No. 22-939

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

BRIEF IN OPPOSITION FOR RESPONDENT JOHN M. FORMELLA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NEW HAMPSHIRE

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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.

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INTRODUCTION

The petition does not warrant this Court's review. The First Circuit's decision in this matter is not in conflict with another decision of a United States court of appeals or a state court of last resort on the same important, federal matter. Sup. Ct. R. 10(a). The First Circuit has also not decided an unsettled, important issue of federal law nor has it decided an important federal question in a way that conflicts with this Court's relevant decisions. Sup. Ct. R. 10(c). To the contrary, the First Circuit correctly concluded, in reliance on the petitioner's concession below, that this Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964), foreclosed his First Amendment claim and correctly held that New Hampshire's criminal defamation statute, N.H. Rev. Stat. § 644:11, is not unconstitutionally vague in violation of the First and Fourteenth Amendments.

The petitioner attempts to manufacture a reason to grant certiorari in this case by alleging that New Hampshire's criminal defamation statute prohibits constitutionally protected criticism of public officials. But the statute does no such thing. New Hampshire's criminal defamation statute is narrow, concise, and clear. It prohibits persons from *purposefully* communicating to another information that he or she *knows* is false and *knows* will tend to expose the target (public official or not) to public hatred, contempt or ridicule. N.H. Rev. Stat. § 644:11, I. The statute covers only unprotected speech, operates within this Court's "actual malice" standard, and prohibits *less* unprotected

speech than this Court's jurisprudence permits. *See Garrison*, 379 U.S. at 75 (explaining that "false statement[s] made with reckless disregard of the truth," a category of statements New Hampshire's criminal defamation statute does not reach, "do not enjoy constitutional protection"). The petitioner has failed to advance a *stare decisis* analysis in his petition detailing why this Court should abandon its established precedent in this area in favor of a new First Amendment rule that withdraws from the States the authority to criminalize this type of injurious defamation only with respect to public servants.

New Hampshire's criminal defamation statute is also not unconstitutionally vague. It is written in clear and precise terms. It "provide[s] a person of ordinary intelligence fair notice of what is prohibited" and is not "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). It incorporates New Hampshire's common law defamation standard in its use of the phrase "will tend to expose any other living person to public hatred, contempt or ridicule," a standard that has remained relatively consistent over the past one-hundred years and is analyzed objectively. *See*, *e.g.*, *Boyle v. Dwyer*, 172 N.H. 548, 554 (2019); *Chagnon v. Union-Leader Corp.*, 103 N.H. 426, 434 (1961); *Richardson v. Thorpe*, 73 N.H. 532, 534-35 (1906). The manner in which a statute is enforced does not make clear and precise statutory language susceptible to a facial vagueness challenge.

The Court should therefore decline to review the questions presented and deny the petition.

STATEMENT OF THE CASE

A. Statutory Background

New Hampshire's criminal defamation statute is narrow, concise, and clear. Under it, "[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 statute defines the word "public" to "include[ ] any professional or social group of which the victim of the defamation is a member." *Id.* § 644:11, II.

In New Hampshire, "[a] person convicted of a class B misdemeanor may be sentenced to conditional or unconditional discharge, a fine, or other sanctions, which shall not include incarceration or probation but may include monitoring by the department of corrections if deemed necessary and appropriate." N.H. Rev. Stat. § 651:2, III. A fine for an individual who commits a class B misdemeanor may not exceed $1,200. *Id.* § 651:2, IV(a). A twenty-four percent penalty assessment must also be imposed, *id.* § 106-L:10, I, which assessment may be reduced or eliminated if the fine is suspended in whole or in part, *id.* § 106-L:10, III, or which may be suspended, in whole or in part, by the court if its imposition "would work a hardship on the

person convicted or on such person's immediate family," *id.* § 106-L:10, V.

B. Factual Background

Between February 26 and May 2, 2012, the petitioner made "over thirty postings" on Craigslist lambasting the character and integrity of a private individual, a certified life coach who promoted his business on Craigslist. The petitioner's postings repeatedly referred to the victim's business as a "scam," D. Ct. ECF No. 31-2 at 30-35, 38-40, 49, 66-67, 69-73, claimed the victim's "own life is a mess," *id.* at 36, and referred to the victim as a "scam artist" and a "crook." *id.* at 48, 74. His posts also included the following: "been molested by [the victim]", D. Ct. ECF No. 31-2 at 63, "[h]as anyone been molested, bothered, or harassed by a . . . [the victim] in Londonderry?", *id.*, "molested by a [the victim]? (Londonderry)", *id.* at 64, "[a]nyone been molested, harassed, or bothered by a [the victim] out of Londonderry?," *id.* Another post read:

> **hear about [the victim]? (NH)**
>
> . . .
>
> Involved in a 'road rage' incident in 2007 distribution of heroin in 2009 charged with willful concealment in 2011 sounds like [victim] needs a Life Coach

D. Ct. ECF No. 31-2 at 65.

The victim attempted to persuade the petitioner to desist to no avail, D. Ct. ECF No. 31-2 at 41-47, and

contacted the Hudson Police Department, which acquired information indicating that the petitioner had purposefully posted information about the victim on the Internet that the petitioner knew to be false and that he did so in order damage the victim's reputation and business. *Id.* at 14-15, 22-23, 28. The Hudson Police Department subsequently charged the petitioner with a class A misdemeanor for violating the harassment statute, N.H. Rev. Stat. § 644:4, I(c), and a class B misdemeanor for violating the criminal defamation statute, N.H. Rev. Stat. § 644:11. D Ct. ECF No. 31-2 at 10-11. The criminal defamation charge alleged that the petitioner did "purposefully communicate in writing via Craigslist, a public internet forum, that [the victim] distributed heroine in 2009 and was charged with willful concealment in 2011, knowing said information was false, this information leaving [the victim] and his business exposed to public ridicule." *Id.* at 11. On August 8, 2012, the petitioner plead guilty to the criminal defamation charge, and the State nolle prossed the harassment charge. D. Ct. ECF No. 31-2 at 4. The petitioner was sentenced to the maximum fine for a class B misdemeanor in New Hampshire, a $1,200 fine, plus a $288 penalty assessment, N.H. Rev. Stat. § 106-L:10, I, $1,116 of which was suspended subject to good behavior for two years and continued engagement with Seacoast Mental Health. D. Ct. ECF No. 31-2 at 4-5.

According to a report of the Exeter Police Department, on or about September 13, 2013, the defendant was found guilty of stalking, violation of a protective order, criminal trespass, theft of lost or mislaid

property, and receiving stolen property. D. Ct. ECF No. 31-4 at 3.

Less than thirty days later, the petitioner was sentenced in federal district court for Social Security Fraud, in violation of 42 U.S.C. § 408(a)(4). *United States v. Frese*, 1:13-cr-00035-JD-1, ECF No. 22. In its sentencing memorandum, the United States Attorney pointed out that the petitioner had 19 criminal convictions and had committed the federal offense at issue while on probation for a criminal offense that involved the unlawful distribution of a controlled substance. *Id.*, ECF No. 14 at 4.

According to a report of the Exeter Police Department, on or about September 9, 2016, the petitioner was convicted of criminal mischief (vandalism), D. Ct. ECF No. 31-4 at 3, and, on or about December 14, 2017, the petitioner was convicted of criminal trespass, *id.*

On August 23, 2018, the federal district court entered an order against the petitioner on admitted violations of the mandatory conditions of his federal sentence in that he committed the crime of reckless conduct in violation of N.H. Rev. Stat. § 631:3 and the crime of Conduct after an Accident in violation of N.H. Rev. Stat. § 264:25 on or about August 8, 2017. *United States v. Frese*, 1:13-cr-00035-JD-1, ECF No. 51.

On May 4, 2018, the petitioner read an article in the *Exeter News-Letter* ("Retiring Exeter officer's favorite role: mentoring youth") that portrayed a retiring Exeter police office in a favorable light. D. Ct. ECF No. 31-3 at 26-28, 32; D. Ct. ECF No. 31-4 at 37-42. The

same day, the petitioner, who had frequent and continuous exposure to the Exeter Police Department from 2002 to 2018, D. Ct. ECF No. 31-4 at 2-9, published an online comment under the pseudonym "Bob Williams," stating, as to the officer and youth mentor:

> This is the dirtiest most corrupt cop I have ever had the displeasure of knowing, he has committed perjury, false charges, conspiracy, false reports to law enforcement, along with his known prostitute daughter who went by the name Isabella Soprano and now goes by the name Angela Greene. Although the truth came out in court he and she were never charged as the 'Blue Wall' of police cover up protected him, and the coward Chief Shupe did nothing about it. D'Amato has nothing to be proud of and will be missed by no one. I picked up his drunk wife on a number of occasions and got her home safely. Good riddance to this creep.

Id. at 35. After Chief Shupe prevailed upon the *Exeter News-Letter* to remove the "Bob William" comment, *id.* at 28-29, the petitioner submitted another comment, now under the pseudonym "Bob Exeter," stating in part:

> D'Amato is the most corrupt cop I have known. He and his known prostitute daughter Isabella Soprano who now goes by the name Angela Greene made false complaints against me which were dismissed in court. 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 that they continue to lie in court and harass people. D'Amato will be missed by no one, and I would not trust this guy around children.

Id. at 36. A similar post made by "Robert William" was captured by Detective Evan Nadeau and read as follows:

> D'Amato is the dirtiest cop I ever knew, he and his known prostitute daughter Isabella Soprano, who now goes by the name Angela Greene falsely accused me of a number of things and were never charged because the coward Chief Shupe is a coward who covers up for his dirty cops. The charges were dismissed in court, but these are the type of cops you have in Exeter, do NOT trust them.

Id. at 37.

On or about May 6, 2018, the petitioner responded to a Craigslist ad for free items at the side of the road on Beech Hill Road in Exeter, New Hampshire. D. Ct. ECF No. 31-3 at 37. When he stopped, a woman who the petitioner recognized as Angela Greene, the daughter of Officer D'Amato who the petitioner referenced in his online postings, came out and allegedly started swearing at him. *Id.* That same day, it appears that the petitioner received a trespass notice in connection with Ms. Greene's property. *Id.* at 37; D. Ct. ECF No. 31-4 at 2.

On May 8, 2018, Detective Patrick Mulholland of the Exeter Police Department interviewed the

petitioner. D. Ct. ECF No. 31-3 at 27. During the interview, the petitioner stated he has consistently been posting since 2013 when D'Amato gave him a bogus ticket. *Id.* He stated that the most recent postings were on the comment section online and that he uses the name Bob Williams as well as ExeterBob@yahoo.com. *Id.* He stated his belief that D'Amato had committed perjury when D'Amato testified at a hearing in a restraining order proceeding his daughter had initiated against the petitioner. *Id.* The petitioner explained that D'Amato got his daughter to make false statements to the court to get a restraining order against him. *Id.* When asked if Chief Shupe covered that up, the petitioner expressed that the Chief had. *Id.*

The petitioner further informed the Detective that he had approached Chief Shupe to file a complaint and that Chief Shupe covered up for D'Amato and his daughter by doing nothing and advising him that he could handle that issue in court on the appropriate court date. D. Ct. ECF No. 31-3 at 27.

A restraining order appears to have issued against the petitioner for the protection of Ms. Greene on May 9, 2018. D. Ct. ECF No. 31-3 at 27, 37; D. Ct. ECF No. 31-4 at 2.

On May 10, 2018, the petitioner sent an email to the New Hampshire Department of Justice seeking help with respect to the Exeter Police Department. D. Ct. ECF No. 31-3 at 37. In it, the petitioner describes his recent encounter and interactions with Angela Greene. *Id.* He also relates that he filed a competing

restraining order against Ms. Greene, which the court denied. *Id.* In the email, the petitioner alleges a history of being targeted by the Exeter Police Department for his conduct, discusses his mental health, and claims that he just wants to be "left alone." *Id.*

The New Hampshire Department of Justice inquired into the matter with the Exeter Police Department, D. Ct. ECF No. 31-3 at 41-42, and, on May 14, 2018, responded as follows:

> We sometimes receive complaints from people who perceive that they are being targeted by the police. Often times, when we look deeper into the situation, it is discovered that the police are merely doing their job and it is actually the conduct of the complainant that is requiring the police response and subsequent contacts.
>
> In looking into this, I have found this to be the case in your situation. Your complaint has therefore been determined to be unfounded.

Id. at 46.

On May 21, 2018, Detective Mulholland applied for an arrest warrant against the petitioner for criminal defamation, contrary to N.H. Rev. Stat. § 644:11. D. Ct. ECF No. 31-3 at 25-28. On May 23, 2018, after examining the content of the application and having orally examined the Detective, a circuit court judge concluded sufficient probable cause for the arrest warranted existed and granted it. *Id.* at 28. The complaint issued charged the petitioner with violating N.H. Rev.

Stat. § 644:11 in that he did "purposefully communicate 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." D. Ct. ECF No. 31-3 at 30.

On June 4, 2018, the New Hampshire Department of Justice, Civil Rights Unit, prepared a six-page memorandum finding that New Hampshire's criminal defamation statute applied to a narrower range of conduct than the "actual malice" standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964), and that in the petitioner's case, there was no probable cause that the petitioner made the statements at issue with knowledge that they were false. D. Ct. ECF No. 31-3 at 12-14. The memorandum was conveyed to the Exeter Police Department. Three days later, on June 7, 2018, the Exeter Police Department voluntarily dismissed the charge.

C. Procedural Posture

On December 18, 2018, the petitioner filed this action in the United States District Court for the District of New Hampshire against the New Hampshire Attorney General challenging N.H. Rev. Stat. § 644:11 as unconstitutional under the First Amendment and on vagueness grounds. After some initial motion practice, the petitioner filed an Amended Complaint, and the respondent moved to dismiss. The federal district court ultimately dismissed the matter, finding that N.H. Rev.

Stat. § 644:11 did not run afoul of the First Amendment and was not unconstitutionally vague.

The petitioner appealed. A three-judge panel of the United States Court of Appeals for the First Circuit affirmed. The majority held, per the petitioner's concession, that this Court's decision in *Garrison* foreclosed his First Amendment claim. Pet.'s App. 8a. The majority also held that N.H. Rev. Stat. § 644:11 was not unconstitutionally vague. Pet.'s App. 8a-20a. One judge concurred, agreeing that this Court's decision in *Garrison* and the procedural posture in which the case arose obliged the panel to reach the conclusion it reached. Pet.'s App. 21a. The concurrence questioned, however, whether it is time to reexamine the concerns raised by Justice Douglas in his dissent in *Garrison*. Pet.'s App. 26a.

REASONS FOR DENYING THE PETITION

None of the considerations identified in Supreme Court Rule 10 are present in this case. The First Circuit's decision is not in conflict with another decision of a United States court of appeals or a state court of last resort on the same important, federal matter. Sup. Ct. R. 10(a). The First Circuit has also not decided an unsettled, important issue of federal law nor has it decided an important federal question in a way that conflicts with this Court's relevant decisions. Sup. Ct. R. 10(c). Rather, the First Circuit's decision in this case is entirely consistent with this Court's existing First Amendment and vagueness jurisprudence and

cogently explains why its decision does not create a split with the Alaska Supreme Court's decision in *Gottschalk v. State*, 75 P.2d 289 (Alaska 1978). Accordingly, for all of these reasons, as explained in further detail below, this Court should deny the petition.

A. The first question presented is foreclosed by a long line of this Court's precedents, and the petitioner has provided no compelling reason for this Court to reconsider those precedents.

This Court has unequivocally and repeatedly reaffirmed that the First Amendment does not protect the type of knowing, calculated, harmful falsehoods that New Hampshire's criminal defamation statute prohibits. *See*, *e.g.*, *United States v. Alvarez*, 567 U.S. 709, 719 (2012); *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 687 n.34 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988); *McDonald v. Smith*, 472 U.S. 479, 485 (1985); *Time, Inc. v. Firestone*, 424 U.S. 448, 472 (1976); *Rosenbloom v. Metromedia*, 403 U.S. 29, 52 (1971) (plurality decision); *Time, Inc. v. Hill*, 385 U.S. 374, 389-90 (1967); *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); *New York Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964).

In *New York Times Co.*, this Court held that the Constitution limits state power in a civil action by prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with

'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80.

In *Garrison*, this Court extended the "actual malice" limitation to criminal defamation statutes. 379 U.S. at 67. In doing so, this Court indicated that a "calculated falsehood[]" "knowingly and deliberately published about a public official" with the design to "unseat the public servant" is categorically "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison*, 379 U.S. at 75. This Court explained that such calculated falsehoods "fall[] into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . .'" *Id.* (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)). Accordingly, this Court held in *Garrison* that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

In *McDonald*, this Court held that the Petition Clause of the First Amendment does not provide absolute immunity to a defendant charged with expressing libelous and damaging falsehoods to the President of the United States about a person being considered for the position of United States Attorney. Quoting *Garrison*, this Court explained that "petitions to the President that contain intentional and reckless falsehoods

'do not enjoy constitutional protection,'" *McDonald*, 472 U.S. at 484 (quoting *Garrison*, 379 U.S. at 75), and may "be reached by the law of libel," *id.*

In *Harte-Hanks Communications*, 491 U.S. at 687, this Court reiterated that public discussion of the qualifications of a candidate for elective office present the strongest possible case for the application of the *New York Times Co.* rule. While observing that "[v]igorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty," *id.*, this Court explained in a footnote that "the protection of 'calculated falsehoods' does not promote self-determination," *id.* at 687 n.34, and proceeded to quote extensively from *Garrison*.

In *Alvarez*, the plurality and dissenting decisions reaffirmed the uncontroversial proposition that the "knowingly false statement" purposefully conveyed in order to harm the reputation of another do not enjoy constitutional protection. 567 U.S. at 719 (plurality opinion); *id.* at 746-47, 750-51 (Alito, Scalia, and Thomas, JJ., dissenting). The concurring opinion further recognized that statutes prohibiting false speech that focus on preventing or redressing specific harm to others like defamation statutes limit their scope in a way that does not "allow its threat of liability or criminal punishment to roam at large." *Id.* at 734-36 (Breyer and Kagan, JJ., concurring).

The uncontroversial proposition that the purposely communicated knowing falsehood designed to

publicly harm another does not enjoy constitutional protection has for decades allowed the States to protect their citizens from defamation through criminal and civil sanction. *Garrison*, 379 U.S. at 75; *New York Times Co.*, 376 U.S. at 283-84. In setting a high bar for such state laws, this Court has fashioned a jurisprudence that prohibits "[s]tate defamation laws" from being "converted into laws against seditious libel," *Rosenblatt v. Baer*, 383 U.S. 75, 91-92 (1966) (Stewart, J., concurring), while ensuring that the "important social values . . . [that] underlie the law of defamation," including society's "pervasive and strong interest in preventing and redressing attacks upon reputation," *id.* at 86 (majority opinion), remain applicable to public officials. *See also Berisha v. Lawson*, ___ U.S. ___, 141 S. Ct. 2424, 2425 (2021) ("Public figure or private, lies impose real harm.") (Thomas, J., dissenting from the denial of certiorari).

The petitioner has not advanced a *stare decisis* argument in his petition demonstrating why this Court should consider overruling this longstanding, uncontroversial First Amendment precedent in favor of further limiting state defamation law. While *stare decisis* is at its weakest when this Court interprets the Constitution, this Court does consider various factors such as: (1) the nature of the claimed error; (2) the quality of the precedents' reasoning; (3) the workability of the precedent; (4) changed law or facts since the prior decisions; and (5) reliance interests. *See*, *e.g.*, *Janus v. AFSCME, Council 31*, ___ U.S. ___, 138 S. Ct. 2448, 2478-79 (2018); *Ramos v. Louisiana*, ___ U.S. ___, 140

S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part).

The petitioner does not argue these or other *stare decisis* factors as a basis for overruling *Garrison* and its progeny. The petitioner instead advances a view that this Court's decision in *Garrison* began a project that this Court will one day finish by judicially extending the First Amendment to "categorically bar criminal defamation prosecutions for speech concerning public officials." Pet. at 11. The petitioner contends that removing this protective power from the States will "harmonize this Court's precedents with Madison's insight into the central meaning of the First Amendment. . . . " *Id.* at 11-12.

The petitioner's characterization of *Garrison* as a project in First Amendment engineering yet to be finished by this Court is simply wrong. *Garrison* confirmed that the *New York Times Co.* rule limited state power to impose criminal sanctions in the same way it limited state power to impose civil sanctions. Presumably, if a different, more stringent or absolute First Amendment rule limited or abolished state power to impose criminal sanctions for defamatory speech, this Court would have said so.

The petitioner's assertion that his newly proposed extension of the *New York Times Co.* rule is somehow grounded in an original understanding of the First Amendment is also questionable. "Many members of this Court have raised questions about various aspects of [*New York Times Co. v.*] *Sullivan*." *Berisha*, ___ U.S.

___, 141 S. Ct. at 2429 (Gorsuch, J., dissenting from the denial of certiorari). Justice Thomas, in particular, has questioned whether the *New York Times Co.* "actual malice" rule has any grounding in the First and Fourteenth Amendments as an original, historical matter. *McKee v. Cosby*, ___ U.S. ___, 139 S. Ct. 675, 680-82 (2019) (Thomas, J., concurring in the denial of certiorari); *see Berisha*, ___ U.S. ___, 141 S. Ct. at 2425 ("The lack of historical support for this Court's actual-malice requirement is reason enough to take a second look at the Court's doctrine.") (Thomas, J., dissenting from the denial of certiorari).

Justice Gorsuch has also considered reevaluating *New York Times Co. v. Sullivan* "given the momentous changes in the Nation's media landscape since 1964," including the rise of social media which has enabled "virtually anyone in this country" to "publish virtually anything for immediate consumption virtually anywhere in the world" to millions of people, and for good reason. *Berisha*, ___ U.S. ___, 141 S. Ct. at 2427, 2430.

As Justice Gorsuch's observations reflect, gone are the days when a person could escape a locally published defamatory newspaper article and begin a new career in a different corner of this country. Modern technology has made the creation, communication, and transfer of information (including defamatory material) more efficient, effective, and permanent than ever. In such an environment, the deliberately communicated, knowing falsehood designed to expose a person (public official or not) to public hatred, contempt, or ridicule is more destructive than ever. Justice Thomas

lists a few examples in his dissent in *Berisha*, but others are worthy of consideration. Take "deepfake" videos, photos, and audio files, for example. It is not difficult to see how the intentional creation, posting, and proliferation of such information over the Internet could be highly damaging to a person (public official or not). *See*, *e.g.*, *Tharpe v. Lawidjaja*, 8 F. Supp. 3d 743, 786 (W.D. Va. 2014) (finding that photoshopped pictures of the defendant placing her in pornographic situations and posted on the Internet could support a state law defamation claim); Jessica Ice, *Defamatory Political Deepfakes and the First Amendment*, 70 Case W. Rsrv. L. Rev. 417, 418 (2019) ("Deepfakes of political figures pose serious challenges for our political system and even national security, but legal remedies for these videos are complicated.");[1] Jack Cook, *Deepfake Technology: Assessing Security Risk*, American University, Washington, D.C., School of International Service (July 27, 2022) (discussing "deepfake" non-consensual pornography and indicating that "[b]ad actors have also used this technique to threaten and intimate journalists, politicians, and other semi-public figures").[2]

Cyber abuse and cyberbullying have also become a national problem adversely affecting the wellbeing

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[1] Available at: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4854&context=caselrev (last visited: June 7, 2023).

[2] Available at: https://www.american.edu/sis/centers/security-technology/deepfake_technology_assessing_security_risk.cfm#:~:text=Often%2C%20they%20inflict%20psychological%20harm,technology%20to%20conduct%20online%20fraud. (last visited: June 7, 2023).

and mental health of adolescents and young adults and leading in some cases to self-harm and suicide. Cyber abuse or cyberbullying includes the perpetuation of defamatory false accusations. Wikipedia, Cyberbullying, https://en.wikipedia.org/wiki/Cyberbullying (last visited: June 7, 2023). In 2021, "suicide was among the top 9 leading causes of death for people ages 10-64" and "was the second leading cause of death for people ages 10-14 and 20-34." Centers for Disease Control and Prevention, Suicide Prevention, Facts About Suicide, https://www.cdc.gov/suicide/facts/index.html (last visited: June 7, 2023). At least one study has concluded that children and young people under 25 who are victims of cyberbullying are more than twice as likely to self-harm and enact suicidal behavior. Ann John, et al., *Self-Harm, Suicidal Behaviours, and Cyberbullying in Children and Young People: Systematic Review*, Journal of Medical Internet Research, Vol. 20, No. 4 (2018)[3].

In the face of these growing national health and safety challenges, the "momentous changes in the Nation's media landscape since 1964," and the questionable historical underpinnings of the *New York Times Co.* "actual malice" standard, it is difficult to imagine overruling *Garrison* and *expanding* First Amendment immunity to cover and thereby condone the purposeful communication of knowing falsehoods with the purpose to knowingly expose public officials to public hatred, contempt, or ridicule. Why should a knowingly false statement purposefully made on the Internet

[3] Available at: https://www.jmir.org/2018/4/e129/ (last visited: June 7, 2023).

stating as fact that a particular law enforcement deputy has stolen illicit drugs from the evidence locker for personal use with the intent of drawing that officer into public contempt in the community with the hope of getting the officer investigated and possibly terminated not be subject to potential prosecution under an appropriately narrow criminal defamation statute? Why should a knowingly false statement of fact made on the Internet about a public school teacher stating that the teacher has molested a minor with the intent of drawing the teacher into public hatred or contempt so the teacher will be investigated, possibly terminated, or materially hindered in his or her lifetime career prospects not be subject to potential prosecution under an appropriately narrow criminal defamation statute? *See Miller v. Watkins*, 2021 Tex. App. LEXIS 1879 at *40 n.6 (Tex. Civ. App. March 11, 2021) (detailing nationwide split among states holding that public school teachers are public officials and states that hold the opposite). This Court has consistently recognized that such communications do not enjoy constitutional protection because they are antithetical to the concepts of self-determination and ordered liberty that underpin our constitutional system and because they are capable of inflicting substantial harm on real people and their families for purely malicious reasons.

The petitioner has not provided the Court with *any* compelling reason to rethink this long line of precedent. The Court should therefore decline to review the first question presented.

B. The second question presented does not implicate any Rule 10 consideration, and instead asks this Court to correct a legal error that does not exist.

The second question presented—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—also does not warrant this Court's review. Once again, the petitioner has not identified *any* compelling reason why the Court should grant review on this question. Sup. Ct. R. 10.

The petitioner does not identify any circuit split on whether a criminal defamation statute like New Hampshire's is facially vague. Instead, he endeavors to place the First Circuit's decision here into conflict with a single, 45-year-old state supreme court decision, *Gottschalk v. State*, 75 P.2d 289 (Alaska 1978). The effort is unavailing, both because the decision below is not in tension with *Gottschalk* at all and because, even if it were, this would not reflect the type of deep split on an important question of federal law that would warrant this Court's intervention absent further lower-court development.

The statute at issue in *Gottschalk* made it unlawful to "publish[] defamatory or scandalous matter concerning another with intent to injure or defame him." 575 P.2d at 290 n.1 (quoting Alaska Stat. § 11.15.310). As the First Circuit observed below, "[t]he statute in

Gottschalk did not define 'defamatory or scandalous,'" and the Alaska Supreme Court therefore determined that "'the common law definition must be relied on.'" *Frese v. Formella*, 53 F.4th 1, 8 n.4 (1st Cir. 2022) (quoting *Gottschalk*, 575 P.2d at 292). This standard, as the district court noted in this case, differed materially from the standard set forth in New Hampshire's criminal defamation law. *See Frese v. MacDonald*, 512 F. Supp. 3d 273, 293-94 (D.N.H. 2021).

"Unlike New Hampshire's criminal defamation statute," the statue at issue in *Gottschalk* "expansively criminalized any statement that would cause another to be 'shunned or avoided,' even if the speaker believed that his or her statements were true." *Id.* at 294 (quoting *Gottschalk*, 575 P.2d at 294). Here, as discussed above, persons are only subject to prosecution under N.H. Rev. Stat. § 644:11 when they purposely communicate information that they *know* is false. *See* N.H. Rev. Stat. § 644:11, I. And by incorporating in part New Hampshire's objective standard for common-law defamation, New Hampshire's criminal defamation statute does not "'depend on the values of the listener,'" as did the statute at issue in *Gottschalk*. *See Frese*, 512 F. Supp. 3d at 293 (quoting *Gottschalk*, 575 P.2d at 292-93). Instead, under New Hampshire law, "the defamatory meaning must be one that could be ascribed to the words by persons of common and reasonable understanding." *Boyle*, 172 N.H. at 554. Because *Gottschalk* involved a materially different statute and common-law defamation standard, and turned on

vagueness concerns not present in this case, it in no way conflicts with the First Circuit's decision.

But even if the decision below conflicted with *Gottschalk*, that conflict is not of the kind that would warrant this Court's review now. As the district court observed in this case, "[i]n the 40 years since *Gottschalk* was decided," this Court and the federal courts of appeals "have published numerous decisions refining how courts approach and evaluate modern vagueness challenges . . . to statutes that touch upon First Amendment freedoms." *Id.* at 294 (citations omitted). The district court noted that, "[d]uring that time, no state or federal court has ruled that a statute criminalizing *knowingly false* defamatory speech, as that phrase is understood at common law, was unconstitutionally vague . . . on its face." *Id.* (citations omitted; emphasis added). In addition to the lower courts here, at least one other federal district court has upheld such a criminal defamation provision against a facial vagueness challenge. *See*, *e.g.*, *How v. City of Baxter Springs, Kan.*, 369 F. Supp. 2d 1300, 1306 (D. Kan. 2005).

As the district court observed, "[t]hese developments undercut [the petitioner's] reliance on *Gottschalk* to breathe life into his facial vagueness claim." *Frese*, 512 F. Supp. 3d at 294. Contrary to the petitioner's suggestion, the First Circuit's decision is not a novel ruling that deviates from a longstanding view, embodied in *Gottschalk*, with respect to the facial vagueness of statutes criminalizing defamation. It is instead a well-reasoned decision that reflects and embodies more than four decades of jurisprudential

developments since *Gottschalk* was decided. To the extent the First Circuit's decision conflicts with *Gottschalk* at all—and it does not for the reasons already stated—then this is more a reflection of the uncontroversial reality that legal standards can be refined over time, not some deep-seated disagreement between jurists on an important question of federal law that would warrant plenary review at this juncture.

Nor does the First Circuit's application of the facial vagueness standard to New Hampshire criminal defamation statute present the type of question that would warrant review on certiorari. The petitioner does not appear to contend that the First Circuit misstated the standard governing facial vagueness claims, and it is hard to see how he could do so given that the First Circuit relied in significant part on a correct articulation of this Court's vagueness precedents. *See*, *e.g.*, *Frese*, 54 F.4th at 6-7 (citing cases). The petitioner instead appears to contend that the First Circuit misapplied those precedents to New Hampshire's criminal defamation statute, at least insofar as the statute is enforced by police prosecutors. This Court's rules make clear that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and the petitioner does not provide any persuasive reason to deviate from that norm in this case.

Even if this Court's function were error correction, however, there is still no error to correct in this case. The First Circuit below assessed the petitioner's

arguments that New Hampshire's criminal defamation statute was unconstitutionally vague due to the risk of discriminatory enforcement and because it failed to provide sufficient notice of the conduct prohibited. *See Frese*, 54 F.4th at 7-11. In rejecting both arguments, the First Circuit considered the statutory text and case law articulating New Hampshire's civil defamation standard. *See id.* The First Circuit concluded, applying normal tools of statutory construction, that the criminal defamation statute proscribes conduct in sufficiently precise terms to protect against discriminatory or arbitrary application and to ensure that a person of ordinary intelligence would understand the conduct the statute prohibits. *See id.* The First Circuit compared the language of New Hampshire's criminal defamation statute with that of other statutes or provisions that were found to be unconstitutionally vague and coherently explained why the language at issue here differed in ways that saved it from invalidation on vagueness grounds. *See id.*

The First Circuit's analysis was in keeping with how this Court and other courts of appeals have assessed facial vagueness claims. The petitioner does not appear to dispute this, but still contends that the First Circuit erred because it failed to properly consider the context in which New Hampshire's criminal defamation statute is enforced—namely, by police prosecutors without formal legal training. But as the First Circuit observed, this Court's precedents make clear a statute is not 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.'" *Id.* at 9 (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)) (brackets and ellipsis in original). As this Court has explained, "[w]hat renders a statute vague is not the possibility that it will sometimes be difficult whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *Williams*, 553 U.S. at 306. It is sufficiently clear from the text of New Hampshire's criminal defamation statute what conduct is prohibited, as the First Circuit explained below. The petitioner does not provide any explanation for how the manner a statute might be enforced—be it by attorneys, police officers, or laypeople—bears on whether the *language* of that statute is unconstitutionally vague on its face.

At most, the petitioner suggests that New Hampshire's criminal defamation statute is somehow vague because police officers may choose to bring prosecutions under it for improper purposes, including to chill legitimate criticism of law enforcement. The notion that an officer might *choose* to misapply the criminal defamation statute would in and of itself suggest that an officer was able to discern what conduct the statute did and did not proscribe. And if the facial vagueness standard turned on whether an unscrupulous prosecutor might choose to enforce it for an improper reason, then any criminal statute would be susceptible to

invalidation on vagueness grounds. That, quite clearly, is not the law.

For all of these reasons, the petitioner's second question presented does not warrant review on certiorari.

CONCLUSION

The Respondent respectfully requests that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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