in Turkey”).

*First*, governments revoke privileges, such as press credentials and the ability to question. This typically is accomplished with rules that are drafted to appear neutral, but, in practice, are implemented predominantly against journalists whose coverage is viewed as unfavorable to the government. For example:

- Since 2010, the Speaker of the Hungarian National Assembly, a member of the ruling far-right Alliance of Young Democrats-Hungarian Civic Union (“Fidesz”) party, has ejected and banned from parliament approximately 60 members of the press, citing parliamentary rules forbidding members of the press from accessing certain areas of the National Assembly building. The Speaker also has significantly restricted the use of cameras on the premises.<sup>26</sup> Though these rules are applicable to all journalists, they have been enforced principally against independent journalists and media outlets whose coverage has been insufficiently favorable toward the Orban regime.<sup>27</sup>
- In 2016, Poland’s PiS-led government proposed to (1) confine journalists who cover the Sejm—the lower house of Polish parliament—to an offsite facility, (2) grant only two press passes per outlet, and (3) forbid cameras and voice recorders from the premises.<sup>28</sup> Although these measures faltered, the PiS-led government has directed that petrol stations operated by the state-run energy company stop selling publications deemed unfavorable to the government, and state agencies have cancelled their subscriptions to such publications.<sup>29</sup>
- In Turkey, the Directorate General of Press and Information’s Press Card Commission—the administrative body responsible for issuing press credentials to cover the President and cabinet ministers—revoked an estimated 800 press cards following a 2016 coup attempt.<sup>30</sup> In 2016, the Radio and Television Supreme

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<sup>26</sup> Balázs Pivarnyik, *Area in Parliament Where Reporters May Pose Questions to MPs on Camera Further Decreased*, BUDAPEST BEACON (Feb. 21, 2018), <https://budapestbeacon.com/area-in-parliament-where-reporters-may-pose-questions-to-mps-on-camera-further-decreased/>.

<sup>27</sup> *Hungarian Journalists Banned from Parliament*, ASSOCIATED PRESS, Apr. 26, 2016, <https://apnews.com/b13229c8a1c14b8d8b1987ce9308dcbb> (reporting parliamentary bans imposed on independent publications *hvg.hu*, *24.hu*, *Index.hu*, and *nol.hu*, as well as independent broadcaster *RTL Klub*).

<sup>28</sup> Annabelle Chapman, *Pluralism Under Attack: the Assault on Press Freedom in Poland*, FREEDOM HOUSE, June 2017, [https://freedomhouse.org/sites/default/files/FH\\_Poland\\_Report\\_Final\\_2017.pdf](https://freedomhouse.org/sites/default/files/FH_Poland_Report_Final_2017.pdf).

<sup>29</sup> Attila Mong, *Mission Journal: In Poland, Some Journalists Fear Worst is Yet to Come*, COMM. TO PROTECT JOURNALISTS (Mar. 12, 2018), <https://cpj.org/blog/2018/03/mission-journal-in-poland-some-journalists-fear-wo.php>.

<sup>30</sup> Freedom of the Press 2017 Profile, *Turkey*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2017/turkey> (last visited May 6, 2019).



Council (“RTUK”) withdrew tens of operating licenses of radio and television stations and issued 57 warnings and 123 fines.<sup>31</sup>

*Second*, governments provide additional access to friendly journalists and outlets, such as exclusive access to government officials, and coordinate with media outlets in order to ensure that their programming provides favorable coverage.<sup>32</sup> Here, too, Poland and Russia provide prime examples:

- Kaczynski and PiS officials regularly grant interview requests to PiS-friendly outlets, yet refuse to even comment on stories when asked by neutral or opposition party-aligned publications.<sup>33</sup>
- The Kremlin’s press office works in concert with state- and Oligarch-controlled media outlets to carefully curate coverage of Putin and further his personal and political agendas.<sup>34</sup> Putin holds a highly publicized, annual year-end press conference that is “highly curated” by the Kremlin’s press office and Putin himself. Despite it being one of the few occasions when independent domestic and foreign press outlets are granted access to him, all questions must be pre-approved by the Kremlin’s press service, and follow-up questions, which present an opportunity for journalists to challenge Putin’s answers, are strictly forbidden.<sup>35</sup>

No matter which method is employed, the goal is the same: complete control over press coverage of the administration.

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<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., Ábrahám Vass, *Orbán: Claim That Pompeo Visit Is Motivated by US Discontent Is ‘Fake News’*, HUNG. TODAY (Jan. 29, 2019), <https://hungarytoday.hu/wsj-orban-pompeo-visit-motivated-us-discontent-fake-news/>; *Media Freedom in Hungary is No More*, EUR. CTR. FOR PRESS AND MEDIA FREEDOM (Nov. 29, 2018), <https://www.ecpmf.eu/news/press-releases/media-freedom-in-hungary-is-no-more>; Lucan Ahmad Way & Steven Levitsky, *How Autocrats Can Rig the Game and Damage Democracy*, WASH. POST, Jan. 4, 2019, <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/>.

<sup>33</sup> See *supra* note 28.

<sup>34</sup> Alexey Kovalev, *In Putin’s Russia, the Hollowed-Out Media Mirrors the State*, THE GUARDIAN, Mar. 24, 2017, <https://www.theguardian.com/commentisfree/2017/mar/24/putin-russia-media-state-government-control>.

<sup>35</sup> Patrick Reeve, *Vladimir Putin Fields Questions for Over 4 Hours, Ranging from the Serious to the Personal, in His Annual Spectacle of Press Conference Stamina*, ABC NEWS (Dec. 20, 2018), <https://abcnews.go.com/International/putins-annual-press-conference-focus-domestic-economy-official/story?id=59924333>.

### C. Part Three: Harm the Business Interests of Media Organizations

Leaders who implement the autocratic playbook often retaliate against the business interests of those who own or control media organizations, including the owners' interests in non-media assets. The autocratic playbook includes a variety of ways by which incumbents extract a financial toll on the exercise of freedom of speech while asserting a "legitimate" basis for doing so.<sup>36</sup>

*First*, governments impose purportedly neutral taxes on news organizations. For example:

- In 2018, the Hungarian National Assembly passed legislation known as the "Stop Soros" law that, among other things, levied a 25% tax on foreign donations received by those "deemed supporters of illegal migration," which, under the vague terms of the law, includes Open Society Foundations. Members of press outlets that receive support from these foundations fear that the measure will almost certainly reduce to a drip the flow of funds received by it.<sup>37</sup>
- The governments of Uganda, Tanzania, and Zambia and Benin impose a tax upon users of, and providers of content to, social-media platforms, such as WhatsApp, Skype, Viber, Twitter, and Facebook. For example, in Tanzania, the law requires providers of online content, namely non-professional journalists,<sup>38</sup> to be certified by the government and pay more than \$930 to license a "blog."<sup>39</sup> In Uganda, a tax, commonly referred to as the "gossip" tax, imposes a 200 shilling levy on each and every person who uses social media; the tax is collected by cellphone operators who "charge the SIM card used to access the facilities."<sup>40</sup> Though the

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<sup>36</sup> See, e.g., Damon Root, *When SCOTUS Stopped a Government-Led Attack on Freedom of the Press*, REASON (Mar. 6, 2017, 9:30 AM), <https://reason.com/2017/03/06/when-scotus-stopped-a-government-led-att/>.

<sup>37</sup> Judith Mischke, *Open Society Takes Hungary to Court Over 'Stop Soros' Law*, POLITICO (Sept. 24, 2018), <https://www.politico.eu/article/open-society-takes-hungary-to-court-over-stop-george-soros-law-asylum-seekers-ecj/>.

<sup>38</sup> "Non-professional journalists play a fundamental role in the production of news and information in countries with oppressive regimes and countries at war, where it is hard for professional journalists to operate." *Worldwide Round-Up of Journalists Killed, Detained, Held Hostage, or Missing in 2018*, REPORTERS WITHOUT BORDERS (December 14, 2018), [https://rsf.org/sites/default/files/worldwilde\\_round-up.pdf](https://rsf.org/sites/default/files/worldwilde_round-up.pdf).

<sup>39</sup> George Ogola, *The Threats to Media Freedom Are Getting More Sophisticated in Africa's Digital Age*, QUARTZ AFR., (Oct. 4, 2018), <https://qz.com/africa/1412973/african-governments-are-blocking-social-media-or-taxing-it/>.

governments generally claim that these measures are designed to raise revenue, the taxes are clearly aimed at silencing government critics.<sup>41</sup>

- In 2018, the Mozambican government instituted “astronomical” fees upon media outlets and journalists as a condition for maintaining government accreditation.

*Second*, leaders interfere directly in the business affairs of private media outlets in order to compel favorable coverage and silence criticism. The governments of Hungary, Russia, and Turkey have been particularly successful in intervening in the purportedly free market to extract financial tolls on those who own or control independent media outlets:

- In 2010, Orban levied a colossal tax hike on the telecommunications sector for the purpose of bringing to its knees *Magyar Telekom*—the largest Hungarian telecommunications company and owner of *Origo*, once Hungary’s leading independent news website responsible for hard-hitting investigations into Orban and his allies.<sup>42</sup>
- In 2013, the AKP-led Turkish government engineered the sale of *Sabah-ATV*, a formerly independent news outlet, to a government-friendly holding company; the deal was facilitated by a *quid pro quo* between the holding company and the government, which offered a multibillion-dollar contract to build an airport in Istanbul in exchange for the holding company’s purchase of *Sabah*.<sup>43</sup>
- The Kremlin directed a raid of RBC, a media outlet owned by Mikhail Prokhorov, an Oligarch who owned prosperous mineral and energy companies, after RBC had run several stories about Putin’s family and finances. With the RBC’s general director facing trumped-up legal claims, Prokhorov sold the outlet and his other business interests to an Oligarch who owns and operates several other pro-Kremlin publications.<sup>44</sup>

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<sup>40</sup> Fred Ojambo, *Uganda Wants Revenue from Social Media Use — and to Penalise Pornography*, BUS. DAY (June 27, 2018), <https://www.businesslive.co.za/bd/world/africa/2018-06-27-uganda-wants-revenue-from-social-media-use--and-to-penalise-pornography/>.

<sup>41</sup> *Supra* note 39.

<sup>42</sup> Patrick Kingsley & Benjamin Novak, *The Website That Shows How a Free Press Can Die*, N.Y. TIMES, Nov. 24, 2018, <https://www.nytimes.com/2018/11/24/world/europe/hungary-viktor-orban-media.html>.

<sup>43</sup> *Supra* note 30.

<sup>44</sup> Konstantin Benyumov, *How Russia’s Independent Media Was Dismantled Piece by Piece*, THE GUARDIAN, May 25, 2016, <https://www.theguardian.com/world/2016/may/25/how-russia-independent-media-was-dismantled-piece-by-piece>.

*Third*, governments promulgate vague and malleable content standards or rules forbidding foreign ownership of media outlets, and then use those rules to impose financial penalties, revoke licenses, and even shut down unfriendly media outlets. For example:

- In 2011, the Hungarian National Assembly passed a pair of media-related laws that, among other things, created a purportedly autonomous Media Council that, in reality, is inextricably intertwined with the Fidesz political apparatus and serves merely as a tool to advance Orban and the Fidesz-led government’s agenda of suppressing the free flow of information from the press to the citizenry. The Media Council’s regulations mandate that content produced by all media demonstrate “political balance”; not “incite hatred against any nation, community, national, ethnic, linguistic, or other minorit[ies], or any majority. . . or religious group”; and exhibit respect for “human dignity.” From 2011 through September 1, 2017, the Media Council instituted nearly 400 proceedings against media organizations from which it collected more than \$250 million in fines.<sup>45</sup>
- The Polish government replaced the “KRRiT”—a regulatory body with the constitutionally vested power of regulating the media whose members were forbidden from affiliating with any political party—with the National Media Council—a body comprised mainly of present and former PiS lawmakers that enforces subjective content-based standards and assesses steep fines against journalists and outlets who violate those standards.<sup>46</sup>
- In the Philippines, the government revoked the operating license of Rappler, an independent news organization that has criticized President Duterte’s handling of the war on drugs. The government claimed that the outlet had failed to comply with the constitution’s “100% Filipino ownership” provision.<sup>47</sup>

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<sup>45</sup> Kim Lane Scheppele, Opinion, *Hungary’s Free Media*, N.Y. TIMES, Mar. 14, 2012, <https://krugman.blogs.nytimes.com/2012/03/14/hungarys-free-media/>.

<sup>46</sup> See *supra* note 28; *supra* note 29 (quoting Andrez Krajewski, a journalist and free-speech expert who curated a report on Polish state broadcasting, as saying “[t]hese personnel changes were necessary to turn public radio and TV into what it is now—a government propaganda tool”).

<sup>47</sup> Agence France-Presse, *Philippines Revokes Licence of Leading News Website Rappler*, THE GUARDIAN, Jan. 15, 2018, <https://www.theguardian.com/world/2018/jan/16/philippines-revokes-licence-news-website-rappler-free-press>.

Without judicial intervention, these tactics cause independent media outlets to close, switch ownership, or self-censor. These outcomes are then portrayed as the natural result of objective market forces rather than autocratic pressure.<sup>48</sup>

#### **D. Part Four: Intimidate, Threaten, Punish**

The fourth tactic in the autocratic playbook calls for the deployment of official power to threaten, or actually punish, journalists and the outlets that employ them. Leaders do so by commencing criminal and civil actions under libel and anti-extremism laws and by perpetrating or encouraging violence against individual journalists.<sup>49</sup> A report published by Reporters Without Borders (“RSF”) concludes that 2018 was the most dangerous year on record to be a member of the press: 348 journalists were detained, 60 were held hostage, and 80 were killed.<sup>50</sup> Prominent examples of recent violence against journalists include the following:

- In 2018, *Washington Post* contributor Jamal Khashoggi was killed at the Saudi consulate in Istanbul, presumably for his critical coverage of Saudi Crown Prince Bin Salman, who, according to intelligence reporting, covertly sent a team of assassins to Turkey to murder him.<sup>51</sup>

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<sup>48</sup> Lucan Ahmad Way & Steven Levitsky, *How Autocrats Can Rig the Game and Damage Democracy*, WASH. POST, Jan. 4, 2019, <https://www.washingtonpost.com/news/monkey-cage/wp/2019/01/04/how-do-you-know-when-a-democracy-has-slipped-over-into-autocracy/>.

<sup>49</sup> See, e.g., Joe Torres, *Threats of Violence Against Journalist Continue to Rise in Asia*, UCA NEWS (Apr. 26, 2018), <https://www.ucanews.com/news/threats-of-violence-against-journalists-continue-to-rise-in-asia/82155>; Amanda Erickson, *2018 Has Been a Brutal Year for Journalists, and It Keeps Getting Worse*, WASH. POST, Oct. 9, 2018, <https://www.washingtonpost.com/world/2018/10/09/has-been-brutal-year-journalists-it-keeps-getting-worse/>; Camila Domonoske, *Violence Against Journalists Reached ‘Unprecedented Levels’ In 2018, Report Finds*, NPR (Dec. 18, 2018, 3:08 PM), <https://www.npr.org/2018/12/18/677819169/violence-against-journalists-reached-unprecedented-levels-in-2018-report-finds>; *Kyrgyzstan Urged to End Restrictive Media Practices*, RADIO FREE EUR. / RADIO LIBERTY (Mar. 15, 2018), <https://www.rferl.org/a/kyrgyzstan-criticism-restrictive-media-practices-cpj-pen/29101206.html>; Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, VOX (Feb. 21, 2017, 8:30 AM), <https://www.vox.com/the-big-idea/2017/2/21/14664568/lose-constitutional-democracy-autocracy-trump-authoritarian>; *supra* note 17; *supra* note 38.

<sup>50</sup> *Supra* note 38.

<sup>51</sup> Greg Miller, *Khashoggi Children Have Received Houses in Saudi Arabia and Monthly Payments as Compensation for Killing of Father*, WASH. POST, Apr. 1, 2019, [https://www.washingtonpost.com/world/national-security/khashoggi-children-have-received-houses-in-saudi-arabia-and-monthly-payments-as-compensation-for-killing-of-father/2019/04/01/c279ca3e-5485-11e9-8ef3-fbd41a2ce4d5\\_story.html](https://www.washingtonpost.com/world/national-security/khashoggi-children-have-received-houses-in-saudi-arabia-and-monthly-payments-as-compensation-for-killing-of-father/2019/04/01/c279ca3e-5485-11e9-8ef3-fbd41a2ce4d5_story.html).

- In Italy, the government pays armed bodyguards to protect hundreds of journalist whose lives are in constant danger due to their reporting on the mafia. But far-right Interior Minister Matteo Salvini has threatened to cut off funding for these protective services. He has justified the move as an austerity measure, but his public comments reveal his true motives: to retaliate against those journalists whose coverage has been less than favorable by invoking credible fear for their lives.<sup>52</sup>
- In Russia, dozens of journalists have been killed and many more brutalized since Putin assumed power in 2000.<sup>53</sup> In 2017 alone, three journalists were killed, 40 attacked, 82 detained, 42 threatened, and 14 prosecuted.<sup>54</sup> Several high-profile cases demonstrate the great personal danger to which journalists subject themselves by pursuing or publishing critical content, and the apathy with which the government treats crimes committed against journalists. For example:
  - In March 2017, independent journalist Nikolay Andruschenko was beaten to death while pursuing an investigation into links between St. Petersburg city officials and organized crime.
  - In April 2018, Maksim Borodin—a correspondent for the independent outlet *Novy Den*—fell from his balcony to his death under suspicious circumstances after he had published stories on the use of Russian mercenaries in Syria.<sup>55</sup>
- As of December 2018, between 81 and 145 journalists are estimated to be imprisoned in Turkey, making it the world’s worst jailer of journalists.<sup>56</sup> *Bianet*, an independent Turkish publication, estimates that 56 journalists and six outlets have faced some form of violent attack during the AKP’s reign, and 118 journalists and five outlets were threatened. Prominent examples include:
  - Assailants hurled Molotov cocktails into the headquarters of two independent newspapers in 2016.

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<sup>52</sup> Stephanie Kirschgaessner, *Matteo Salvini Threatens to Remove Gemorrah Author’s Police Protection*, THE GUARDIAN, June 21, 2018, <https://www.theguardian.com/world/2018/jun/21/matteo-salvini-threatens-to-remove-gomorrah-roberto-saviano-police-protection>.

<sup>53</sup> Scott Simon, *Why Do Russian Journalists Keep Falling?*, NPR (Apr. 21, 2018), <https://www.npr.org/2018/04/21/604497554/why-do-russian-journalists-keep-falling>. (listing prominent cases of Russian journalists murdered under suspicious circumstances).

<sup>54</sup> *Supra* note 24.

<sup>55</sup> *Supra* note 53.

<sup>56</sup> Freedom in the World 2019 Profile, Turkey, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/turkey> (last visited May 6, 2019); *Supra* note 29.

- An independent newspaper’s editor-in-chief was attacked by gunmen.
- A French photographer employed by *National Geographic* was harassed and jailed on terrorism-related charges in May 2017.<sup>57</sup>

Legislatures controlled by strong-man leaders have expanded civil and criminal libel laws to provide additional tools for threatening and punishing journalists and outlets that exercise independence. For example:

- In Hungary, the Fidesz-led National Assembly amended civil libel laws to loosen the standards to obtain a monetary reward.<sup>58</sup> The National Assembly also amended the Hungarian Criminal Code in 2013 to make it a crime to create and/or distribute video or audio recordings containing false content deemed to have intentionally violated a person’s dignity.<sup>59</sup>
- In Poland, under Kaczynski’s leadership, parliament has enacted criminal libel laws under which Kaczynski has referred cases to the Polish Chief Prosecutor. Notably, Kaczynski requested that criminal proceedings be commenced against Polish newspaper *Gazeta Wyborecza* for publishing an investigative report into his involvement in transactions relating to a luxury skyscraper in Warsaw.<sup>60</sup>
- Under the Turkish penal code, insulting the President constitutes actionable defamation, and Erdogan has commenced nearly 2,000 defamation cases.<sup>61</sup>
- Recently, the Russian government passed a law banning “fake news” on the internet; the measure not only permits law enforcement to directly censor content

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<sup>57</sup> See *supra* note 30; see also U.S. Dep’t of State, Turkey 2017 Human Rights Report, <https://www.state.gov/documents/organization/277471.pdf>.

<sup>58</sup> *Hungarian Civil Defamation Laws Threaten Political Journalism*, INT’L PRESS INST., Mar. 2, 2017, <https://ipi.media/new-study-analyses-civil-defamation-practice-in-hungary/> (“In one case, *Index.hu* was forced to pay a former Constitutional Court judge . . . [€2,595] in relation to coverage of a [European Court of Human Rights] decision not in the judge’s favour. In another, a court of second instance ordered the site to pay [€1,945] to former President Janos Ader after it reported on comments made by a writer claiming that Ader had previously spent time in prison.”).

<sup>59</sup> U.S. Dep’t of State, Hungary Human Rights Report (2013), <https://www.state.gov/documents/organization/220497.pdf> (last visited May 9, 2019).

<sup>60</sup> *Poland: RSF Decries Criminal Libel Proceedings Against Polish Daily*, REPORTERS WITHOUT BORDERS (Feb. 22, 2019), <https://rsf.org/en/news/poland-rsf-decries-criminal-libel-proceedings-against-polish-daily> (last updated Feb. 23, 2019).

<sup>61</sup> *Supra* note 30. As a supposed gesture of good faith, Erdogan dropped all cases filed prior to the attempted coup in 2016, but none of the other AKP officials who had filed barrages of defamation claims followed suit and Erdogan quickly picked up from where he left off. *Id.*

unfavorable to the Kremlin, but also serves as a powerful tool for the Kremlin to delegitimize such content under the guise it is inherently false.<sup>62</sup>

Anti-extremism regulations are also an effective way to chill freedom of expression and inhibit the flow of information. Here, too, the governments of Russia and Turkey serve as prime examples:

- Turkey’s anti-terrorism law makes affiliation with a “terrorist” or “extremist group” and “making terrorist propaganda” punishable by imprisonment, but those terms are defined so broadly that the law effectively bestows law enforcement with the power and discretion to regulate speech, particularly content that is critical of the government. Indeed, Turkish law-enforcement has commenced criminal actions under these laws against peaceful journalists employed by independent or opposition-aligned outlets who are not engaged in terroristic or extremist activities under any commonly accepted definition of those terms, but who are merely attempting to hold those in power accountable.<sup>63</sup>
- In November 2017, Putin signed into law legislation that permits the Kremlin to designate as “foreign agents” media outlets with foreign ownership interests, requiring them to register as such or risk closure. Moreover, the legislation provides law enforcement with the power to block online content it deems “undesirable” or “extremist.”<sup>64</sup>

As these examples illustrate, strong-man leaders have successfully used intimidation, threats, and punishments—including violence—to silence members of the press and media outlets that attempt to hold the government accountable.

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<sup>62</sup> See *id.*; see also Shannon Van Sant, *Russia Criminalizes the Spread of Online News Which ‘Disrespects’ the Government*, NPR (Mar. 18, 2019), <https://www.npr.org/2019/03/18/704600310/russia-criminalizes-the-spread-of-online-news-which-disrespects-the-government> (quoting Kremlin spokesman responding to critics of the law, “No doubt, one can hardly agree with the opinion that this is some sort of censorship . . . . This sphere—the sphere of fake news—insults and so on, is under strict regulation in many countries of the world, even in European states. This undoubtedly has to be done in our country.”).

<sup>63</sup> Editorial, *Turkey’s Stalinist Prosecution of Journalists for Tweets and Blogs*, WASH. POST, Dec. 27, 2017, [https://www.washingtonpost.com/opinions/turkeys-theater-of-the-absurd/2017/12/27/1d8c1fa2-e5ac-11e7-833f-155031558ff4\\_story.html?utm\\_term=.d3e97f8bfeb8](https://www.washingtonpost.com/opinions/turkeys-theater-of-the-absurd/2017/12/27/1d8c1fa2-e5ac-11e7-833f-155031558ff4_story.html?utm_term=.d3e97f8bfeb8) (reporting that the prosecution’s case against *Cumhuriyet*’s online editor was premised on a tweet in which he used the words “mowed down” to describe the death of a Turkish prosecutor who was killed in a car accident; the editor deleted the tweet after 52 seconds, realizing it was inappropriate. He was sentenced to more than three years’ imprisonment on terrorism charges).

<sup>64</sup> Alina Polyakova, *The Kremlin’s Latest Crackdown on Independent Media*, BROOKINGS (Dec. 6, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/12/06/the-kremlins-latest-crackdown-on-independent-media/>.



## II. The Global Retreat of Freedom of Speech, Press Liberty and Democracy

The autocratic playbook is not just an attack on the press; it is an attack on democracy itself. Nations with reasonably strong democratic institutions and track records of protecting civil liberties have experienced back-sliding of democracy at the hands of populist leaders who undermine the freedom of the press.<sup>65</sup> Attacks on journalists, other members of the press, and independent public and private media outlets by the leaders of Hungary, Poland, Russia, and Turkey provide four examples of how leaders use the playbook to subvert democracy.<sup>66</sup> The pattern in these countries offers striking parallels to President Trump's own efforts to silence his critics, and it provides a glimpse of what we can expect if the President's First Amendment violations are left unconstrained by the courts.

### A. Hungary

In 1989, Hungary formally declared itself a republic, effectively ending 40 years of Soviet rule and communism. It held its first truly free elections in 1990, and joined the North Atlantic Treaty Organization ("NATO") in 1999 and the EU in 2004. For nearly 30 years following the end of the Cold War, the level of democracy in Hungary far exceeded that of the

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<sup>65</sup> According to data and surveys compiled by the V-Dem Institute, the number of people worldwide living under democracies has declined precipitously since 2017, and there is a visible trend of autocratization affecting "Europe and the whole American continent." Anna Lührmann & Matthew Wilson, *One-Third of the World's Population Lives in a Declining Democracy. That Includes the United States*. WASH. POST, July 4, 2018, [https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/03/one-third-of-the-worlds-population-lives-in-a-declining-democracy-that-includes-americans/?utm\\_term=.53c68fadf597](https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/03/one-third-of-the-worlds-population-lives-in-a-declining-democracy-that-includes-americans/?utm_term=.53c68fadf597) ("[F]or the first time since 1979, the same number of countries (24 in total) are backsliding on democracy as are advancing.").

<sup>66</sup> The Constitutions of each of the listed nations expressly protect freedom of expression, freedom of the press, and freedom of access to and distribution of information. See MAGYARORSZÁG ALAPTÖRVÉNYE [CONSTITUTION] Apr. 18, 2011, art. IX (Hung.); KONSTYTUCJI RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] Apr. 2 1997, art. 14, 25, 54 (Pol.); KONSTITUTSIYA ROSSIJSKOI FEDERATSII [CONSTITUTION] Dec. 12, 1993, art. 29 (Russ.); CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 57–58; TÜRKIYE CUMHURİYETİ ANAYASASI [CONSTITUTION], art. 25–32 (Turk.). But the rights enshrined in the hallowed documents from which democratically elected autocrats derive their power to govern have no teeth without independent democratic institutions to serve as checks and balances against overreach by strong-man leaders.

average level of democracy globally.<sup>67</sup> During that time, Hungarian public and private media outlets operated mostly free of government censorship, and the vast media offerings reflected the pluralism of Hungarian politics.<sup>68</sup> But press liberty in Hungary today is illusory, and, consequently, democracy in Hungary is in free fall.<sup>69</sup>

In 2010, the far-right Alliance of Young Democrats-Hungarian Civic Union (“Fidesz”) party won an unprecedented two-thirds majority of the seats in Hungary’s National Assembly and appointed Viktor Orban Prime Minister.<sup>70</sup> Orban had served as Prime Minister from 1998 through 2002, and spent much of that term attacking the independent press for pursuing investigations into the purportedly corrupt dealings of his family business and of other Fidesz officials.<sup>71</sup> A seasoned Orban assumed power in 2010 with a clear distaste for the press and the judges who had previously upheld the media’s right to operate freely. Since then, Orban and the Fidesz-led government have used autocratic tactics, described in *supra* Section II, to suppress meaningful opposition. Those tactics have included sowing distrust in the press, restricting press access to the government, eliminating media pluralism through economic and regulatory

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<sup>67</sup> See Lauren Leatherby & Mira Rojanasakul, *Elected Leaders Are Making the World Less Democratic*, Bloomberg, July 23, 2018, <https://www.bloomberg.com/graphics/2018-democracy-decline/> (comparing Hungary’s V-Dem Liberal Democracy Index score against the global average from 1900 through 2017).

<sup>68</sup> See, e.g., Franklin Foer, *Viktor Orban’s War on Intellect*, THE ATLANTIC, June 2019, <https://www.theatlantic.com/magazine/archive/2019/06/george-soros-viktor-orban-ceu/588070/>; *supra* note 45 (Kim Lane Scheppelle Opinion).

<sup>69</sup> See, e.g., *supra* note 45.

<sup>70</sup> See Krisztina Than & Gergely Szakacs, *Fidesz Wins Hungary Election with Strong Mandate*, REUTERS (Apr. 11, 2010), <https://www.reuters.com/article/us-hungary-election/fidesz-wins-hungary-election-with-strong-mandate-idUSTRE63A1GE20100412>.

<sup>71</sup> In 1999, investigative journalists revealed that Orban’s father’s mining business had, with the help of a Hungarian business magnate, gained control of a privatized mine and that Orban’s father was awarded several lucrative government contracts to supply materials to state construction projects. See Neil Buckley & Andrew Byrne, *Viktor Orban’s Oligarchs: a New Elite Emerges in Hungary*, FIN. TIMES, Dec. 21, 2017, <https://www.ft.com/content/ecf6fb4e-d900-11e7-a039-c64b1c09b482>. The Fidesz brought a defamation lawsuit against one of the media outlets that published stories about the scandal, and Orban ordered law enforcement to raid the headquarters of several other newspapers as retaliation for unfavorable coverage. *Supra* note 57.

policies, and incentivizing self-censorship through threat of punishment. Orban has thus implemented every tactic in the autocratic playbook.

Orban's harsh rhetoric directed at delegitimizing Hungary's independent press has been buttressed by substantial financial backing from Fidesz's political apparatus<sup>72</sup> and an expanding network of pro-Fidesz media outlets, which have become increasingly manifold.<sup>73</sup> Indeed, Fidesz-friendly publications have lessened the need for Orban to get his hands dirty by vilifying the independent press himself. For example, in 2017 an online news outlet owned by a Fidesz ally published a list of journalists whom it labeled as mere puppets of George Soros and enemies of Hungary.<sup>74</sup> An article accompanying the list stated that “[t]he international media, with a few exceptions, generally write bad things of the government because a small minority with great media influence does everything to tarnish the reputation of Hungary in front of the world—prestige that has been built over hundreds of years by patriots.”<sup>75</sup>

Orban's regime has forced the owners of numerous publications and radio and television stations critical of him to cease operations or sell their interests, in some instances to Fidesz-friendly owners.<sup>76</sup> Indeed, the Hungarian media market today is now dominated by “a massive

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<sup>72</sup> The Fidesz-led government spent €40 million on two “Stop Soros” campaigns in advance of the 2018 parliamentary elections, which included using taxpayer funds on short propaganda films and anti-Soros billboards and ads. See Katalin Erdélyi, *Hungarian Government Spent €8.1 Million on Its Latest ‘Stop Soros’ Campaign*, ATLATZSO, Mar. 22, 2018, <https://english.atlatzso.hu/2018/03/22/hungarian-government-spent-e8-1-million-on-its-latest-stop-soros-campaign/> (last updated Feb. 10, 2019).

<sup>73</sup> See U.S. Dep’t of State, *Hungary 2017 Human Rights Report*, <https://www.state.gov/documents/organization/277417.pdf> (last visited May 6, 2018) (listing a number of instances in which pro-government media outlets have defamed independent journalists in a manner that mimics Orban’s divisive rhetoric).

<sup>74</sup> *Id.*; Benjamin Novak, *The List: Introducing Soros’ Foreign Propagandists*, BUDAPEST BEACON (Sept. 12, 2017), <https://budapestbeacon.com/list-introducing-soros-foreign-propagandists/>.

<sup>75</sup> *Id.*

<sup>76</sup> See *Articles of Asphyxiation: Soft Censorship in Hungary*, WAN-IFRA (2015), [https://www.wan-ifra.org/sites/default/files/field\\_article\\_file/SoftCensorship%20Hungary%202015%20update%20final.pdf](https://www.wan-ifra.org/sites/default/files/field_article_file/SoftCensorship%20Hungary%202015%20update%20final.pdf); Nic

pro-government media conglomerate” created when the owners of nearly 500 reliably pro-government titles and outlets voluntarily transferred their interests to a central holding company controlled by an Orban loyalist. Although these transfers clearly were unlawful, Orban and the Fidesz-led government bent or ignored antitrust laws and regulations to create their own media channels without any scrutiny from a purportedly independent judiciary.<sup>77</sup>

Orban’s domination and reshaping of Hungarian media have been so successful because the judiciary has not constrained his conduct. After assuming power, the Fidesz-led government expanded the size of the Constitutional Court—a specialized court created by the Hungarian constitution for the purposes of assessing the constitutionality of legislation—and eliminated the opposition parties’ veto power in the judicial selection process. By 2013, the Constitutional Court was filled by a majority of pro-Fidesz judges. Moreover, the National Assembly enacted several constitutional amendments that prohibited the Constitutional Court from (1) issuing rulings on laws relating to budgets or fiscal policy or (2) reviewing laws that the Court previously had declared unconstitutional but that had subsequently been inserted into the Hungarian constitution via amendment by the National Assembly. Consequently, many of the measures that Orban has taken from the autocratic playbook have avoided constitutional review;

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Newman et al, *Digital News Report 2018*, REUTERS INST., <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf?x89475> (last visited May 6, 2019). For example, before 2016, the two largest-circulation Hungarian newspapers were the *Nepzabadsag*, a left-leaning daily, and the *Magyar Nemzet*, right-wing daily owned by Orban ally Lajos Simicska. In 2008, those papers received 12.7% and 7.4% of the total share of state advertisement funding in the print-media sector, respectively. But by 2012, *Magyar Nemzet* received 23.35% of the total state advertisement funds in the print-media sector, while *Nepzabadsag*’s had fallen to 2.35%. This redistribution was not attributable to any change in the two publications’ readership or distribution; rather, it reflected the government’s blatant favoritism towards Fidesz-friendly media. Ultimately, the *Nepzabadsag* was forced to close in 2016. (Ironically, *Magyar Nemzet* suffered a similar fate when Orban pressured Simicska to sell his stake in the daily following a rift in the pair’s relationship.) See *Capturing Them Softly: Soft Censorship and State Capture in Hungarian Media*, WAN-IFRA (Jan. 2014), [https://www.wan-ifra.org/system/files/field\\_article\\_file/WAN-IFRA%20Soft%20Censorship%20Hungary%20Report\\_0.pdf](https://www.wan-ifra.org/system/files/field_article_file/WAN-IFRA%20Soft%20Censorship%20Hungary%20Report_0.pdf)

<sup>77</sup> Freedom in the World 2019 Profile, Hungary, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/hungary> (last visited May 6, 2019).

and even when review occurs, it is done by a packed Constitutional Court that has no mechanism to enforce its judgments. For example, in 2011, before the Constitutional Court was filled with a majority of pro-Fidesz judges, it struck down certain Media Council regulations as too restrictive and, in essence, undemocratic. But the Orban regime has largely ignored the Court decision, leaving undisturbed the Media Council's power to enforce the media laws' vague provisions as it wishes.<sup>78</sup>

The Fidesz-led government has also packed the ordinary judiciary. Orban lowered the required retirement age for judges from 70 to 62, forcing 10% of the judiciary to resign, and subsequently replaced them with Fidesz loyalists. The National Assembly also conferred power on the president of the National Judicial Office—the wife of Fidesz's E.U. representative—to appoint and fire judges and to control the judiciary's jurisdiction and finances.<sup>79</sup>

Orban's control of the media—left unchecked by the judiciary—has paved the way for him to become a *de facto* autocratic leader with an iron grip on the country.<sup>80</sup> “Hungary at present is essentially a single-party state in which Fidesz controls all levers of power,” in part because the party's base, comprised mainly of rural Hungarians, “receive[s] only state media and local pro-Fidesz newspapers.”<sup>81</sup> Remaining independent media outlets have been forced to adopt

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<sup>78</sup> Freedom of the Press 2015 Profile, *Hungary*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2015/hungary> (last visited May 7, 2019).

<sup>79</sup> *Supra* note 77.

<sup>80</sup> Fidesz “trounced” its opposition in the 2014 and 2018 parliamentary elections. In the 2014 elections, Fidesz lost some ground in the National Assembly but retained its majority and reappointed Orban. Fidesz again won a coveted two-thirds of the National Assembly seats in the 2018 parliamentary elections under the tireless campaigning of Orban, who remained Prime Minister following the victory. Notably, the party that controls two-thirds of the seats in the National Assembly has a supermajority that enables it to amend the constitution, and, thus, both reshape entirely the independent judicial branch and bypass rulings of the “Constitutional Court,” a specialized court comprised of 15 judges that reviews the constitutionality of legislation enacted by the National Assembly.

<sup>81</sup> Paul Hockenos, *Hungary Finally Has an Opposition Worth a Damn, The Country's Youngest Party Has United the Left and Right Against Viktor Orban*, FOREIGN POL'Y, Jan. 17, 2019, <https://foreignpolicy.com/2019/01/17/hungary-finally-has-an-opposition-worth-a-damn/>.

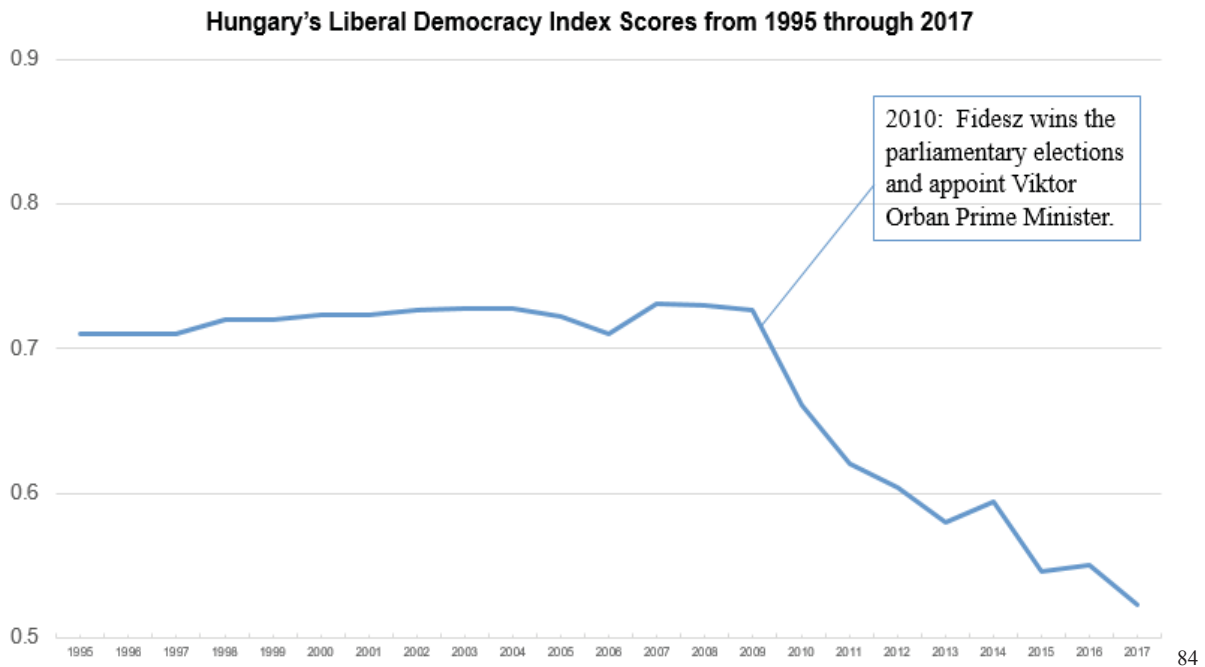
a culture of self-censorship. Indeed, according to the MerteK Standard Media Monitor's 2013 Press Freedom Index, 53% of print journalists in Hungary concealed facts to avoid unfavorable consequences, as did 27% of online journalists.<sup>82</sup> In turn, Hungarian news consumers are among the most distrustful in the world. According to the Reuters Institute's 2018 Digital Media Report, merely 29% of Hungarians trust the news generally, with pro-government outlets such as *Origo*, *MTV*, and *TV2* scoring the lowest in brand trust.<sup>83</sup> Absent the free flow of information, it is doubtful that opposition parties will be able to communicate to voters that Orban's politics and policies are intended to foment his anti-democratic consolidation of power, let alone defeat Orban and the Fidesz in country-wide parliamentary elections.

Data collected by a leading democracy watchdog, V-Dem Institute, confirms that the playbook has worked, and that Hungary has undergone a democratic backslide since Orban's election and his crackdown on the press. The V-Dem Institute "produces the largest global dataset on democracy" and "measures hundreds of different attributes of democracy," "involving over 3,000 scholars and other country experts." Its Liberal Democracy Index judges the quality of democracy by the limits placed on government, "such as constitutionally protected civil liberties, strong rule of law, an independent judiciary, and effective checks and balances that, together, limit the exercise of executive power." The index provides an annual measure of democracy for hundreds of countries throughout the world. As shown below, after years of being a better than average democracy, Hungary's democracy has taken a precipitous decline since Orban's election.

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<sup>82</sup> MERTEK MEDIA MONITOR, *An Illiberal Model of Media Markets: Soft Censorship 2017*, <https://mertek.eu/wp-content/uploads/2018/08/MertekFuzetek15.pdf> (last visited May 9, 2019)..

<sup>83</sup> Nic Newman et al, *Digital News Report 2018*, REUTERS INST., <http://media.digitalnewsreport.org/wp-content/uploads/2018/06/digital-news-report-2018.pdf?x89475> (last visited May 6, 2019) (ranking Hungary 30th out of 37 countries surveyed with respect to general trust in media).



As is clear from the above graph, Hungary's democracy is in a back-slide due in large part to Orban's successful use of the autocratic playbook to stifle a free and independent press.

## **B. Poland**

Similar to Hungary, Poland experienced a boom of prosperity and a renaissance of personal and political freedom in 1989.<sup>85</sup> In fact, Poland was widely seen as the greatest success story among former Soviet-bloc countries. The size of Poland's economy has tripled since 1989, and it benefited greatly from joining the EU in 2004, so much so that while the rest of Europe "fell into recession following the start of the global crisis in 2008, Poland kept growing."<sup>86</sup> The expansion of personal and civil liberties in Poland were commensurate with its

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<sup>84</sup> This index also takes into consideration the strength of a country's electoral democracy. The Liberal Democracy Index allocates a score of zero, demarcating the lowest level of liberal democracy, to one, which is the highest score a liberal democracy can achieve. *Varieties of Democracy, Codebook V.8* (July 2018).

<sup>85</sup> Jan Cienski, *Poland's Transformation Is a Story Worth Telling*, POLITICO (Jan. 8, 2019), <https://www.politico.eu/article/poland-transformation-economic-success/> (last updated Apr. 19, 2019).

<sup>86</sup> *Id.*

economic growth. The Polish media landscape was regarded as one of the most pluralistic amongst democratic nations. It was comprised of a public media service that, historically, had exhibited some degree of bias towards the party in power,<sup>87</sup> and many private media outlets whose offerings spanned Poland’s pluralistic political spectrum. But press liberty—and democracy—is now in retreat in Poland due to the ascension to power in 2015 of the far-right Law and Justice (“PiS”) party; its chairman, Jaroslaw Kaczynski; and President Andrej Duda, a self-styled populist. Together, they have used the autocratic playbook to reconstruct the Polish media landscape in their favor.<sup>88</sup>

The PiS-led government views with suspicion “the liberal center ground of Western politics,” which includes neutral and opposition-aligned media outlets.<sup>89</sup> Poland’s Minister of Foreign Affairs has proclaimed that Kaczynski, Duda, and the PiS-led government are now “curing” Poland of “diseases” following “25 years of liberal indoctrination.”<sup>90</sup> In doing so, they are, as Kaczynski puts it, “repolonizing” Polish media by targeting the Polish press, an institution they accuse of being tarnished by an “absurd” liberal bias; by employing autocratic tactics to advance the PiS-friendly media’s share of the Polish media landscape; and by building an environment in which editors of independent outlets choose self-censorship over confrontation.<sup>91</sup>

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<sup>87</sup> *Polish Media Laws: Government Takes Control of State Media*, BBC NEWS (Jan. 7, 2016), <https://www.bbc.com/news/world-europe-35257105> (“[I]ncoming governments in Poland tend to put their own people in to run large state companies, institutions, and the public media—but the PiS is going faster and further this time.”).

<sup>88</sup> *Is Poland a Failing Democracy?*, POLITICO (Jan. 13, 2016), <https://www.politico.eu/article/poland-democracy-failing-pis-law-and-justice-media-rule-of-law/> (last updated Jan. 26, 2016) (“The political earthquake that hit in 2015 with the unprecedented electoral sweep by [PiS] has now upset contemporary assumptions about Poland. Immediately upon taking power, [PiS] passed laws that critics, among them prominent voices in Brussels, say neuter the judiciary and hobble the free press.”).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Supra* note 28.



By implementing the autocratic playbook and hewing closely to the tactics of Orban, Kaczynski has transformed the public media service into an unapologetic propagandist. This resulted from the “small-media law,” which transferred the power to terminate public media service employees from a neutral administrative body to the PiS-aligned Treasury Minister. The law had a dramatic impact on *Wiadomosci*, a popular news program broadcast by a branch of the public media service that reaches an average nightly audience of three million viewers. After *Wiadomosci*’s editors were fired under the provisions of the small-media law, the program began to exhibit a strong pro-government bias.<sup>92</sup>

Kaczynski has also exacted a toll upon the financial interests of private media outlets, causing sweeping lay-offs even at well-established outlets like *Gazeta Wyborcza*, widely seen as the leading critic of the PiS, Kaczynski, and Duda.<sup>93</sup> In addition, the PiS-led government has amended the constitution to divert the authority to oversee the media from a neutral administrative body to a newly created, PiS-aligned regulator with the power to institute fines for media content and viewpoints that it deems unfavorable.<sup>94</sup>

As in Hungary, the Polish government’s efforts to curb press liberty have been emboldened and facilitated by a weakened judiciary. Legislation enacted shortly after the PiS and Duda took power (1) lowered the retirement age of judges who sit on Poland’s Supreme

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<sup>92</sup> For example, in October 2016, Poland was paralyzed by protests against restrictive abortion laws pushed forward by the government. *Wiadomosci* intentionally discounted the number of people who attended the protest by half, and spent an equal amount of time covering the much smaller pro-government counter-protests. Another such incident occurred in March 2017, when the European Union rebuked the Polish government’s effort to block Donald Tusk’s reappointment as President of the European Council. Tusk, who is Polish, is the leader of PiS’s primary opposition party and a political enemy of Kaczynski. Nevertheless, *Wiadomosci* reported on the summit as if it were a success while vilifying the European governments, especially Germany, for pushing through Tusk’s reappointment. *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *See id.*; *supra* note 29 (quoting Andrez Krajewski, a journalist and free-speech expert who curated a report on Polish state broadcasting as saying “[t]hese personnel changes were necessary to turn public radio and TV into what is now—a government propaganda tool”).

Court, leading to scores of forced resignations, and (2) transferred the power to nominate judges from Supreme Court judges to PiS party officials.<sup>95</sup> Although the Supreme Court enjoined Duda from appointing new judges, he has simply disregarded the prohibition by elevating as many as 27 new judges to the Supreme Court.<sup>96</sup> Furthermore, a law passed in January 2018 bestows upon a newly created body of political appointees the power to “re-hear and re-decide *any* court case that has been heard by civil, criminal or military courts,” including the Supreme Court, since October 1997.<sup>97</sup> Without an independent judiciary to check the anti-free press policies and conduct of the PiS-led government, Poland, predictably, has seen freedom of the press disappear.

Kaczynski and the PiS-led government have been successful in their attempts to sow distrust in independent press outlets and foment a new mainstream media aligned with the government’s agenda. By suppressing the communication of critical viewpoints to the Polish electorate, Kaczynski, Duda, and their allies keep the public from knowing that real dissent exists and from understanding the basis for that dissent, and cause those voicing dissent to become hopeless and apathetic. Hundreds of journalists and other media personnel have been forced out of the public media service for being insufficiently loyal to the regime, and the remaining independent outlets and the journalists whom they employ must be careful about what they say, to whom they give a voice, and what viewpoint they offer.<sup>98</sup> Otherwise, they face legal

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<sup>95</sup> R. Daniel Kelemen & Laurent Pech, *Poland’s Plan to Get Rid of Independent Judges Has Just Hit a Roadblock*, Wash. Post, Oct. 25, 2018, available at [https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/25/polands-plan-to-get-rid-of-independent-judges-has-just-hit-a-roadblock/?noredirect=on&utm\\_term=.6631ceb5e8c1](https://www.washingtonpost.com/news/monkey-cage/wp/2018/10/25/polands-plan-to-get-rid-of-independent-judges-has-just-hit-a-roadblock/?noredirect=on&utm_term=.6631ceb5e8c1).

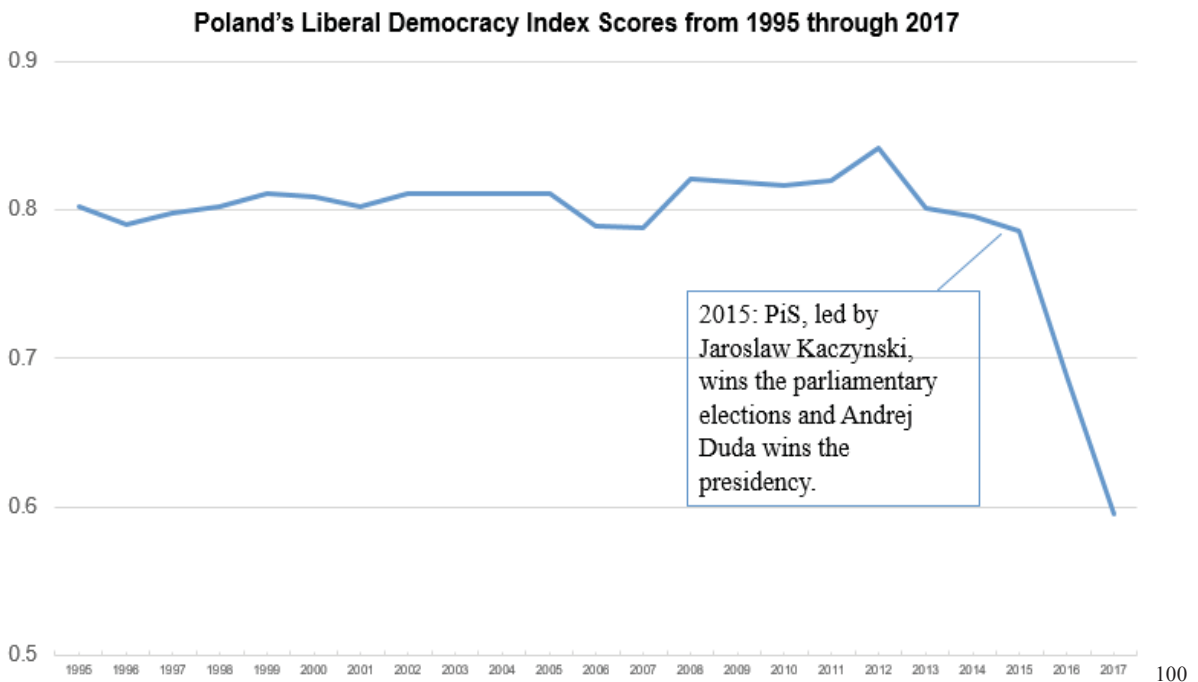
<sup>96</sup> *Id.*

<sup>97</sup> Melissa Hooper, *Poland: Failing at Both Law and Justice*, JUST SEC. (July 16, 2018), <https://www.justsecurity.org/59466/poland-failing-law-justice/>.

<sup>98</sup> *Supra* note 29 (reporting that ,at a panel discussing press liberty in Gdansk, Poland, a board member of the Society of Journalists said the “political pressure” under which Polish journalists find themselves is “unprecedented”).

exposure under expanding criminal and civil libel laws. Together, the policies implemented by the PiS-led government and shepherded by Kaczynski and Duda control the flow of information from the press to its consumers and “psychologically pressure” journalists into thinking twice before publishing or broadcasting a report.<sup>99</sup> Today, the control that the PiS-led government exerts on the flow of information portends a reversion to pre-1989 Poland.

Once again, data collected from V-Dem Institute confirms the effect of the PiS-led government’s use of the autocratic playbook on the quality of democracy in Poland.



Indeed, what had been a flourishing democracy for decades is now in a steep back-slide due in large part to the PiS-led government’s expansion of power achieved through its control over the free flow of information to the public.

<sup>99</sup> *Supra* note 97.

<sup>100</sup> This figure represents Poland’s Liberal Democracy Index scores from 1976 through 2017. *See supra* note 84.

### C. Russia

Democratic reforms first emerged in Russia when it was still the Soviet Union. Mikhail Gorbachev, who became the Soviet leader in 1985, implemented policies that ended many forms of censorship, granted greater freedom of political association, and permitted multi-candidate elections in which opposition parties could participate. Under the rule of Boris Yeltsin, who served as President from 1991 through 1999, the level of democracy in Russia remained at approximately the same level. During the early years of Vladimir Putin's first stint as President from 2000 through 2008, Russia was considered "Partly Free"<sup>101</sup>; and although "the Kremlin" increasingly placed pressure on Russian media outlets through libel suits, anti-extremism laws, and governmental takeover,<sup>102</sup> hope of press liberty returned in 2008 when Dimitry Medvedev replaced Putin as President. But Putin thrashed those hopes when he won the presidency in 2012. Today, an "authoritarian political system is concentrated in the hands of President Vladimir Putin. With loyalist security forces, a subservient judiciary, . . . and a legislature consisting of a ruling party and pliable opposition factions, the Kremlin is able to manipulate elections and suppress genuine dissent."<sup>103</sup>

Putin's annexation of the Russian press, as well as the credible fear that he has instilled in the remaining independent journalists, is one of the principal reasons why authoritarianism is at its peak in Russia. Since 2012, Putin has overseen a complete takeover of all national television networks and most radio and print outlets by the government, state-owned companies, and Kremlin-friendly Oligarchs. The government and Oligarchs control, collectively, approximately

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<sup>101</sup> See, e.g., Freedom in the World 2003 Profile, Russia, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2003/russia> (last visited May 6, 2019).

<sup>102</sup> See *id.*

<sup>103</sup> Freedom in the World 2019 Profile, Russia, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/2019/russia> (last visited May 6, 2019).

86% of the 29 most-watched television stations and more than 60% of Russia's registered local publications.<sup>104</sup> From daily newspapers to nightly broadcasts, from talk-show radio to weekly magazines, the Russian media landscape is dominated by pundits, commentators, and reporters fiercely loyal to Putin's personal and political agenda. Putin has signed into law legislation that is similar to the tactics used by other strong-man leaders—restricting the press's access to information, regulating print and broadcast media with vague proscriptions and punitive fines, and prosecuting purveyors of critical content under criminal libel and anti-extremism laws. Recently, the Kremlin took the first steps to confront online-based media content, identifying the risk that an unregulated internet poses in an age when media outlets are turning to the internet to disseminate their content.<sup>105</sup> Under new laws, the Kremlin can block access to internet-based media outlets, in some cases without first seeking permission of a court. Outlets or individuals whose published content violates purposefully ill-defined standards of decency face fines of up to \$1.5 million, while repeat offenders may be imprisoned for 15 days.<sup>106</sup> As media consumers increasingly trend towards the internet and social media as a source for news, strong-man leaders elsewhere will surely mimic the Kremlin's tactics to infringe upon press liberty in the seemingly irrepressible online world.

The Kremlin has been able to operate in this manner because it has no concern about being checked by Russia's judiciary. Russia's judiciary is compromised at every level by systemic pro-Kremlin bias. Judges, wary of being overturned on appeal for ruling against the interests of the Kremlin and of retribution from the Kremlin itself, are so pro-government in their

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<sup>104</sup> *Supra* note 24; *accord supra* note 103.

<sup>105</sup> *See supra* note 62.

<sup>106</sup> *Id.*

determinations that judicial outcomes appear predetermined. Indeed, under Putin, the courts serve as another arm of the Kremlin through which it can infringe upon press liberty, freedom of expression, and access to information. For example, in 2018, leading up to Russian elections, a court enjoined Putin's principal opponent, Alex Navalny, from posting on his website photographs and video of Kremlin-linked Oligarch Oleg Deripaska and a Kremlin official whom he was accused of bribing together on a luxury yacht. The court held that the website had violated Deripaska's privacy. The Russian judiciary has gone to further lengths, brushing aside constitutional guarantees of political freedom and freedom of association in order to uphold politically motivated prosecutions against the Kremlin's political opponents and against independent journalists who pose a threat to Putin's grip on power.<sup>107</sup> Such trials proceed even *in absentia*, though Russian law gives defendants the right to be present.<sup>108</sup> Put simply, the Russian judiciary serves merely as a rubber stamp that bestows an aura of legitimacy upon the Kremlin's autocratic tactics, including those directed against the press.

When the media is dominated by fawning and uncritical content, public trust in the media as a whole falters, allowing leaders to consolidate power at the expense of democracy. Indeed, in Russia, the government's consolidation of the press has spawned widespread cynicism, and "[t]he vast majority of Russians now feel that it is pointless to get involved in the political process because their participation has little chance of effecting real change."<sup>109</sup> Putin has not

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<sup>107</sup> Anton Troianovski, *Russian Opposition Leader Slams Instagram for Caving in to the Government*, WASH. POST, Feb. 15, 2018, [https://www.washingtonpost.com/world/europe/russian-opposition-leader-slams-instagram-for-caving-in-to-the-government/2018/02/15/fddd06da-1247-11e8-9570-29c9830535e5\\_story.html?utm\\_term=.bffade1679be](https://www.washingtonpost.com/world/europe/russian-opposition-leader-slams-instagram-for-caving-in-to-the-government/2018/02/15/fddd06da-1247-11e8-9570-29c9830535e5_story.html?utm_term=.bffade1679be).

<sup>108</sup> *Supra* note 23; Joshua Yaffa, *How Bill Browder Became Russia's Most Wanted Man*, NEW YORKER, Aug. 13, 2018, <https://www.newyorker.com/magazine/2018/08/20/how-bill-browder-became-russias-most-wanted-man>.

<sup>109</sup> Robert Ortung, *Russia's Struggle for Press Freedom*, GEO. J. INT'L AFF., Apr. 29, 2018, <https://www.georgetownjournalofinternationalaffairs.org/online-edition/2018/4/29/russias-struggle-for-press-freedom>.

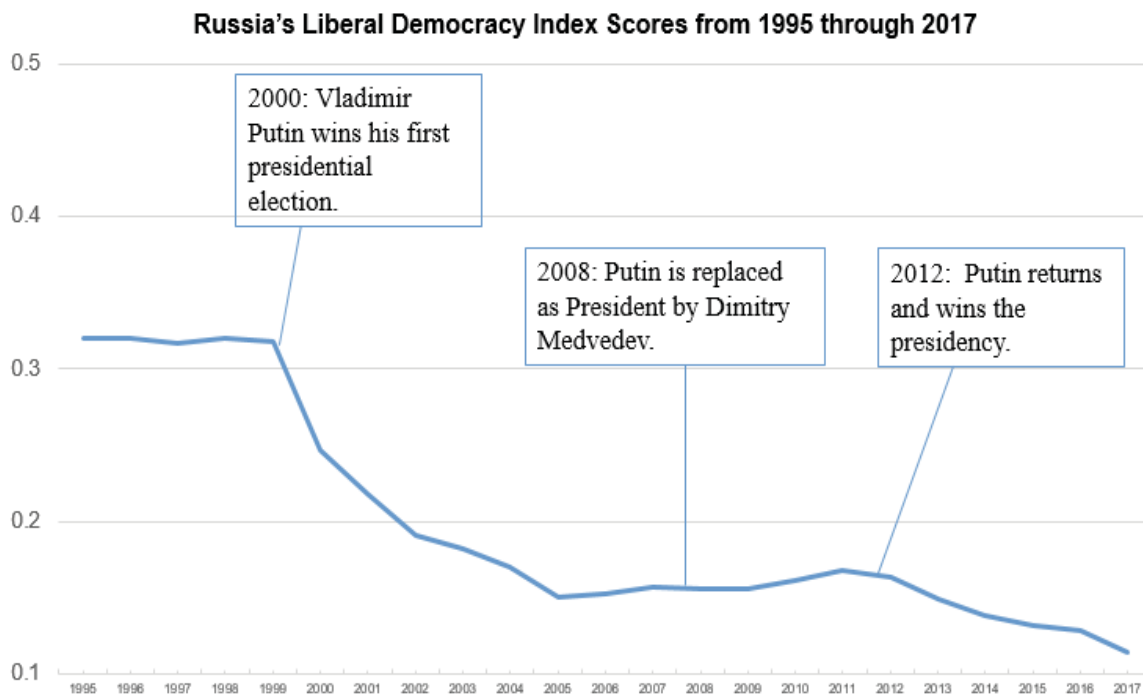
faced a candidate with a serious chance of victory since his first nationwide election; and the 2016 elections were defined by record low turnout, particularly in major cities where Putin's approval historically has been lower than elsewhere in Russia.<sup>110</sup> In fact, in Moscow, only 28% of eligible voters voted.<sup>111</sup> The Kremlin has successfully suppressed political opposition from the electorate by ridding the media landscape of persuasive critical voices and content.

Here, too, data collected from V-Dem Institute clearly demonstrates the profound effect Putin's governing tactics—including his mastery of the autocratic playbook—has had on the quality of democracy in Russia.

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<sup>110</sup> See Shaun Walker, *Russia Stays Loyal to Kremlin in Election with Record Low Turnout*, THE GUARDIAN, Sept. 19, 2016, <https://www.theguardian.com/world/2016/sep/19/russia-stays-loyal-kremlin-election-record-low-turnout>; Neil MacFarquhar, *Putin Is Certain to Win Re-election, but His Support May Be Slipping*, N.Y. TIMES, Mar. 16, 2018, <https://www.nytimes.com/2018/03/16/world/europe/putin-russia-election.html> (reporting that “support for [Putin] in large cities has been uneven or declining”).

<sup>111</sup> Shaun Walker, *Russia Stays Loyal to Kremlin in Election with Record Low Turnout*, THE GUARDIAN, Sept. 19, 2016, <https://www.theguardian.com/world/2016/sep/19/russia-stays-loyal-kremlin-election-record-low-turnout>.



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Indeed, many observers believed that the progression from Yeltsin to Putin in 2000 represented the first free transfer of power in Russian history. But even in his first term, shrouded by both his relative anonymity and electoral victory, Putin stifled democratic progress and began to exert complete control over the government.<sup>113</sup> Over time, Putin’s abuses have become more brazen and Russia even less democratic. Putin’s ability to exert this control goes hand-in-hand with his use of the autocratic playbook to eliminate the free flow of information to the Russian public.

#### **D. Turkey**

The Justice and Development Party (“AKP”), led by Recep Tayyip Erdogan, became the ruling party in Turkey in 2002, and with it ushered in unprecedented democratic reforms,

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<sup>112</sup> This figure represents Russia’s Liberal Democracy Index score from 1976 through 2017. *See supra* Note 84.

<sup>113</sup> Thomas L. Friedman, *Russia: Sort of, But Not Really*, N.Y. TIMES, Feb. 4, 2012, <https://www.nytimes.com/2012/02/05/opinion/sunday/friedman-russia-sort-of-but-not-really.html> .



including freedom of the press to a degree unlike any that had previously existed in Turkey.<sup>114</sup> However, as democracy burgeoned, the number and strength of opposition figures and parties rose as well. These include, among others, Kurdish opposition parties and Fetullah Gulen—an expatriate cleric formerly aligned with Erdogan—and his strong group of followers referred to as “Gülenists,” whom Erdogan holds responsible for a failed coup attempt in 2016.<sup>115</sup> The emergence of political opposition prompted Erdogan to chip away at civil liberties, and when he assumed the presidency in 2014, his attention immediately turned towards stifling the free press.

Today, Erdogan’s allies and relatives control the “vast majority” of national media outlets in Turkey, although there is still an active presence of independent print and internet publications.<sup>116</sup> These independent outlets and the journalists whom they employ are routinely vilified and pressured to engage in self-censorship out of fear of being prosecuted for violating content-based restrictions—justified on pretextual bases such as decency, national security, and patriotism—and punishable by long terms of imprisonment.

Erdogan has used his bully pulpit and wielded his executive power to ensure that media outlets and journalists who are not loyal to the AKP operate in a hostile national environment in which the government deems them not only untrustworthy, but also enemies of the state. Like President Trump, Erdogan portrays an image of Turkey as vulnerable to so-called “terrorists”—

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<sup>114</sup> See, e.g., *supra* note 56; Zia Weise, *How Did Things Get So Bad for Turkey’s Journalists?*, THE ATLANTIC, Aug. 23, 2018, <https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/>; see also *supra* note 29 (drawing as an example a 2004 amendment backed by the AKP that replaced prison sentences with fines as punishment for certain press law violations).

<sup>115</sup> *Supra* note 56; see also U.S. Dep’t of State, Turkey 2017 Human Rights Report, <https://www.state.gov/documents/organization/277471.pdf>; Zia Weise, *How Did Things Get So Bad for Turkey’s Journalists?*, THE ATLANTIC, Aug. 23, 2018, <https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/>.

<sup>116</sup> *Supra* note 56; U.S. Dep’t of State, Turkey 2017 Human Rights Report, <https://www.state.gov/documents/organization/277471.pdf>.

Gülenists, Kurds, and, journalists—and positions himself as the only one who truly understands his audience and can deliver them victory against these inimical interests.<sup>117</sup> According to a Turkish journalist who was fired by her editors in 2015 for reporting on a Turkish military operation in Kurdish cities, “You have to be on one side. They’re pushing you to be a patriot, not a journalist.”<sup>118</sup> The threat faced by independent journalists in Turkey is not limited to verbal hostility; the AKP-led government has jailed thousands of political opponents, including scores of journalists who, if permitted to freely express their views or publish their investigative findings, would pose a risk to Erdogan’s grip on power.<sup>119</sup>

Erdogan’s attack on the independent press has been enabled by the inability of the judiciary to place any meaningful check on Erdogan’s actions. The AKP-led government has effectively undermined any notion of judicial independence in Turkey by ignoring court orders and accusing disloyal judges of political bias or even conspiring against the administration. In February 2016, Erdogan flatly refused to accept the Constitutional Court’s decision finding the detention of two journalists on national-security grounds unconstitutional as a “violation of rights to liberty and security and freedom of expression.” Erdogan stated that he “does not accept” and “will not abide” by the Constitutional Court’s ruling.<sup>120</sup> Moreover, Erdogan and the AKP-led

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<sup>117</sup> Ece Toksabay & Ali Kucukgocmen, *Erdogan’s Election Rivals Struggle to Be Heard in Turkey’s Media*, REUTERS (June 20, 2018), <https://www.reuters.com/article/us-turkey-election-media/erdogans-election-rivals-struggle-to-be-heard-in-turkeys-media-idUSKBN1JG23Z> (quoting an Erdogan ally who heads Radio and Television Supreme Council—a state agency—as stating “[t]errorist organizations are carrying out an image campaign against Turkey using propaganda aimed at Europe to say that there is no press freedom in Turkey”).

<sup>118</sup> Zia Weise, *How Did Things Get So Bad for Turkey’s Journalists?*, THE ATLANTIC, Aug. 23, 2018, <https://www.theatlantic.com/international/archive/2018/08/destroying-free-press-erdogan-turkey/568402/>.

<sup>119</sup> Editorial, *Erdogan Hasn’t Killed Turkey’s Democracy Yet*, N.Y. TIMES, June 25, 2018, <https://www.nytimes.com/2018/06/25/opinion/erdogan-turkey-election.html>.

<sup>120</sup> International Commission of Jurists, *Turkey: The Judicial System in Peril—A Briefing Paper* at 11, <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf>.

government have taken control of the country's courts through legislation that removes troublesome judges and permits Erdogan to appoint their successors. The Turkish judiciary thus has proven futile in protecting journalists and other media members whose content the AKP-led government finds unfavorable or too critical—indeed, Turkey jails more journalists than any other nation in the world.<sup>121</sup>

Erdogan's tactics have been effective at suppressing the press and have caused democracy to back-slide in Turkey. Indeed, opposition to AKP and Erdogan is in a "headfirst free fall."<sup>122</sup> This is due, in large part, to the extremely limited access the electorate has to independent news coverage and non-government-controlled commentary. A prominent journalist and author, Ahmet Sik, who was one of 14 journalists sentenced to prison on charges of terrorism and supporting the Gulenist movement—all charges he denied—said of the Turkish media landscape, "The mainstream media is either siding with the ruling party, has surrendered to the ruling party, or has kneeled before it. [Turkish broadcasters are] one voice with many channels."<sup>123</sup> According to the European Council on Foreign Relations, Erdogan's rhetoric, including his diatribes aimed at the press, is a significant reason he has maintained power for nearly two decades.<sup>124</sup> The voice that consumers of Turkish media most often hear is Erdogan's: Turkey's public media service gave Erdogan 67 hours of airtime on its most-watched television station in the month leading up to the 2018 elections.<sup>125</sup> Erdogan's successful stranglehold over the media—through his use of the autocratic playbook—has permitted him to consolidate power

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<sup>121</sup> *Supra* note 56; *supra* note 3.

<sup>122</sup> *Supra* note 117.

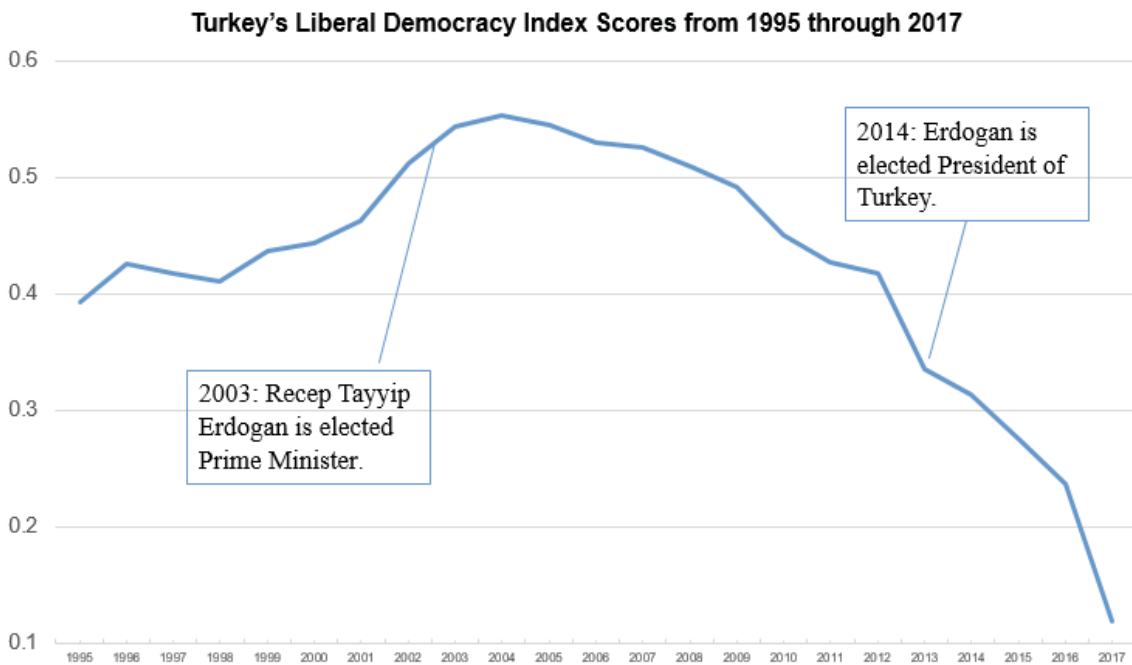
<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

to a degree that is inconsistent with democratic principles. He has dispensed with the office of the Prime Minister, has the authority to intervene in the Turkish judicial system, and has a mandate to appoint top officials in all positions of government.<sup>126</sup> Without a free press to serve as a bulwark for the few remaining democratic norms and institutions in Turkey, Erdogan will be emboldened to continue to concentrate power and thus cause Turkey to further back-slide from its democratic principles.

Once again, data collected from V-Dem Institute clearly demonstrates the precipitous decline in Turkey's democracy coinciding with Erdogan's deployment of the autocratic playbook.



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<sup>126</sup> *Supra* note 119.

<sup>127</sup> This figure represents Turkey's Liberal Democracy Index score from 1976 through 2017. *See supra* Note 84.

As shown above, after years of being a better than average democracy, Turkey has experienced a severe democratic back-slide as a result of Erdogan’s complete control of the government.

Without a free press to provide critical coverage of Erdogan’s government, or an independent judiciary to provide a check on Erdogan’s control over the press, Turkey’s democracy will continue to back-slide and Turkey may become one of the least democratic countries in the world.

### **III. President Trump’s Application of the Autocratic Playbook**

President Trump’s repeated deployment of government power against the press—unprecedented in modern times in this country—replicates the playbook used by strong-man leaders and their allies in Hungary, Poland, Russia, Turkey, and elsewhere to erode the democratic institutions in those countries. Since President Trump took office, the United States’ standing among the world’s democracies has diminished. Freedom House’s *Freedom in the World Report for 2019*, which assesses the strength of civil liberties and political rights in 195 countries, found that the United States ranks below other major democracies such as France, Germany, and the United Kingdom, its scores have had a pronounced decline since President Trump took office, and its “closest peers with respect to total *Freedom in the World* scores are Belize, Croatia, Greece, Latvia, and Mongolia.”<sup>128</sup>

A significant driver of the United States’ declining level of democracy in recent years has been the reduction of press liberty and freedom of speech. President Trump has abused his official power in the ways described in the Amended Complaint, dated February 16, 2019 (Docket Item 38) (“Am. Compl.”), and through acts described in further detail herein, for the

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<sup>128</sup> *Freedom in the World 2019*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat> (last visited April 24, 2019). Freedom House is an “independent watchdog organization” that the United States government relies on for its expertise in assessing civil and political rights across the globe.

purpose of bullying the American press into doing his bidding while simultaneously discrediting the press as a meaningful check on his power. Indeed, President Trump has already been successful to a degree: at no point in American history has there been such hostility aimed at journalists and media outlets. Fortunately, our founders anticipated such intrusions on American democracy and decency in drafting the First Amendment, and vested the power to enforce violations thereof in an independent and coequal federal judiciary, which this action appropriately seeks to do.

A key distinction between the United States and the foregoing nations is that our federal judiciary remains able to exercise its constitutionally vested power to restrain executive overreach despite President Trump's best efforts to subvert checks and balances against him. Since President Trump's inauguration, federal district and appellate courts have struck down policies that comprised constitutional violations.<sup>129</sup> These decisions are vital because each upholds important rights and guarantees. But moreover, they preserve the role of the federal judiciary as the neutral arbiter of the Constitution in our constitutional democracy, on par with Congress and the executive.<sup>130</sup> Unlike the courts of Hungary, Poland, Turkey, and Russia, this Court has an opportunity to protect the constitutional right to a free press, the demise of which would set into motion a democratic back-slide here in the United States.

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<sup>129</sup> *In His Own Words: The President's Attack on the Courts*, BRENNAN CENTER FOR JUSTICE (June 5, 2017), <https://www.brennancenter.org/analysis/his-own-words-presidents-attacks-courts> (listing federal district and appellate courts decisions adverse to the Trump administration).

<sup>130</sup> *See Marbury v. Madison*, 5 U.S. 137 (1803) (establishing the principle that the federal judiciary has the power to strike down acts of Congress and the President and that the Supreme Court is a co-equal and separate third branch of government).

### A. President Trump Plants the “Seeds of Distrust”

President Trump’s rhetorical attacks against the press, “combined with the drumbeat of constant repetition, has done lasting harm to reality-based journalism: It deepens mistrust and undermines the crucial role of the free press.”<sup>131</sup> Drawing on Orban’s example in Hungary, since his inauguration in January 2017, President Trump has taken to Twitter approximately 450 times to condemn as “fake news,” “fake news media,” or the “Enemy of the People,” the journalists, media outlets, and specific stories that are critical of him.<sup>132</sup> President Trump employs the same rhetoric at his raucous political rallies, of which he has conducted at least 57 since becoming president, and official Presidential addresses. Notably, the term “enemy of the people” was first termed by Russian dictator Joseph Stalin in the 1930s, when he used the phrase *vragi naroda* to describe generally all people and organizations who disagreed with the Kremlin. Those deemed *vragi naroda* were often sent to the Gulags or sentenced to death.<sup>133</sup> Whether the President is aware of the dark history of the phrase he strategically employs is unclear, but his intentions are all the same: to sow distrust of the press and thus discredit critical coverage before it is published.

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<sup>131</sup> Margaret Sullivan, *Trump Doesn’t Even Believe His Own Damaging Rants About ‘Fake News’*, WASH. POST, Feb. 4, 2019, [https://www.washingtonpost.com/lifestyle/style/trump-doesnt-believe-his-own-damaging-rants-about-fake-news/2019/02/04/b368b526-2881-11e9-984d-9b8fba003e81\\_story.html](https://www.washingtonpost.com/lifestyle/style/trump-doesnt-believe-his-own-damaging-rants-about-fake-news/2019/02/04/b368b526-2881-11e9-984d-9b8fba003e81_story.html).

<sup>132</sup> Results for search terms “fake news,” “fakenews,” and “fake media” in tweets by Donald J. Trump, Trump Twitter Archive, <http://www.trumptwitterarchive.com/archive/fake%20news%20%7C%7C%20fakenews%20%7C%7C%20fake%20media> (last visited Apr. 3, 2019). The President is clearly aware of the vast reach his Twitter feed has and, thus, its propensity to influence its followers. As a candidate, Trump likened his Twitter feed to “owning [his] own newspaper.” Rebecca Savransky, *Trump Compares Twitter to Owning His Own Newspaper*, THE HILL (Apr. 3, 2016), <https://thehill.com/blogs/ballot-box/presidential-races/275046-trump-compares-twitter-to-owning-his-own-newspaper>.

<sup>133</sup> Nina Khrushcheva, *Donald Trump’s Not Quite Joseph Stalin. But His ‘Fake News Awards’ Should Scare Us*, NBC NEWS (Jan. 17, 2018, 1:06 PM), <https://www.nbcnews.com/think/opinion/donald-trump-s-not-quite-joseph-stalin-his-fake-news-ncna838456>.

President Trump clearly espouses the belief that his attacks on the press have served their purpose of delegitimizing established and prestigious outlets, such as the *New York Times*, CNN, and the *Washington Post*. In an interview with Lou Dobbs on Fox Business Network, President Trump proclaimed, “I’m so proud I’ve been able to convince people how fake [the media] is.”<sup>134</sup> Objective measures indicate that President Trump is, indeed, succeeding. In an April 2018 Monmouth University poll, 31% of respondents answered that they believed mainstream newspapers and television broadcasts publish “fake news” regularly, and 46% believed that those outlets published “fake news” occasionally.<sup>135</sup> This represented a 12% increase from 2017.<sup>136</sup> In reality, nearly all of the coverage that President Trump objects to is not “fake news,” but rather “merely accurate coverage that he does not like.”<sup>137</sup> But as we have seen above, those are the tactics of the aspiring strong-man leaders.

Certain individual journalists who work for independent outlets have particularly caught President Trump’s attention. For example, in November 2018, President Trump attacked April Ryan and Jim Acosta, the White House correspondents for American Urban Radio Networks and CNN, respectively, during an off-the-cuff speech at a media availability session before embarking for the G20 summit. President Trump referred to Ryan as “somebody that’s a loser,”

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<sup>134</sup> Rebecca Savransky, *Trump Compares Twitter to Owning His Own Newspaper*, THE HILL (Apr. 3, 2016), <https://thehill.com/blogs/ballot-box/presidential-races/275046-trump-compares-twitter-to-owning-his-own-newspaper>.

<sup>135</sup> Monmouth Univ. Polling Inst., *‘Fake News’ Threat to Media; Editorial Decisions, Outside Actors at Fault*, Monmouth (Apr. 2, 2018), [https://www.monmouth.edu/polling-institute/reports/monmouthpoll\\_us\\_040218/](https://www.monmouth.edu/polling-institute/reports/monmouthpoll_us_040218/).

<sup>136</sup> Michael Conway, *Trump’s Public Attacks on the ‘Enemies of the People’ Echo Nixon’s Private Press War – Except Worse*, NBC NEWS (Nov. 20, 2018), <https://www.nbcnews.com/think/opinion/trump-s-public-attacks-enemies-people-echo-nixon-s-private-ncna938481..>

<sup>137</sup> *Id.* Rather, it appears that Trump is the one who has a difficult relationship with the truth. Fact checkers at the *Washington Post* who have been keeping track of the President’s lies since his inauguration report that, in 801 days in office, Trump made 9,451 false or misleading claims. *Fact Checker: In 801 Days, President Trump Has Made 9,451 False or Misleading Claims*, WASH. POST, Mar. 31, 2019, [https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm\\_term=.b6799e37047e](https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.b6799e37047e).



who “doesn’t know what the hell she’s doing,” and is “very nasty.”<sup>138</sup> President Trump called Acosta “very unprofessional” and unintelligent.<sup>139</sup> In January 2018, President Trump planned a “Fake News Awards” ceremony. The winners were revealed on the Republican National Committee (“RNC”) website. The introduction read: “2017 was a year of unrelenting bias, unfair news coverage, and even downright fake news . . . . Studies have shown that over 90% of the media’s coverage of President Trump is negative.” The *New York Times*, *ABC News*, *TIME*, and the *Washington Post* were among the “winners.”<sup>140</sup> Of course, this is just a small sampling of the litany of attacks against individual journalists and outlets launched by President Trump and administration officials, which have served to foster an environment of distrust and hostility towards the press. President Trump has echoed, in essence, Erdogan’s “us-versus-them” rhetorical assault against the press, which many respected commentators credit as the reason Erdogan has maintained his tight grip on power in Turkey.<sup>141</sup>

These tactics have worked, just as they have worked for other leaders who have followed the autocratic playbook. In 2018, the Reuters Institute determined from its survey of thousands of media consumers in 37 countries across Europe, the Americas, and the Asia-Pacific that the

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<sup>138</sup> Jordan Fabian, *Trump Calls April Ryan a ‘Loser,’ Threatens to Revoke More Press Credentials*, THE HILL (Nov. 9, 2018), <https://thehill.com/homenews/administration/415900-trump-calls-april-ryan-a-loser-threatens-to-revoke-more-press>.

<sup>139</sup> *Id.*

<sup>140</sup> Jen Kirby & Libby Nelson, *The “Winners” of Trump’s Fake News Awards, Annotated*, VOX (Jan. 17, 2018), <https://www.vox.com/2018/1/17/16871430/trumps-fake-news-awards-annotated>. Among the “winners” were some stories that contained factual inaccuracies, including a report that Trump had removed a bust of Martin Luther King Jr. from the White House and that Donald Trump Jr. had received an email from Wikileaks before it released hacked DNC documents leading up to the 2016 presidential election. But in each case, either the story had been quickly retracted and corrected or the responsible writer had been punished for failing to abide by the institution’s journalistic standards.

<sup>141</sup> Ishaan Tharoor, *As Trump Wages War on the Media, the Echoes of Erdogan Grow Louder*, WASH. POST, July 3, 2017, [https://www.washingtonpost.com/news/worldviews/wp/2017/07/03/as-trump-wages-war-on-the-media-the-echoes-of-erdogan-grow-louder/?utm\\_term=.950c1cc40934](https://www.washingtonpost.com/news/worldviews/wp/2017/07/03/as-trump-wages-war-on-the-media-the-echoes-of-erdogan-grow-louder/?utm_term=.950c1cc40934).

United States ranks 30th in overall trust in media.<sup>142</sup> In fact, only 34% of Americans generally trust the news, reflecting a four-percentage point decline since President Trump assumed office.<sup>143</sup> A poll conducted by Gallup and the John S. and James L. Knight Foundation published in September 2018 found that “30 percent of those who identified themselves as being on the conservative end of the spectrum . . . not only lost faith in the media, but . . . expect that change to be permanent.”<sup>144</sup>

**B. President Trump Limits Media Access for Those He Views as Critics and Provides Unfettered Access for Those Who Support Him and His Agenda**

Through his official acts, President Trump has unlawfully denied specific journalists and news outlets access to the White House and other government officials, effectively precluding certain media from communicating to the public facts about his administration (*see* Am. Compl. ¶¶ 16, 29-48). In some instances, he has attempted to provide a *post hoc* and purportedly legitimate justification for its actions (*see* Am. Compl. ¶¶ 40-41). But it is difficult to conceal the true purpose of these official acts when the President posts his real motives on Twitter (*see, e.g.,* Am. Compl. ¶ 38). And much like Russia’s Vladimir Putin, whom President Trump has referred to as a “very, very strong” leader, President Trump has employed several tactics from the autocratic playbook to quash critical coverage of him and his administration (*see* Am. Compl. ¶¶ 29-114).

As alleged in the Amended Complaint, the President and White House Press Secretary Sarah Huckabee Sanders threatened numerous times to revoke the press passes of journalists

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<sup>142</sup> *Supra* note 83.

<sup>143</sup> *Supra* note 83.

<sup>144</sup> Matthew Ingram, *Most Americans Says They Have Lost Trust in the Media*, COLUM. JOURNALISM REV. (Sept. 12, 2018), [https://www.cjr.org/the\\_media\\_today/trust-in-media-down.php](https://www.cjr.org/the_media_today/trust-in-media-down.php).

who have been critical of the administration and, in fact, did (1) preclude a CNN reporter from attending a bill signing, (2) revoked another CNN reporter's press credentials, and (3) revoked the former CIA Director's security clearance, in retaliation for coverage that shed an unfavorable light on the administration (*see* Am. Compl. ¶¶ 35-36, 38-42, 45).

Ever since the filing of the Amended Complaint, the President has continued to restrict journalists' access in a discriminatory manner. At the February 27, 2019 meeting in Hanoi with North Korean dictator Kim Jong Un, the President was asked during a media session about his former disgraced personal lawyer, Michael Cohen, who had testified before the House Judiciary Committee about, among other things, campaign-finance crimes he had committed allegedly at the President's direction. President Trump refused to answer. Within an hour, the White House blocked the press from attending a "pool spray,"<sup>145</sup> despite the fact that "[p]ast administrations have pointedly advocated for press access during meetings with repressive governments," and that, until they were told that they were being denied access, journalists had anticipated being able to attend.<sup>146</sup>

On March 19, 2019, Secretary of State Mike Pompeo held a telephonic briefing addressing "international religious freedom" before his trip to the Middle East. Initially, one member of the State Department press corps was invited to join the call, but that invitation was later revoked. When the journalist asked on what grounds he was being excluded, he was reportedly told that only representatives of "faith-based media" were permitted to attend. A State Department spokesperson did not deny the journalist's account, and, in essence, stated that

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<sup>145</sup> A "pool spray" is a colloquial term used to describe a session during which the White House press corps is allotted time to ask questions of the President.

<sup>146</sup> *White House Limits Press Access at Trump-Kim Meeting After Reporters Asked Questions About Michael Cohen*, CNN (Feb. 27, 2019), [https://m.cnn.com/en/article/h\\_c71591f1262611a60276627b135ed49c](https://m.cnn.com/en/article/h_c71591f1262611a60276627b135ed49c).



to pick and choose which journalists would have credentials. A number of respected and long-standing members of the White House press corps, including vocal Trump critic Dana Milbank of the *Washington Post*, who has held a White House press pass for more than 20 years, have been denied an exception.<sup>150</sup>

In addition to denying access to mainstream press whose coverage President Trump finds unfavorable, he also uses his platform as President to exhibit a clear preference towards journalists and outlets that fawn over him and ignore—or even actively seek to discredit—accurate, damaging stories. President Trump has no better ally in the mass media than *Fox News Channel*, a reliably pro-Trump “news-and-opinion network” owned by Rupert Murdoch, a friend and ally of President Trump. *Fox News Channel* broadcasts shows that are notable for their flattering coverage of President Trump and aversion to discussing negative stories regarding the President or his administration, including *Fox & Friends*, *Tucker Carlson Tonight*, *Justice with Judge Janine Pirro*, and *Hannity*.

President Trump not only routinely tweets out praise for these shows, he has provided hosts at *Fox News Channel* with unparalleled access. As of January 1, 2019, President Trump has granted *Fox News Channel* over 40 exclusive interviews, far more than he has done with all other networks combined. On occasion, President Trump will call his favorite *Fox News Channel* hosts live during their broadcast.<sup>151</sup> He also has used the Office of the President to promote *Fox News Channel* and its television personalities. For instance, the President promoted

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<sup>150</sup> See *supra* note 147.

<sup>151</sup> Joe Concha, *Fox’s Bartiromo to Interview Trump*, THE HILL (Mar. 21, 2019), <https://thehill.com/homenews/media/435077-foxs-bartiromo-to-interview-trump>.

from the Oval Office Pirro's new book, "Liars, Leakers, and Liberals."<sup>152</sup> Moreover, President Trump invited Sean Hannity and Pirro onstage at a Trump rally in Missouri before the 2018 mid-term elections. Hannity was even given the opportunity to speak; he wasted no time calling the press covering the event "fake news."

*Fox News Channel* is the most-watched cable television network and the fifth most watched network across broadcast and cable.<sup>153</sup> It is therefore troublesome that, presumably due to its close relationship with President Trump and his administration, *Fox News Channel* and its affiliate, *Fox Business*, routinely ignore or downplay groundbreaking, unflattering stories that are widely reported across mainstream media about the administration. For example, on May 15, 2017, when the *Washington Post* reported that President Trump had inappropriately revealed classified foreign intelligence information to high-ranking Russian diplomats in the Oval Office, the story drove nearly nonstop analysis on *CNN* and *MSNBC*. But not on *Fox News Channel*. Instead, *Fox* anchors and hosts barely mentioned the story, and instead ran programming concerning the 2016 investigation into Hillary Clinton's use of a private e-mail server while serving as Secretary of State. Indeed, on many of the days when administration-defining stories that cast President Trump in an unfavorable light break, *Fox News Channel* and its affiliates instead focus on other stories, such as intolerance of conservatives in academia and the

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<sup>152</sup> Jacqueline Thomsen, *Trump Promotes Jeanine Pirro's New Book in Oval Office*, THE HILL (July 24, 2018), <https://thehill.com/homenews/media/398685-trump-endorses-jeanine-pirros-new-book-in-oval-office> (reporting posed with Jeanine Pirro for photos in which he is holding a copy of Pirro's new book, which Pirro then posted to Twitter with the caption, "I think @realDonaldTrump likes it!"). Pirro has been one of Trump's most loyal mouthpieces; she has called for the prosecution and jailing of Trump's favorite foils, including Robert Mueller, Andrew McCabe, James Comey, and Hillary Clinton.

<sup>153</sup> A.J. Katz, *2018 Ratings: Fox News Is the Most-Watched Network on Cable for the Third Straight Year*, TVNEWSEER (Jan. 2, 2019), <https://www.adweek.com/tvnewser/2018-ratings-fox-news-is-the-most-watched-network-on-cable-for-the-third-straight-year/387943/>.

entertainment industry.<sup>154</sup> Like Kaczinski, who has transformed the Polish public media service into the government’s propagandist, the President’s relationship with *Fox News Channel* and its star personalities, and the synergy of the President’s agenda with the content that the channel broadcasts, creates the perception that *Fox* is merely an arm of the White House—a state-controlled news agency.<sup>155</sup>

### **C. President Trump Seeks to Harm the Financial Interests of Media Outlets He Views as Providing Unfavorable Press**

President Trump has used his executive mandate to exact a financial toll on the business interests of Jeff Bezos, who owns the *Washington Post* and also is the founder and largest shareholder of *Amazon*. The *Washington Post* has conducted and published hard-hitting investigations that have uncovered corruption and incompetence by President Trump and his administration. President Trump routinely uses rhetoric to delegitimize the *Washington Post* and its journalists, and falsely claims that the newspaper serves as *Amazon*’s lobbying arm. President Trump ultimately dialed in on *Amazon* itself. On December 29, 2017, after the *Washington Post*

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<sup>154</sup> Will Oremus, *Fox News Is Losing Its Grip*, SLATE (May 25, 2017), <https://slate.com/news-and-politics/2017/05/fox-news-refusal-to-cover-trumps-scandals-makes-for-bad-ratings-and-boring-tv.html>.

<sup>155</sup> This disparity of access is exacerbated by the revolving door between the Trump Administration and *Fox*. *Fox* contributor Ben Carson was appointed to be Secretary of Housing and Urban Development, *Fox* commentators K.T. McFarland and John Bolton were both picked to be Trump’s national-security advisors, former *Fox News Channel* anchor Heather Nauert served as State Department Spokeswoman and was nominated to be Ambassador to the United Nations before she voluntarily withdrew herself from consideration, *Fox* television personality Kimberly Guilfoyle works on Trump’s reelection campaign, and former co-president of *Fox* Bill Shine was picked to be the White House Communications Director. Shine, who had been forced out at *Fox* for purportedly enabling sexual harassment in the work place, remained on the *Fox* payrolls while he was a public servant in the White House; “financial-disclosure forms reveal[] that *Fox* ha[d] been paying Shine millions of dollars since he joined the Administration.” Trump Administration officials who seek to leave the government for more lucrative opportunities also find their way to *Fox*. For example, Hope Hicks, former White House Communications Director, and one of Trump’s most loyal aides, left the Administration to become *Fox Corporation*’s “top public-relations officer.” And Sebastian Gorka, a former Trump advisor who first entered the political limelight through appearances on *Fox News Channel* shows, is now back where he started, making regular guest appearances on the *Fox Business Channel*. Jane Meyer, *The Making of the Fox News White House*, NEW YORKER, Mar. 4, 2019, <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> (Jane Meyer opining that “[a]s the President has been beset by scandals, congressional hearings, and even talk of impeachment, *Fox* has been both his shield and his sword. The White House and *Fox* interact so seamlessly that it can be hard to determine during a particular news cycle, which one is following the other’s lead.”).

had run a critical year-end review of the Trump Administration, President Trump tweeted: “Why is the United States Postal Office, which is losing many billions of dollars a year, while charging Amazon and others very little to deliver their packages, making Amazon richer and the Post Office dumber and poorer? Should be charging MUCH MORE!”<sup>156</sup> Self-empowered by his false claims that *Amazon* received preferential treatment from the Post Office, President Trump established a task force to review the Postal Service’s “unsuitable financial path,” including its pricing of the package-delivery market (Compl. ¶ 68-73). While the task force was purportedly reviewing and discussing Postal Service reforms, President Trump continued his Twitter attacks against Amazon, extending his tweet threats to bringing antitrust claims against *Amazon* (see Compl. ¶ 71). Ultimately, the Postal Service recommended an increase in rates for purely commercial, non-essential use of package delivery services—the precise services that *Amazon* employs for the vast majority of its Postal Service deliveries. President Trump’s tactics resembled Orban’s tax hike on the Hungarian telecommunications sector.

President Trump also has abused his power by interfering in standard Department of Justice work to suppress the free flow of information that he views as unfavorable. Throughout President Trump’s campaign and continuing through his presidency, President Trump’s favorite media target has been CNN. Indeed, on August 15, 2017, President Trump posted a cartoon to his Twitter depicting a man with a CNN logo for a head being hit by a Train with the “Trump” logo on it.<sup>157</sup> Again, President Trump’s threats against CNN were not merely rhetorical. In fact, on August 20, 2017, he directed the Department of Justice’s Antitrust Division to block a

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<sup>156</sup> Tracey Lien, *President Trump Calls for Postage Rate Increase as Amazon Gets ‘Richer’*, L.A. TIMES, Dec. 29, 2017, <https://www.latimes.com/business/technology/la-fi-tn-trump-postage-20171229-story.html>.

<sup>157</sup> Jackie Strause, *Trump Shares Image of Train Running Over CNN Reporter*, HOLLYWOOD REPORTER (Aug. 15, 2017), <https://www.hollywoodreporter.com/news/trump-retweets-image-train-running-cnn-reporter-1029667>.



proposed vertical merger between Time Warner (CNN’s parent company) and AT&T (Am. Compl. ¶ 79). President Trump’s public statements, including a campaign promise to “not approve” the proposed deal, reveal that the real basis for seeking to enjoin this merger was not out of a concern for market competition, but in order to impose a financial toll on a media company whose coverage he deems hostile, and to make an example of that media company in order to inhibit critical coverage by others (Am. Compl. ¶ 77).

**D. President Trump Has Repeatedly Sought to Punish Journalists Including through the Proposed Amendment of Libel Laws**

Under President Trump, threats and attacks against journalists are the new normal. April Ryan and CNN anchor Brian Stelter are among the many journalists who have received death threats from President Trump’s supporters.<sup>158</sup> In August 2018, a man was charged with making death threats against journalists at the *Boston Globe* who had written an editorial response to the President’s rhetoric aimed at the media.<sup>159</sup> In February 2019, a Coast Guard lieutenant was arrested and charged with terrorism in connection with a plot to kill prominent cable hosts whose coverage is critical of the president, including Chris Hayes, Ari Melber, Don Lemon, and Chris Cuomo.<sup>160</sup> No doubt emboldened by President Trump’s violent rhetoric, perpetrators of such threats have increasingly turned to action. In February 2019, an audience member at a Trump

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<sup>158</sup> Ryan W. Miller, *Reporter April Ryan Says She Got Death Threats for Asking If Trump Considered Resigning*, USA TODAY, Apr. 11, 2018, <https://www.usatoday.com/story/news/politics/onpolitics/2018/04/11/april-ryan-death-threats-trump-resignation-question/509476002/> (reporting that April Ryan received death threats in retaliation for asking whether Trump has considered resigning); *Caller Threatens to Shoot Journalists*, C-SPAN (Aug. 3, 2018), <https://www.c-span.org/video/?c4743402/caller-threatens-shoot-journalists> (video clip presenting audio of a C-SPAN caller threatened on air to shoot Brian Stelter and Don Lemon).

<sup>159</sup> Alanna Durkin Richer & Brian Melley, *Man Charged with Making Death Threats Over Trump Editorials*, ASSOCIATED PRESS (Aug. 31, 2018), <https://www.apnews.com/4f9fc2487e8c4c9a94703e32029bd91c>.

<sup>160</sup> Greg Myre, *Coast Guard Officer Accused of Being a Domestic Terrorist*, NPR (Feb. 21, 2019), *transcript available at* <https://www.npr.org/2019/02/21/696532333/coast-guard-officer-faces-domestic-terrorism-charges>.

rally in El Paso shouted at and then violently shoved BBC cameraman Ron Skeans.<sup>161</sup> And in July 2018, a man stormed into the *Capital Gazette's* newsroom in Annapolis, Maryland, and shot and killed five journalists.<sup>162</sup> President Trump's condemnation of these acts of violence against journalists, to the extent he offers any, hardly exceeds the disinterested responses of Putin and the Kremlin to similar acts of violence in Russia, despite evidence that his violent rhetoric is to blame.<sup>163</sup>

Like leaders in Hungary, Poland, Turkey and Russia, President Trump also has tried to use the threat of libel laws to chill freedom of the press. He has pledged to “take a strong look into our country’s libel laws, so that when someone says something that is false and defamatory about someone, that person will have meaningful recourse in our courts.”<sup>164</sup> In 1964, the Supreme Court decided in *New York Times v. Sullivan*<sup>165</sup> that a public figure who commences a defamation suit must prove that the person who uttered an allegedly false statement defaming his or her character knew of, or was recklessly indifferent to, that falsity. Since then, it has been well-settled in our courts that lawsuits alleging defamation shall not be deployed as a mechanism

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<sup>161</sup> Iliana Magra, *BBC Cameraman Is Attacked at Trump Rally*, N.Y. TIMES, Feb. 12, 2019, <https://www.nytimes.com/2019/02/12/us/politics/bbc-cameraman-attacked.html>.

<sup>162</sup> Jean Marbella, *Six Months Later, the Capital Gazette Shooting Still Resonates, Among Family, Community, News Industry*, BALTIMORE SUN, Dec. 20, 2018, <https://www.baltimoresun.com/year-in-review/bs-md-yir-capital-gazette-1231-story.html>.

<sup>163</sup> Ayal Feinberg et al., *Counties that Hosted a 2016 Trump Rally Saw a 226 Percent Increase in Hate Crimes*, WASH. POST, Mar. 22, 2019, <https://www.washingtonpost.com/politics/2019/03/22/trumps-rhetoric-does-inspire-more-hate-crimes/>.

<sup>164</sup> Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws*, N.Y. TIMES, Jan. 10, 2018, <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>.

<sup>165</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)

to chill press liberty. The President seeks to scale back established Supreme Court precedent, and there are signs his efforts may be successful.<sup>166</sup>

## CONCLUSION

It is difficult to imagine that the United States could be on the path toward abandoning its democratic principles. But it was similarly difficult for citizens of other democratic nations to imagine that they would see their countries back-slide into pseudo-autocratic or autocratic regimes. It does not happen overnight. Indeed, it is the slow drip of the concentration of power by elected strong-man leaders that corrode democracies. A necessary step in that corrosive process is the undermining of the free press. As we have seen throughout the world, strong-man leaders employ similar tactics from the autocratic playbook to stifle the free press. Without a strong and independent judiciary to protect the freedom of the press, we too could see our democracy back-slide from its founding principles.

For all the foregoing reasons, we respectfully submit that Donald J. Trump's motion to dismiss should be denied, and that PEN American Center, Inc. should be permitted to proceed with this important action that seeks to preserve the freedom of press under the First Amendment.

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<sup>166</sup> Adam Liptak, *Justice Clarence Thomas Calls for Reconsideration of Landmark Libel Ruling*, N.Y. TIMES, Feb. 19, 2019, <https://www.nytimes.com/2019/02/19/us/politics/clarence-thomas-first-amendment-libel.html> (reporting that Justice Clarence Thomas wrote of *New York Times v. Sullivan* in a 2019 First Amendment-opinion, “[w]e did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified,” suggesting that he believes it inappropriate for the federal government to dictate the scope of libel law under the First Amendment).

Dated: New York, New York  
May 10, 2019

**SHEARMAN & STERLING LLP**

By: /s/ Richard Schwed

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*Counsel for Amici Curiae*

## **Appendix A: Identities of *Amici Curiae***

### **Ruth Ben-Ghiat**

Ruth Ben-Ghiat is a Professor of Italian and History at New York University. She received a Bachelor of Arts in History at the University of California at Los Angeles and a Ph.D. in Comparative History at Brandeis University. Her expertise is on fascism, authoritarianism, war, and propaganda. Her work on those topics can be found on *Slate*, the *Washington Post*, the *Atlantic*, and *CNN.com*, and she regularly provides political commentary to the *Washington Post*, CNN, MSNBC, Canadian Broadcast Corporation, *KCRW*, and other media outlets.

### **Kim Lane Scheppele**

Kim Lane Scheppele is the Laurance S. Rockefeller Professor of Sociology and International Affairs at Woodrow Wilson School and in the University Center for Human Values at Princeton University after 10 years on the law faculty at the University of Pennsylvania. Scheppele has studied the emergence of constitutional law in Hungary and Russia, living in both places for extended periods, and she has been documenting the rise of autocratic legalism in Hungary, Poland, the European Union, and elsewhere in the world. Scheppele was elected President of the Law and Society Association in 2017, a position she still holds, and is also an elected member of the American Academy of Arts and Sciences and the International Academy of Comparative Law.

### **Seyla Benhabib**

Seyla Benhabib is the Eugene Meyer Professor of Political Science and Professor of Philosophy at Yale University. She has been an Adjunct Professor of Law at Yale University for seven terms and is the John S. Carpenter Visiting Professor of Law at Columbia University. She has received the Ernst Bloch prize for her contributions to cultural dialogue in a global civilization and the Leopold Lucas Prize of the Evangelical Academy of Tübingen. Benhabib specializes in democratic theory, refugee, migration and citizenship studies, and European Union studies. A native of Istanbul, Turkey, she has contributed articles to the *New York Times*, the *Washington Post*, *Die Zeit*, and other American and European publications on Turkish political developments.

### **Aziz Huq**

Aziz Huq is the Frank and Bernice J. Greenberg Professor of Law at the University of Chicago Law School. He is the co-author of *How to Save Your Constitutional Democracy* (2018), a comparative constitutional analysis of the mechanisms by which contemporary democracies fall.

### **Samuel Moyn**

Samuel Moyn is the Henry R. Luce Professor of Jurisprudence and Professor of History at Yale University. Moyn has studied the idea of democracy across history, as well as fears of its collapse.