

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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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 The memorandum order of the district court denying respondent’s motion for reconsideration is unpublished, but is available at 2020 WL 13003802 (D.N.H. 2020).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.

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’s 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.

Dated: March 23, 2023 Respectfully submitted,
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APPENDIX

APPENDIX

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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.

APPENDIX A

**United States Court of Appeals
For the First Circuit**

No. 21-1068

ROBERT FRESE,

Plaintiff, Appellant,

v.

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

Defendant, Appellee.

JUDGMENT

Entered: November 8, 2022

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed.

By the Court:

Maria R. Hamilton, Clerk

cc: Gilles R. Bissonnette, Lawrence Allen Vogelmann,
John M. Greabe, Henry R. Klementowicz, Brian
Matthew Hauss, Emerson Sykes, Anthony J. Galdieri,
Samuel R. V. Garland

APPENDIX B

**United States Court of Appeals
For the First Circuit**

No. 21-1068

ROBERT FRESE,

Plaintiff, Appellant,

v.

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

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW
HAMPSHIRE

[Hon. Joseph N. Laplante, U.S. District Judge]

Before

Kayatta, Howard, and Thompson, Circuit Judges.

Brian Hauss, with whom Emerson Sykes,
American Civil Liberties Union Foundation; Gilles
Bissonnette and Henry R. Klementowicz, American

Civil Liberties Union of New Hampshire; John M. Greabe; Lawrence A. Vogelmann and Shaheen & Gordon, P.A. were on brief, for appellant.

Samuel R.V. Garland, Assistant Attorney General, with whom John M. Formella, Attorney General of New Hampshire, and Anthony J. Galdieri, Senior Assistant Attorney General, were on brief, for appellee.

November 8, 2022

HOWARD, Circuit Judge. New Hampshire is among a handful of states that allow criminal prosecution of defamation. Appellant Robert Frese has twice been charged with violating the criminal defamation statute and now argues that the statute itself contravenes the First and Fourteenth Amendments. Mindful of the Supreme Court’s guidance that “the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection[,]” we conclude that Frese’s allegations fall short of asserting viable constitutional claims. Garrison v. Louisiana, 379 U.S. 64, 75 (1964). We thus affirm the district court’s dismissal.

I.

New Hampshire’s criminal defamation statute provides that “[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.” N.H. Rev. Stat. § 644:11(I). “[P]ublic’ includes any professional or social group of which the victim of the defamation is a member.” Id. at § 11(II). A person convicted of a class B misdemeanor faces a fine of up to \$1,200. N.H. Rev. Stat. § 651:2(IV)(a). Because such charges carry no possibility of jail time, criminal defamation defendants have no right to trial by jury and are not afforded court-appointed counsel. See State v. Whitney, 172 N.H. 380, 382 (2019); State v. Foote, 149 N.H. 323, 324 (2003); State v. Westover, 140 N.H. 375, 377-78 (1995).

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. See State v. La Palme, 104 N.H. 97, 98-99 (1962) (“The prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791 and is still permissible under existing statutes.” (citing State v. Urban, 98 N.H. 346 (1953))); see also N.H. Rev. Stat. § 41:10-a (recognizing the power of police officers to prosecute misdemeanors). Private citizens may also prosecute misdemeanors in New Hampshire, so long as incarceration is not an applicable penalty. See State v. Martineau, 148 N.H. 259, 261, 263 (2002).²

² Notably, any private citizen who commences one of these actions could be held liable for malicious prosecution if that person acted without probable cause; likewise, a police officer could be liable if the officer acted wantonly. Farrelly v. City of

Although criminal defamation is rarely prosecuted in New Hampshire, Frese has twice been charged under section 644:11. In 2012, the Hudson Police Department arrested Frese for comments about a local life coach that he posted on a Craigslist website. Frese called the coach's business a scam and accused him of, among other things, being involved in a road rage incident and distributing heroin. Without the advice of counsel, Frese pleaded guilty and was fined \$1,488, of which \$1,116 was conditionally suspended. Six years later, the Exeter Police Department arrested Frese for comments he had pseudonymously posted in the online comments section of a newspaper article about a retiring Exeter police officer. The comments included statements that the retiring officer was "the dirtiest[,] most corrupt cop [Frese] ha[d] ever had the displeasure of knowing" and that the officer's daughter was a prostitute.

Frese's second arrest generated public controversy. In response, the New Hampshire Attorney General interposed and concluded that the police department had arrested Frese without probable cause because there was no evidence that Frese knew his statements were false. The Exeter Police Department subsequently dropped the charges.

In late 2018, maintaining that he feared future arrest, Frese filed a complaint in federal district court asserting that section 644:11 is so vague as to violate the Fourteenth Amendment. After initial skirmishing, Frese filed an amended two-count complaint, which is the operative complaint before us. As before, the first count charges that section 644:11 "is

Concord, 168 N.H. 430, 440 (2015); State v. Rollins, 129 N.H. 684, 687 (1987) (Souter, J.).

unconstitutionally vague, both on its face and as applied in the context of New Hampshire’s system for prosecuting [c]lass B misdemeanors,” in violation of the Fourteenth Amendment. The second count asserts that the statute “violates the First Amendment because it criminalizes defamatory speech.” The State moved to dismiss the amended complaint, and the district court obliged. After first finding that Frese had established standing to bring the case, the court dismissed for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6).³ Frese’s timely appeal followed.

II.

We review the district court’s dismissal of the complaint under Rule 12(b)(6) de novo. See Barchock v. CVS Health Corp., 886 F.3d 43, 48 (1st Cir. 2018) (citing SEC v. Tambone, 597 F.3d 436, 441 (1st Cir. 2010) (en banc)). “We take the complaint’s well-pleaded facts as true, and we draw all reasonable inferences in [Frese’s] favor.” Id. Well-pleaded facts are those that are “‘non-conclusory’ and ‘non-speculative.’” Id. (quoting Schatz v. Republican State Leadership Comm., 669 F.3d 50, 55 (1st Cir. 2012)). To survive dismissal, “the complaint must ‘contain sufficient factual matter, accepted as true, to

³ The parties do not challenge the finding of standing, and we see no error in the district court’s standing analysis. See Dantzer, Inc. v. Empresas Berríos Inventory and Operations, Inc., 958 F.3d 38, 46 (1st Cir. 2020) (“[B]ecause standing is a prerequisite to a federal court’s subject matter jurisdiction’ . . . we must ‘assure ourselves of our jurisdiction under the federal Constitution’ before we proceed to the merits of a case.” (first quoting Hochendoner v. Genzyme Corp., 823 F.3d 724, 730 (1st Cir. 2016), then quoting Pérez-Kudzma v. United States, 940 F.3d 142, 144 (1st Cir. 2019))).

state a claim to relief that is plausible on its face.” Id. (quoting Tambone, 597 F.3d at 437).

A. First Amendment Claim

Frese argues that section 644:11 violates the First Amendment because criminal defamation laws should be per se unconstitutional. The Supreme Court, however, has upheld the criminalizing of false speech, explaining that deliberate and recklessly false speech “do[es] not enjoy constitutional protection.” Garrison, 379 U.S. at 75. Thus, 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” -- that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not.” Id. at 67 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)); see also Mangual v. Rotger-Sabat, 317 F.3d 45, 66 (1st Cir. 2003).

Frese concedes that Garrison forecloses his First Amendment claim but argues that “[t]he time has come to revisit that decision.” But, as Frese acknowledges, we do not have the power to revisit Supreme Court decisions. See Hohn v. United States, 524 U.S. 236, 252-53 (1998); United States v. Morosco, 822 F.3d 1, 7 (1st Cir. 2016) (“[B]ecause overruling Supreme Court precedent is the Court’s job, not ours, we must follow [prior decisions] until the Court specifically tells us not to . . . even if these long-on-the-books cases are in tension with [newer cases].”). Accordingly, we must find that Garrison precludes Frese’s First Amendment attack on section 644:11.

B. Fourteenth Amendment Vagueness

“The vagueness doctrine, a derivative of due

process, protects against the ills of laws whose ‘prohibitions are not clearly defined.’” Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011), abrogated on other grounds by Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). A statute is impermissibly vague if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” United States v. Williams, 553 U.S. 285, 304 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)); see also Johnson v. United States, 576 U.S. 591, 595 (2015). This creates two avenues by which to attack a vague statute: discriminatory enforcement and lack of notice.

To prevent the chilling of constitutionally protected speech, we apply a “heightened standard” in cases involving the First Amendment and “require[] a ‘greater degree of specificity’” in a statute that restricts speech. McKee, 649 F.3d at 62 (quoting Buckley v. Valeo, 424 U.S. 1, 77 (1976)). Additionally, “if criminal penalties may be imposed for violations of a law, a stricter standard is applied in reviewing the statute for vagueness.” Manning v. Caldwell for City of Roanoke, 930 F.3d 264, 272-73 (4th Cir. 2019) (citing Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498-99 (1982)). “But ‘perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.’” Williams, 553 U.S. at 304 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)); see also McKee, 649 F.3d at 62.

Frese mounts a facial challenge to section 644:11, as well as a “hybrid” challenge. We first

consider his facial challenge. To succeed, Frese must “establish that no set of circumstances exists under which the [statute] would be valid.” Dutil v. Murphy, 550 F.3d 154, 160 (1st Cir. 2008) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)). We are mindful that facial challenges “are disfavored” because they “often rest on speculation,” “run contrary to the fundamental principle of judicial restraint,” and “threaten to short circuit the democratic process.” Hightower v. City of Boston, 693 F.3d 61, 76-77 (1st Cir. 2012) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 450 (2008)).

Frese argues that section 644:11 is unconstitutionally vague under both lack of notice and discriminatory enforcement theories, training most of his attention on discriminatory enforcement. We turn to that claim first.

1. Discriminatory Enforcement

A “statute authorizes an impermissible degree of enforcement discretion -- and is therefore void for vagueness -- where it fails to ‘set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement.’” Act Now to Stop War & End Racism Coal. v. District of Columbia, 846 F.3d 391, 410-11 (D.C. Cir. 2017) (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)); see also Kolender v. Lawson, 461 U.S. 352, 358 (1983) (explaining that the most “important aspect of vagueness doctrine” is “the requirement that a legislature establish minimal guidelines to govern law enforcement” (internal citation omitted)).

We conclude that the statute at issue here provides adequate guidelines for law enforcement,

and therefore passes constitutional muster. Frese argues that the statute is unconstitutionally vague, because different persons may have “different standards for determining what is and is not defamatory.” But the statute provides reasonably clear guidance -- defamatory statements are those false statements that “expos[e] any . . . person to public hatred, contempt or ridicule.” Likewise, we doubt that reasonable persons will have much difficulty in ascertaining objectively whether a false statement exposes the victim to public hatred, contempt, or ridicule, even if the public is defined to include professional and social groups to which the victim belongs. Frese offers no hypothetical example of how a factfinder might struggle unduly to determine whether a given set of facts demonstrates the requisite tendency of the false remarks. Indeed, for centuries factfinders have made such determinations. E.g., Richardson v. Thorpe, 73 N.H. 532, 534 (1906) (collecting cases for the proposition that whether an ambiguous phrase was defamatory is a question for the jury).

The parties also agree that section 644:11 adopts part of New Hampshire’s common law defamation standard. Under the common law, “[w]ords may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn or ridicule, or tend to impair [the plaintiff’s] standing in the community.” Boyle v. Dwyer, 172 N.H. 548, 554 (2019) (second alteration in original) (quoting Thomas v. Tel. Publ’g Co., 155 N.H. 314, 338 (2007)). The incorporation of common law standards provides further guidance to law enforcement about the meaning of the statute, not least because the definition of defamation under New Hampshire

common law has remained relatively consistent for over one hundred years, and has been regularly analyzed by courts and applied by juries. Compare Richardson, 73 N.H. 532 at 534 (“Any written words which directly or indirectly charge a person with a crime, or which tend to injure his reputation in any other way, or to expose him to public hatred, contempt, or ridicule, are defamatory.”), with Boyle, 172 N.H. at 554 (“Words may be found to be defamatory if they hold the plaintiff up to contempt, hatred, scorn or ridicule, or tend to impair [the plaintiff’s] standing in the community.” (alteration in original) (quoting Thomas, 155 N.H. at 338)).

Additionally, common law defamation in New Hampshire is subject to objective measurement, which further protects against arbitrary enforcement. Under New Hampshire common law, liability may be imposed only if “the defamatory meaning . . . [is] one that could be ascribed to the words by persons of common and reasonable understanding.” Id. (quoting Thomson v. Cash, 119 N.H. 371, 373 (1979)).

Nevertheless, Frese contends that “the common law of civil defamation is not stable or precise enough to define a criminal restriction on speech.” Frese cites three cases to support this contention. But in each of these cases the laws found to be unconstitutionally vague were significantly broader than section 644:11 and did not contain a requirement that the speaker know the statement to be false. See Ashton v. Kentucky, 384 U.S. 195, 198 (1966) (trial court defined criminal libel as “any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act, which, when

done, is indictable”);⁴ Tollett v. United States, 485 F.2d 1087, 1088 n.1 (8th Cir. 1973) (statute prohibited mailing post cards containing “language of libelous, scurrilous, defamatory, or threatening character, or [language] calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another”); Gottschalk v. State, 575 P.2d 289, 290 n.1 (Alaska 1978) (statute proscribed “publish[ing] defamatory or scandalous matter concerning another with intent to injure or defame him”).⁵

Thus, none of Frese’s cited cases involved a statute on all fours with the one here, and Frese offers us no reason to discount this distinction. And at least one federal district court has denied a vagueness challenge to a criminal defamation statute broader than section 644:11. See How, 369 F. Supp. 2d at 1304

⁴ It is worth noting that in Ashton, the Supreme Court implied in its analysis that a criminal defamation law that prohibited “the publication of a defamatory statement about another which is false, with malice” would not be unconstitutionally vague. See Ashton, 384 U.S. at 198; How v. City of Baxter Springs, 369 F. Supp. 2d 1300, 1305–06 (D. Kan. 2005).

⁵ The statute in Gottschalk did not define “defamatory or scandalous.” Gottschalk, 575 P.2d at 292. The court determined that therefore, “the common law definition must be relied on.” Id. The common law considered “any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory.” Id. The court in Gottschalk apparently found that this common law definition was impermissibly vague, though at times the court seemed to gesture towards the language of the statute itself as the root of the vagueness problem. Id. at 293 (explaining that the language of the statute -- prohibiting “defamatory” or “scandalous” speech - - is vague).

(finding statute that criminalized “communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance” was not unconstitutionally vague).

Section 644:11 also provides significantly more guidance than statutes that have been determined unconstitutionally vague. In Kolender, the Supreme Court concluded that a California statute targeting loitering was unconstitutional. The law required a suspect stopped by police to provide “reliable” identification and to account for his presence. Kolender, 461 U.S. at 353. When asked to give “examples of how suspects would satisfy the [statute’s] requirement[s],” counsel explained that “a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him or could satisfy the identification requirement simply by reciting his name and address.” Id. at 360 (internal citations omitted).

The Supreme Court determined that this statute afforded “full discretion” to police “to determine whether the suspect has provided a ‘credible and reliable’ identification,” id., and therefore impermissibly “entrust[ed] lawmaking to the moment-to-moment judgment of the policeman on his beat,” id. (quoting Smith, 415 U.S. at 575). Other laws or regulations found by courts to be unconstitutionally vague include statutes that contain no standard at all about when officials can exercise

their discretion, as well as regulations prohibiting any “appearance” that is “objectionable.” Act Now, 846 F.3d at 411 (citing Niemotko v. Maryland, 340 U.S. 268, 271–72 (1951), then quoting Armstrong v. D.C. Pub. Library, 154 F. Supp. 2d 67, 81-82 (D.D.C. 2001)); see also Williams, 553 U.S. at 306 (explaining that statutes that proscribe “annoying” behavior are vague, as they involve “wholly subjective judgments”). The statute here is a far cry from the blank checks to law enforcement that were found unconstitutional in these cases.

Nor is the statute vague because it requires some exercise of law enforcement judgment -- indeed, “enforcement [inevitably] requires the exercise of some degree of police judgment,” and the question thus becomes whether “the degree of judgment involved . . . is acceptable.” Hill, 530 U.S. at 733 (quoting Grayned, 408 U.S. at 114). The language of section 644:11 is sufficient, as it gives reasonably specific guidance to law enforcement. Likewise, “[w]hat renders a statute vague . . . is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.” Act Now, 846 F.3d at 411 (quoting Williams, 553 U.S. at 306). At most, Frese contends that, in any given case, it might be debatable whether it has been established that a statement in fact “tend[s] to expose . . . another . . . to hatred [or] contempt.” His challenge fails accordingly.⁶

⁶ Frese argues that the statute must be considered in light of extrinsic evidence of New Hampshire’s enforcement scheme. However, we need not address this issue, because we determine that the core statutory text of the criminal defamation

2. Lack of Notice

A statute is impermissibly vague for lack of notice “only if it ‘prohibits . . . an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.’” McKee, 649 F.3d at 62 (quoting United States v. Councilman, 418 F.3d 67, 84 (1st Cir. 2005) (en banc)).⁷ We conclude that the statute provides sufficiently clear notice. For the reasons described above, the language clearly defines and delimits its scope, such that it gives a person of “ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” Hill, 530 U.S. at 732.

In Hill, the Supreme Court confronted a challenge to a Colorado statute that prohibited “knowingly approach[ing]” a person to “engag[e] in oral protest, education, or counseling with [that] person.” Id. at 707. The Court concluded that the statute provided adequate notice. Specifically, it reasoned, while there might be some hypothetical cases where there would be a “nice question” about the “meaning of these terms,” courts cannot require statutes to use language with “mathematical certainty.” Id. at 732-33 (quoting Am. Commc’ns Assn. v. Douds, 339 U.S. 382, 412 (1950), then Grayned, 408 U.S. at 110). As with the Colorado statute considered in Hill, section

statute provides adequate enforcement guidelines and the prosecution scheme does not alter or overcome this conclusion. We therefore need not address precisely what extrinsic context a court may consider in a vagueness analysis.

⁷ The district court collapsed its discussion of lack of notice into its consideration of Frese’s excessive discretion claim. As Frese points out, however, the district court’s “analysis of [his] arbitrary enforcement challenge focused largely on notice issues.”

644:11 may beget cases where there are questions about whether the conduct at issue falls within the language of the statute. However, this alone does not create a notice problem, given that “it is clear what the [statute] as a whole prohibits.” Hill, 530 U.S. at 733 (quoting Grayned, 408 U.S. at 110); see also Henderson v. McMurray, 987 F.3d 997, 1004 (11th Cir. 2021).

Refining his notice argument, Frese takes issue with section 644:11’s definition of “public” to include “any professional or social group,” which Frese claims does not consider “how small the group or how peculiar its views.” Frese argues that the statute cannot provide adequate notice because “[d]ifferent professional and social groups will often have different, sometimes conflicting, standards for what constitutes defamation.” The statute, Frese argues, “incorporates each of these” potentially disparate “standards as a yardstick for criminal conviction,” and as such, makes it difficult for any person to determine what conduct the statute prohibits.⁸

We are not convinced. First, the incorporation of the common law provides safeguards against imposing criminal liability for speech that offends the views of particularly niche or idiosyncratic groups, which in turn shields against any notice problems. As discussed previously, the common law objectivity standard requires that “the defamatory meaning . . .

⁸ Frese also asserts that “this is a constitutionally significant departure from the common law,” which imposes civil liability for defamation only when a person’s language “tend[s] to lower the plaintiff ‘in the esteem of any substantial and respectable group, even though it may be quite a small minority.’” Thomson, 119 N.H. at 373 (quoting Prosser on Torts § 111 (4th ed. 1971)).

[is] one that could be ascribed to the words by persons of common and reasonable understanding.” Boyle, 172 N.H. at 554. And section 644:11(I)’s knowledge requirement creates additional protection.⁹

Moreover, in order for a statute to give fair notice, it need not map out what is prohibited with “meticulous specificity.” Grayned, 408 U.S. at 110 (upholding statute that prohibited the “making of any noise or diversion which disturbs or tends to disturb the peace or good order of [a] school session or class thereof”). It must only “delineate[] its reach in words of common understanding.” Id. at 112 (quoting Cameron v. Johnson, 390 U.S. 611, 616 (1968)). Thus, while there is indeed some “breadth” and “flexibility” inherent in the scope of the statute, id. (quoting Esteban v. Cent. Mo. State Coll., 415 F.2d 1077, 1088

⁹ Citing United States v. Alvarez, 567 U.S. 709, 736 (2012) (Breyer, J., concurring in the judgment), Frese points out that a mens rea requirement does not eliminate chilling concerns because “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 did not involve a vagueness challenge, but there is some force to the point. Even if, however, the mens rea requirement standing alone might be insufficient to provide constitutionally adequate notice, it nevertheless does assist in ameliorating notice concerns here.

Similarly, citing Smith, 415 U.S. at 580, and Ashton, 384 U.S. at 200, Frese argues that a mens rea requirement cannot cure an inherently vague statute. Again, while this may be true, our analysis does not rely solely on section 644:11’s mens rea component, and we have no trouble finding that the knowledge requirement -- considered in combination with the other factors discussed -- helps to limit vagueness concerns. See United States v. Nieves-Castano, 480 F.3d 597, 603 (1st Cir. 2007) (explaining that the statute’s “scienter requirement ameliorates any vagueness concerns” (citing Hill, 530 U.S. at 732)).

(8th Cir. 1969) (Blackmun, J.)), none of Frese's arguments persuade us that a person of average intelligence would have to "to guess" at section 644:11's meaning or the scope of the conduct it prohibits, Councilman, 418 F.3d at 84.

3. "Hybrid" Vagueness Claim

Having addressed Frese's facial claims, we return briefly to what he characterizes as his "hybrid" vagueness claim. Frese asserts that section 644:11 "is unconstitutionally vague, both on its face and as applied in the context of New Hampshire's system for prosecuting [c]lass B misdemeanors." (Emphasis added). Frese characterizes this second claim as a "hybrid vagueness claim": "it is 'facial' in the sense that it is not limited to Frese's particular case, but it is 'as applied' in the sense that it does not seek to strike [section 644:11] outside the context of New Hampshire's particular misdemeanor process." The district court dismissed Frese's "hybrid" claim for the same reasons that it dismissed his facial claim.

As we discussed above, the New Hampshire statute is not unconstitutionally vague, because it gives meaningful enforcement guidelines and adequate notice. Nor does consideration of the New Hampshire prosecution context alter that conclusion - regardless of the enforcement setting, the statute is not standardless and provides adequate guidelines for enforcement. See supra note 5. His hybrid claim therefore falls with his facial claim.

III.

Assuming Frese's 2018 prosecution to have been brought without reasonable cause to believe that Frese knew that his speech had been false, then it was certainly wrongful, as implied by its dismissal. But

that wrong had little, if anything, to do with what Frese claims is the statute's vagueness. Certainly "knowing" an assertion to be false is not a vague element. Nor, for the foregoing reasons, do we think that a reasonable person has much difficulty in ascertaining whether speech subjects a living person to public hatred, contempt, or ridicule and what a "professional or social group" is in this context. Accordingly, the district court's judgment is affirmed.

-Concurring Opinion Follows-

THOMPSON, Circuit Judge, concurring.

I agree with my colleagues that the precedent by which we are bound, see Garrison v. Louisiana, 379 U.S. 64, 68-70 (1964),¹⁰ and the procedural posture in which this appeal arises oblige us to reach the above-reasoned conclusions. I take this opportunity, however, to shine a light on sweeping concerns and important questions this case showcases, but upon which its resolution does not now depend. Each of these concerns and questions, as I'll explain, stem from this overarching query: Can the continued existence of speech-chilling criminal defamation laws be reconciled with the democratic ideals of the First Amendment?

Ours is a country that touts a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). That commitment may well be profound; but it is not the whole story. And lately, one needn't look far for examples of speech curtailed or, by contrast, speech that seems to be wholly divorced from the truth but goes unaddressed by the law. When, as has been the case in this country of late, the truth often seems up for grabs and objectively accurate facts are tossed aside in favor of alternative versions that suit a given narrative, drawing the line between truths and lies -- and malicious lies at that -- is exceptionally tricky. But also exceptionally important. And yet, increasingly, whether and where that line should be drawn as to some speech or other speech seems to depend on who's holding the pen. The significance of

¹⁰ As my colleagues observe, and as Frese concedes, only the Supreme Court can overrule this precedent.

all this skyrockets when criminalizing this speech is on the table.

It's at the intersection of history, present day, fact, and fiction (and everything in between) that today's case arises.

As we know, this is a case about New Hampshire's criminal defamation statute, which explains that "[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." N.H. Rev. Stat. § 644:11(I).

The troubling seditious-criminal-libel historical context that underpins a law like this one is well known to First Amendment scholars, advocates, and jurists -- and perhaps most deeply felt by those who've had brushes with it. See Garrison, 379 U.S. at 68-70; id. at 79-80 (Black, J., concurring); id. at 80-83 (Douglas, J., concurring); New York Times Co., 376 U.S. at 296-97 (Black, J., concurring); Beauharnais v. Illinois, 343 U.S. 250, 287 (1952) (Jackson, J., dissenting); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) (joined by Brandeis, J.).¹¹ I will not explicate the ins and outs of that history here -- and there is a great deal of important history to digest. For today's purposes, it suffices to say these laws have their genesis in undemocratic systems that criminalized any speech criticizing public officials. True, that is not today's American system per se. But like it or not, that is

¹¹ I urge the curious reader to consult these important cases and the sources upon which they rely.

where our system's roots lie, and even in view of the rightly heightened standards we deploy when reviewing laws that restrict speech, see Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011), abrogated on other grounds by Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021), it is remarkable that we are still confronting laws criminalizing speech at all.

Perhaps the persistence of these laws owes to society-at-large's unawareness of or ambivalence to them. It's possible many believe criminal defamation is basically off the books; Garrison can be read to have been aimed at accomplishing as much, at least from a federal standpoint, in that it nixed as unconstitutional civil and criminal penalties for truthful statements about public officials, leaving room to sanction only those statements made with actual malice (knowledge of falsity or reckless disregard for the truth). See 379 U.S. at 74. But persist they do, with many states retaining their criminal defamation laws.¹²

And indeed, this is remarkable. Particularly so given the current political climate in this country, with "truth" at a premium. It seems to me that if these laws were robustly enforced, dockets in these states 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

¹² See, e.g., Idaho Code §§ 18-4801--4809 (2021); Kan. Stat. Ann. § 21-6103 (2021); Mich. Comp. Laws Ann. § 750.370 (2021); Minn. Stat. Ann. § 609.765 (2021); N.H. Rev. Stat. Ann. § 644:11 (2021); N.C. Gen. Stat. Ann. §§ 14-47, 15-168 (2020); N.D. Cent. Code Ann. § 12.1-15-01 (2021); Okla. Stat. Ann. tit. 21, §§ 771-774, 776-778 (2021); Utah Code Ann. § 76-9-404 (2021); Va. Code Ann. § 18.2-417 (2021); Wis. Stat. Ann. § 942.01 (2021).

which does not. Instead, the boundary emerges case by case, lying solely in the eye of the charge-bringing beholder -- or the ego of the person offended or called out by the speech. And this is troubling because it underscores the simple truth that a criminal defamation law can be wielded, weaponized by a person who disagrees with whatever speech has been uttered.¹³

To those who might disagree, it strikes me as 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. See, e.g., Garrison, 379 U.S. at 80-83 (Douglas, J., concurring) (warning of the dangers posed by criminal defamation laws and those laws acting as "instrument[s] of destruction" for free expression); Gottschalk v. State, 575 P.2d 289, 292 (Alaska 1978) ("It has become clear that the real interest being protected by criminal defamation statutes is personal reputation. Whether that purpose justifies use of the criminal law has been questioned."). And by virtue of their very existence, criminal defamation laws deter and chill speech -- indeed, their existence represents a looming threat of criminal prosecution, which of course will cause many to think twice before speaking out. This is all the more so when, as in New

¹³ I am mindful that not all criminal defamation prosecutions will be successful, and yes, as my colleagues note, supra note 1, malicious prosecution might in some instances exist as a means to pursue recourse for wrongful prosecution. But the fact remains that a great deal of damage could have already been done to the person targeted by an unsuccessful (or worse, malicious) prosecution, particularly depending on what exactly was said and done in the course of that prosecution -- that bell, as they say, cannot be unring.

Hampshire, a plea deal or successful criminal defamation prosecution would show up on a background check (and remember, criminal defamation defendants have no right to trial by jury and don't get court-appointed counsel). But "[f]ining [people] or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it." Garrison, 379 U.S. at 80 (Black, J., concurring).

It is not lost on me that proponents of criminal defamation laws see utility in having them as an alternative to civil suits to be deployed when, for example, an alleged defamer might be what we refer to as "judgment-proof," i.e., even if a favorable verdict resulted from a civil defamation suit, the defamer wouldn't have the cash available to cover any damages that were assessed. This assumes money damages are the best relief for a victim of defamation, and I cannot abide that premise. Does it not also invite criminal prosecution of people with less means? And critically, having a criminal defamation route enables an end-run around the important constitutional restrictions imposed in civil defamation cases. And I haven't spied any requirement that, to bring a criminal prosecution, one must demonstrate the criminal charge is being pursued because a civil suit just wouldn't cut it for some legitimate reason or another. This brings me back to the reality that criminal defamation laws are all too easily wielded as a silencing threat of punishment for speech.

By my lights, 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. See id. at 79-80 (Black, J., concurring) (“[T]he 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. Indeed, ‘malicious,’ ‘seditious,’ and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs.”).¹⁴ And so I echo the concern voiced by Justice Douglas in Garrison, a concern as valid today as it was nearly sixty years ago: “It is disquieting to know that one of [seditious libel’s] instruments of destruction is abroad in the land today.” 379 U.S. at 80-83 (Douglas, J., concurring).

¹⁴ Without touching on criminal defamation laws specifically, the Court in United States v. Alvarez, striking down part of the Stolen Valor Act, generally pointed to sweeping dangers posed by criminal restrictions on speech regarding matters of public concern. See 567 U.S. 709, 723 (2012) (“Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.”); id. at 736-37 (Breyer, J., concurring) (joined by Kagan, J.) (“ . . . [T]here remains a risk of chilling that is not completely eliminated by *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. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like.”).

APPENDIX C

**United States Court of Appeals
For the First Circuit**

No. 21-1068

ROBERT FRESE,

Plaintiff, Appellant,

v.

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

Defendant, Appellee.

ERRATA SHEET

The opinion of this Court, issued on November 8, 2022, is amended as follows:

On page 9, line 12, replace "Smith v. Goguen" with "Smith v. Goguen."

APPENDIX D

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE**

Robert Frese

v.

Case No. 18-cv-1180-JL

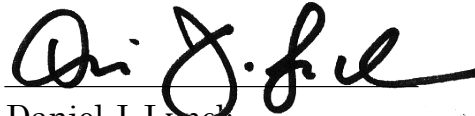
NH Attorney General

JUDGMENT

Judgment is hereby entered in accordance with the Order of Judge Joseph N. Laplante dated January 12, 2021.

The prevailing party may recover costs consistent with Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920.

By the Court:

A handwritten signature in black ink, appearing to read "D. J. Lynch", written over a horizontal line.

Daniel J. Lynch
Clerk of Court

Date: January 19, 2021

cc: Brian M. Hauss, Esq.
Emerson J. Sykes, Esq.
Henry Klementowicz, Esq.
John M. Greabe, Esq.
Lawrence A. Vogelmann, Esq.
Gilles R. Bissonnette, Esq.
Samuel R. V. Garland, Esq.

APPENDIX E

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

Robert Frese

v.

Civil No. 18-cv-1180-JL

Gordon J. MacDonald,
In his official capacity
only as Attorney General
of the State of New
Hampshire

MEMORANDUM ORDER

This case concerns the facial constitutionality of New Hampshire's criminal defamation statute, N.H. Rev. Stat. § 644:11, under the First and Fourteenth Amendments. The State of New Hampshire has moved to dismiss plaintiff Robert Frese's amended complaint on standing and sufficiency grounds. See Fed. R. Civ. P. 12(b)(1), (6). In late 2019, the court denied a previous motion to dismiss because the State had failed to show that Frese's original allegations were legally insufficient to state a constitutional claim and because Frese had sufficiently pled his standing to sue. See Frese v. MacDonald, 425 F. Supp. 3d 64, 82 (D.N.H. 2019).¹ In 2020, the court also denied a motion for reconsideration by the State which misconstrued the court's 2019 order and raised new arguments and authority which were not developed in the State's first

¹ Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19).

motion to dismiss. In doing so, the court deemed the State's new arguments waived for the purposes of the motion, but reserved the right to revisit the State's new arguments and authority in a later procedural posture if they were properly raised.²

In the wake of these decisions, Frese amended his original complaint to clarify the legal basis for his claims, giving the State the opportunity to challenge anew. Again, the State argues that Frese lacks standing and fails to state a claim, citing newly provided authority that sharpens the State's previous arguments. Additionally, the State newly contends that First Circuit precedent precludes Frese from maintaining his facial constitutional claims under the First and Fourteenth Amendment of the U.S. Constitution. After considering the parties' arguments, as refined by Frese's amended pleading and motion practice in this case, the court concludes that Frese's allegations cannot sustain his asserted constitutional claims. The court thus grants the State's motion and dismisses Frese's complaint in its entirety for failing to state a claim. See Fed. R. Civ. P. 12(b)(6).

I. Background

The court has provided a more thorough account of the factual allegations underlying this case in its prior orders.³ The following draws from those prior accounts, restates the most pertinent facts, and

² Feb. 14, 2020 Order Denying Mot. for Reconsideration (Doc. No. 25).

³ See Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19, at 2-6); Feb. 14, 2020 Order Denying Mot. for Reconsideration (Doc. No. 25, 2-4).

recounts more recent procedural history.

A. The criminal defamation statute and the police prosecutions of Frese

New Hampshire's criminal defamation statute, N.H. Rev. Stat. § 644:11, provides: "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."⁴ Because the offense is a Class B misdemeanor, the applicable penalties do not include incarceration. Instead, those convicted face a fine of up to \$1,200, see id. § 651:2(IV)(a), have no right to a trial by jury, see State v. Foote, 149 N.H. 323, 324 (2003), and are not afforded court-appointed counsel if they are indigent, see State v. Westover, 140 N.H. 375, 378 (1995).

Although prosecutions for criminal defamation in New Hampshire are not common, plaintiff Robert Frese has been charged twice under § 644:11. In 2012, the Hudson Police Department arrested Frese for comments he posted on the online platform Craigslist about the owner of a local life coaching business.⁵ Without counsel, Frese pled guilty and was fined \$1,488, with \$1,116 conditionally suspended.⁶ Then,

⁴ As used in the statute, "public" includes any professional or social group of which the victim of the defamation is a member. See id. § 644:11(II); see also Sanguedolce v. Wolfe, 164 N.H. 644, 646 (2013) (discussing the common-law definition of "public" in the context of defamation).

⁵ Am. Compl. (Doc. No. 31, ¶ 15); Frese Exs. (Doc. No. 31-2, at HUD013-14).

⁶ Am. Compl. (Doc. No. 31, ¶ 16). This fine included up to a 24% penalty assessment. Id.

in 2018, the Exeter Police Department arrested and prosecuted Frese for comments he pseudonymously posted on an online newspaper article's comments section about a retiring Exeter police officer who Frese considered corrupt.⁷ This arrest caused public controversy, and Frese's case was eventually referred to the N.H. Attorney General's Office. Its Civil Rights Division opined that there was no probable cause that Frese violated the criminal defamation statute, even though a New Hampshire Circuit Judge had initially found probable cause to arrest Frese based on the police department's submitted filings.⁸ Three days after the Attorney General reported this conclusion, the Exeter Police Department dropped its charges against Frese.⁹

B. Litigation of the state's first motion to dismiss

At the end of 2018, Frese, allegedly fearing future arrests or prosecutions for criticizing law enforcement and other public officials, filed a complaint requesting that this court declare the criminal defamation statute overbroad and void for vagueness. The State, in turn, moved to dismiss on standing and sufficiency grounds.¹⁰

In September 2019, the court held oral

⁷ Am. Compl. (Doc. No. 31, ¶¶ 17-31); Frese Exs. (Doc. No. 31-3, at EXE019-21, 91-92).

⁸ See NHDOJ June 4, 2018 Mem. (Doc. No. 31-3, at EXE008-013).

⁹ Am. Compl. (Doc. No. 31, ¶ 31).

¹⁰ State's Mot. to Dismiss (Doc. No. 11). Oral argument was delayed until September to accommodate the parties' availability and this court's busy trial schedule. See June 11, 2019 Endorsed Order granting Frese's Mot. to Continue.

argument, at which it gave the parties ample opportunity to explain the arguments advanced in their written submissions. At the hearing, the court questioned counsel about how the statute’s historical enforcement impacted the constitutional questions presented—an issue addressed at no point in the State’s briefing. The court also allowed the parties to submit supplemental briefing on this question, and while Frese’s counsel submitted a supplemental brief,¹¹ the State’s counsel neither submitted supplemental authority nor responded to the authority submitted by Frese.

The following month, the court denied the State’s motion to dismiss. In doing so, the court emphasized that the parties (and the public) should not interpret the preliminary decision as holding “that New Hampshire’s criminal defamation statute is unconstitutional on its face.”¹² 425 F. Supp. 3d at 82. Rather, the court’s holding was limited to the narrow issue before it under Rule 12(b)(6): that on the record and arguments briefed by the parties, the State had failed to show that Frese had not stated a claim as a matter of law.¹³ Id.

In an unusual step, the State then asked the court to reconsider the decision denying the motion to dismiss on the argued grounds that the decision rested on purportedly manifest errors of law.¹⁴ The court denied the State’s request without oral

¹¹ Frese’s Notice of Supp. Authority (Doc. No. 18).

¹² Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19, at 24).

¹³ Id. at 24-25.

¹⁴ See State’s Mot for Reconsideration (Doc. No. 21).

argument, as the State’s arguments rested on a misconstruction of the October 25 Order’s plain language, as well as authorities that the State had failed to raise in support of its motion to dismiss, even after the court had invited the State to supplement its briefing.¹⁵ In doing so, the court made clear that it took “no position” on the State’s new arguments and would “revisit them if raised properly at a later procedural posture.”¹⁶

C. Amended complaint

In April 2020, Frese amended his complaint to clarify the nature of his constitutional claims.¹⁷ In Count 1, as amended, he maintains his original claim 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,” in violation of the Fourteenth Amendment. In Count 2, he newly pleads that the statute violates the First Amendment’s prohibition against government abridgment of speech because it criminalizes speech which civil remedies can sufficiently address. This prompted the State to file the instant motion, which not only re-asserts the State’s previous arguments, but also advances new arguments concerning the sufficiency of Frese’s facial vagueness claims under First Circuit precedent. The court now turns to these arguments.

¹⁵ Feb. 14, 2020 Order Denying Mot. for Reconsideration (Doc. No. 25).

¹⁶ Id.

¹⁷ Assented-to Mot. to Am. Compl. (Doc. No. 29); see also Am. Compl. (Doc. No. 31).

II. Applicable legal standard

A. Standing

“The Constitution limits the judicial power of the federal courts to actual cases and controversies.” Katz v. Pershing, LLC, 672 F.3d 64, 72 (1st Cir. 2012) (citing U.S. Cons. Art. III, § 2 cl. 1). “A case or controversy exists only when the party soliciting federal court jurisdiction (normally, the plaintiff) demonstrates ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.’” Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

“To satisfy the personal stake requirement a plaintiff must establish each part of a familiar triad: injury, causation, and redressability.” Id. (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992)); see also Massachusetts v. U.S. Dep’t of Health & Human Servs., 923 F.3d 209, 221 (1st Cir. 2019) (explaining that the burden of alleging facts sufficient to prove these elements rests with the party invoking federal jurisdiction). “[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,” which is, “with the manner and degree of evidence required at the successive stages of the litigation.” Katz, 672 F.3d at 72 (quoting Lujan, 504 U.S. at 561) (internal quotation marks omitted).

In considering a pre-discovery grant of a motion to dismiss for lack of standing, the court “accept[s] as true all well-ple[d] factual averments in the plaintiff’s . . . complaint and indulge[s] all reasonable inferences therefrom in his [or her] favor.” Id. at 70. And while generally the court does not consider materials

outside the pleadings on a motion to dismiss, it may look beyond the pleadings—to affidavits, depositions, and other materials—to determine jurisdiction. See Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Strahan v. Nielsen, No. 18-cv-161-JL, 2018 WL 3966318, at *1 (D.N.H. Aug. 17, 2018).

B. Statement of a claim

The court determines the sufficiency of a complaint through a “holistic, context-specific analysis.” Gilbert v. City of Chicopee, 915 F.3d 74, 80 (1st Cir. 2019). First, it “isolate[s] and ignore[s] statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.” Zenon v. Guzman, 924 F.3d 611, 615 (1st Cir. 2019) (citations and quotation marks omitted). It then “evaluate[s] whether the remaining factual content supports a ‘reasonable inference that the defendant is liable for the misconduct alleged.’” In re Curran, 855 F.3d 19, 25 (1st Cir. 2017) (quoting Shay v. Walters, 702 F.3d 76, 82 (1st Cir. 2012)); see also Glob. Network Commc’ns, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006) (“The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff’s statement of a claim for relief without resolving a contest regarding its substantive merits.”).

In doing so, the court must accept “all well-pled facts in the complaint as true” and construe all reasonable inferences in the plaintiff’s favor. See Gilbert, 915 F.3d at 80. In addition, the court may consider documents attached as exhibits or incorporated by reference in the complaint. See Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 321 (1st Cir. 2008). But the court “need not give

weight to bare conclusions, unembellished by pertinent facts.” Shay, 702 F.3d at 82–83. If the complaint’s factual averments are “too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture,” dismissal is warranted. S.E.C. v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010) (en banc).

III. Analysis

The State contends that Frese’s amended complaint should be dismissed on two grounds. First, it renews its argument that Frese lacks pre-enforcement standing to sue because he has not alleged, in the State’s view, an intent to engage in speech that is both proscribed by the criminal defamation statute and arguably affected with a constitutional interest. See also Fed. R. Civ. P. 12(b)(1). Second, it asserts that Frese has failed to plead a claim that the criminal defamation statute is unconstitutionally vague or that the statute impermissibly abridges protected speech. See Fed. R. Civ. P. 12(b)(6). The court reaffirms that Frese’s pleadings adequately confer standing to bring this lawsuit, but concludes, based on the State’s newly submitted legal authority, that Frese’s allegations fail to state a constitutional claim under the First or Fourteenth Amendment.

A. Standing

The State first argues that Frese has failed to meet his burden of pleading pre-enforcement standing to sue because he has not alleged a sufficient pre-enforcement injury in fact—specifically an intention to engage in conduct proscribed by the criminal defamation statute, N.H. Rev. Stat. § 644:11. The statute criminalizes only speech that a speaker

“knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.” Id. (emphasis added). The State contends that “Frese’s claim of standing does not leave the gate, as deliberately false and defamatory speech”—the only conduct proscribed by § 644:11 in the State’s view—is not “arguably affected with a constitutional interest.”¹⁸ In essence, this argument restates the State’s prior position on standing. The court again disagrees, as the State’s standing argument still misunderstands (or perhaps mischaracterizes) Frese’s challenge.

In the context of the First Amendment, “two types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution.” Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003). The first is when “the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.” Babbitt, 442 U.S. at 298; accord Mangual, 317 F.3d at 56. The second is when a plaintiff “is chilled from exercising [his or] her right to free expression or forgoes expression in order to avoid enforcement consequences.” N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996). Here, Frese’s pleadings focus on the first type of pre-enforcement injury: he “fears that he will be arrested and/or prosecuted” under the criminal defamation statute for future “speech criticizing law enforcement

¹⁸ State’s Mot. to Dismiss Am. Compl. Mem. (Doc. No. 33-1, at 8) (quoting Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979)) (emphasis added by the State).

and other public officials.”¹⁹

Frese’s fear of arrest for criticizing law enforcement and public officials satisfies all three elements for a pre-enforcement injury. First, such speech is “arguably affected with a constitutional interest.” See Babbitt, 442 U.S. at 298 (emphasis added); see also Mangual, 317 F.3d at 58 (finding a pre-enforcement injury in fact where a journalist stated “an intention to continue covering police corruption”); O’Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993) (holding that speech concerning the alleged abuse of public office occupies “the highest rung of the hierarchy of First Amendment values”); Bourne v. Arruda, No. 10-cv-393, 2011 U.S. Dist. Lexis 62332, at *40 (D.N.H. June 20, 2011) (McCafferty, J.) (“the right to criticize public officials is protected by the First Amendment” (quotation marks and citation omitted)). Moreover, New Hampshire’s criminal defamation statute “arguably . . . proscribe[s]” speech criticizing public officials, as the statute sweeps broadly and carves out no exceptions for speech concerning law enforcement or other public officials. See Susan B. Anthony List v. Driehaus, 573 U.S. 149, 162 (2014) (quoting Babbitt, 442 U.S. at 298), see also Mangual, 317 F.3d at 48 (finding credible threat of prosecution of a journalist’s speech concerning police corruption where libel statute did not “carve out any exception” for such speech).

The State contends that statute does not proscribe constitutionally protected speech because it only proscribes “purposeful communications” of “information that the speaker knows to be false and knows will tend to expose any other living person to

¹⁹ Am. Compl. (Doc. No. 31, ¶ 33).

public hatred, contempt, or ridicule.”²⁰ But, as explained in this court’s prior order,²¹ the State’s focus on the statute’s knowledge requirement “misses the point” for standing purposes. See SBA List, 573 U.S. at 164. In SBA List, the Supreme Court rejected a similar argument regarding an Ohio statute criminalizing false statements about candidates during political campaigns. Id. at 162-63. There, the respondents argued that the petitioner’s alleged fears of enforcement were misplaced because it could “only be liable for making a statement ‘knowing’ it [was] false” and had not said it planned to lie. Id. In the respondent’s view, the petitioner’s insistence that its speech was factually true made “the possibility of prosecution for uttering such statements exceedingly slim.” Id. The Court noted that the petitioner’s past insistence that its statements were true did not prevent a finding of probable cause that the petitioner had violated the Ohio law. As such, there was “every reason to think that similar speech in the future will result in similar proceedings, notwithstanding [the speaker’s] belief in the truth of its allegations.” Id.

Frese’s past encounters with the police similarly demonstrate that a speaker’s belief that his or her comments are true does not shield law enforcement critics from the initiation of criminal process. In 2018, for example, when the Exeter Police Department filed criminal charges against Frese, and a New Hampshire Circuit Court Judge approved a warrant to arrest Frese, Frese’s belief in the truth of

²⁰ State’s Mot. to Dismiss Am. Compl. Mem. (Doc. No. 33-1, at 12) (quoting uncited material) (emphasis added by the court).

²¹ See Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19, at 11).

his statements regarding the purported corruption of an Exeter police officer did not protect him from arrest or the initial stages of prosecution. Additionally, the State has not taken the position that criminal defamation charges could not be sustained against a speaker who outwardly expresses a belief that his false and defamatory speech is subjectively true. At oral argument on the State's first motion to dismiss, the court pressed the State's counsel on what kinds of proof would satisfy the criminal defamation statute's knowledge element. Though counsel responded that an admission would suffice, he could not rule out a criminal defamation case built on indirect evidence, including indirect evidence about the speaker's knowledge. If that is the case, it is more than just possible that speech like Frese's 2018 comments could result in criminal proceedings, notwithstanding the speaker's belief in the truth of his or her allegations. See id.

Finally, the threat of future enforcement is credible given the past enforcement actions against Frese for similar conduct. SBA List, 573 U.S. at 149 ("[P]ast enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical."). Under New Hampshire law, individuals can initiate private prosecutions for criminal offenses that do not carry a possible penalty of imprisonment, see Tucker v. Gratta, 101 N.H. 87, 87 (1957), including criminal defamation. The power to prosecute misdemeanor crimes similarly extends to law enforcement officers, who commonly do so without the approval or guidance of a prosecuting attorney. See State v. La Palme, 104 N.H. 97, 98 (1962); see also N.H. Rev. Stat. § 41:10 (implicitly recognizing, if not expressly authorizing, police prosecutions). As such,

even if the New Hampshire Department of Justice disavowed any intention to prosecute criminal defamation cases like Frese’s past litigation—which, to date, it has not—Frese would still have a “credible fear of being haled into court on a criminal charge.” Mangual, 317 F.3d at 59. This “is enough for the purposes of standing, even if it were not likely that [Frese] would be convicted.” Id.

Under the particular facts and circumstances of this case, including Frese’s history of prosecution, the state of New Hampshire’s unique procedures permitting prosecutions initiated and handled by private citizens and public officers, and the arguments and positions advanced by counsel in their filings and arguments, Frese has demonstrated a pre-enforcement injury in fact sufficient to establish Article III standing under a Rule 12(b) challenge. Accordingly, the State has failed to show that this court lacks subject matter jurisdiction.

B. Sufficiency

The State next contends that Frese has failed to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Frese’s amended complaint raises two types of claims: In Count 1, he contends that New Hampshire’s criminal defamation statute is unconstitutionally vague in violation of Fourteenth Amendment’s Due Process Clause. In Count 2, he argues that the criminal defamation statute also violates the First Amendment’s prohibition against government abridgment of speech because it overbroadly criminalizes speech that civil remedies can sufficiently address. The court addresses each Count in turn, and ultimately concludes that Frese’s allegations can sustain neither a First Amendment

overbreadth nor a Fourteenth Amendment vagueness claim.

1. First Amendment overbreadth claims

“In a facial challenge to the overbreadth and vagueness of a law, a court’s first task” is to assess the viability of the plaintiffs’ First Amendment overbreadth claim before examining a facial vagueness challenge. Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494–95 (1982). Thus, the court first addresses Frese’s claim that New Hampshire’s criminal defamation statute violates the First Amendment for criminalizing false and defamatory speech or, in the alternative, for criminalizing false speech criticizing public officials.

The State contends that Frese’s First Amendment claim lacks merit because the claim essentially asks this court to overrule United States Supreme Court precedent implicitly recognizing criminal defamation statutes as constitutionally permissible. See, e.g., Garrison v. Louisiana, 379 U.S. 64, 67 (1964) (holding that a Louisiana criminal libel statute punishing true statements made with actual malice was unconstitutional because “only . . . false statements made with the high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions.”). Additionally, it asserts that Frese’s First Amendment claim simply questions the public policy rationale for criminal defamation statutes (rather than constitutional imperatives), which are matters for the Executive and Legislative Branches, but not this court, to decide.²²

²² State’s Mot. to Dismiss Am. Compl. Mem. (Doc. No. 33-1) at 20 (quoting United States v. Myers, 635 F.2d 932 (2d Cir. 1980)).

Frese’s able counsel, in appreciated candor, do not shy away from the controversial nature of his claim. In his objection, Frese maintains that if Garrison holds that criminal defamation statutes are permissible under the First Amendment (so long as they include an actual malice requirement), then “the case was wrongly decided.”²³ Additionally, he explains that, though this court may lack the prerogative to overturn Supreme Court precedent, he seeks to preserve the ability to raise his public policy-related arguments before an appellate court that can question Garrison’s rationale.²⁴

At bottom, Frese agrees with the State that “overruling the Supreme Court is the Court’s job,” not the trial courts’. United States v. Morosco, 822 F.3d 1, 7 (1st Cir. 2016). Accordingly, this court must apply Garrison to Frese’s First Amendment claims until the Supreme Court or the First Circuit Court of Appeals rules otherwise—even in the face of Frese’s allegations that criminal libel statutes are “antithetical to any and every form of representative government.”²⁵ Under Garrison, the State may impose criminal sanctions against false and defamatory speech made with actual malice without violating the First Amendment. As such, Frese’s allegation that the criminal defamation statute unlawfully criminalizes any and all false, defamatory

²³ Frese’s Obj to the State’s Mot. to Dismiss Compl. (Doc. No. 14, at 12 n.5) (incorporated into Frese’s Obj. to the State’s current motion to dismiss).

²⁴ Id.

²⁵ Am. Compl. (Doc. No. 31, ¶ 9) (citing George C. Lisby, No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence, 9 Comm’n Law and Policy 433 (2004)).

speech fails to state a First Amendment claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6).

2. Fourteenth Amendment vagueness claims

The State next argues that Frese has failed to state a void-for-vagueness claim under the Fourteenth Amendment for three reasons. First, it contends that First Circuit precedent precludes Frese from bringing a facial vagueness claim outside of the context of a traditional, as-applied challenge. Second, it argues that, even if First Circuit precedent allows Frese to proceed on parts of his vagueness claim, he has still not sufficiently pled how the terms of the criminal defamation statute fail to articulate a discernible standard that would prevent selective or discriminatory enforcement. Finally, it notes that Frese has not alleged an actual as-applied vagueness claim. As discussed below, the court mostly agrees as to the State's latter two points, as Frese's allegations do not demonstrate how § 644:11's proscriptions, which incorporate the common-law definition of defamation and require proof of actual malice, are so standardless that they fail to guard against the danger of selective or arbitrary enforcement by law enforcement officials. The court thus concludes that, under Rule 12(b), Frese has failed to state a claim.

a. *The vagueness doctrine*

"The vagueness doctrine, a derivative of due process, protects against the ills of laws whose 'prohibitions are not clearly defined.'" Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108(1972)).

In prohibiting overly vague laws, the

doctrine seeks to ensure that persons of ordinary intelligence have ‘fair warning’ of what a law prohibits, prevent ‘arbitrary and discriminatory enforcement’ of laws by requiring that they provide explicit standards for those who apply them, and, in cases where the statute abut(s) upon sensitive areas of basic First Amendment freedoms avoid chilling the exercise of First Amendment rights.

Id. (quoting Grayned, 408 U.S. at 108–09) (internal quotation marks omitted).

In prior orders, the court more thoroughly reviewed the vagueness doctrine’s application to statutes in the First Amendment context.²⁶ The court restates only the essential points here, as supplemented by the State’s more-recently submitted legal authority (now properly before the court²⁷): A facial challenge like Frese’s “is best understood as a challenge to the terms of the statute” itself, see Saucedo v. Gardner, 335 F. Supp. 3d 202, 214 (D.N.H. 2018) (McCafferty, J.), and is resolved simply by assessing whether it prohibits “an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.” McKee, 649 F.3d at 62 (internal citations and quotation marks omitted). A statute is not rendered unconstitutionally vague merely because it “requires a person to confirm his [or her]

²⁶ See Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19, at 18-24); Feb. 14, 2020 Order Denying Mot. for Reconsideration (Doc. No. 25, 6-8, 11-13).

²⁷ See Part I.B, supra.

conduct to an imprecise but normative standard,” the satisfaction of which might vary depending upon whom one asks. E.g., Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). “Rather, a statute is unconstitutionally vague if, applying the rules for interpreting legal texts, its meaning specifies ‘no standard of conduct . . . at all.’” United States v. Bronstein, 849 F.3d 1101, 1108 (D.C. Cir. 2017) (quoting Coates, 402 U.S. at 614); see also United States v. Whitty, 688 F. Supp. 48, 54 (D. Me. 1988) (Cyr, C.J.) (“A statute is unconstitutionally vague on its face if it is expressed in such general terms that ‘no standard of conduct is specified at all.’” (internal citation omitted) (emphasis in original)).

Several recent decisions from the D.C. Circuit Court of Appeals demonstrate how courts generally apply the vagueness doctrine to statutes that imprecisely define unlawful speech. See, e.g., Bronstein, 849 F.3d at 1108–11; Act Now to Stop War & End Racism Coal. & Muslim Am. Soc’y Freedom Found. v. D.C., 846 F.3d 391, 412 (D.C. Cir. 2017). In Bronstein, for example, political dissidents who had interrupted U.S. Supreme Court oral arguments to engage in protest brought a facial vagueness challenge against a 1949 law making it unlawful to “make a harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court.” Id. (quoting 40 U.S.C. § 6134). The district court found that, for constitutional purposes, the words “harangue” and “oration” were anachronisms that had multiple, subjective dictionary definitions without “an objective and neatly isolable core.” 151 F. Supp. 3d 31, 41–44 (D.D.C. 2015) (“The various definitions of ‘harangue’ rest largely on subjective assessments of the nature of the speech involved.”).

The district court therefore held that the terms were unconstitutionally vague. Id. On appeal, however, the D.C. Circuit Court of Appeals reversed because a person of ordinary intelligence could read these anachronisms and “understand that, as a member of the Supreme Court’s oral argument audience, making disruptive public speeches is clearly proscribed behavior.” 849 F.3d at 1104.

In reaching this conclusion, the Court of Appeals explained that a vagueness analysis is not concerned with whether a statutory term “requires a person to conform his conduct to an imprecise but comprehensible normative standard, whose satisfaction may vary depending upon whom you ask.” Id. (quoting Coates, 402 U.S. at 614). “Rather, a statute is unconstitutionally vague if, applying the rules for interpreting legal texts, its meaning specifies no standard of conduct at all.” Id. (internal quotation marks and citations omitted). The Court of Appeals then applied these principles to the specific inquiry before it. It elaborated that, though “harangue” and “oration” covered different facets of public speeches—“orations” can include formal speeches, while “harangues” can include angry or vehement speeches—the question for the Court was whether the terms “converge[d] upon certain behavior” that were useful as “descriptors of the ‘core’ behavior to which the statute may constitutionally be applied.” Id. at 1108 (internal quotation marks and citations omitted). The Court of Appeals concluded, based on the statute’s textual context, that “harangue” and “oration” “meant to cover any form of public speeches that tend to disrupt the Supreme Court’s operations,” and that “a person of ordinary intelligence could read this law and understand that” such conduct was

“clearly proscribed behavior.” Id. at 1109-10 (internal citation omitted). It thus held that the district court erred in striking the two terms as unconstitutionally vague. Id. at 1111; see also Act Now, 846 F.3d at 410–412 (holding that an municipal regulation governing displays of posters in public spaces “d[id] not give enforcement officials so little guidance as to permit them to act in an arbitrary or discriminatory way” because it “set[] reasonably clear guidelines”).

Similarly, in Agnew v. Gov’t of the District of Columbia, the D.C. Circuit Court of Appeals affirmed that an anti-obstructing ordinance, making it a misdemeanor “to crowd, obstruct, or incommode” the use of public ways, was not unconstitutionally vague on its face, even though term “incommode” was no longer in everyday use and “does not mean the same thing to all people, all the time.” 920 F.3d 49, 56-57 (D.C. Cir. 2019) (quoting Bronstein, 849 F.3d at 1107–08). Using textual canons of statutory construction, the Court of Appeals found that “crowd, obstruct, or incommode” read together in context were “plainly concerned with impediment[s] or hinderance[s]” of the “public’s shared use of common public spaces.” Id. at 57-58. Additionally, it found that, though the plaintiffs had alleged the statute was enforced in a racially discriminatory, harassing manner, the “identified instances of a statute’s misapplication” alleged did not suffice to show that the ordinance was unconstitutional on its face. Id. at 60 (noting that “similar allegations could bolster an as-applied challenge”).

Though fewer in number, multiple decisions from this Circuit echo the core vagueness analysis principles articulated in Bronstein, Agnew, and other out-of-circuit opinions. See, e.g., McKee, 649 F.3d at

62; Donovan v. City of Haverhill, 311 F.3d 74, 77 (1st Cir. 2002). The court thus applies these principles here.

b. Preclusion of facial void-for-vagueness claims

The State first contends that First Circuit precedent—specifically Draper v. Healey, 827 F.3d 1 (1st Cir. 2016)—precludes Frese from bringing a facial void-for-vagueness claim. In Draper, the Court of Appeals held that the plaintiffs’ constitutional claim, which challenged a handgun-sales regulation as void-for-vagueness, was “eligible only for as-applied, not facial, review.” Id. at 3 (citing United States v. Zhen Zhou Wu, 711 F.3d 1, 15 (1st Cir. 2013)). The State reads this holding as an “unequivocal[]” statement that all void-for-vagueness claims arising under the Fourteenth Amendment’s Due Process Clause are “eligible only for as applied, not facial review.”²⁸ The court disagrees, finding that the Court of Appeals has not yet adopted such an absolute rule.

Both the Supreme Court and the First Circuit Court of Appeals have long permitted facial vagueness challenges under the Fourteenth Amendment’s Due Process Clause where challenged laws arguably inhibited the exercise of First Amendment freedoms. In Kolender v. Lawson, for example, the Supreme Court found that a criminal statute concerning loitering was “unconstitutionally vague” on its face “within the meaning of the Due Process [C]lause of the Fourteenth Amendment by failing to clarify what was contemplated by the requirement that a suspect

²⁸ State’s Reply to Mot. to Dismiss Am. Compl. (Doc. No. 41, ¶ 2) (quoting Draper, 827 F.3d at 3) (emphasis added by the State).

provide a ‘credible and reliable’ identification.” 461 U.S. 352, 353-54 (1983) (noting that its vagueness ruling was “based upon the potential for arbitrarily suppressing First Amendment liberties”); cf. Sessions v. Dimaya, 138 S. Ct. 1204, 210 (2018) (a non-First Amendment case decided after Draper in which the Supreme Court facially invalidated a criminal statute on vagueness grounds). Likewise, in URI Student Senate v. Town of Narragansett, the First Circuit Court of Appeals considered a facial challenge to a nuisance ordinance prohibiting “unruly gatherings,” and ultimately found the ordinance’s use of undefined terms such as “substantial disturbance” and “a significant segment of a neighborhood” did not render it unconstitutionally vague under the Fourteenth Amendment. 631 F.3d 1, 13-14 (1st Cir. 2011).

Despite the State’s assertions, Draper does not directly call these precedents into question or otherwise create a turning point in First or Fourteenth Amendment jurisprudence. In Draper, the Court of Appeals simply considered a void-for-vagueness challenge to a Massachusetts regulation making it an unfair or deceptive practice for handgun purveyors to transfer to a customer a handgun that did not contain “a load indicator or magazine safety disconnect.” 827 F.3d at 2. The plaintiffs, consisting of handgun dealers, consumers, and advocacy groups, argued that the regulation failed to provide fair notice of what was prohibited, even though the State Attorney General informed dealers of its position that certain handguns violated the regulation. See id. (finding that the advocacy groups lacked standing). Justice Souter, writing for the three-judge panel, explained that such a constitutional challenge was “eligible only for as-applied, not facial, review”

because it fell outside the First Amendment context. Id. (quoting Zhen Zhou Wu, 711 F.3d at 15 (“Outside the First Amendment context, we consider whether a statute is vague as applied to the particular facts at issue”). The panel then considered whether the plaintiffs’ as-applied challenge had merit and concluded it did not because the challenged regulation’s language provided “anyone of ordinary intelligence fair notice that what” was required was “a readily perceptible signal that a loaded gun is loaded.” Id. at 3-4; see also id. at 4 (noting also that the Massachusetts Attorney General had publicly taken the position that the handguns at issue violated the load indicator regulation).

In reaching this conclusion, the Court of Appeals at no point found that facial challenges to statutes were categorically inappropriate.²⁹ That question was not presented to the Court of Appeals. Nor did the Court find that the plaintiffs’ constitutional challenge fell within the exception for First Amendment issues articulated in Zhen Shou Wu.³⁰ And even if it had, the plaintiffs’ facial challenge for lack of notice still would have lacked merit because the law clearly proscribed the conduct

²⁹ Indeed, had the Court of Appeals intended for its holding in Draper to bar all facial challenges going forward, it presumably would have said as much in clear and certain terms. Additionally, it presumably would have done so after spending some time addressing past cases permitting facial vagueness challenges, rather than through a single sentence parenthetically noting that facial challenges can arise in the First Amendment context.

³⁰ Zhen Zhou Wu does not specify whether the exception broadly applies to cases concerning First Amendment interests or more narrowly applies to facial challenges specifically arising under a First Amendment claim, such as under the overbreadth doctrine.

they sought to engage in. See Vill. of Hoffman Estates, 455 U.S. at 495 (“A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.”); see also Holder v. Humanitarian Law Project, 561 U.S. 1, 21 (2010) (reversing partial grant of relief based on facial vagueness challenge for lack of notice where the “the statutory terms [at issue were] clear in their application to plaintiffs’ proposed conduct”); United States v. Ackell, No. 15-cr-123-JL, 2016 WL 6407840, at *1 (D.N.H. Oct. 28, 2016), aff’d, 907 F.3d 67 (1st Cir. 2018) (rejecting a criminal defendant’s facial challenge that a statute was unconstitutionally vague for lack of notice where the cyberstalking statute at issue clearly proscribed the conduct alleged in the indictment). Frese’s case concerning free speech, by comparison, arguably falls within the First Amendment context. Moreover, New Hampshire’s criminal defamation statute does not clearly authorize or proscribe Frese’s intended conduct of openly criticizing public officials such as police officers.

Perhaps recognizing that its position overstates or overextends precedent, the State suggests that the Supreme Court may soon need to address the appropriateness of facial vagueness challenges head on and presumably find them to be categorically inappropriate based on Justice Thomas’s dissenting opinion in Sessions v. Dimaya.³¹ See 138 S. Ct. at 1252 (Thomas, J., dissenting) (questioning whether “facial vagueness challenges are ever appropriate”). Even if the State were correct,³² it is not this trial

³¹ State’s Reply to Mot. to Dismiss Am. Compl. (Doc. No. 41, ¶ 2).

³² The court takes no position on whether Justice Thomas’s

court's role to rebuff existing Supreme Court and First Circuit precedent permitting facial challenges like Frese's under the circumstances, especially where, as here, no controlling opinion by the Supreme Court or the Court of Appeals has explicitly called that precedent into doubt. Cf. Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case . . . the Court of Appeals should follow that case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions); Morosco, 822 F.3d at 7 ("[B]ecause overruling the Supreme Court precedent is the Court's job, not ours, we must follow [] until the Court specifically tells us not to . . .").

The State also argues for the first time in its Reply that, even if it is wrong about Draper, Frese has still failed to state a facial vagueness claim because he failed to state a sufficient as-applied claim.³³ In support of this new argument, the State notes that in United States v. Ackell, this court held that while a litigant can bring a facial overbreadth challenge without an as-applied challenge in the First Amendment context, "[t]he law recognizes no such exception for a vagueness" claim. 2016 WL 6407840, at*7. This court first points out the obvious: "[N]ew arguments may not be raised for the first time in a reply brief." E.g., Villoldo v. Castro Ruz, 821 F.3d 196, 206 (1st Cir. 2016). The court deems this new

dissenting views in Dimaya may represent the views of other Justices of the Supreme Court. And though the court is critical of the State's citation to a single Justice's dissenting opinion, it does not intent to suggest that the State's view on the appropriateness of facial challenges is completely unfounded.

³³ State's Reply to Mot. to Dismiss Am. Compl. (Doc. No. 41, ¶ 3).

argument, raised for the first time in a reply to a second motion to dismiss, waived. See Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 299 (1st Cir. 2000).

But even if the argument were not waived, it would still not require dismissal under Rule 12(b)(6) for several reasons. First, this court’s holding in Ackell was limited to, and must be construed in the context of, its particular facts—specifically, a criminal defendant whose alleged cyberstalking of a teenager was clearly proscribed by the statute under which he was charged. 2016 WL 6407840, at *7. In this context, the court narrowly held that because the defendant’s behavior was clearly proscribed, he lacked standing to challenge the statute’s facial failure to provide “fair notice” to others. Id. (citing Humanitarian Law Project, 561 U.S. at 20). The court’s decision did not address whether a litigant—whether a plaintiff or a criminal defendant—could still bring a purely facial vagueness challenge under an arbitrary-enforcement vagueness theory. And, as the State recognizes, at least one Circuit Court of Appeals has held since Ackell that, under Humanitarian Law Project, a plaintiff can bring a vagueness challenge under an arbitrary-enforcement theory (like Frese does here) without also bringing an as-applied challenge.³⁴ See Act Now, 846 F.3d at 412 (finding that an ordinance requiring removal of signs for events after 30 days

³⁴ In this procedural posture (a Rule 12(b) challenge), the court further declines the State’s invitation to disregard Act Now on the argued grounds that the D.C. Circuit Court of Appeals’s decision “conflated vagueness challenges under the Fourteenth Amendment and overbreadth challenges under the First Amendment,” in the absence of legal authority supporting the State’s critique.

was not unconstitutionally vague as it “set[] reasonably clear guidelines for law enforcement officers to determine whether a sign [was] event related”).

For now, based on the authority cited by the parties, the court presumes for the purposes of this motion, without finding, that plaintiffs may bring facial vagueness challenges against statutes that invite excessively discretionary enforcement, without pleading a sufficient as-applied claim, so long as the challenge arises in the First Amendment context. As discussed above, Frese’s challenge arguably does so, as his plans to criticize public officials, including police officers, are not conduct clearly proscribed or permitted by the criminal defamation statute’s plain text. His challenge to the criminal defamation statute thus rises or falls on whether he has sufficiently stated a claim for relief, or more specifically in this context, whether, if after applying the rules for interpreting legal texts, the statute is “so standardless that it authorizes or encourages seriously discriminatory enforcement.” United States v. Williams, 553 U.S. 285, 304 (2008) (internal citation omitted).

c. Frese’s arbitrary-enforcement allegations

Frese contends that the criminal defamation statute is unconstitutionally vague because “it is not always easy to predict what will be taken as defamatory,” given the diverse spectrum of values any particular listener might hold.³⁵ In his view, “whether an utterance” meets the criminal defamation statute’s standard of proscribed conduct— i.e. information that

³⁵ Am. Compl. (Doc. No. 31, ¶ 37).

“will tend to expose [a] living person to public hatred, contempt or ridicule”—“depends on the values of the listener.”³⁶ Additionally, he argues that “[w]ithout a well-defined standard of criminal responsibility, law enforcement officials and factfinders are given nearly unfettered discretion to apply their own standards,” resulting in “arbitrary, uneven, and selective enforcement.”³⁷

A statutory standard is not rendered unconstitutionally vague, however, just because it requires a person to conform to an imprecise normative standard that may “not mean the same thing to all people, all the time, everywhere,” see, e.g., Roth v. United States, 354 U.S. 476, 491 (1957), or because it “will sometimes be difficult to determine whether the incriminating fact it establishes has been proved.” Williams, 553 U.S. at 306; see also McKee, 649 F.3d at 62 (“[T]he mere fact that a regulation requires interpretation does not make it vague.” (citation omitted)). “[T]he law is full of instances where a man’s fate depends on his estimating rightly . . . some matter of degree.” Nash v. United States, 229 U.S. 373, 377 (1913). The vagueness doctrine does “not doubt the constitutionality” of such laws “that call for the application of a qualitative standard to real world conduct.” Johnson v. United States, 576 U.S. 591 (2015). Instead, the doctrine’s concerns are objective, focusing “on the basis of the statute itself and other personal law,” without reference to subjective perceptions or individual sensibilities. See Bouie v. City of Columbia, 378 U.S. 347, 355 n.5

³⁶ Id.

³⁷ Id. ¶ 39.

(1964).

At oral argument, Frese’s counsel agreed that the criminal defamation statute adopts part of the common law standard for civil defamation—a discernable, normative standard which New Hampshire courts have consistently construed, and New Hampshire juries have regularly applied, for over one hundred years.³⁸ E.g., Richardson v. Thorpe, 73 N.H. 532, 532 (1906) (defining defamation to include words “which tend to expose [a person] to public hatred, contempt, or ridicule”); Boyle v. Dwyer, 172 N.H. 548, 554 (2019) (same); see also Evans v. United States, 504 U.S. 255, 259 (1992) (“[W]here [the legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.”); In re Diana P., 120 N.H. 791, 794–95 (1980), overruled on other grounds by In re Craig T., 147 N.H. 739 (2002) (applying common-law definition for a key term where the statute at issue did not define the term). “Precedent from the New Hampshire courts makes clear that, under the civil standard, a defamation

³⁸ At New Hampshire common law, words could “be found to be defamatory if they hold [a person] up to contempt, hatred, scorn or ridicule, or tend to impair his [or her] standing in the community.” See, e.g., Thomas v. Tel. Publ’g Co., 155 N.H. 314, 338 (2007). The criminal defamation statute omits the latter part of this common-law definition. In doing so, it arguably imposes a higher threshold that divides criminal defamatory speech—words that tend to hold a person up to public hatred, contempt, or ridicule—from civilly actionable defamatory speech that is less likely to stoke the public’s passions.

action “cannot be maintained on an artificial, unreasonable, or tortured construction imposed upon innocent words, nor when only ‘supersensitive persons, with morbid imaginations’ would consider the words defamatory.” See, e.g., Thomson v. Cash, 119 N.H. 371, 373 (1979) (quoting Lambert v. Providence Journal Co., 508 F.2d 656, 659 (1st Cir. 1975)); Straughn v. Delta Air Lines, Inc., No. 98-396-M, 2000 WL 33667077, at *5 (D.N.H. Mar. 21, 2000) (McAuliffe, J.) (quoting Thomson, 119 N.H. at 373); Boyle, 172 N.H. at 554. The defamatory meaning must be objectively reasonable—“one that could be ascribed to the words by persons of common and reasonable understanding.” Id. And it “must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority.” Sanguedolce, 164 N.H. at 646 (quotation omitted).

The adoption of the common law defamation standard does much to rein in any alleged vagueness of the criminal defamation statute by giving persons of ordinary intelligence a familiar standard of conduct by which to abide. See People of State of Michigan, by Haggerty, v. Michigan Tr. Co., 286 U.S. 334, 343 (1932) (explaining that “commonlaw (sic) implications . . . giv[e] meaning and perspective to a vague and imperfect [statutory] outline”); Pregent v. N.H. Dep’t of Employment Sec., 361 F. Supp. 782 (D.N.H. 1973) (Bownes, J.), vacated on other grounds, 417 U.S. 903 (1974) (finding that standard borrowed from the “common-law of torts” was “not so vague and imprecise as to provide no guidance”). By adopting the common law standard, the criminal defamation statute affords equal, if not higher protections to defendants in criminal cases than those traditionally

afforded to civil litigants.³⁹ See, e.g., Winters v. New York, 333 U.S. 507, 515 (1948) (“The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”); Hutton v. State Pers. Comm’n, 113 N.H. 34, 35 (1973) (recognizing higher degree of protection given to accused in criminal matters). Moreover, narrowing constructions of the common law defamation standard applied by the New Hampshire courts, as well as the federal courts, add additional precision and guidance to prevent enforcement of the criminal defamation statute in a generally arbitrary or discriminatory way. See, e.g., Vill of Hoffman Estates, 455 U.S. at 489 (“In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.”); Whiting v. Town of Westerly, 743 F. Supp. 97, 101 (D.R.I. 1990) (Boyle, C.J.) (finding that “a limiting construction” proffered by a town removed any risk that an ordinance prohibiting sleeping in a public space was unconstitutionally vague).

Frese maintains that, despite the adoption of the common-law standard, the criminal defamation statute is still too vague based on Gottschalk v. State, 575 P.2d 289 (Alaska 1978). In Gottschalk, the Alaska Supreme Court held that Alaska’s criminal libel statute, which constructively incorporated the full, common-law standard of defamation, was both overbroad and unconstitutionally vague on its face.

³⁹ Counsel also took the position at oral argument that criminal defamation statute relatedly adopted the New Hampshire Supreme Court decisions interpreting the common law definition based on the criminal defamation statute’s textual adoption of the common law definition.

Id. at 292-96. The Court first briefly construed the statute and concluded that defamation’s common-law definition failed to define what conduct was prohibited in sufficiently definite and certain terms. Id. at 292-204. In its view, “whether an utterance [was] defamatory” under the full common-law definition “depend[ed] on the values of the listener” rather than an objective standard.⁴⁰ Id. at 292-93. But see Williams, 553 U.S. at 306 (“What renders a statute vague . . . is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is.”). Unlike New Hampshire’s criminal defamation statute, however, the Alaska statute, as construed, expansively criminalized any statement which would cause another “to be shunned or avoided,”⁴¹ 575 P.2d at 292, even if the speaker believed that his or her statements were true,⁴² id. at 296. The Court thus held that even if the statute at issue were not vague, it “would still be overbroad” for implicitly proscribing categories of

⁴⁰ The Court further explained that confusion caused by a subjective definition of defamation was “compounded in Alaska, because among the several ethnic groups which reside here there may be divergent views on what is, and what is not, disreputable.” Id.

⁴¹ The Court relied on the common-law definition because the statute at issue, AS 11.15.310 (1972), did not define “defamatory.” It found that, “[a]t common law, any statement which would tend to disgrace or degrade another, to hold him up to public hatred, contempt or ridicule, or to cause him to be shunned or avoided was considered defamatory.” Id. (emphasis added).

⁴² See AS 11.15.320 (1972) (“[T]he truth of the defamatory or scandalous matter is a defense only when uttered or published with a good motive and for a justifiable end.”).

speech that were indisputably protected under the First Amendment. 575 P.2d at 296 (recognizing that the Alaskan statute proscribed truthful speech made with bad intent where public officials, public figures, and issues of general or public interest were involved).

In the 40 years since Gottschalk was decided, the U.S. Supreme Court and the Circuit Courts of Appeals have published numerous decisions refining how courts approach and evaluate modern vagueness challenges (and overbreadth challenges) to statutes that arguably touch upon First Amendment freedoms. See, e.g., Williams, 553 U.S. 285; Act Now, 846 F.3d at 410–412; McKee, 649 F.3d at 62. During that time, no state or federal court has ruled that a state statute criminalizing knowingly false defamatory speech, as that phrase is understood at common law, was unconstitutionally vague (or overbroad) on its face. But cf. Williamson v. State, 295 S.E.2d 305, 305 (Ga. 1982) (holding that statute prohibiting communications that “tend[ed] to provoke a breach of the peace” was overbroad and unconstitutionally vague under Gooding v. Wilson, 405 U.S. 518 (1972)). By comparison, at least one district court has found that a defamation ordinance criminalizing speech “tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends” was not unconstitutionally vague on its face. How v. City of Baxter Springs, Kan., 369 F. Supp. 2d 1300, 1306 (D. Kan. 2005). These developments undercut Frese’s reliance on Gottschalk to breathe life into his facial vagueness claim.

Frese's examples highlighting the history of selective criminal defamation prosecutions in America are similarly unavailing. In support of this argument, Frese contends that even though criminal defamation is "committed in this country a thousand times, and possibly ten or twenty thousand times, daily," criminal defamation statutes like New Hampshire's are "sporadically enforced," often on a political basis.⁴³ In his view, New Hampshire's particular misdemeanor criminal process—which authorizes police officers to initiate and prosecute criminal defamation actions, and grants no right to a jury or court-appointed counsel for criminal defamation claims—exacerbates the risk that the criminal defamation statute may be misused. Indeed, Frese's interactions with Exeter police in 2018 anecdotally illustrate the attempted use of the criminal defamation statute to prosecute speech that defamed a retired Exeter police officer, even though the New Hampshire Department of Justice later concluded that there was no probable cause to arrest or prosecute Frese.⁴⁴

⁴³ Frese's Opp. to Mot. to Dismiss (Doc. No. 14, at 18-19) (quoting The Social Utility of the Criminal Law of Defamation, 34 Tex. L. Rev. 984, 984 (1956)); see also id. (noting that "one study of 77 criminal defamation investigations and prosecutions from 1965 through 2002, found that 68.8 percent of cases involved 'statements about public officials, public figures, or matters of public concern,'" and "that law enforcement officers and elected officials were the two most frequent complainants, comprising 19.5 percent and 14.3 percent of cases, respective." (quoting Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison, 37-38, Media Law Resource Center Bulletin (Mar. 2003)).

⁴⁴ See Part II.A, supra, at 4 (citing NHDOJ June 4, 2018 Mem. (Doc. No. 31-3, at EXE008-013) (concluding that the Exeter Police

The facts of Frese’s 2018 prosecution are concerning, as is information suggesting that criminal defamation statutes are routinely enforced in a selective, political manner. See also Frese, 425 F. Supp. 3d at 82 n.44 (questioning the “kinds of proof necessary to prove a criminal defamation case before a [New Hampshire] judge . . . since individuals prosecuted for criminal defamation have no right to a jury”).⁴⁵ But “identified instances of a statute’s misapplication do not tell us whether the law is [facially] unconstitutional” Agnew, 920 F.3d at 60 (internal citations omitted). Though similar allegations could bolster an as-applied challenge or some other claim against the New Hampshire criminal process for misdemeanors, Frese has not raised such claims in his amended complaint. Instead, his complaint focuses on unconstitutional vagueness—which requires a textual analysis. Frese’s enforcement-based allegations thus do not support his facial vagueness claim.⁴⁶

As repeated throughout this order, the ultimate question for a facial vagueness claim is whether the criminal defamation statute is so standardless as to

Department had “arrested and charged Frese without probable cause of actual malice—that is, that he made the statements at issue with knowledge that they were false.”)).

⁴⁵ Doc. No. 19, at 23 n.44.

⁴⁶ In reaching this conclusion, the court does not intend to suggest that the risk of discriminatory enforcement of the criminal defamation statute is actually insignificant, or that New Hampshire’s misdemeanor criminal process—with all its particular idiosyncrasies, including the ability of police officers to charge and prosecute misdemeanor crimes—does not result in pressures increasing the likelihood that defendants plead guilty to defamation charges to avoid further criminal proceedings.

permit selective or discriminatory enforcement. See, e.g., Bronstein, 849 F.3d at 1107 (explaining that a statute is unconstitutionally vague on its face if, after applying the rules for interpreting legal texts, a challenged statute specifies no discernable “standard of conduct . . . at all” (internal citation omitted)); see also McKee, 649 F.3d at 62 (“[A] statute is unconstitutionally vague only if it ‘prohibits . . . an act in terms so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application.’” (internal citation omitted)). Upon applying the tools of statutory construction, the language of the statute articulates a sufficiently discernible and familiar standard as to prevent such enforcement concerns by requiring that the defendant subjectively believe that his speech is false and that his speech is defamatory. These are clear questions of fact that are subject to a “true-or-false” determination. Williams, 553 U.S. at 306–07 (internal citation omitted)

To be sure, it may be difficult in some cases to determine whether these clear requirements have been met. “But courts and juries every day pass upon knowledge, belief and intent—the state of men’s minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred.” And they similarly pass every day upon the reasonable import of a defendant’s statements

Id. (internal citation omitted). Frese has failed to show otherwise, either through the factual allegations in his amended complaint or in arguments raised in opposition to the State’s motion to dismiss. He has thus failed to meet his pleading burden for a facial

vagueness claim under the Fourteenth Amendment.

3. Frese's as-applied challenge

Lastly, the State contends that Frese has not adequately alleged an as-applied vagueness claim to the criminal defamation statute because he “does not allege that [the statute] is constitutional as applied to him, but rather ‘as applied in in the context of New Hampshire’s system for prosecuting Class B misdemeanors.’”⁴⁷ Frese concedes that he has not pled a traditional as-applied claim; instead, he contends to have pled a hybrid vagueness claim that is predominately facial in the sense that it is not limited to [his] particular case,” but also as-applied “in the sense that it does not seek to strike the [statute] outside the context of New Hampshire’s particular misdemeanor process.”

With due regard to Frese’s characterization of the claim, “[t]he label is not what matters.” See John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). Both parties agree that “[t]he important point” is that Frese’s “as-applied” vagueness claim “and the relief that would follow . . . reach beyond [his] particular circumstances” and “therefore must satisfy [the] standard for a facial challenge to the extent of that reach.”⁴⁸ See John Doe No. 1, 561 U.S. at 194; Project Veritas Action Fund v. Rollins, No. 19-1586, 2020 WL 7350243, at *9 (1st Cir. Dec. 15, 2020) (finding that challenge with both “as-applied” and “facial” characteristics must satisfy the “standards for a

⁴⁷ State’s Mot. to Dismiss Am. Compl. Mem. (Doc. No. 33-1, at 13) (quoting Am. Compl. ¶ 36).

⁴⁸ State’s Reply to Mot. to Dismiss Am. Compl. (Doc. No. 41, ¶ 8); Frese Obj. at 7-8 (same).

facial challenge to the extent of that reach” (quoting John Doe No. 1, 561 U.S. at 194)). For the reasons discussed in this court’s facial vagueness analysis, Frese’s “hybrid” claim falls short of this standard. He has therefore failed to state either a facial or an as-applied vagueness claim upon which relief can be granted. See Fed. R. Civ. P. 12(b).

IV. Conclusion

Laws criminalizing the purposeful communication of knowingly false defamatory speech remain in force in many states across the country. It is not this district court’s role to determine whether these laws are wise or effective. See Vill. of Hoffman Estates, 455 U.S. at 505. The court only considers whether Frese’s allegations can sustain an overbreadth or a void-for-vagueness challenge against the specific language of New Hampshire’s criminal defamation statute.

Previously, the State failed to demonstrate that Frese’s allegations did not pass muster under Rule 12(b) based on the arguments and case authority it had presented in its first motion to dismiss. See Frese, 425 F. Supp. 3d at 82.⁴⁹ At that time, the State focused on the criminal defamation statute’s scienter requirement rather than the statute’s standard for defamation;⁵⁰ asserted, without support, that the

⁴⁹ See Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No. 19, at 24) at 20-23.

⁵⁰ See State’s Mot. to Dismiss Mem. (Doc. No. 11-1, at 11-12) (examining the definitions of the terms “purposely” and “knowingly,” but not for the clause “will tend to expose [a] living person to hatred, contempt, or ridicule.”). The court specifically found that the State’s cited authorities for this argument were readily distinguishable and thus not persuasive in a Rule 12(b) posture. Oct. 25, 2019 Order Denying Mot. to Dismiss (Doc. No.

statute had “no phrases or terms like ‘defamatory’” that might require definition; and submitted no case authority that directly refuted Frese’s argument that criminal defamation, as defined by the statute, rested largely on subjective assessments of the speech in question.⁵¹ The court found the State’s showing to be lacking—a position validated by the State’s recent and better-supported filings—and thus declined to rule that the criminal defamation statute was not constitutionally vague as a matter of law. Possibly distracted by its busy criminal trial calendar, as well as its concerns about what the discovery process would reveal about New Hampshire’s unique police-staffed prosecutions of unrepresented defendants in the context of criminal defamation, the court perhaps should have done more on its own to discover the arguments now made and the authorities now cited by the State. But see Shaner v. Chase Bank USA, 587 F.3d 488 (1st Cir. 2009) (“It is not [the court’s] job, especially in a counseled civil case, to create arguments for someone who has not made them or to assemble them from assorted hints and references scattered throughout the brief.” (internal citation omitted)); United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work, create the ossature for the argument, and put flesh on its bones. . . . [A] litigant has an obligation ‘to spell out its arguments

19, at 20-21).

⁵¹ See State’s Mot for Reconsideration (Doc. No. 21) at 2-3 (improperly introducing new arguments on the issue of vagueness based on the D.C. Circuit Court of Appeal’s decisions in Bronstein and Agnew, and Judge McCafferty’s decision in Saucedo).

squarely and distinctly,' or else forever hold its peace.”
(internal citation omitted)).

This is no longer the case. Applying the principles articulated above to Frese’s amended allegations, Frese’s allegations cannot sustain a void-for-vagueness or overbreadth claim. Accordingly, the court grants the State’s Rule 12(b) motion on sufficiency grounds and dismisses Frese’s amended complaint in its entirety.⁵²

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: January 12, 2021

cc: Brian M. Hauss, Esq.
Emerson J. Sykes, Esq.
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⁵² Doc. No. 33 (motion to dismiss); Doc. No. 31 (amended complaint).

APPENDIX F

UNITED STATES DISTRICT COURT DISTRICT OF NEW HAMPSHIRE

Robert Frese

v.

Civil No. 18-cv-1180-JL
Opinion No. 2019 DNH 184

Gordon J. MacDonald,

In his official capacity
only as Attorney General
of the State of New
Hampshire

MEMORANDUM OPINION

This case concerns the constitutional permissibility of criminal defamation enforcement. The Attorney General of the State of New Hampshire (“the State”) has moved to dismiss a pre-enforcement challenge to New Hampshire’s criminal defamation statute, N.H. Rev. Stat. 644:11, on Article III standing and sufficiency grounds. Plaintiff Robert Frese, a self-described “outspoken” New Hampshire resident twice charged with criminal defamation, submits the statute is unconstitutional under the First and Fourteenth Amendments because it fails to provide fair notice of what conduct it prohibits and is highly susceptible to arbitrary enforcement. The question at this stage is two-fold: Does Frese’s alleged fear of future prosecution amount to an “injury in fact” that confers standing to sue? And if so, does his complaint sufficiently plead that the statute is unconstitutionally vague? While the ultimate permissibility of the statute’s enforcement remains to

be determined, the preliminary answer to these standing and sufficiency questions is yes.

At the motion-to-dismiss stage, a plaintiff in a pre-enforcement case need only plead an intention to engage in conduct arguably affected with constitutional interest, but proscribed by a statute, and a credible threat of prosecution to allege an Article III injury in fact. Frese has cleared this bar by alleging an intent to publicly criticize law enforcement and public officials. Such speech occupies “the highest rung of the hierarchy of First Amendment values,” see O’Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993), and is arguably proscribed by the criminal defamation statute’s sweeping language. The threat of enforcement is also credible, given that in 2018, a municipal police department arrested and prosecuted Frese for accusing an officer of corruption. He has therefore alleged an injury in fact that confers standing to sue.

Additionally, to plead a void-for-vagueness claim, a plaintiff need only allege that a statute either fails to provide people of ordinary intelligence fair notice of the conduct it prohibits or encourages arbitrary and discriminatory enforcement. Again, Frese’s allegations satisfy both theories. Although the statute’s scienter element requires that the speaker know his speech is false and will tend to be defamatory, a question remains as to whether the statute adequately delineates the threshold between speech that is criminal rather than merely provocative. Additionally, Frese’s allegations give reason to question whether the criminal defamation statute, when construed in the context it is enforced, encourages arbitrary and selective enforcement by municipal police departments, which retain the

ability to prosecute misdemeanors like criminal defamation without the oversight of a licensed, state-sanctioned attorney. As such, Frese has stated a cognizable claim for relief. This court has jurisdiction under 28 U.S.C. § 1331.

I. Background

The following draws from the complaint’s non-conclusory allegations and the submitted documents referenced therein. See [Gilbert v. City of Chicopee](#), 915 F.3d 74, 80 (1st Cir. 2019).

New Hampshire’s criminal defamation statute, N.H. Rev. Stat. 644:11, provides: “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.”¹ Infractions carry no jail time, but can result in a fine of up to \$1,200, plus a 24 percent penalty assessment. See [id.](#) 651:2(IV)(a).

Municipal police departments in New Hampshire have been empowered since colonial times to initiate prosecutions for misdemeanors like criminal defamation without input or approval from a state-employed and legally trained prosecutor.²

¹ As used in the statute, “public” includes any professional or social group of which the victim of the defamation is a member. See [id.](#) 644:11(II).

² Compl. (doc. no. 1) ¶ 7; see also [State v. La Palme](#), 104 N.H. 97, 98 (N.H. 1962) (citing [State v. Urban](#), 98 N.H. 346, 347 (N.H. 1953) (“[T]he prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791 and is still permissible under existing statutes.”)); see generally [State v. Martineau](#), 148 N.H. 259, 260-62 (N.H. 2002) (tracing the history of this practice at common law back to practices employed by the colonial courts); N.H. Rev. Stat. 41:10-a (recognizing

Because charges carry no possibility of imprisonment, criminal defamation defendants are not entitled to a trial by jury. See N.H. Const. Pt. 1, Art. 20; State v. Foote, 149 N.H. 323, 324 (N.H. 2003). Additionally, state law does not afford indigent criminal defamation defendants the right to court-appointed counsel. See State v. Westover, 140 N.H. 375, 378 (1985). While criminal defamation prosecutions are not common, records from the New Hampshire Judicial Branch suggest that over the past ten years, approximately 25 defendants were charged under the criminal defamation statute.³

Plaintiff Robert Frese, a self-described “outspoken resident of Exeter, New Hampshire,” is one such individual and, in fact, has been prosecuted twice for criminal defamation. In 2012, the Hudson Police Department interviewed Frese after a local life coach complained about comments Frese posted on the online platform Craigslist.⁴ In those posts, Frese repeatedly called the coaching business a scam and claimed the coach had been charged with distributing heroin.⁵ The Hudson Police Department ultimately charged Frese with harassment and criminal defamation and obtained an arrest warrant signed by a justice of the peace.⁶ Frese, without counsel, pleaded guilty to the charges and was fined \$1,488, with \$1,116 suspended on the condition he stay in

power of the state police to prosecute misdemeanors).

³ Compl. ¶ 8; see also Courts Chapter 91-A Response (doc. no. 1-1) (judicial branch records re: criminal defamation cases).

⁴ Compl. ¶ 9.

⁵ See Hudson Prosecution Docs. (doc. no. 1-2) at HUD013-014.

⁶ See id. at HUD019-022.

good behavior for two years.⁷

More recently, in 2018, the Exeter Police Department arrested and charged Frese with criminal defamation after he pseudonymously posted comments on the Exeter News-Letter's Facebook page concerning a retiring Exeter police officer.⁸ In his first comment, Frese, under the pseudonym "Bob William," stated that the retiring officer was "the dirtiest most corrupt cop that I have ever had the displeasure of knowing . . . and the coward Chief Shupe did nothing about it."⁹ The Exeter News-Letter removed this comment at the police department's request.¹⁰ After the comment was deleted, Frese submitted a second comment under the pseudonym "Bob Exeter" stating: "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" ¹¹

In the following days, Exeter Detective Mulholland discussed these comments with Chief Shupe, who in turn denied being aware of criminal acts by the retiring officer, denied covering up criminal conduct,¹² and "expressed his concern" that "false and baseless" comments "were made in a public forum."¹³ Upon reviewing the criminal defamation

⁷ Compl. ¶ 10.

⁸ Id. ¶¶ 11-12.

⁹ Id. ¶ 12 (quoting Exeter Prosecution Docs. (doc. no. 1-3) at EXE091).

¹⁰ Id. ¶ 13.

¹¹ Id. ¶ 14 (quoting Exeter Prosecution Docs. at EXE092).

¹² Id. ¶ 18.

¹³ Id. ¶ 16 (quoting Narrative for Detective Mullholland, Exeter

statute, both officers “believed that Frese crossed a line from speech to a violation of law.”¹⁴ The next day, police officers interviewed Frese, who insisted his comments were true and revealed no other information suggesting he believed his online comments to be false.¹⁵ On this record, Detective Mulholland determined that “no credible information exist[ed] to believe that [the retiring officer] committed the acts Frese suggest[ed].”¹⁶ He therefore filed a criminal complaint against Frese.¹⁷ Based on this complaint and supporting police affidavits, a New Hampshire Circuit Court judge found probable cause to arrest Frese.¹⁸

Frese’s 2018 arrest caused public controversy.¹⁹ Behind the scenes, the Rockingham County Attorney’s Office, with which the Exeter Police Department contracts to prosecute its cases, sought the advice of the N.H. Office of the State.²⁰ In June 2018, the State’s Civil Rights Division responded with a memorandum finding a lack of probable cause that Frese made his comments with “actual malice.”²¹

Prosecution Docs. at EXE019).

¹⁴ Id. (quoting Exeter Prosecution Docs. at EXE019).

¹⁵ Exeter Prosecution Docs. at EXE20.

¹⁶ Compl. (doc. no. 1) ¶ 19.

¹⁷ Id. ¶¶ 19-20; see also Exeter Prosecution Docs. at EXE029.

¹⁸ See Exeter Prosecution Docs. at EXE024-27.

¹⁹ Compl. ¶ 23.

²⁰ See Exeter Prosecution Docs. Part II (doc. no. 1-4) at EXE 108-111.

²¹ Id. ¶ 24 (citing NHDOJ June 4, 2018 Mem. (doc. no. 1-3) at EXE008-013).

Three days later, the Exeter Police Department dismissed its criminal complaint.²²

In light of these two arrests, Frese now claims that he fears future arrests or prosecutions for speech criticizing law enforcement and other public officials.²³ He alleges, on information and belief, that “individuals throughout New Hampshire routinely violate the criminal defamation statute, but [he] was arrested and prosecuted because he criticized law enforcement officials.”²⁴ As such, he filed this lawsuit requesting declaratory and injunctive relief.

II. Applicable legal standard

A. Standing

“The Constitution limits the judicial power of the federal courts to actual cases and controversies.” Katz v. Pershing, LLC, 672 F.3d 64, 72 (1st Cir. 2012) (citing U.S. Cons. Art. III, § 2 cl. 1). “A case or controversy exists only when the party soliciting federal court jurisdiction (normally, the plaintiff) demonstrates ‘such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.’” Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

“To satisfy the personal stake requirement a plaintiff must establish each part of a familiar triad: injury, causation, and redressability.” Id. (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)); see also Massachusetts v. U.S. Dep’t of Health

²² Id. ¶ 25.

²³ Id. ¶ 27.

²⁴ Id. ¶ 35.

& Human Servs., 923 F.3d 209, 221 (1st Cir. 2019) (explaining that the burden of alleging facts sufficient to prove these elements rests with the party invoking federal jurisdiction). “[E]ach element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof,” which is, “with the manner and degree of evidence required at the successive stages of the litigation.” Katz, 672 F.3d at 72 (quoting Lujan, 504 U.S. at 561) (internal quotation marks omitted).

In considering a pre-discovery grant of a motion to dismiss for lack of standing, the court “accept[s] as true all well-pleaded factual averments in the plaintiff’s . . . complaint and indulge[s] all reasonable inferences therefrom in his favor.” Id. at 70. And while generally the court does not consider materials outside the pleadings on a motion to dismiss, it may look beyond the pleadings – to affidavits, depositions, and other materials — to determine jurisdiction. See Gonzales v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Strahan v. Nielsen, 18-CV-161, 2018 WL 3966318, at *1 (D.N.H. Aug. 17, 2018).

B. Statement of a claim

Rule 12(b)(6) imposes a similar standard. See Katz, 672 F.3d at 71 (citing Nisselson v. Lernout, 469 F.3d 143, 150 (1st Cir. 2006)). The court makes determinations about the sufficiency of a complaint through a “holistic, context-specific analysis.” Gilbert, 915 F.3d at 80. First, it “isolate[s] and ignore[s] statements in the complaint that simply offer legal labels and conclusions or merely rehash cause-of-action elements.” Zenon v. Guzman, 924 F.3d 611, 615 (1st Cir. 2019) (citations and quotation marks

omitted). It then “evaluate[s] whether the remaining factual content supports a ‘reasonable inference that the defendant is liable for the misconduct alleged.’” In re Curran, 855 F.3d 19, 25 (1st Cir. 2017) (quoting Shay v. Walters, 702 F.3d 76, 82 (1st Cir. 2012)); see also Glob. Network Commc’ns, Inc. v. City of New York, 458 F.3d 150, 155 (2d Cir. 2006) (“The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff’s statement of a claim for relief without resolving a contest regarding its substantive merits.”).

In doing so, the court must accept “all well-pled facts in the complaint as true” and construe all reasonable inferences in the plaintiff’s favor. See Gilbert, 915 F.3d at 80. In addition, the court may consider documents attached as exhibits or incorporated by reference in the complaint. See Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 321 (1st Cir. 2008). But the court “need not give weight to bare conclusions, unembellished by pertinent facts.” Shay, 702 F.3d at 82-83. If the complaint’s factual averments are “too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture,” dismissal will be warranted. SEC v. Tambone, 597 F.3d 436, 442 (1st Cir. 2010) (en banc).

III. Analysis

The State contends that the complaint should be dismissed for two reasons. First, he contends that the court lacks subject matter jurisdiction because Frese has not alleged an intent to engage in speech that is both protected under the First Amendment and proscribed by the statute, as required for pre-enforcement standing to sue. Second, he argues that

Frese has failed to state a void-for-vagueness claim under the Fourteenth Amendment because the criminal defamation statute “define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited,” and imposes no criminal penalties unless a person knows his or her speech is defamatory.²⁵ As discussed herein, the court finds that Frese has adequately pleaded his standing to challenge the criminal defamation statute, as well as a claim that the statute is unconstitutionally vague.

A. Standing

The State first argues that Frese cannot establish standing because he has not alleged an intention to engage in conduct proscribed by the criminal defamation statute, N.H. Rev. Stat. 644:11. The statute only criminalizes speech that a speaker “knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule.” Id. (emphasis added). The State contends that because Frese has not alleged he intends to engage in speech he knows to be false and defamatory, Frese has failed to allege an intent to engage in speech proscribed by the statute.²⁶ Alternatively, the State contends that had Frese alleged such an intent, his planned conduct would enjoy no constitutional protection.²⁷ The court disagrees: Supreme Court

²⁵ Def.’s Mot. to Dismiss Mem. (doc. no. 11-1) at 9 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983) (internal quotation marks omitted)).

²⁶ See Def.’s Mot. to Dismiss Mem. at 8-9.

²⁷ Both parties agree that such speech is not traditionally protected by the First Amendment. See Compl. (doc. no. 1) ¶ 33; Def.’s Mot. to Dismiss Mem. at 9.

precedent makes clear that a plaintiff in a pre-enforcement challenge of a law's constitutionality need not confess that he or she will in fact violate that law before filing suit.

“The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.” Susan B. Anthony List v. Driehaus, 573 U.S. 149, 157 (2014) (quoting Clapper v. Amnesty Int’l USA, 568 U.S. 398, 408 (2013)). “In keeping with the purpose of this doctrine,” the courts’ “standing inquiry has been especially rigorous when reaching the merits of the dispute would force [it] to decide whether an action taken by” a state legislature or executive was unconstitutional. Clapper, 568 U.S. at 408 (quoting Raines v. Byrd, 521 U.S. 811, 819-20 (1997)) (internal quotation marks omitted); see Griswold v. Connecticut, 381 U.S. 479, 481 (1965).

The “[f]irst and foremost” concern in standing analysis is the requirement that the plaintiff establish an injury in fact, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (alteration in original) (quoting Steel Co. v. Citizens for a Better Env’t, 523 U.S. 83 (1998)), which “helps to ensure that the plaintiff has a ‘personal stake in the outcome of the controversy,’” SBA List, 134 S. Ct. at 2341 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)). To satisfy Article III, the injury must be “concrete and particularized” and “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Id. (quoting Lujan, 504 U.S. at 560) (internal quotation marks omitted).

Here, Frese mounts a pre-enforcement challenge to the criminal defamation statute; in other

words, he is not a defendant in a pending criminal case. “In certain circumstances, ‘the threatened enforcement of a law’ may suffice as an ‘imminent’ Article III injury in fact.” Reddy v. Foster, 845 F.3d 493, 500 (1st Cir. 2017) (quoting SBA List, 134 S. Ct. at 2342). “The rationale for pre-enforcement standing is that a plaintiff should not have to ‘expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.’” Id. (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)). “An allegation of future injury may suffice if the threatened injury is ‘certainly impending,’ or [if] there is a “substantial risk” that the harm will occur.” SBA List, 134 S. Ct. at 2341 (quoting Clapper, 568 U.S. at 414 n.5).

In the context of the First Amendment, “two types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution.” Mangual v. Rotger-Sabat, 317 F.3d 45, 56 (1st Cir. 2003). The first is when “the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.” Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 298 (1979) (emphasis added); accord Mangual, 317 F.3d at 56. The second is when a plaintiff “is chilled from exercising [his or] her right to free expression or forgoes expression in order to avoid enforcement consequences.” N.H. Right to Life Political Action Comm. v. Gardner, 99 F.3d 8, 13 (1st Cir. 1996). Frese’s opposition focuses on the former type of injury. He contends that the threat that the government will prosecute him in the future for his speech constitutes an Article III injury in fact. The

court agrees, finding that his allegations satisfy all three elements for a credible threat-of-enforcement injury.

1. Constitutional interest

First, Frese has alleged “an intention to engage in a course of conduct arguably affected with a constitutional interest,” see Babbitt, 442 U.S. at 298, particularly, “speech criticizing law enforcement and other public officials.”²⁸ “[T]he right to criticize public officials’ is protected by the First Amendment.” Bourne v. Arruda, No. 10-cv-393, 2011 U.S. Dist. Lexis 62332, at *40 (D.N.H. June 20, 2011) (quoting Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 588 (6th Cir. 2008)). Although the complaint identifies no specific statements that Frese intends to make in the future, it intimates that Frese intends to engage in speech resembling his past critiques, which include criticism of law enforcement officers.²⁹ See Martin v. Evans, 241 F. Supp. 3d 276, 283 (D. Mass. 2017) (Saris, C.J.) (concluding that Supreme Court precedent does not require plaintiffs to allege specific language to establish a pre-enforcement injury in fact). Such speech is certainly “affected with a constitutional interest.” Martin, 241 F. Supp. 3d at 282-83; see also See v. City of Elyria, 502 F.3d 484, 493 (6th Cir. 2007) (“Statements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protection.”); Mangual, 317 F.3d at 58 (finding a pre-enforcement injury in fact where a journalist stated

²⁸ Compl. (doc. no. 1) ¶ 27.

²⁹ See also Pl.’s Obj. to Mot. to Dismiss (doc. no. 14) at 5 (“He will continue to express his views on what he believes is a corrupt police department in Exeter . . .”).

“an intention to continue covering police corruption”); O’Connor, 994 F.2d at 915 (holding that speech concerning the alleged abuse of public office occupies “the highest rung of the hierarchy of First Amendment values”); Wagner v. City of Holyoke, 241 F. Supp. 2d 78, 91 (D. Mass. 2003) (holding that statements comprising evidence of possible corruption within a police department “are precisely the type of communications that demand strong First Amendment protection”).

2. *Conduct proscribed*

Second, the criminal defamation statute “arguably . . . proscribe[s]” Frese’s intended future conduct.³⁰ See SBA List, 573 U.S. at 162 (quoting Babbitt, 442 U.S. at 298). The criminal defamation statute sweeps broadly, carving out no exceptions for speech concerning law enforcement or other public officials. See also Mangual, 317 F.3d at 48 (finding credible threat of prosecution of a journalist’s speech concerning police corruption where libel statute did not “carve out any exception” for such speech). The Exeter Police Department already commenced a criminal defamation action against Frese in 2018 when he commented that “Officer Shupe did nothing” and covered up “the dirtiest most corrupt cop that [Frese] ever had the displeasure of knowing.”³¹ Although the department eventually followed the

³⁰ While at first blush, it may appear that “arguably,” as used in Babbitt, modifies only the first requirement for a pre-enforcement injury (conduct arguably affected with a constitutional interest), SBA List makes clear that “arguably” also applies to the second element (conduct arguably proscribed). See 573 U.S. at 162.

³¹ Compl. (doc. no. 1) ¶¶ 13-14.

advice of the State's Civil Rights Division in terminating the prosecution, Frese was nonetheless arrested and, for a time, prosecuted.

The State, relying on Blum v. Holder, 744 F.3d 790 (1st Cir. 2014), argues that Frese's fear of enforcement does not suffice because he has not asserted that he plans to communicate "information which he knows to be false" and "knows will tend to expose [a] living person to public hatred, contempt."³² Moreover, it counters that "the 'outspoken' Mr. Frese cannot, via inadvertent gaffe or blunder, stumble into a violation of the Criminal Defamation Statute" because it "commands a truly culpable intent – purpose and knowledge."³³ But as the Supreme Court noted in SBA List, this argument "misses the point." See 573 U.S. at 163.

In SBA List – decided three months after Blum v. Holder – the Supreme Court rejected a similar argument supporting an Ohio statute criminalizing false political advertising.³⁴ 573 U.S. at 151-52. There, an advocacy group had filed a pre-enforcement suit for declaratory and injunctive relief after it had accused a congressional candidate of supporting an Affordable Care Act measure that included "taxpayer-

³² Def.'s Mot. to Dismiss Mem. (doc. no. 11-1) at 8-9.

³³ Id. at 9.

³⁴ In particular, the statute made it a crime for any person to "[m]ake a false statement concerning the voting record of a candidate or public official,' [Ohio Rev. Code] § 3517.21(B)(9), or to '[p]ost, publish, circulate, distribute, or otherwise disseminate a false statement concerning a candidate, either knowing the same to be false or with reckless disregard of whether it was false or not,' § 3517.21(B)(10).1." SBA List, 573 U.S. at 152.

funded abortion,” and an elections panel had found probable cause that this accusation violated the Ohio statute.³⁵ Id. at 154. On appeal, the Sixth Circuit Court of Appeals held that the group’s fear of enforcement did not engender an Article III injury in fact because the group “ha[d] not said it ‘plan[ned] to lie or recklessly disregard the veracity of its speech.’” Id. at 156 (quoting appellate court). The Supreme Court found, however, that this “miss[ed] the point,” as “[n]othing in [its] decisions require[d] a plaintiff who wishe[d] to challenge the constitutionality of a law to confess that he will in fact violate that law.” 573 U.S. at 164. Additionally, the Court observed that the group’s insistence its statements were true did not prevent the Ohio Elections Commission from finding probable cause of a violation. Id. It therefore found the petitioners had demonstrated an injury in fact sufficient for Article III standing. Id. at 168.

Even if Frese does not plan in the future “to lie or recklessly disregard the veracity of his speech,” see id. at 156, his complaint sufficiently alleges that the State’s prosecutorial arms, which include non-attorney police officers, retain overly broad discretion to determine whether an individual knew his speech to be true or false. Like the SBA List plaintiff, Frese’s insistence that his 2018 comments were true did not prevent Exeter police officials from filing a criminal complaint against him or prevent a Circuit Court

³⁵ Upon a finding of probable cause of a violation of the statute, Ohio law required the elections panel to hold a full hearing. See id. at 152. If the panel determined by clear and convincing evidence that a party violated the false statement statute, the panel would then refer the matter to a county official to prosecute the violation as a first-degree misdemeanor (punishable by up to six months of imprisonment and/or up to a \$5000 fine). Id.

judge from finding probable cause to arrest Frese based on the police's filings. Accordingly, Frese has demonstrated that his intended future conduct is "arguably . . . proscribed by the statute." See Babbitt, 442 U.S. at 298.

3. *Credible threat of enforcement*

Finally, the threat of future enforcement is credible, given Frese's history with the criminal defamation statute. See SBA List, 573 U.S. at 149. As the Court observed in SBA List, "past enforcement against the same conduct is good evidence that the threat of enforcement is not chimerical." 573 U.S. at 149 (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)) (internal quotation marks omitted) (finding credible threat of prosecution where an administrative body had already found probable cause to believe the plaintiff knowingly lied). Here, two municipal police departments previously arrested and filed criminal charges against Frese for his speech, and the most recent charge concerned speech criticizing alleged police corruption – the very type of constitutionally protected speech that Frese allegedly plans to make in the future. This prosecution, and to a lesser extent, his 2012 prosecution, constitute "good evidence" that he faces a credible threat of enforcement going forward. See SBA List, 573 U.S. at 164; see also, e.g., City of Houston v. Hill, 482 U.S. 451, 459 n.7 (1987) (agreeing with the appellate court that the plaintiffs' "record of arrests under [an] ordinance and his adopted role as citizen provocateur" gave him standing to challenge the facial validity of the ordinance (quoting 789 F.2d. at 1107)).

This threat is amplified by the fact that in New

Hampshire, initiation of the criminal process is not limited to the State or to similar state, county, or municipally employed attorneys. See SBA List, 573 U.S. at 164; Mangual, 317 F.3d at 59. Under New Hampshire law, individuals can initiate private prosecutions for criminal offenses that does not carry a possible penalty of imprisonment. See State v. Tucker v. Gratta, 101 N.H. 87, 87 (1957) (referring to private prosecutions as “not uncommon”). Since as early as 1827, New Hampshire courts have recognized the potential “dangers to both the public interest and to the sound administration of justice” that private prosecutions pose. See Richard B. McNamara, New Hampshire Practice, Criminal Practice and Procedure § 15.04[1] (6th ed. 2017) (quoting Waldron v. Tuttle, 4 N.H. 149, 151 (1827)). Although the State or his deputy may enter a “nolle prosequi” on a private criminal complaint, see, e.g., State v. Rollins, 129 N.H. 684, 685 (N.H. 1987), this authority does not prevent private litigants from haling speakers like Frese into court on criminal charges in the first instance.

The ability to prosecute misdemeanor crimes similarly extends to law enforcement officers, who commonly do so without the approval or guidance of a prosecuting attorney. See La Palme, 104 N.H. at 98. “[T]he prosecution of misdemeanors by police officers is a practice that has continued in one form or another since 1791 and is still permissible under existing statutes.” Id. at 98-99 (citing Urban, 98 N.H. at 347); see generally Martineau, 148 N.H. at 260-62 (tracing the history of this practice at common law back to practices employed by the colonial courts); N.H. Criminal Practice and Procedure, supra, § 2.03. This practice is also implicitly recognized, if not expressly

authorized, by statute. See, e.g., N.H. Rev. Stat. 41:10. Both times Frese was charged with criminal defamation, municipal law enforcement initiated the proceedings. The second criminal complaint concerned criticism of the executing officer's supervisor, Chief Shupe.³⁶ And while the Attorney General eventually intervened by opining there was no probable cause to support the charge,³⁷ the Attorney General does not routinely exercise preliminary oversight over municipal police prosecutions.

Both the Supreme Court and the First Circuit Court of Appeals have found that similar enforcement regimes heightened enforcement risks. In Mangual, for example, the Court of Appeals found that even if the Puerto Rico Department of Justice disavowed any intention to prosecute criminal libel cases, the plaintiff “would still have a credible fear of having criminal charges against him” because the power to prosecute was not limited to a government prosecutor or agency, explaining:

Under Puerto Rico law, if the crime is a misdemeanor, individuals may file a complaint with the police or pro se; it is after probable cause is shown and the matter is set for trial that the Justice Department steps in to prosecute the case. The Secretary [of Justice] exercises no control over whom the local police choose to prosecute for misdemeanors;

³⁶ The court makes this observation without forming any opinion about the propriety or merits of the underlying prosecutorial decision.

³⁷ NHDOJ June 4, 2018 Mem. (doc. no. 1-3) at EXE011.

indeed, as the history of [an intervenor's] prosecution indicates, at least one local police department prosecuted despite a federal court injunction ordering it not to prosecute. The plaintiff's credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that the reporter would be convicted.

Mangual, 317 F.3d at 59. Likewise, in SBA List, the Supreme Court found that the credibility of a future enforcement threat was "bolstered" where "the false statement statute allow[ed] 'any person' with knowledge of the purported violation to file a complaint. Because the universe of potential complainants is not restricted to state officials who are constrained by explicit guidelines or ethical obligations, there is a real risk of complaints from, for example, political opponents." 573 U.S. at 164.

In light of these factors, Frese's allegations demonstrate an injury in fact sufficient for Article III standing. Accordingly, the court has jurisdiction to consider whether Frese has sufficiently alleged First and Fourteenth Amendment claims.

B. Void for vagueness claim³⁸

³⁸ As an alternative argument, Frese also contends that "to the extent [Garrison v. Louisiana, 379 U.S. 64 (1964),] holds that a criminal defamation law complies with the First Amendment if it includes an actual malice requirement, the case was wrongly decided." See Pl.'s Obj. to Mot. to Dismiss (doc. no. 14) at 12 n.5. At oral argument, Frese acknowledged that this court lacks the authority to overturn Supreme Court precedent (to the extent Garrison holds as such), but nevertheless advances the argument to preserve the ability to challenge Garrison on appeal.

Next, the State contends that Frese's vagueness challenge must fail, in most part, because the criminal defamation statute's scienter element requires that the speaker "know that his knowingly false statement 'will tend to expose [another] to public hatred, contempt or ridicule.'"³⁹ While the State is correct that a scienter element may mitigate vagueness concerns, see, e.g., Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982), he has not persuaded the court that the vagueness concerns raised in the complaint are so mitigated such that dismissal is warranted at the outset of this lawsuit.

The Fourteenth Amendment's Due Process Clause bars state actors from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The vagueness doctrine, a derivative of due process, protects against the ills of laws whose 'prohibitions are not clearly defined.'" Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)). As the Supreme Court observed in Grayned:

Vague laws offend several important values. . . . Vague laws may trap the innocent by not providing fair warning. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . . [And] where a vague

³⁹ Def.'s Mot. to Dismiss Mem. (doc. no. 11-1) at 12 (quoting N.H. Rev. Stat. 644:11).

statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

408 U.S. at 108.

“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” Hill v. Colorado, 530 U.S. 703, 732 (2000) (citing City of Chicago v. Morales, 527 U.S. 41, 56– 67 (1999)); accord URI Student Senate v. Town of Narragansett, 631 F.3d 1, 13 (1st Cir. 2011). “Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the Supreme Court has] recognized that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.” Kolender v. Lawson, 461 U.S. 352, 358 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)); accord Butler v. O’Brien, 663 F.3d 514, 520 (1st Cir. 2011).

In the First Amendment context, the potential for arbitrary suppression of free speech draws “enhanced concerns.” Butler, 663 F.3d at 514. As such, when a law threatens to inhibit “the right of free speech or of association, a more stringent vagueness test . . . appl[ies].” Holder v. Humanitarian Law

Project, 561 U.S. 1, 19 (2010); see also Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 62 (1st Cir. 2011) (explaining that in view of the interest against arbitrary enforcement, “the Constitution requires a ‘greater degree of specificity’ in cases involving First Amendment rights” (citation omitted)). Additionally, the Supreme Court has expressed less tolerance of enactments with criminal rather than civil penalties “because the consequences of imprecision are qualitatively” more severe. See Hoffman Estates, 455 U.S. at 499.

“[P]erfect clarity and precise guidance[, however,] have never been required even of regulations that restrict expressive activity.” United States v. Williams, 553 U.S. 285, 304 (2008) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989)). “Because ‘words are rough-hewn tools, not surgically precise instruments[,] . . . some degree of inexactitude is acceptable in statutory language. . . . [R]easonable breadth in the terms employed by an ordinance does not require that it be invalidated on vagueness grounds.” Draper v. Healey, 827 F.3d 1, 4 (1st Cir. 2016) (quoting URI Student Senate, 631 F.3d at 14). Additionally, “the [Supreme] Court has recognized that a scienter requirement may mitigate a law’s vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.” Hoffman, 455 U.S. at 499.

Applying the principles here, Frese has sufficiently alleged that N.H. Rev. Stat. 644:11 may be unconstitutionally vague. The court’s vagueness concerns are two-fold. First, the criminal defamation statute arguably fails to provide “people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” and what speech is

acceptable. Hill, 530 U.S. at 732; see also United States v. Paz-Alvarez, 799 F.3d 12, 28 (1st Cir. 2015) (stating that a statute cannot criminalize conduct “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” (citations omitted)). Briefly put, the statute repeats parts of the common law definition of defamation, see Restatement (Second) of Torts § 559, comment b, which the Alaska Supreme Court in Gottschalk v. Alaska found “falls far short of the reasonable precision necessary to define criminal conduct.” 575 P.2d 289, 292 (Alaska 1978) (finding unconstitutional a statute making it a misdemeanor for “[a] person who willfully speaks, writes, or in any other manner publishes defamatory or scandalous matter concerning another with intent to injure or defame him,” including any statement which would tend to hold another “up to public hatred, contempt or ridicule”). Even when construing the criminal defamation statute in line with its “knowing” scienter requirement, the statute may still not adequately delineate what speech must be known to have the tendency “to expose any other living person to public hatred, contempt or ridicule.” See Goguen, 415 U.S. at 580 (rejecting contention that limiting a statute criminalizing the contemptuous treatment of the U.S. flag to intentional conduct would “clarify what constitute[d] contempt, whether intentional or inadvertent”).

The State’s cited authorities involving the Controlled Substances Act, see 21 U.S.C. § 812, do not persuade the court otherwise at this Rule 12(b) procedural posture. In each of the cases cited, there was no question as to what constituted a controlled or illegal substance: each illegal substance was listed in

a statutory schedule. See, e.g., United States v. Mire, 725 F.3d 665, 674 (7th Cir. 2013) (rejecting an as-applied notice challenge to the Controlled Substances Act because the government was required to demonstrate that the defendant “had actual knowledge that khat—fresh or dried—contain[ed] a controlled substance”). In contrast, exactly what speech a person knows will “tend to expose any other living person to public hatred, contempt or ridicule” may not be so easily determined in a diverse, pluralistic nation. See Ashton v. Kentucky, 384 U.S. 195 (1966) (holding that Kentucky’s common law crime of criminal libel was unconstitutionally void, as no court case had redefined the crime’s sweeping language in understandable terms, leaving prosecution decisions to be made on a case to case basis); see also Tollett v. United States, 485 F.2d 1087, 1097 (8th Cir. 1973) (voiding as vague statute punishing “libelous, scurrilous, defamatory words” written on the outside of an envelope”).

Second, Frese has sufficiently pleaded that the criminal defamation statute may be prone to arbitrary enforcement. Frese alleges that, “[o]n information and belief, individuals throughout New Hampshire routinely violate the criminal defamation statute, but [he] was arrested and prosecuted because he criticized law enforcement officials.” As clarified by his objection, Frese urges this court infer that because the statute “gives law enforcement far too much discretion in deciding whom to prosecute,”⁴⁰ the motivation to prosecute criminal defamation is often political.⁴¹ At

⁴⁰ See Compl. (doc. no. 1) at 2.

⁴¹ See Pl.’s Obj. to Mot. to Dismiss Mem. (doc. no. 14) at 18-25. Frese devotes a substantial portion of his objection to studies and surveys that are not incorporated into the complaint. See e.g., id.

the pre-discovery stage, this inference, though sparsely supported by the complaint, suffices.

In assessing a facial challenge to a statute, courts may consider not just the “words of a statute,” but also “their context” and “their place in the overall statutory scheme.” Davis v. Mich. Dep’t of Treasury, 489 U.S. 803, 809, 1 (1989); see also In re Consol. Freightways Corp. of Del., 564 F.3d 1161, 1165 (9th Cir. 2009) (stating that courts must “construe th[e] provision [at issue] with the statutory scheme in which it is embedded”). In Manning v. Caldwell, for example, the Court of Appeals for the Fourth Circuit found that “[t]he integrated structure” of a challenged statutory scheme permitting civil interdiction of “habitual drunkards” supported the conclusion that the statute was quasi-criminal in nature. 930 F. 3d 264, 273 (4th Cir. 2019) (en banc). See also Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 329 (2006) (explaining in a facial challenge that “when confronting a constitutional flaw in a statute,” courts should strive “to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . . or to sever its problematic portions while leaving the remainder

(“Another study identified 23 criminal defamation prosecutions or threatened prosecutions for the period from 1990–2002, 12 of which were deemed “political,” and 20 of which involved public figures or issues of public controversy.”) These discussions, while helpful to understanding Frese’s larger case, are disregarded for purposes of evaluating the sufficiency of his complaint. See Graf v. Hosp. Mut. Ins. Co., 754 F.3d 74, 76 (1st Cir. 2014) (“Ordinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein” (quoting Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001))).

intact” (internal citations omitted)).

As discussed above,⁴² New Hampshire’s distinctive criminal process may exacerbate the potential for arbitrary or selective prosecutions. With his complaint, Frese incorporated records from the New Hampshire Judicial Branch evidencing how infrequently criminal defamation charges have been brought in each New Hampshire district court.”⁴³ Although these records do not identify the complained-about speech, Frese’s case is not the first reported decision of a municipal police department that prosecuted an individual who criticized one of its officers. See Nevins v. Mancini, No. 19-cv-119, 1993 WL 764212, at *1–2 (D.N.H. Sept. 3, 1993) (McAullife, J.) (Bivens actions in which the plaintiff alleged the Bennington Police Department unlawfully threatened and then prosecuted the plaintiff for criminal defamation after he sent complaints to state officials about the conduct of one of its officers). At oral argument, the Assistant State Attorney General could not provide more detail or substance to these records. Nor could he point to any formal guidance instructing state prosecutors, municipal police departments, or the courts on how to apply New Hampshire’s criminal defamation statute to potentially violative speech.⁴⁴

⁴² See supra at 18-20.

⁴³ See Compl. ¶ 8; Courts Chapter 91-A Response (doc. no. 1-1) (judicial branch records for criminal defamation cases, including 2012 charge).

⁴⁴ At the hearing, the court further pressed the State’s counsel on what kinds of proof would be necessary to prove a criminal defamation case before a judge (since individuals prosecuted for criminal defamation have no right to a jury). Counsel responded that it would depend on the case, and that while a defendant’s admission that they knew their speech was false and defamatory

Answers to these questions may emerge on a more developed record.

Although some criminal defamation prosecutions may collapse on close scrutiny, as was the case with Frese in 2018, this fact does not negate the risk of an excessively discretionary scenario created by the statutory language challenged here. Frese's encounters with prosecutions under the statute highlight several of these risks. As such, 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. This is not to say that New Hampshire's criminal defamation statute is unconstitutional on its face. But in this preliminary, pre-discovery procedural posture, the court declines to rule as a matter of law that it is not. It therefore denies the motion to dismiss Frese's void-for-vagueness claim.

IV. Conclusion

For the above-stated reasons, the court finds Frese has sufficiently pleaded standing and an arguable void-for-vagueness claim. The State's motion to dismiss is denied.⁴⁵

would suffice, counsel could not rule out a criminal defamation case built on indirect evidence. The court then noted that in such cases, determining whether showed an utterance was defamatory would then depend on the unconstrained values of the factfinder.

⁴⁵ Doc. no. 11.

SO ORDERED.



Joseph N. Laplante
United States District Judge

Dated: October 25, 2019

cc: Brian M. Hauss, Esq.
Emerson J. Sykes, Esq.
Henry Kleentowicz, Esq.
John M. Greabe, Esq.
Lawrence A. Vogelmann, Esq.
Gilles R. Bissonnette, Esq.
Lawrence Edelman, Esq.
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APPENDIX G

**UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE**

ROBERT FRESE

Plaintiff,

v.

**GORDON MACDONALD,
in his official capacity
only as Attorney General
of the State of New
Hampshire,**

Defendant.

**Case No.:
1:18-cv-01180-JL**

**AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

INTRODUCTION

New Hampshire's criminal defamation statute, RSA 644:11, makes it a misdemeanor to "purposely communicate[] to any person, orally or in writing, any information which [the defendant] knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." Robert Frese, an outspoken resident of Exeter, New Hampshire, has twice been arrested and charged with criminal defamation under the statute. Most recently, on May 4,

2018, the Exeter Police Department arrested Mr. Frese and charged him with criminal defamation after he posted online comments stating that Exeter Police Chief William Shupe “covered up for [a] dirty cop.”

Criminal defamation statutes must be considered “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Because “erroneous statement is inevitable in free debate,” defamation laws must provide the “breathing space” that free expression “need[s] to survive.” *Id.* at 271–72 (citation and internal quotation marks omitted). The Supreme Court’s “decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions for defamation.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992). “The emphasis has shifted from criminal to civil remedies, from the protection of absolute social values to the safeguarding of valid personal interests. Truth has become an absolute defense in almost all cases, and privileges designed to foster free communication are almost universally recognized.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 151–52 (1967).

RSA 644:11 violates the Fourteenth Amendment’s Due Process Clause and the First Amendment. The standard for determining whether speech is defamatory falls “far short of the reasonable precision necessary to define *criminal* conduct.” *Gottschalk v. State*, 575 P.2d 289, 292 (Alaska 1978) (emphasis added). New Hampshire’s criminal defamation law gives the public far too little guidance

on what may constitute a crime, and gives law enforcement far too much discretion in deciding whom to prosecute. “[T]he fear of being prosecuted under laws prohibiting false speech may deter the promulgation of valuable and protected speech,” a concern that “is particularly acute in the context of allegations of police misconduct.” *State v. Allard*, 148 N.H. 702, 706 (2003).

The public interest in preventing defamation is insufficient to justify the repressive effect that criminal defamation laws impose on free expression. The award of damages in a civil action provides an adequate remedy for the defamed individual. See *Garrison v. Louisiana*, 379 U.S. 64, 69 (1964). And, although prosecutions for so-called “seditious libel” against the government were known at the time of the Star Chamber in England and the Alien & Sedition Act in the United States, it is now widely recognized that “[t]he Constitution does not tolerate actions for libel on government.” *Rosenblatt v. Baer*, 383 U.S. 75, 91 (1966) (Stewart, J., concurring).

Accordingly, Mr. Frese brings a claim for declaratory and injunctive relief against the State of New Hampshire. He seeks a ruling (i) declaring that RSA 644:11 violates the Fourteenth Amendment’s Due Process Clause and the First Amendment; and (ii) permanently enjoining the State from enforcing the statute. He further alleges as follows:

PARTIES

1. Plaintiff Robert Frese lives in Exeter, New Hampshire. He has been twice been arrested for and charged with criminal defamation. These consisted of the following: (i) a prosecution in 2012 by the Hudson Police Department; and (ii) a prosecution

in 2018 by the Exeter Police Department.

2. Defendant Gordon MacDonald is the Attorney General of the State of New Hampshire. He is named in his official capacity. His office is located at 33 Capitol Street, Concord, NH 03301. The Attorney General is the chief legal officer and chief law enforcement officer of the State. He exercises “general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys [he] shall enforce the criminal laws of the state.” RSA 7:6. Law enforcement officers “shall be subject to the control of the attorney general whenever in the discretion of the latter he shall see fit to exercise the same.” RSA 7:11.

JURISDICTION AND VENUE

3. This action arises under the First and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

4. Declaratory relief is authorized by 28 U.S.C. § 2201 and 28 U.S.C. § 2202.

5. The Defendant is a public official of the State of New Hampshire. The Defendant resides within this District and/or performs official duties within the State of New Hampshire. This Court, accordingly, has personal jurisdiction over the Defendant.

6. Venue in the District of New Hampshire is based on 28 U.S.C. § 1391(b).

FACTS

Criminal Defamation Laws

7. In *Garrison v. Louisiana*, the Supreme Court expressed disapproval of criminal defamation laws, but observed that prosecutions under these laws had long since fallen “into virtual desuetude,” as “the civil remedy had virtually pre-empted the field of defamation.” 379 U.S. 64, 69 (1964).

8. Nonetheless, criminal defamation laws remain on the books in 25 states and the U.S. Virgin Islands. See Committee to Protect Journalists, *Critics Are Not Criminals: Comparative Study of Criminal Defamation Laws in the Americas* 25–27 (2016), <https://cpj.org/x/675b>. Penalties range from \$500 to \$10,000 and/or ten years in jail for certain offenses, but the typical penalty is \$1,000 and/or one year in jail. *Id.* Any criminal conviction also carries a number of collateral penalties, including potential immigration consequences and ineligibility for various employment and housing opportunities.

9. Nationally, criminal defamation charges are disproportionately filed against people who criticize public officials or government employees, especially law enforcement officers. One study identified 23 criminal defamation prosecutions or threatened prosecutions for the period from 1990-2002, 12 of which were deemed “political,” and 20 of which involved public figures or issues of public controversy. George C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol’y 433, 467 (2004) (citing Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990-2002*, Libel Defense Resource Center Bull., Mar. 27, 2002, at 97)).

Another study, focusing on Wisconsin, found that 39 percent of criminal defamation prosecutions involved either public officeholders or government employees, including numerous charges of sexual misconduct by law enforcement and probation officers. David Pritchard, *Rethinking Criminal Libel: An Empirical Study*, 14 Comm. L. & Pol'y 303, 327– 33 (2009).

10. Although criminal defamation prosecutions remain relatively rare, they have increased with the rise of online speech. Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media & Criminal Libel Prosecutions*, 21 Santa Clara Computer & High Tech. L.J. 289, 298 (2005). In Wisconsin, one study found that there were 21 criminal defamation prosecutions from 1991 through 1998, or roughly 2.62 per year, none of which involved online speech. Pritchard at 316. From 1999 through 2007, there were 40 criminal defamation prosecutions, 18 of which involved the Internet. *Id.* at 317.

11. If the trend continues, abetted by calls for government regulation of “fake news,” criminal defamation laws could become regular tools for policing online discourse.

New Hampshire’s Criminal Defamation Statute

12. New Hampshire’s criminal defamation statute, RSA 644:11, provides: “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.”

13. Criminal defamation under RSA 644:11 is a class B misdemeanor, which carries a maximum

penalty of a fine up to \$1,200, *see* RSA 651:2, IV(a), plus a twenty-four percent penalty assessment. Police departments may initiate prosecutions under RSA 644:11 on their own initiative, without input from an attorney. People charged under RSA 644:11 are not entitled to court-appointed counsel if they are indigent.

14. Records from the New Hampshire Judicial Branch reveal approximately 25 cases between January 1, 2009 and December 31, 2017 in which a defendant was charged with criminal defamation under RSA 644:11. *See Exhibit A.*

The 2012 Hudson Police Department Prosecution

15. Mr. Frese was first charged with criminal defamation in May of 2012 by the Hudson Police Department for, in part, repeatedly calling a life coach business a “scam” on Craigslist. *See Exhibit B*, e.g., HUD010, 013-14, 021-22, 024-027, 029-39, and 047-053.

16. Without the benefit of an attorney to advise him on his legal rights, Mr. Frese pleaded guilty to criminal defamation under RSA 644:11 in August of 2012. As part of his sentence, Mr. Frese was fined \$1,488 (with \$1,116 suspended) and ordered to be on good behavior for two years. *Id.* at HUD003-04.

The 2018 Exeter Police Department Prosecution

17. On May 4, 2018, the *Exeter News-Letter* published online, including on its Facebook page, an article entitled “Retiring Exeter Officer’s Favorite Role: Mentoring Youth.”

18. Using the pseudonym “Bob William,”¹ Mr. Frese published a comment to this article on the *Exeter News-Letter*’s Facebook page. The comment stated, in part, that “[t]his [Officer D’Amato] is the dirtiest most corrupt cop that I have ever had the displeasure of knowing [...] and the coward Chief [William] Shupe did nothing about it.” See *Exhibit C*, EXE091.

19. That day, Chief William Shupe became aware of the comment and emailed the reporter who wrote the article, asking that the comment be removed. The *Exeter News-Letter* complied and removed the comment. See *Exhibit C*, EXE084-85.

20. After the *Exeter News-Letter* deleted Mr. Frese’s comment, Mr. Frese submitted another comment under the pseudonym “Bob Exeter.” 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” See *Exhibit C*, EXE092. This comment was forwarded by Chief Shupe to Detective Patrick Mulholland. See *Exhibit C*, EXE019 (P. Mulholland May 9, 2018 Police Report, Paragraph 4), EXE026 (P. Mulholland May 23, 2018 Arrest Warrant Affidavit, Paragraph 4).

21. Mr. Frese’s speech was constitutionally protected under the First Amendment.

22. Detective Mulholland discussed the investigation with Chief Shupe, who “expressed his concern regarding the comments as they are false and baseless and were made in a public forum.” See

¹ William is Mr. Frese’s middle name.

Exhibit C, EXE019 (P. Mulholland May 9, 2018 Police Report, Paragraph 6), EXE026 (P. Mulholland May 23, 2018 Arrest Warrant Affidavit, Paragraph 4). Detective Mulholland and Chief Shupe reviewed the criminal defamation statute, RSA 644:11, and “believed that Frese crossed a line from free speech to a violation of law.” *Id.*

23. Detective Mulholland then spoke with Mr. Frese at the Exeter Police Station on May 8, 2018.

24. According to police reports, Detective Mulholland discussed the interview with Chief Shupe. Chief Shupe denied being aware of criminal acts by Officer D’Amato and denied covering up criminal conduct. Detective Mulholland determined that “no credible information exists to believe that Ofc. D’Amato committed the acts Frese suggests.” See Exhibit C, EXE020 (P. Mulholland May 11, 2018 Police Report, Paragraph 5), EXE026-27 (P. Mulholland May 23, 2018 Arrest Warrant Affidavit, Paragraph 10).

25. On May 23, 2018, the Exeter Police Department drafted a complaint alleging that Mr. Frese “purposefully communicated 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.” See Exhibit C, EXE029 (Complaint).

26. Detective Mulholland also completed an arrest warrant pursuant to RSA 644:11. See Exhibit C, EXE024-27 (P. Mulholland May 23, 2018 Arrest Warrant Affidavit). The arrest warrant was granted by the 10th Circuit Court—Brentwood—District Division (LeFrancois, J.) on May 23, 2018. *Id.*

27. On May 23, 2018, Mr. Frese turned himself into the police, after Detective Mulholland advised him of the warrant. Mr. Frese was formally charged with criminal defamation under RSA 644:11. *See Exhibit C*, EXE016 (P. Mulholland May 24, 2018 police report).

28. Mr. Frese was given a court date of July 10, 2018. *Id.* One of Mr. Frese's bail conditions was "no contact with Interested Parties," which barred Mr. Frese from contacting Chief Shupe. *See Exhibit C*, EXE088. Mr. Frese was also ordered to refrain from possession a firearm, destructive device, dangerous weapon or ammunition, and to refrain from excessive use of alcohol. *See id.*

29. News about Mr. Frese's arrest and prosecution caused significant public controversy. *See Exhibit C*, EXE069-70.

30. On June 4, 2018, the New Hampshire Attorney General's Civil Rights Division criticized the Department's decision to arrest and charge Mr. Frese. *See Exhibit C*, EXE008-013 (DOJ June 4, 2018 Memo.).

31. On June 7, 2018, the Exeter Police Department dismissed Mr. Frese's charge under RSA 644:11.

32. At the time of his arrest, Mr. Frese was subject to a "good behavior" condition on a suspended sentence from another case. A conviction under RSA 644:11 could have constituted a violation of "good behavior," and resulted in Mr. Frese's imprisonment.

33. Based on his two prior arrests under the statute, Mr. Frese reasonably fears future prosecution under RSA 644:11 for his speech. He especially fears

that he will be arrested and/or prosecuted for speech criticizing law enforcement and other public officials.

CLAIM FOR RELIEF

COUNT I

42 U.S.C. § 1983 – DUE PROCESS CLAUSE

34. All prior paragraphs are incorporated.

35. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits laws that are unconstitutionally vague.

36. RSA 644:11 is unconstitutionally vague, both on its face and as applied in the context of New Hampshire's system for prosecuting Class B misdemeanors. "Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Because a vague statute that "abut(s) upon sensitive areas of basic First Amendment freedoms . . . operates to inhibit the exercise of (those) freedoms," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972), courts require a "greater degree of specificity" when evaluating statutes that implicate First Amendment rights, *Buckley v. Valeo*, 424 U.S. 1, 77 (1976).

37. RSA 644:11 fails to provide the reasonable precision necessary to define criminal conduct. The statute applies to intentionally false and defamatory statements. Statements that are deliberately false, but are not defamatory are protected under the First Amendment. *United States*

v. Alvarez, 567 U.S. 709 (2003). But “[w]hether an utterance is defamatory depends on the values of the listener[,] and it is not always easy to predict what will be taken as defamatory.” *Gottschalk*, 575 P.2d at 293. Furthermore, even ostensibly false and defamatory statements may be protected speech if they constitute satire, parody, or rhetorical hyperbole. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 757 (1986).

38. Thus, although deliberately false and defamatory statements of fact are not protected by the First Amendment, the line between protected speech and unprotected defamation is inherently blurry. As a result, it is often almost impossible for a speaker to determine in advance whether their speech would be considered unprotected defamation or protected expression. Civil law may permit such ambiguities, but criminal laws must be held to a higher standard of definition. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982) (stating that the Court has “expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe”).

39. Without a well-defined standard of criminal responsibility, law enforcement officials and factfinders are given nearly unfettered discretion to apply their own standards. Criminal defamation laws are thus susceptible to arbitrary, uneven, and selective enforcement.

40. Mr. Frese’s recent prosecution under RSA 644:11 demonstrates the problem. On information and belief, individuals throughout New

Hampshire routinely violate the criminal defamation statute, but Mr. Frese was arrested and prosecuted because he criticized law enforcement officials. The use of criminal defamation laws to prosecute the government's critics "is both the hallmark and the vice of a vague criminal statute." *Gottschalk*, 575 P.2d at 294–95.

COUNT II

42 U.S.C. § 1983 – FIRST AMENDMENT

41. All prior paragraphs are incorporated.

42. The First Amendment to the United States Constitution prohibits abridgment of freedom of speech.

43. The First Amendment is applied to the states through the Fourteenth Amendment.

44. RSA 644:11 violates the First Amendment because it criminalizes defamatory speech. Civil remedies are sufficient to address the State's interest in preventing defamation. The State's interest in preventing defamation is insufficient to justify the repressive effects that RSA 644:11 imposes on free expression.

45. Furthermore, RSA 644:11 is unconstitutionally overbroad because it criminalizes speech criticizing public officials. "[U]nder our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel" against those who defame government officials. *Id.* at 80 (Black, J., concurring); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

46. Alternatively, RSA 644:11 is unconstitutional as applied to speech criticizing public officials.

47. To the extent *Garrison* bars Plaintiff's facial or as applied First Amendment claims, it should be overruled.

RELIEF REQUESTED

WHEREFORE, Plaintiff Robert Frese respectfully requests that this Court:

A. Declare that RSA 644:11 violates the First and Fourteenth Amendments to the United States Constitution, on its face and as applied;

B. Permanently restrain and enjoin the Defendant—including all of Defendant's officers, troopers, agents, servants, employees, attorneys, and other persons in active concert or participation with Defendant, including but not limited to every New Hampshire County Attorney, municipal prosecutor, police prosecutor, or peace officer—from enforcing RSA 644:11 on its face and as applied;

C. Award Plaintiff attorneys' fees in this action pursuant to 42. U.S.C. § 1988(b);

D. Award Plaintiff its costs of suit; and

E. Grant such other and further relief as this Court deems just and proper in the circumstances.

Respectfully submitted,
ROBERT FRESE,

By and through his attorneys
affiliated with the American

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Date: April 13, 2020