No. _____

IN THE

Supreme Court of the United States

ROBERT FRESE,

Petitioner,

—v.—

JOHN M. FORMELLA, in his official capacity as Attorney General of the State of New Hampshire,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment tolerates criminal prosecution for alleged defamation of a public official.

2. Whether New Hampshire's common law of civil defamation is too vague to define a criminal restriction on speech, particularly where the state authorizes police departments to initiate prosecutions without the participation of a licensed attorney.

RELATED PROCEEDINGS

United States District Court for the District of New Hampshire:

Frese v. MacDonald, No. 18-cv-1180-JL (Oct. 25, 2019) (denying motion to dismiss)

Frese v. MacDonald, No. 18-cv-1180-JL (Feb. 14, 2020) (denying motion for reconsideration)

Frese v. MacDonald, No. 18-cv-1180-JL (Jan. 12, 2021) (granting motion to dismiss following amended complaint)

United States Court of Appeals for the First Circuit:

Frese v. Formella, No. 21-1068 (Nov. 8, 2022, amended Nov. 18, 2022) (panel opinion affirming grant of motion to dismiss)

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[1] Exhibits A–C—comprising scanned original documents, court exhibits, and images, not readily resizable in their original form and not necessary to the resolution of this petition—can be accessed at D. Ct. ECF No. 31, Attachs. 1–4. Petitioner is prepared to reproduce and submit these exhibits in a separate supplemental volume upon request of this Court.

TABLE OF AUTHORITIES

Cases

Statutes & Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert William Frese respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The panel opinion of the court of appeals (App.3a–26a) is reported at *Frese v. Formella*, 53 F.4th 1 (1st Cir. 2022). The memorandum order of the district court granting respondent's motion to dismiss (App.29a–69a), following petitioner's amended complaint (App.99a–114a), is reported at *Frese v. MacDonald*, 512 F. Supp. 3d 273 (D.N.H. 2021). The memorandum order of the district court denying respondent's motion for reconsideration is unpublished, but is available at 2020 WL 13003802 (D.N.H. 2020). The memorandum opinion of the district court denying respondent's motion to dismiss (App.70a–98a) is reported at 425 F. Supp. 3d 64 (D.N.H. 2019).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on November 8, 2022. By an order dated January 24, 2023, this Court extended the time within which to file any petition for a writ of certiorari due on February 6, 2023, by forty-five days, to March 23, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant statutory provision, N.H. Rev. Stat. Ann. § 644:11, provides:

> I. A person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.
>
> II. As used in this section "public" includes any professional or social group of which the victim of the defamation is a member.

STATEMENT OF THE CASE

I. Statutory Background

New Hampshire's criminal defamation statute makes it a Class B misdemeanor to knowingly defame another person. N.H. Rev. Stat. Ann. § 644:11 (West 2023). Class B misdemeanors carry a maximum penalty of a fine up to $1,200, *see* N.H. Rev. Stat. Ann. § 651:2 IV(a), plus a twenty-four percent penalty assessment, N.H. Rev. Stat. Ann. § 106-L:10(I) (West 2023).

Police departments may initiate prosecutions under the criminal defamation statute on their own initiative, without input from an attorney. App.5a. People charged under the statute are not entitled to court-appointed counsel even if they are indigent. *Id.* Nor are they entitled to a jury trial. *Id.* Records from the New Hampshire Judicial Branch reveal that approximately 25 defendants were charged under the criminal defamation statute from 2009 through 2017. App.73a, 105a.

II. Factual Background

Petitioner Robert Frese, an outspoken resident of Exeter, New Hampshire, has been charged with violating the criminal defamation statute on two separate occasions. App.6a. He was first charged with criminal defamation in May 2012 by the Hudson Police Department for defaming a local life coach. *Id.* Without the benefit of an attorney to advise him on his legal rights, he pleaded guilty and was fined $1,488, of which $1,116 was conditionally suspended. *Id.*

Petitioner again faced charges under the criminal defamation statute six years later. *Id.* In May 2018, the *Exeter News-Letter* published online an article entitled "Retiring Exeter Officer's Favorite Role: Mentoring Youth." App.105a. Using the moniker "Bob William," petitioner added a "comment" to this article on the *Exeter News-Letter*'s Facebook page stating, in relevant part, that the retiring officer was "the dirtiest most corrupt cop I have ever had the displeasure of knowing . . . . and the coward [Exeter Police] Chief [William] Shupe did nothing about it." App.74a; D. Ct. ECF No. 31-4 at EXE091. The *Exeter News-Letter* removed the comment at the police

department's request. App.74a. After the *Exeter News-Letter* deleted his comment, petitioner submitted another comment under the moniker "Bob Exeter." *Id.* This comment stated in part: "The coward Chief Shupe did nothing about it and covered up for this dirty cop. This is the most corrupt bunch of cops I have ever known and they continue to lie in court and harass people. . . ." App.74a; D. Ct. ECF No. 31-4 at EXE092.

Exeter Police Department Detective Patrick Mulholland discussed petitioner's comments with Chief Shupe. App.74a. According to Detective Mulholland's police report, Chief Shupe "expressed his concern" that petitioner had made "false and baseless" comments about him "in a public forum." *Id.* Chief Shupe denied that he was aware of any criminal acts committed by the retiring officer and denied covering up any criminal conduct. App.74a–75a. Detective Mulholland and Chief Shupe reviewed the criminal defamation statute and concluded that petitioner "crossed a line from free speech to a violation of law." *Id.* Based on his conversations with petitioner and Chief Shupe, Detective Mulholland determined that "no credible information exist[ed] to believe that [the retiring officer] committed the acts Frese suggest[ed]." App.75a (alteration in original).

Detective Mulholland then prepared a criminal complaint alleging that petitioner violated the criminal defamation statute by "purposefully communicat[ing] on a public website, in writing, information which he knows to be false and knows will tend to expose another person to public contempt, by posting that Chief Shupe covered up for a dirty cop."

App.107a; D. Ct. ECF No. 31-3 at EXE029.[2] Based on this complaint and Detective Mulholland's supporting affidavit, a New Hampshire Circuit Court judge granted a warrant for petitioner's arrest on May 23, 2018. App.75a, 107a.

Petitioner turned himself in, was formally arrested, and was released on bail. App.108a. One of petitioner's bail conditions was that he could not have any contact with interested parties, including Chief Shupe. App.108a; D. Ct. ECF No. 31-3 at EXE016. He was also ordered to refrain from possession of a firearm, destructive device, dangerous weapon or ammunition, and to refrain from excessive use of alcohol. App.108a; D. Ct. ECF No. 31-4 at EXE088. At the time of his arrest, petitioner was subject to a "good behavior" condition on a suspended sentence from another case; a conviction under the criminal defamation statute could have constituted a violation of "good behavior," resulting in petitioner's imprisonment. App.108a; D. Ct. ECF No. 31-4 at EXE088.

Petitioner's arrest generated public controversy. App.6a. The New Hampshire Department of Justice's Civil Rights Division issued a memorandum opining that there was no probable cause to believe that petitioner published the offending statements with actual malice. App.6a, 75a. D. Ct. ECF No. 31-3 at EXE008–13. The Exeter Police Department subsequently dismissed the complaint.

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[2] The court of appeals below described other statements petitioner made concerning the retiring officer and his daughter, App.6a, but the criminal complaint against petitioner made clear that he was being prosecuted solely for his comments regarding Chief Shupe. App.107a; D. Ct. ECF No. 31-3 at EXE029.

App.6a.

As alleged in the amended complaint, petitioner fears future prosecution under the criminal defamation statute for his speech. App.108a. He especially fears that he will be arrested and prosecuted for speech criticizing law enforcement and other public officials. App.108a–09a.

III. Proceedings Below

A. District Court Proceedings

In late 2018, petitioner brought this pre-enforcement challenge in the U.S. District Court for the District of New Hampshire, alleging that the criminal defamation statute imposes an unconstitutional restriction on speech and that it is void for vagueness. App.70a. He asked the court to declare the statute facially unconstitutional and enjoin its future enforcement. App.76a. Respondent moved to dismiss, arguing that petitioner lacked standing and failed to state a claim. App.70a.

On October 25, 2019, the district court issued a memorandum opinion denying respondent's motion. App.70a–98a. The court held that petitioner has standing to bring this pre-enforcement challenge, even though he does not intend to defame anyone, because he credibly fears prosecution for speech that he believes to be true and/or nondefamatory. App.79a–89a. On the merits, the court held that petitioner's First Amendment claim was foreclosed by this Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964). App.89a n.38. But the court held that petitioner had sufficiently alleged a vagueness challenge. App.89a–97a. The court observed that "the discretion afforded to police departments to prosecute

misdemeanors, taken together with the criminal defamation statute's sweeping language, may produce more unpredictability and arbitrariness than the Fourteenth Amendment's Due Process Clause permits." App.97a.

In April 2020, petitioner amended the complaint to expressly include as-applied First Amendment and vagueness challenges. App.34a. The amended complaint alleges that the criminal defamation statute is unconstitutionally vague, both on its face and as applied in the context of New Hampshire's system for prosecuting Class B misdemeanors. App.109a ¶ 36. The amended complaint also alleges that the statute violates the First Amendment on its face, and that it is unconstitutional as applied to speech criticizing public officials. App.111a ¶¶ 44–46.

The amended complaint prompted respondent to file a second motion to dismiss, which the district court granted on January 12, 2021—three days before the close of discovery. App.29a–69a. The court reaffirmed that petitioner has standing to pursue his claims for prospective relief, App.35a–36a, and that *Garrison v. Louisiana* precludes petitioner's First Amendment claim, App.43a–45a. But the court reconsidered its previous holding that petitioner had plausibly alleged a vagueness claim, now concluding that the criminal defamation statute is not vague, because it incorporates the common law of civil defamation, App.58a–60a, and because it requires "knowing" defamation, App.65a.

B. The Court of Appeals Decision

The First Circuit affirmed. The court of appeals agreed that petitioner has standing to bring his

constitutional challenges to the criminal defamation statute. App.7a n.2. With respect to petitioner's First Amendment claims, the court observed that this Court "has upheld the criminalizing of false speech, explaining that deliberate and recklessly false speech 'do[es] not enjoy constitutional protection.'" App.8a (alteration in original) (quoting *Garrison*, 379 U.S. at 75). "Thus," the court reasoned, "the state can impose criminal sanctions for criticism of the official conduct of public officials so long as the statements were made with actual malice." *Id.* (internal quotation marks omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). Accordingly, the court held that *Garrison* precludes petitioner's First Amendment challenge to the criminal defamation statute. App.8a.

The court also affirmed the dismissal of petitioner's vagueness claims, concluding that a reasonable person should be able to "ascertain[] objectively whether a false statement exposes the victim to public hatred, contempt, or ridicule," and that the statute incorporates the common law of civil defamation. App.11a. The court rejected petitioner's arguments that New Hampshire's criminal procedure for class B misdemeanors—which allows police officers to prosecute offenses, and deny jury trial and indigent defense counsel rights to defendants—exacerbated the statute's vagueness. App.15a n.5.[3]

Concurring, Judge Thompson agreed that *Garrison* requires dismissal of petitioner's challenge

[3] The court cited the same reasoning in rejecting petitioner's "hybrid" vagueness claim, which alleges that the criminal defamation statute is unconstitutionally vague as applied in the context of New Hampshire's system for prosecuting Class B misdemeanors. App.19a.

to the criminal defamation statute, but questioned whether "the continued existence of speech-chilling criminal defamation laws" can "be reconciled with the democratic ideals of the First Amendment." App.21a. She pointed out that criminal defamation laws "have their genesis in undemocratic systems that criminalized any speech criticizing public officials," including the English crime of seditious libel. App.22a. Judge Thompson noted that "many states retain[] their criminal defamation laws." App.23a. She observed that, without a "readily discernible boundary between what gossip or loose talk amounts to being criminal and that which does not," the decision about what speech to prosecute lies "solely in the eye of the charge-bringing beholder—or the ego of the person offended or called out by the speech." App.23a–24a.

Judge Thompson considered it "out of touch with reality to suggest these laws are not being selectively harnessed or that these laws aren't particularly susceptible to such use and abuse." App.24a. Even when the laws are not actively enforced, the "looming threat of criminal prosecution" under a criminal defamation statute "will cause many to think twice before speaking out." *Id.* And she noted that this Court has recently highlighted the "sweeping dangers posed by criminal restrictions on speech regarding matters of public concern." App.26a n.13 (citing *United States v. Alvarez*, 567 U.S. 709, 723 (2012); *Alvarez* , 567 U.S. 709 at 736–37 (Breyer, J., concurring in the judgment)). Judge Thompson concluded that "criminal defamation laws—even the ones that require knowledge of the falsity of the speech—simply cannot be reconciled with our democratic ideals of robust debate and uninhibited

free speech." App.25a–26a (citing *Garrison*, 379 U.S. at 79–80 (Black, J., concurring)).

REASONS FOR GRANTING THE PETITION

It is sometimes assumed that criminal defamation prosecutions are a thing of the past. *See, e.g.*, "criminal libel," Black's Law Dictionary (11th ed. 2019) ("Because of constitutional protections of free speech, libel is no longer criminally prosecuted."). But generally applicable criminal defamation laws remain on the books in over a dozen states, and hundreds of prosecutions have been brought under these statutes over the past two decades. A significant number of prosecutions and threatened prosecutions involve speech criticizing public officials, especially law enforcement officers.

Here, petitioner has twice been prosecuted under New Hampshire's criminal defamation statute, most recently for stating on a local newspaper's Facebook page that his town's police chief was corrupt. The court of appeals rejected petitioner's First Amendment and vagueness challenges to the continued enforcement of the statute; however, this Court should accept the concurrence's invitation to resolve whether criminal defamation laws can "be reconciled with our democratic ideals of robust debate and uninhibited free speech." App.25a–26a.

First, the Court should grant this petition to categorically repudiate the doctrine of criminal seditious libel, which authorizes government officials to prosecute, and thereby bring the entire apparatus of the criminal system to bear on, speech criticizing themselves. This country's unfortunate experience under the Sedition Act of 1798 demonstrated the danger inherent in such measures, as the incumbent

Federalists initiated scores of criminal sedition prosecutions to harass and silence the newspapers aligned with their Republican opponents. Responding to these abuses, James Madison and other leading Republicans maintained that seditious libel prosecutions are inconsistent with the freedom of the press and America's republican form of government. *See, e.g.*, *Garrison*, 379 U.S. 64 app. at 83–84, 87–88 (appendix to opinion of Douglas, J., concurring). The Republicans routed the Federalists in the election of 1800, thanks in part to widespread revilement of the Sedition Act, and the Madisonian position has become the cornerstone of this Court's First Amendment jurisprudence.

In *Garrison v. Louisiana*, this Court held Louisiana's criminal defamation statute could not be constitutionally applied to speech criticizing public officials, because the law did not require actual malice as defined in *New York Times Co. v. Sullivan*. *Garrison*, 379 U.S. at 77–78. That rationale was sufficient to reverse the criminal conviction before the Court, but it failed to fully repudiate the doctrine of criminal seditious libel. And although nearly six decades have passed since *Garrison* was decided, the Court has not revisited the issue. Meanwhile, criminal defamation prosecutions continue to be brought against those who, like petitioner here, criticize law enforcement officers and other public officials.

This Court should finish the project it began in *Garrison* and declare that the First Amendment categorically bars criminal defamation prosecutions for speech concerning public officials. A decision firmly rejecting the doctrine of criminal seditious libel would harmonize this Court's precedents with Madison's insight into the central meaning of the First

Amendment, which remains just as relevant in today's polarized political climate as it was in 1798. As this Court noted in *Alvarez*, 567 U.S. 709, it is exceedingly dangerous to allow the government to wield the criminal law to enforce its conception of the truth, particularly when it comes to speech on matters of public concern. Laws empowering the government to prosecute criticism of its officials present this danger in its starkest form.

Second, the Court should accept this petition to resolve a conflict in authority over whether the common law of *civil* defamation is sufficiently precise to form the basis for *criminal* prosecution. The court below held that New Hampshire's criminal defamation statute is not unconstitutionally vague, because it incorporates the civil defamation standard. That decision conflicts with the Alaska Supreme Court's decision in *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978), which held that the common law of civil defamation does not provide a constitutional yardstick for a criminal restriction on speech, because vagueness standards are more demanding for criminal punishment.

Gottschalk was correctly decided, and the decision below was not. A statute that criminalizes any knowingly defamatory statement confers far too much discretion on law enforcement officials to pursue their own personal predilections in deciding what speech to prosecute. And New Hampshire's idiosyncratic misdemeanor criminal procedure—which authorizes police officers to initiate criminal prosecutions on their own, without the participation of a licensed prosecutor—exacerbates the potential for abuse of this authority against disfavored speakers, or to protect sensitive egos. The exceedingly broad sweep

of the criminal defamation statute, coupled with its enforcement apparatus, invites arbitrary or selective enforcement and "creates a significant risk of First Amendment harm." *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring in the judgment).

I. The Constitutional Validity of Criminal Defamation Laws Is a Question of National Importance Because Such Statutes Still Exist in Over a Dozen States and Continue to Be Enforced Against Those Who Criticize Public Officials.

Generally applicable criminal defamation laws are outliers today, but they remain on the books in 14 states and the U.S. Virgin Islands.[4] Some statutes have been declared unconstitutional as applied to speech on matters of public concern, because they do not require the government to demonstrate actual malice. *See State v. Powell*, 839 P.2d 139, 147 (N.M. Ct. App. 1992). Most, however, still apply to

[4] Fla. Stat. Ann. § 836.01 (West 2023); Idaho Code Ann. §§ 18-4801–09 (West 2022); Kan. Stat. Ann. § 21-6103 (West 2023); Mich. Comp. Laws Ann. § 750.370 (West 2023); Minn. Stat. Ann. § 609.765 (West 2023); Miss. Code Ann. § 97-3-55 (West 2023); N.C. Gen. Stat. Ann. §§ 14-47, 15-168 (West 2022); N.D. Cent. Code Ann. § 12.1-15-01 (West 2023); N.H. Rev. Stat. Ann. § 644:11 (West 2023); N.M. Stat. Ann. § 30-11-1 (West 2023); Okla. Stat. Ann. tit. 21, §§ 771–74, 776–78 (West 2023); Utah Code Ann. § 76-9-404 (West 2022); Va. Code Ann. § 18.2-417 (West 2023); Wis. Stat. Ann. § 942.01 (West 2022); *see also* V.I. Code Ann. tit. 14, §§ 1171–79 (West 2022). Laws prohibiting group libels or libels tending to incite breaches of the peace, *see Beauharnais v. Illinois*, 343 U.S. 250 (1952), or libels of particular entities, such as financial institutions, are not included here.

statements on matters of public concern, including criticism of public officials.

These statutes also continue to be enforced. In Minnesota alone, there were 121 criminal defamation prosecutions and 26 convictions between 2006 and 2014. Jane E. Kirtley & Casey Carmody, *Criminal Defamation: Still an "Instrument of Destruction" in the Age of Fake News*, 8 J. Int'l Media & Ent. L. 163, 167 n.21 (2020). In Wisconsin, there were 61 criminal defamation prosecutions between 1991 and 2007. David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 Comm. L. & Pol'y 303, 313 (2009). And in Virginia, there were at least 300 criminal defamation *convictions* between 1993 and 2008. Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 Nw. Univ. L. Rev. 731, 753 (2013). Here, too, public records requests identified 25 criminal defamation prosecutions in New Hampshire from 2009 through 2017. App.73a, 105a. Furthermore, prosecutions appear to be rising along with the increasing prevalence of Internet speech. *See* Pritchard, *supra*, at 316–17 (observing that none of the twenty-one criminal defamation prosecutions brought in Wisconsin between 1991 and 1998 involved the Internet or email, while eighteen of the forty prosecutions brought between 1999 and 2007 were Internet-related). Social media platforms, in particular, offer law enforcement easily searchable databases of potentially offending statements.

Many criminal defamation prosecutions involve purely private disputes, but a substantial number involve speech criticizing public officials, especially law enforcement. *See* Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American*

Jurisprudence, 9 Comm. L. & Pol'y 433, 474–75 (2004) (collecting cases and examples of threatened prosecutions).[5] Last year, for instance, a district attorney in North Carolina informed the Josh Stein for Attorney General campaign that he intended to bring charges against the campaign under a North Carolina law prohibiting the publication, with actual malice, of derogatory reports regarding a candidate for elective office. The charges were based on the Stein campaign's allegation that his opponent had "left 1,500 rape kits on a shelf" while serving as a district attorney. *Grimmett v. Freeman*, 59 F.4th 689, 691 (4th Cir. 2023). The Fourth Circuit blocked the prosecution, holding that the law is overbroad because it applies to at least some truthful speech, and that it is impermissibly content-based because it applies only to speech about candidates. *Id.* at 692–96. But nothing in the decision would prohibit a similar criminal prosecution under a statute that did not single out candidates and that applied only to false statements made with actual malice, *See, e.g.*, *State v. Carson*, No. 90690, 2004 WL 1878312 (Kan. App. Aug. 20, 2004) (per curiam) (unpublished) (affirming convictions under Kansas criminal defamation statute for reporting alleging that the mayor of Wyandotte County and her husband, a local district judge, did not satisfy local residency requirements).

[5] While outside the record on this appeal, because the district court dismissed the case while discovery was pending, petitioner identified several instances in which individuals were prosecuted or threatened with prosecution for criticizing law enforcement officers and other public officials. For instance, a woman was prosecuted for, and pleaded guilty to, criminal defamation after she claimed during her arraignment on another charge that a police officer had unlawfully searched her person and property.

This case presents an ideal vehicle for the Court to address the constitutionality of criminal defamation laws. The petition comes to the Court on appeal from a decision granting a motion to dismiss. The questions it presents are purely legal. Those questions were squarely resolved below. And the petition presents no disputes of fact, disagreements about the sufficiency of the evidence, or other fact-bound issues.

II. This Court Should Grant the Petition to Clarify That Criminal Defamation Laws Are Unconstitutional As Applied to Speech Criticizing Public Officials.

The Court should grant review and hold that the First Amendment does not permit the application of *criminal* libel statutes to speech criticizing public officials with respect to matters of public concern. The government's practice of prosecuting those who criticize its officials effectively resuscitates the discredited doctrine of criminal seditious libel. It cannot be squared with the First Amendment's commitment to free and robust debate on public issues.

The tension between seditious libel and the First Amendment was the subject of this country's first dispute over the meaning of the Bill of Rights, concerning the Sedition Act of 1798. The Sedition Act "made it a crime, punishable by a $5,000 fine and five years in prison," to communicate "'any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . ., or the President . . ., with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or

either or any of them, the hatred of the good people of the United States." *N.Y. Times*, 376 U.S. at 273–74 (quoting 1 Stat. 596) (alterations in original). The Adams Administration used the Act as a weapon against the rival Democratic-Republican Party and its newspapers. Wendell Bird, *Criminal Dissent: Prosecution Under the Alien and Sedition Acts of 1798*, at 360–61 (2020) (noting the "most prosecuted actions" were for negative statements made by newspaper editors or everyday people against the president, his administration, or new taxes). During the 31 months that the Sedition Act remained in force, 43 individuals—almost exclusively members of the opposition, many of them newspaper editors—were prosecuted for "speech critical of the President, Congress, or the administration." *Id.* at 361–62.

Federalists argued that the Sedition Act was consistent with Blackstone's account of the common law of press freedom, because it did not impose any prior restraints. *Id.* at 45. They also touted the Act's limited protections, such as allowing a defense for truth and empowering the jury to deliver a general verdict on the statutory elements of criminal intent and defamatory character. *Id.* at 47. Republicans countered that the Act's criminal restrictions nonetheless violated the freedom of the press enshrined in the First Amendment, which they read much more broadly than their Federalist counterparts. *Id.* at 367–68. As this Court noted in *New York Times*, the decisive election of 1800—and the judgment of history—vindicated the Republicans. 376 U.S. at 276. In particular, Madison's Report on the Virginia Resolutions opposing the Alien and Sedition Acts has become canonical for the light it sheds on the central meaning of the First Amendment.

Madison maintained that the First Amendment expanded the British common law freedom of the press—defined by Blackstone as a freedom from prior restraints—to accommodate America's republican form of government, in which "[t]he people, not the government, possess the absolute sovereignty." 4 Debates of the State Conventions on the Federal Constitution 569 (1876) [hereinafter Elliot's Debates]. Britain's unwritten constitution protected parliamentary supremacy against executive encroachment—"[u]nder such a government as this, an exemption of the press from previous restraint by licensers appointed by the king, is all the freedom that can be secured to it." *Id*. In the United States, by contrast, the "great and essential rights of the people are secured against legislative as well as against executive ambition" which means that these rights must be secured against both executive infringements (through prior restraints) *and* legislative infringements (through censorious laws). *Id.* at 569–70.

Madison further argued that fundamental differences between the two countries' governing institutions required a reappraisal of press freedoms in the United States. Under the British constitution, the King could do no wrong, Parliament could do as it pleased, and both institutions remained largely hereditary. *Id.* at 570. "In the United States," however, "the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both, being elective, are both responsible." *Id.* To Madison, it was "natural and necessary, under such different circumstances, that a different degree of freedom in the use of the press should be contemplated." *Id.* In short, American democracy

required the right to openly debate the fitness of public officials—free from either prior restraint or criminal punishment. As Madison put it: "'In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this foundation it yet stands . . . .'" *Id.*

Madison also rejected the Federalists' contention that the Sedition Act was constitutional because it allowed a defense of truth and required the government to prove malicious intent. With respect to the former, Madison observed that "there is sufficient difficulty in some cases, and sufficient trouble and vexation in all, in meeting a prosecution from the government with the full and formal proof necessary in a court of law," particularly since "opinions and inferences, and conjectural observations, are not only in many cases inseparable from the facts, but may often be more the objects of the prosecution than the facts themselves." *Id.* at 575. He also asserted that "it is manifestly impossible to punish the intent to bring those who administer the government into disrepute or contempt, without striking at the right of freely discussing public characters and measures." *Id.*

In Madison's view, public officials who had been defamed had "a remedy, for their injured reputations, under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties[.]" *Id.* at 573. By this, "Madison meant a *civil* suit for damages, not a criminal prosecution." Leonard Levy, *Emergence of a Free Press* 320 (1985); *accord* Bird, *supra*, at 166.

Madison was not alone in espousing this robust conception of First Amendment press freedom. Congressman John Nicholas' 1799 minority report urging repeal of the Sedition Act, St. George Tucker's appendix to his influential edition of Blackstone's *Commentaries*, and a host of Republican treatises and essays similarly inveighed against the doctrine of criminal seditious libel. *See* Anthony Lewis, *Make No Law: The* Sullivan *Case and the First Amendment* 60 (1991); Levy, *supra*, at 310–337; Bird, *supra*, at 167. "The emergence of a body of libertarian thought among the Jeffersonians did not, however, result in a union of principle and practice when they achieved power." Levy, *supra*, at 337. President Jefferson confidentially encouraged his allies in the states to initiate seditious libel prosecutions (and allowed a handful of federal common law prosecutions) against the Federalist printers, who themselves discovered a timely appreciation for the weaknesses inherent in Blackstone's crabbed interpretation of the common law. *Id.* at 337–347. *See, e.g.*, *People v. Croswell*, 3 Johns. Cas. 337 (N.Y. 1804). This history underscores Madison's prescience; those in power—whomever they may be—will be tempted to abuse seditious libel laws against their critics and opponents.

Madison's Report is the rock on which this Court has built its modern First Amendment jurisprudence. *See N.Y. Times*, 376 U.S. at 273–74. As the "Father of the Constitution" and the principal author of the First Amendment, Madison was uniquely well placed to discern the Amendment's proper meaning and function in the new scheme of government. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 2429 n.5 (2022) (citing Madison's writings to interpret the Free Speech, Free

Exercise, and Establishment Clauses). His view that the crime of seditious libel is fundamentally incompatible with the freedom of the press, and the republican form of government it secures, carries considerable weight—not least because he was correct. *See* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment*," 1964 Sup. Ct. Rev. 191, 205 (1964) ("[T]he presence or absence in the law of the concept of seditious libel defines the society. A society may or may not treat obscenity or contempt by publication as legal offenses without altering its basic nature. If, however, it makes seditious libel an offense, it is not a free society no matter what its other characteristics.").

This Court last addressed the First Amendment's application to a criminal libel prosecution nearly 60 years ago. In *Garrison v. Louisiana*, the district attorney for Orleans Parish in Louisiana was convicted under that state's criminal defamation statute for his statement at a press conference attributing "a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the [Parish's criminal district court] judges," and accusing the judges of corruptly "hamper[ing] his efforts to enforce the vice laws" by "refusing to authorize disbursements to cover the expenses of undercover investigations." 379 U.S. at 64–66. This Court reversed the conviction, holding that Louisiana' statute could not constitutionally be applied to Garrison's criticism of public officials, because it failed to meet the actual malice standard announced by the Court in the *New York Times* case. *Id.* at 77–79.

The Court noted that "civil [defamation] remed[ies] had virtually pre-empted the field of

defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude." *Id.* at 69. It observed that the American Law Institute's Proposed Official Draft of the Model Penal Code did not include a model criminal defamation statute, because the Institute's reporters asserted that "personal calumny" is "inappropriate for penal control." *Id.* at 69–70 (quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44, 45). And it reversed Garrison's conviction, reasoning that the Louisiana statute did not include the "actual malice" standard that the Court had required in civil defamation cases brought by public officials. *Id.* at 73–75. Because that holding was sufficient to reverse the conviction, the *Garrison* majority had no occasion to go further. It suggested in dicta that "[t]he use of calculated falsehood . . . would put a different cast on the constitutional question." *Id.* at 75. But since then, the Court has not upheld a single criminal defamation conviction.

In separate concurrences, Justices Black, Douglas, and Goldberg stated that they would go further and reject the doctrine of seditious libel altogether. *See id.* at 79–88. Justice Black asserted "that the Court is mistaken if it thinks that requiring proof that statements were 'malicious' or 'defamatory' will really create any substantial hurdle to block public officials from punishing those who criticize the way they conduct their office," given how often "evil-sounding words" like "malicious" and "seditious" had "been invoked to punish people for expressing their views on public affairs." *Id.* at 79–80. In his view, "[f]ining men or sending them to jail for criticizing public officials" is wholly inconsistent with "the free, open public discussion which our Constitution

guarantees." *Id.* at 80. He concluded that he "would hold now and not wait to hold later, that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel." *Id.* (citations omitted). Justices Douglas and Goldberg agreed. *See id.* at 83 (Douglas, J., concurring); *id.* at 88 (Goldberg, J., concurring).

While the majority in *Garrison* did not go as far as the concurrences, it did not need to do so in order to reverse the conviction in that case. This Court has not revisited the issue since *Garrison* was decided, nor has it ever affirmed a criminal defamation conviction for speech criticizing a public official. The consensus against criminal seditious libel has become so strong that modern legal dictionaries deny the doctrine's vitality. *See* "seditious libel," Black's Law Dictionary (11th ed. 2019) ("Like other forms of criminal libel, seditious libel is no longer prosecuted."). Yet criminal defamation laws persist on the books in over a dozen states; and they continue to be invoked, as here, by public officials against their critics. The Court should finish the project it began in *Garrison*, and bring speech and press freedoms fully in line with Madison's vision, by clarifying that the First Amendment categorically bars criminal defamation prosecutions for speech concerning public officials.

Such a ruling would be consistent with this Court's more recent precedents. Developments in the law since *Garrison* confirm that criminal prosecution of defamation directed at public officials cannot be squared with the First Amendment. In *Alvarez*, 567 U.S. at 719, this Court struck down the Stolen Valor Act of 2005, which made it a misdemeanor to "falsely represent[] [oneself], verbally or in writing, to have

been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States." *Id.* at 716 (quoting 18 U.S.C. § 704(b)). Writing for the plurality, Justice Kennedy rejected the government's argument "that false statements receive no First Amendment protection." *Id.* at 719. Both the concurring and dissenting Justices agreed on this essential point. *See id.* at 732–33 (Breyer, J., concurring in the judgment) ("I must concede, as the Government points out, that this Court has frequently said or implied that false factual statements enjoy little First Amendment protection. But these judicial statements cannot be read to mean 'no protection at all.'" (citations omitted)); *id.* at 751 (Alito, J., dissenting) (acknowledging that there are "circumstances in which false factual statements enjoy a degree of instrumental constitutional protection").

As *Alvarez* recognized, the principal danger in affording the government authority to criminalize false speech—and, in particular, false speech on matters of public concern—is the potential for politicized prosecution. The plurality wrote that "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 723 (citing George Orwell, *Nineteen Eighty-Four* (1949) (Centennial ed. 2003)). Justice Breyer, concurring, noted that "the pervasiveness of false statements . . . provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively." *Id.* at 734. And Justice Alito, in dissent, maintained that "[a]llowing the state to proscribe false statements in [philosophy, religion, history, the social sciences, the

arts, and other matters of public concern] also opens the door for the state to use its power for political ends." *Id.* at 752.

Alvarez acknowledged that lies tending to cause specific harm to identifiable victims, including defamation, are less deserving of First Amendment protection. *See id*. at 719. But as Madison pointed out, those harms can be remedied through civil suits. *See* 4 Elliot's Debates at 573. While the threat of civil liability can also chill press freedoms, *N.Y. Times*, 376 U.S. at 724–25, money damages in civil suits compensate individuals for reputational harms. *See Alvarez*, 567 U.S. at 719 (noting that "in defamation cases . . . the law permits *recoveries for tortious wrongs*" (emphasis added)). The actual malice standard strikes the appropriate balance between society's interest in robust public debate and the defamed public official's interest in individual redress. By contrast, criminal defamation prosecutions are brought on behalf of the state, rather than the injured individual. And criminal convictions are qualitatively more severe than civil liability. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498–99 (1982); *see also Lawrence v. Texas*, 539 U.S. 558, 575–76 (2003) (observing that even a minor misdemeanor offense "remains a criminal offense with all that imports for the dignity of the persons charged," including "notations on job application forms").

In light of the availability of civil remedies, there is no legitimate need to bring the force of criminal law to bear in this delicate area—particularly given the risk of retaliatory prosecutions when it comes to criticism of public officials themselves. Nor can the danger of retaliatory prosecution, and the chilling effect it threatens, be

eliminated through mens rea requirements. "[A] speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable," *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring in the judgment). Even if the prosecution collapses, the threat of prosecution alone is often sufficient to silence critics. *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 52–54 (1st Cir. 2003) (describing the abuse of Puerto Rico's criminal libel statute to harass journalists reporting on police corruption). Whatever interest the government might have in shielding its officials from criticism, they are insufficient to overcome the grave First Amendment concerns raised by the threat of prosecution for seditious libel.

As the concurrence below observed, deepening political polarization means that accusations of "fake news" or "disinformation" will often "depend on who's holding the pen," but the significance of these disagreements "skyrockets when criminalizing this speech is on the table." App.21a–22a. The First Amendment was designed to lower the stakes of these debates by taking certain penalties, such as criminal seditious libel, off the table. Because civil remedies are sufficient to redress injuries to individual reputation, there is no justification for empowering the government to prosecute those who criticize its officials. Accordingly, this Court should grant the petition to clarify that criminal defamation laws are unconstitutional as applied to speech criticizing public officials with respect to matters of public concern.

III. In Rejecting Petitioner's Vagueness Challenge, the Court of Appeals Created a Conflict with the Alaska Supreme Court.

Even if the Court is not inclined to declare criminal defamation laws unconstitutional as applied to criticism of public officials, the Court should grant review to resolve a conflict between the First Circuit and the Alaska Supreme Court on whether a criminal defamation statute that merely incorporates the common law of civil defamation is sufficiently clear to satisfy the heightened vagueness standards applicable to criminal laws. The Alaska Supreme Court held that it is not; the First Circuit held that it is.

It has long been established that statutes imposing criminal liability must satisfy a more stringent vagueness standard than those imposing only civil sanctions. "Criminal statutes must be scrutinized [for vagueness] with particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987). This is because vague criminal statutes "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections,'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (alteration in original) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)), and because civil liability is "qualitatively less severe" than a criminal conviction, *Hoffman Ests.*, 455 U.S. at 499. Concerns about arbitrary or selective enforcement are particularly acute when it comes to criminal or quasi-criminal regulations of speech, "for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

The First Circuit held that New Hampshire's criminal defamation statute is not unconstitutionally vague, because it at least partly incorporates New Hampshire's common law of civil libel. App.11a–12a. This ruling directly conflicts with the Alaska Supreme Court's decision in *Gottschalk*. In that case, the defendant was convicted under Alaska's criminal defamation statutes after accusing a state trooper of stealing money from him. 575 P.2d at 289. The Alaska Supreme Court construed those statutes to incorporate the common law of civil libel, but concluded that the common law of defamation "falls far short of the reasonable precision necessary to define criminal conduct." *Id.* at 292.

The court explained that, under the common law standard, "[w]hether an utterance is defamatory depends on the values of the listener," and even in a "homogeneous culture these values will not be uniform." 575 P.2d at 293. "Establishing a standard against which potentially defamatory statements may be measured generates considerable difficulty in a democratic society which prides itself on pluralism." *Id.* at 293 n.11. The court also pointed out that "what is defamatory changes over time." *Id.* For instance, "labeling someone a 'communist' or a 'marxist' . . . has been considered first defamatory, then non-defamatory, and next defamatory again, depending largely on United States foreign policy changes." *Id.* (citing W. Prosser, Handbook on the Law of Torts § 111, at 744 nn.3, 4 (4th ed. 1971)). Given these problems, the court concluded that the vagueness inherent in the common law standard invited "arbitrary, uneven and selective enforcement"—noting numerous studies showing that criminal defamation laws are often enforced against those who

criticize public officials, and the fact that the first reported application of the statute (the conviction under review) concerned a prosecution for speech critical of a law enforcement officer. *Id.* at 294–95.

The opinion below sought to distinguish *Gottschalk* on the ground that the Alaska statute "did not contain a requirement that the speaker know the statement to be false." App.12a. It is true that the Alaska Supreme Court also deemed the criminal defamation statute substantially overbroad because it allowed only a conditional defense of truth for libels published with good motives. 575 P.2d at 296. But this was an alternative holding that did not affect the court's independent conclusion that the criminal defamation statutes were unconstitutionally vague because they incorporated a nebulous common law standard. *See id.* ("Even if our criminal defamation statutes were sufficiently precise to escape the defect of vagueness, they would still be overbroad."). It is impossible to reconcile *Gottschalk*'s conclusion that the common law of defamation is insufficiently precise to authorize criminal sanctions with the First Circuit's holding to the contrary.

IV. The Broad Sweep of New Hampshire's Criminal Defamation Statute Invites Arbitrary or Selective Enforcement, Particularly by Unlicensed Police Prosecutors.

The court of appeals erred in holding that New Hampshire's Criminal Defamation Statute does not invite arbitrary or selective enforcement. This Court has long observed that "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to

the courts to step inside and say who could be rightfully detained, and who should be set at large." *Kolender*, 461 U.S. at 358 n.7 (1983) (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)). That is precisely what New Hampshire's criminal defamation statute does by incorporating the entire and evolving common law of civil libel.[6] If this law "were robustly enforced, dockets . . . would be positively teeming with prosecutions. That's not what happens. Why is that? Probably because there is no readily discernible boundary between what gossip or loose talk amounts to being criminal and that which does not." App.23a–24a (Thompson, J., concurring). Instead, the decision whether a libel should be criminally sanctioned is left to the unguided discretion of courts and law enforcement. That, without more, is sufficient to declare the statute impermissibly vague.

But there is more. New Hampshire's criminal procedure for Class B misdemeanors entrusts the discretion to initiate prosecutions to police officers. As the court of appeals acknowledged: "New Hampshire's misdemeanor enforcement process empowers police departments to prosecute defamation. In the absence of the exercise of discretionary supervisory authority by the state Attorney General or County Attorneys, municipal police departments may initiate prosecutions for misdemeanors, including criminal defamation, without prior input or approval from such prosecutors." App.5a (citing *State v. La Palme*, 104 N.H. 97, 98–99 (1962)). Indeed, even private citizens are authorized to "prosecute misdemeanors in New

[6] In *Ashton v. Kentucky*, this Court held that the traditional common law of criminal libel, which relied on a "breach of the peace" standard, was unconstitutionally vague. 384 U.S. 195, 198–201 (1966).

Hampshire, so long as incarceration is not an applicable penalty." *Id.* (citing *State v. Martineau*, 148 N.H. 259, 261, 263 (2002)). New Hampshire's devolution of prosecutorial authority invests police officers and private citizens alike with an unusually wide amount of discretion over the enforcement of a criminal restriction on speech.

The exercise of that discretion is a serious matter. The decision to bring a criminal charge is the most consequential choice in any prosecution; it is also "that part of the prosecutor's discretion which carries with it the greatest potential for misuse." Andrew Horwitz, *Taking the Cop out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 Ariz. L. Rev. 1305, 1309 n.20 (1998) (internal quotation marks omitted) (quoting Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 Am. J. Comp. L. 532, 537 (1970)). The potential for misuse is especially high in police prosecutions, both because police officers lack the "legal expertise . . . required . . . to make that decision appropriately," and because police officers are not "bound by various [ethical] rules concerning conflicts of interest," which apply to attorneys. *Id.* at 1309, 1311.

A police officer or police department that is the "victim" of a potentially defamatory statement, as here, "is not likely to view a case in the same fashion as would an attorney without any personal connection to the case." *Id.* at 1313. But "[w]hile a prosecuting attorney must recuse himself or herself from a case in which he or she has a conflict of interest, a police prosecutor is not bound by any similar rule." *Id.* In petitioner's case, for instance, an Exeter Police Department detective initiated a baseless criminal defamation prosecution on behalf of his own police

chief, despite an obvious conflict of interest. And, as petitioner's prosecution further illustrates, police officers may fail to appreciate the important legal distinction between false speech and *knowingly* false speech—and the extent to which people might sincerely believe statements that appear obviously false to the police prosecutor.

Once a charge is brought, the defendant will be under intense pressure to plead guilty, regardless of the merits, to avoid further embarrassment, heightened fines, and other consequences. An uncounseled misdemeanor defendant will be informed "that they are charged with a crime—the definition of which they may not know or understand—and told what resolution the government wants." Alexandra Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1345 (2012). Many people will simply succumb to that pressure to avoid further proceedings. Additionally, "the 'evidence' of a misdemeanor defendant's guilt," especially in a criminal defamation case, "will often be no more than a police officer's assertion." *Id.* at 1346. "In order to contest their guilt, the defendant's word would have to be believed over that of the officer, an outcome that many poor minority defendants rightly dismiss as unrealistic." *Id.* (citation omitted).

New Hampshire is also an outlier when it comes to defendants' jury trial rights. The constitutions of 39 states require the jury to adjudicate falsity in criminal libel prosecutions, and 29 states require the jury to adjudicate all major factual questions. Note, *Constitutionality of the Law of Criminal Libel*, 52 Colum. L. Rev. 521, 533 (1952).[7]

[7] Many of these states no longer have criminal defamation laws. *See supra* n.4.

The New Hampshire Constitution's press clause, however, does not offer any jury trial guarantee for criminal defamation defendants. N.H. Const., pt. I, art. XXII. And because New Hampshire's Criminal Defamation Statute is a class B misdemeanor, N.H. Rev. Stat. Ann. 644:11(I), defendants are not entitled to a jury trial under Part I, Article 15 of the New Hampshire Constitution. *State v. Foote*, 821 A.2d 1072, 1073 (N.H. 2003).

In this context, the broad sweep of New Hampshire's criminal defamation statute entrusts far too much discretion "to the moment-to-moment judgment of the policeman on his beat." *Kolender*, 461 U.S. at 360 (internal quotation marks omitted) (quoting *Smith*, 415 U.S. at 575). It "confers on police a virtually unrestrained power to arrest and charge persons with a violation," and thereby "furnishes a convenient tool for harsh and discriminatory enforcement" against disfavored speakers—particularly those who criticize law enforcement, as petitioner did here. *Id.* (citations and internal quotation marks omitted). The court of appeals' holding to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the U.S. Court of Appeal for the First Circuit should be granted.

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