No. 21-1068

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT FRESE

Plaintiff – Appellant,

v.

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

Defendant – Appellee.

CORRECTED PLAINTIFF-APPELLANT'S OPENING BRIEF

Appeal from the United States District Court
for the District of New Hampshire No. 1:18-cv-01180-JL

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Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison, 2003 Media L. Resource Bull., No.1 (Mar. 2003) ... 37

David Pritchard, *Rethinking Criminal Libel: An Empirical Study*,
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Edward Livingston, *A System of Penal Law for the State of Louisiana* (1833) 50

George C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Comm. L. & Pol'y 433 (2004) 37

Irving Brant, *Seditious Libel: Myth & Reality*,
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Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*,
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Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990-2002*, Libel Def. Resource Center Bull., No. 2 (Mar. 27, 2002) 37

Wayne R. LaFave, *The Prosecutor's Discretion in the United States*,
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INTRODUCTION

As Justice Holmes argued more than a century ago, the First Amendment was designed to eradicate any vestige of the doctrine of seditious criminal libel, which prohibited attacks on the government and its officials. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The crime of seditious libel was "entirely the creation of the Star Chamber," widely regarded as the "most iniquitous tribunal in English history" because of the "the vicious procedures by which [it] stifled criticism of the government and freedom of political opinion." *Garrison v. Louisiana*, 379 U.S. 64, 83 & n.4 (1964) (Douglas, J., concurring) (quoting Irving Brant, *Seditious Libel: Myth & Reality*, 34 N.Y.U. L. Rev. 1, 11 (1964)). It is "totally repugnant to the Constitution of the United States." *Id.* at 83 n.4 (quoting Brant, 34 N.Y.U. L. Rev. at 11).

Yet although the doctrine of seditious criminal libel has been widely repudiated, "one of its instruments of destruction is abroad in the land today." *Id.* at 83. Generally applicable criminal defamation laws remain on the books in 13 states, including New Hampshire, and in the U.S. Virgin Islands.[2] As discussed herein,

[2] Idaho Code §§ 18-4801–4809 (2021); Kan. Stat. Ann. § 21-6103 (2021); La. Stat. Ann. § 14:47–50 (2020); Mich. Comp. Laws Ann. § 750.370 (2021); Minn. Stat. Ann. § 609.765 (2021); N.H. Rev. Stat. Ann. § 644:11 (2021); N.M. Stat. Ann. § 30-11-1 (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); *see also* V.I. Code Ann. tit. 14, §§ 1171–1179 (2021). Two of these

numerous studies have shown that criminal defamation laws are disproportionately filed against people who criticize public officials or government employees, especially law enforcement officers. While prosecutions remain rare, they have increased with the rise of online speech, which proliferates the number of potentially actionable statements easily identifiable by law enforcement.

New Hampshire's Criminal Defamation Statute, N.H. RSA 644:11, is particularly susceptible to abuse by law enforcement. The statute makes it a crime 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," and defines the "public" to include "any professional or social group of which the victim of the defamation is a member." *Id.* Under New Hampshire's idiosyncratic misdemeanor process, police officers are authorized to prosecute Class B misdemeanor offenses on their own initiative, without the participation of a licensed attorney, and the defendant is not entitled to court-appointed counsel or trial by jury. Given these circumstances, there is an acute risk that police officers will selectively (and, in many cases, improperly)

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statutes have been held unconstitutional as applied to statements on matters of public concern. *State v. Snyder*, 277 So. 2d 660, 668 (La. 1972), *rev'd on other grounds*, 304 So. 2d 334, 334 n.1 (La. 1974); *State v. Powell*, 114 N.M. 395, 403, 839 P.2d 139, 147 (N.M. Ct. App. 1992).

invoke the Criminal Defamation Statute to prosecute speech criticizing the government and its officers.

This case is a textbook example of the danger posed by the Criminal Defamation Statute. Plaintiff-Appellant Robert Frese was arrested and prosecuted under the statute for posting comments on news and social media websites stating that the Exeter Police Chief was a "coward" who was "covering up for a dirty cop," even though there was no evidence whatsoever that Frese believed his statements to be false. Because Frese was on a suspended sentence for good behavior in another case, he faced the possibility of jail upon conviction. Fortunately, after Frese's case drew significant publicity, the New Hampshire Department of Justice advised that the prosecution violated the First Amendment, and the Exeter Police Department dropped the charges.

Frese brought this lawsuit challenging the constitutionality of the Criminal Defamation Statute against Defendant-Appellee then-New Hampshire Attorney General Gordon MacDonald (the "State"). Frese claims that the statute is unconstitutionally vague on its face and as-applied in the context of New Hampshire's process for prosecuting Class B misdemeanors. He also claims that the statute violates the First Amendment on its face and as-applied to criticism of public officials. After denying the State's motion to dismiss Frese's initial complaint and its motion for reconsideration, the district court reversed course and granted the

State's motion to dismiss Frese's amended complaint just three days before the discovery deadline.

The court reasoned that the Criminal Defamation Statute provides a comprehensible standard for prosecution because it incorporates New Hampshire's common law of civil defamation. It declined to consider how New Hampshire's idiosyncratic misdemeanor process may affect the statute's vagueness—and it refused to allow Frese the opportunity to build a record about whether the statute had in fact been enforced in an arbitrary, selective, or discriminatory manner—on the ground that such nontextual factors are irrelevant to Frese's facial and hybrid facial/as-applied vagueness challenges. The court also held that Frese's First Amendment claim is barred by the Supreme Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964).

This Court should reverse. *First*, the district court erred in refusing to consider the risk that the Criminal Defamation Statute's broad sweep, combined with New Hampshire's reliance on police-prosecutors, may invite or encourage arbitrary, selective, or discriminatory enforcement against those who criticize the government and its officers. *Second*, the common law of civil defamation is too abstruse and unstable to define a criminal restriction on speech, and the Criminal Defamation Statute departs from the common law in ways that make it even more difficult to predict what speech will be criminalized. *Finally*, to the extent that *Garrison* bars

Frese's First Amendment claim that the government cannot criminalize speech criticizing public officials under any circumstances, the time has come for the Supreme Court to revisit that decision.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to First Circuit Local Rule 34, Plaintiff-Appellant Robert Frese submits that oral argument would assist the Court in its deliberations and disposition of this matter, and, therefore, requests oral argument.

JURISDICTIONAL STATEMENT

The jurisdiction of the district court was based upon 28 U.S.C. § 1331 because the action arose under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. On January 19, 2021, the district court entered judgment in favor of Defendant in accordance with its Memorandum Order granting the State's motion to dismiss. J.A. 419. On January 20, 2021, Frese timely filed a Notice of Appeal. J.A. 421. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this is an appeal from a final order of the district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. In dismissing Frese's facial and hybrid vagueness claims, did the district court fail to properly consider whether the Criminal Defamation Statute's broad and indeterminate sweep plausibly invites or encourages arbitrary, selective, or discriminatory enforcement in the context of New Hampshire's idiosyncratic

misdemeanor process?

2. Has Frese plausibly alleged that the Criminal Defamation Statute fails to provide adequate notice about what speech is criminalized, where the yardstick for criminal conviction depends on what particular professional or social groups would consider defamatory?

3. To the extent *Garrison v. Louisiana*, 379 U.S. 64 (1964), holds that criminal defamation laws do not violate the First Amendment so long as they include an actual malice requirement, should the decision be revisited?

STATEMENT OF THE CASE

I. Factual Background

A. New Hampshire's Criminal Defamation Statute

New Hampshire's Criminal Defamation Statute, N.H. 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." Class B misdemeanors carry a maximum penalty of a fine up to $1,200, *see* N.H. 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. J.A. 107 & n.2, 155. People charged under RSA 644:11 are not entitled to court-appointed counsel if they are indigent. J.A. 107,

155. Nor are they entitled to a jury trial. J.A. 107. 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. J.A. 155, 163–88. Though outside the motion to dismiss record in this case, discovery in this case revealed that there were an additional 6 criminal defamation prosecutions filed from January 1, 2018 to June 30, 2020, including Frese's 2018 prosecution by the Exeter Police Department.

B. The Criminal Defamation Statute's Application to Robert Frese

Robert Frese, an outspoken resident of Exeter, New Hampshire, has been charged with violating the Criminal Defamation Statute on two separate occasions. He was first charged with criminal defamation in May 2012 by the Hudson Police Department for, in part, repeatedly calling a life coach business a "scam" on Craigslist. J.A. 155, 189–265. Without the benefit of an attorney to advise him on his legal rights, Frese pleaded guilty to criminal defamation under RSA 644:11 in August of 2012. J.A. 155. As part of his sentence, Frese was fined $1,488 (with $1,116 suspended) and ordered to be on good behavior for two years. *Id.*

Frese's second brush with the Criminal Defamation Statute came several years later. 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." *Id.* Using the moniker "Robert William," Frese published a

comment to this article on the *Exeter News-Letter*'s Facebook page stating, in relevant 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." J.A. 155, 285, 358. The *Exeter News-Letter* removed the comment at the request of Exeter Police Chief William Shupe. J.A. 155–56, 351–52. After the *Exeter News-Letter* deleted his comment, Frese submitted another comment under the moniker "Bob Exeter." J.A. 156. 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…. " J.A. 156, 285, 359. This comment was forwarded by Chief Shupe to Detective Patrick Mulholland. J.A. 156, 285.

Detective Mulholland discussed the matter with Chief Shupe. According to Detective Mulholland's police report, Chief Shupe "expressed his concern regarding the comments as they are false and baseless and were made in a public forum." J.A. 156, 285. 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." J.A. 156, 285. Chief Shupe denied that he was aware of any criminal acts committed by Officer D'Amato and denied covering up any criminal conduct. J.A. 156, 286. Based on his conversation with Chief Shupe—and a separate interview with Frese, in which Frese "advised just his testimony" about his

conversation with Chief Shupe regarding Officer D'Amato—Detective Mulholland determined that "no credible information exists to believe that Ofc. D'Amato committed the acts Frese suggests." J.A. 156, 286, 292–93.

Detective Mulholland then prepared a criminal complaint alleging that Frese violated RSA 644:11 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." J.A. 157, 295. Based on this complaint and Detective Mulholland's supporting affidavit, a New Hampshire Circuit Court judge granted a warrant for Frese's arrest on May 23, 2018. J.A. 157, 290–93.

That same day, Frese turned himself in, was formally arrested, and was released on bail. J.A. 157, 355. One of his bail conditions was that he could not have any contact with interested parties, including Chief Shupe. J.A. 157, 355. 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. J.A. 157, 355. At the time of his arrest, 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," resulting in his imprisonment. J.A. 158. The prosecution was then to be managed by one of the Exeter Police Department's internal attorney prosecutors. However, after this case generated public attention,

there was a concern that this case was "too close to the vest" for her to prosecute and, thus, she had a conflict. *See* J.A. 375, 380–82.

News about Frese's arrest caused significant public controversy, with *Seacoast Online* publishing a story on the prosecution on May 31, 2018. J.A. 157, 336–37, 368–69. On June 4, 2018, the New Hampshire Attorney General's Civil Rights Division issued a memorandum criticizing the Department's decision to arrest and charge Mr. Frese. J.A. 157, 274–79. Observing that "[a]ll of the information available at the time of Frese's arrest indicates that Frese believed his comments about Officer D'Amato and Chief Shupe were true," the Civil Rights Division concluded that "[t]he fact that members of the Exeter Police Department think that Frese's statements are false does not somehow criminalize Frese's speech." J.A. 278. On June 6, 2018, the New Hampshire Attorney General's Office apparently communicated this opinion to the Exeter Police Department. J.A. 375–76. That same day, Frese secured counsel to defend himself against this prosecution. J.A. 371. On June 7, 2018, the Exeter Police Department formally dismissed the criminal complaint. J.A. 157–58, 374.

In light of his two prior arrests, Frese fears future prosecution under the Criminal Defamation Statute for his speech. J.A. 158. He especially fears that he will be arrested and prosecuted for speech criticizing law enforcement and other public officials. *Id.*

II. Prior Proceedings

A. Plaintiff's Superseded Complaint and the District Court's October 25, 2019 Order

On December 18, 2018, Frese brought this pre-enforcement challenge against then-New Hampshire Attorney General Gordon MacDonald in his official capacity. Dist. Ct. ECF No. 1. Frese alleged that RSA 644:11 is void-for-vagueness and that it imposes an unconstitutional restriction on speech. *Id.* He asked the court to declare the Criminal Defamation Statute facially unconstitutional and enjoin its future enforcement. *Id.*

On March 19, 2019, the State moved to dismiss, arguing that Frese lacked standing to challenge the Criminal Defamation Statute and that he failed to state a claim. After a motion hearing held on September 13, 2019, J.A. 1–103, the district court issued a Memorandum Opinion denying the State's motion on October 25, 2019. J.A. 104–129.

First, the court held that Frese has standing to bring this pre-enforcement challenge. Applying the tripartite analysis for pre-enforcement constitutional challenges, *see Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014), the court held that: (1) Frese's speech criticizing public officials, including law enforcement officers, is affected with a constitutional interest; (2) Frese's speech is arguably proscribed by RSA 644:11, even though he does not intend to knowingly communicate false and defamatory information, because Frese could be prosecuted

for speech that he believes to be true and/or nondefamatory; and (3) in light of his prior prosecutions, both of which were initiated by municipal police departments, Frese faces a credible threat of future enforcement. J.A. 113–122.

Second, the court held that Frese had sufficiently alleged that RSA 644:11 may be unconstitutionally vague. J.A. 122–28.[3] The court reasoned that the law, which largely reiterates the common law formula for defamation, may be void-for-vagueness because it "arguably fails to provide 'people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' and what speech is acceptable." J.A. 124 (all footnotes omitted). The court cited an Alaska Supreme Court decision holding that the common law defamation standard "falls far short of the reasonable precision necessary to define criminal conduct." J.A. 124 (citing *Gottschalk v. State*, 575 P.2d 289, 292 (Alaska 1978)). The district court explained that "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." J.A. 125.

The court further held that "Frese has sufficiently pleaded that the criminal defamation statute may be prone to arbitrary enforcement." J.A. 126. Considering

[3] In a footnote, the court suggested that *Garrison v. Louisiana*, 379 U.S. 64 (1964), bars Frese's facial First Amendment challenge to the Act. J.A. 122 n.38. The court noted that Frese raised the argument in order to preserve the ability to challenge *Garrison* on appeal. *Id*.

the statute in the context of the statutory enforcement scheme, 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." J.A. 128. Indeed, the court pointed out, "Frese's case is not the first reported decision of a municipal police department that prosecuted an individual who criticized one of its officers." J.A. 127 (citing *Nevins v. Mancini*, No. CIV. 91-119-M, 1993 WL 764212, at *1–2 (D.N.H. Sept. 3, 1993)). The court was also troubled by the State's failure to identify "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." J.A. 128–29. It noted that, in many cases, determining whether the utterance was defamatory might "depend on the unconstrained values of the factfinder." J.A. 128 n.44.

The court accordingly concluded that "Frese ha[d] sufficiently pleaded standing and a void-for-vagueness claim." J.A. 128. It emphasized that it was not holding the Criminal Defamation Statute facially unconstitutional; rather, the court confined itself to the tentative conclusion that Frese might be able to demonstrate the Act's unconstitutionality. *Id.* It explained that answers to questions as to how the statute has been applied in the context of New Hampshire's "distinctive criminal

process," which would aid the constitutional analysis, "may emerge on a more developed record." J.A. 127–28.

B. The District Court's February 14, 2020 Order

On November 25, 2019, the State filed a motion to reconsider the district court's order denying the motion to dismiss. On February 14, 2020, the court issued Memorandum Opinion denying the State's motion for reconsideration. J.A. 131–144. The court disagreed with the State's assertion that it had inappropriately considered facts beyond the four corners of the statute in holding that Frese had stated a facial vagueness claim. J.A. 135–38. To the contrary, the court stated, it "focused its analysis on the text of the criminal defamation statute and found that Frese had sufficiently alleged the text 'may be unconstitutionally vague.'" J.A. 136. "It was only after making these text-based findings that the court opined that 'New Hampshire's distinctive criminal process may *exacerbate* the potential for arbitrary or selective prosecutions' beyond the inherent prosecutorial risks arguably 'created by the *statutory language* challenged.'" J.A. 137 (emphasis in original).

The court clarified that it "did not find that Frese's case was a purely facial challenge or that Frese had waived the ability to also raise as-applied theories; it did not find that that the police's ability to prosecute criminal defamation cases rendered the statute void for vagueness; and it did not find that Frese's remedies were limited to complete statutory invalidation, as opposed to granting partial or 'as-applied'

invalidation, should he ultimately succeed in this case." J.A. 138–39. The court faulted the State for attempting to interject new arguments that should have been raised in its prior briefing, and noted that it was not taking any position on the merits of those arguments. J.A. 138–141. Finally, it rejected the State's contention "that it was manifest error of law for the court to consider 'the means and methods' of the criminal defamation statute's enforcement." J.A. 141. The court reasoned that it was entirely appropriate for it to consider extrinsic evidence of statutory meaning, or the absence of any such sources, in resolving Frese's facial vagueness challenge. J.A. 142–43. Characterizing its prior October 25, 2019 order, the court noted that it had "want[ed] a more robust record on how other authorities and enforcement agencies have interpreted N.H. Rev. Stat. § 644:11 or similar speech-restricting statutes." J.A. 143. Again, however, it emphasized that it had not yet passed final judgment on the merits of Frese's claim. *Id.*

Following this February 14, 2020 order, the parties agreed to a discovery plan on April 13, 2020, with discovery to end on January 15, 2021 and summary judgment briefing to begin shortly thereafter. The court held a status conference on April 22, 2020 status conference. On May 7, 2020, it approved the discovery plan in this case. Discovery then proceeded.

C. Plaintiff's Amended Complaint and the District Court's January 12, 2021 Order

On April 10, 2020, Frese filed an assented-to motion to amend the complaint to clarify that it includes hybrid facial/as-applied vagueness and First Amendment claims. J.A. 145–48. The amended complaint alleges that "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." J.A. 158. It also alleges that the statute facially violates the First Amendment because it criminalizes defamatory speech, that it is substantially overbroad because it criminalizes speech criticizing public officials, and that it is unconstitutional as applied to speech criticizing public officials. J.A. 160. The district court granted the motion to amend the complaint on April 13, 2020. Frese filed his amended complaint that same day.

On May 6, 2020, the State filed a new motion to dismiss the amended complaint. Dist. Ct. ECF No. 33. The district court directed Frese not to respond to the arguments assessed in the court's prior orders, but asked Frese to specifically respond to the State's new argument that First Circuit precedent precludes both facial and hybrid facial/as-applied vagueness claims. Text Order, May 8, 2020. The court denied the State's motion to reconsider its briefing direction, while noting that none of the State's arguments raised in previous motions were forfeited or waived. Text Order, May 19, 2020.

On January 12, 2021, three days before the close of discovery and the subsequent commencement of summary judgment briefing, the district court issued a Memorandum Order granting the State's motion to dismiss. Addendum ("Add.") 2–36. After reiterating its rejection of the State's standing arguments, Add. 9–13, the court turned its attention to the merits. First, it again rejected Frese's claim that the Criminal Defamation Statute violates the First Amendment. Add. 14. It held that Frese's First Amendment claim is precluded by the Supreme Court's decision in *Garrison*, 379 U.S. at 67, while noting that Frese raised the argument in order to preserve it for "an appellate court that can question *Garrison*'s rationale." Add. 14–15.

Reconsidering its previous decisions from October 25, 2019 and February 14, 2020, the district court also held that Frese has failed to state a vagueness claim. It disagreed with the State's contention that Frese's facial and hybrid facial/as-applied vagueness challenges are precluded by this Court's decision in *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (holding that the plaintiffs' vagueness challenge to a handgun-sales regulation was "eligible for only as-applied, not facial, review"). Add. 20–25. Pointing out that "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," Add. 20, the court concluded that *Draper*—which

concerned a restriction of pure conduct that clearly prohibited the defendants' activity—"does not directly call these precedents into question or otherwise create a turning point in First or Fourteenth Amendment jurisprudence," Add. 21.

The court also rejected the State's contention, raised for the first time in its reply brief, that a plaintiff must plead a valid as-applied vagueness challenge in order to state a facial or hybrid claim. Add. 24. Citing the D.C. Circuit's decision in *Act Now to Stop War & End Racism Coal. v. District of Columbia.*, 846 F.3d 391, 412 (D.C. Cir. 2017), the district court presumed 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." Add. 25. It also suggested that Frese has "arguably" pleaded facts sufficient to support a valid as-applied claim, "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." *Id.*

In a reversal of its prior two decisions, however, the district court held that Frese has failed to state a facial vagueness claim. Noting Frese's acknowledgment that the Criminal Defamation Statute adopts the common-law standard for defamation, Add. 27, it held that "the common law defamation standard," together with the statute's *mens rea* requirement, "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," Add. 28.

The district court discounted Frese's "examples highlighting the history of selective criminal defamation prosecutions in America," including his own prosecution by the Exeter Police Department, as well as his argument that "New Hampshire's particular misdemeanor criminal process . . . exacerbates the risk that the criminal defamation statute may be misused." Add. 31. The court did "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." Add. 32 n.46. But it held that these points are irrelevant to the "textual analysis" attendant on a facial vagueness claim. Add. 32.

The district court also rejected Frese's hybrid facial/as-applied challenge. Reasoning that the label is not what matters, the court concluded that Frese's claim must satisfy the standards for stating a facial vagueness claim because his challenge, and the relief that would follow, reaches beyond his particular circumstances. Add. 34. It accordingly rejected Frese's hybrid claim for the same reason it rejected his facial claim. *Id.*

STANDARD OF REVIEW

This Court reviews *de novo* a district court's order granting a motion to dismiss for failure to state a claim. *Alston v. Spiegel*, 988 F.3d 564, 571 (1st Cir. 2021). It accepts as true all well-pleaded facts alleged in the complaint and draws all reasonable inferences in the nonmoving party's favor. *Id.* "At bottom, a complaint will survive a motion to dismiss when it alleges 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim is plausible when the factual content adumbrated in the complaint permits a reasonable inference that the defendant is liable." *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

SUMMARY OF ARGUMENT

I. The district court erred in dismissing Frese's facial and hybrid facial/as-applied vagueness claims at the pleading stage and on the eve of discovery's completion. A law may be unconstitutionally vague either because it invites or encourages arbitrary, selective, or discriminatory enforcement or because it fails to provide adequate notice about what is prohibited. Criminal restrictions on speech, such as New Hampshire's Criminal Defamation Statute, are subject to the most stringent form of vagueness scrutiny, because of the particular danger that law enforcement officers will abuse them to prosecute dissidents and critics. Properly considered, the Criminal Defamation Statute cannot survive this exacting review.

First, Frese has plausibly alleged that the Criminal Defamation Statute is unconstitutionally vague because it invites or encourages arbitrary, selective, or discriminatory enforcement. In assessing Frese's vagueness claim based on excessive discretion, the district court looked outside the statutory text by holding that the Criminal Defamation Statute incorporates New Hampshire's common law of civil libel, but refused to consider whether New Hampshire's idiosyncratic misdemeanor process—particularly its reliance on police-prosecutors—invites or encourages arbitrary, selective, or discriminatory enforcement under the Criminal Defamation Statute's sweeping and indeterminate standard. And the court denied Frese the opportunity to build and present a record concerning the Criminal Defamation Statute's actual enforcement and the enforcement of similar statutes. This was error. Even in the context of facial vagueness challenges, courts have looked to extrinsic sources, including both the overall statutory scheme and the challenged statute's enforcement history, to determine whether the challenged statute gives too much discretion to enforcement officials. Furthermore, in this case, Frese has expressly challenged the Criminal Defamation Statute as applied in the context of New Hampshire's process for prosecuting Class B misdemeanors.

Taking the Criminal Defamation Statute's enforcement context into account, Frese has alleged sufficient facts to survive a motion to dismiss. For half a century, study after study has shown that, although criminal defamation prosecutions are

quite rare relative to the number of daily violations of criminal defamation prosecutions, they are disproportionately brought against those who criticize law enforcement officers or public officials. New Hampshire's Criminal Defamation Statute is particularly susceptive to arbitrary, selective, or discriminatory enforcement because police officers are empowered to bring prosecutions under the statute without the participation of a licensed attorney. Frese's recent prosecution for constitutionally protected speech criticizing the Exeter Police Chief is a textbook example of the dangers posed by the confluence of the Criminal Defamation Statute's broad and indeterminate sweep and New Hampshire's idiosyncratic misdemeanor process. At the very least, Frese should be given the opportunity to build and present a record showing how criminal defamation laws, including the Criminal Defamation Statute, have actually been enforced. Frese was in the process of building this record, consistent with the district court's October 25, 2019 and February 14, 2020 orders, when the district court abruptly dismissed this case.

Second, Frese has also stated a vagueness claim based on lack of adequate notice. It is possible that the district court declined to formally address Frese's notice claim because it concluded that a plaintiff cannot plead a facial vagueness claim for lack of notice without separately pleading an as-applied claim. If so, the court erred. Notice claims may be brought so long as the statute does not clearly prohibit or permit the plaintiff's speech, and here the district court recognized that the Criminal

Defamation Statute does not clearly prohibit or permit Frese's criticism of law enforcement.

The district court also erred in holding that the Criminal Defamation Statute is not unconstitutionally vague, because it incorporates New Hampshire's common law of civil defamation. To the contrary, the common law of civil defamation is too indefinite and uncertain to define a criminal restriction on speech. Moreover, the Criminal Defamation Statute expressly departs from the common law standard in a manner that exacerbates the statute's vagueness: Whereas the common law defines defamation as false statements tending to injure the victim's reputation with any substantial and respectable minority of the public, the Criminal Defamation Statute defines defamation to encompass false statements tending to injure the victim's reputation in any professional or social group of which they may be a member—a substantially more elastic standard. Finally, even courts have struggled to draw the line between statements of opinion and potentially defamatory statements of fact. The standard is simply too abstruse to guide an average person's speech on pain of criminal penalty.

II. The Criminal Defamation Statute also violates the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), the Supreme Court held that criminal defamation laws must satisfy the *New York Times Co. v. Sullivan* standard insofar as they prohibit speech criticizing public officials, but declined to go further and hold

that criminal defamation laws are unconstitutional *per se*. Although the Court recognized that civil remedies are sufficient to provide redress for injuries to reputation, it suggested that criminal defamation laws may still have a legitimate role to play in suppressing seditious criminal libel. However, as Justices Black, Douglas, and Goldberg recognized in their concurrences, the First Amendment was meant to eradicate the Star Chamber doctrine of seditious criminal libel and, with it, any justification for imposing criminal penalties on speech criticizing government officials, regardless of the defendant's *mens rea*.

Subsequent Supreme Court decisions have lent further support to the *Garrison* concurrences. In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that the government may not selectively criminalize defamation of public officials, thus vitiating any interest the government might claim in preventing seditious criminal libel. And, in *United States v. Alvarez*, 567 U.S. 709 (2012), the Supreme Court rejected the notion that knowingly false speech is categorically unprotected under the First Amendment. Notably, all nine justices in *Alvarez* agreed that laws broadly criminalizing false speech on matters of public concern raise grave First Amendment problems, because it is extremely dangerous to let the government act as the final arbiter of truth on issues of societal importance. In short, the time has come for the Supreme Court to revisit *Garrison*.

ARGUMENT

I. The district court erred in holding that Frese has failed to state a vagueness claim.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). "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, 56–57 (1999)). Of these two requirements, "the more important aspect of vagueness doctrine 'is . . . 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)). Thus, even a law that is not formally vague may violate due process if it confers excessive discretion on law enforcement officials.

Two thumbs are placed on the scale when assessing a vagueness challenge to a criminal regulation of speech, such as the Criminal Defamation Statute. *First*, while the Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982), it has made clear that "[c]riminal 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*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575), and because civil liability is "qualitatively less severe" than a criminal conviction, *Hoffman Estates*, 455 U.S. at 499. *Cf. Lawrence v. Texas*, 539 U.S. 558, 560 (2003) (observing that the "stigma" imposed by even "a minor misdemeanor" is "not trivial").

Second, laws regulating speech are subject to a "more stringent vagueness test" than laws regulating conduct. *Hoffman Estates*, 455 U.S. at 499. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The heightened vagueness standard applied to laws regulating speech is necessary, both because "there are enhanced concerns about arbitrary enforcement under the void for vagueness doctrine where there is the 'potential for arbitrarily suppressing First Amendment liberties,'" *Butler v. O'Brien*, 663 F.3d 514, 520 (1st Cir. 2011) (quoting *Kolender*, 461 U.S. at 358), and to "ensure that ambiguity does not chill protected speech," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012).

A. Frese has plausibly alleged that the Criminal Defamation Statute invites or encourages arbitrary, selective, or discriminatory enforcement.

The district court failed to properly evaluate Frese's facial and hybrid facial/as-applied vagueness challenges to the Criminal Defamation Statute, because it erroneously concluded that such challenges must be limited to a purely textual analysis. The court accordingly disregarded the ways in which New Hampshire's idiosyncratic misdemeanor process exacerbates the Criminal Defamation Statute's susceptibility to arbitrary, selective, or discriminatory enforcement, and denied Frese the opportunity to build and present a factual record that should inform the vagueness analysis. This record would have been completed by the discovery deadline of January 15, 2021, and presented to the district court in the form of a motion for summary judgment, had the district court not abruptly dismissed this case on January 12, 2021. In any event, under the proper analysis, Frese has at least plausibly alleged that the Criminal Defamation statute invites or encourages arbitrary, selective, or discriminatory enforcement.

i. The district court erroneously confined its analysis of Frese's vagueness challenge to the Criminal Defamation Statute's text, thereby ignoring essential context about the Act's enforcement under New Hampshire's idiosyncratic misdemeanor process.

The district court's dismissal order is premised on a fundamental misunderstanding about the proper scope of review on a facial or hybrid facial/as-applied vagueness challenge.

In its October 25, 2019 Memorandum Opinion denying the State's first motion to dismiss, the district court recognized that, even in the context of a purely facial challenge, "courts may consider not just 'the words of the statute,' but also 'their context' and 'their place in the overall statutory scheme.'" J.A. 126 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). The court reiterated this point in its February 14, 2020 Memorandum Opinion denying the State's first motion for reconsideration. J.A. 141 (rejecting the State's contention "that it was manifest error of law for the court to consider 'the means and methods' of the criminal defamation statute's enforcement").

Three days before the close of discovery, the district court reversed course without explanation, holding in its January 12, 2021 Memorandum Order that Frese's facial vagueness claim requires a purely "textual analysis" of the Criminal Defamation Statute's text, and disregarding "New Hampshire's misdemeanor criminal process—with all its particular idiosyncrasies, including the ability of police officers to charge and prosecute misdemeanor crimes." Add. 32 & n.46. The court extended this reasoning to Frese's hybrid facial/as-applied challenge, summarily holding that this claim failed "[f]or the reasons discussed in [the] court's facial vagueness analysis." Add. 34. Thus, although the court initially recognized that it may consider statutory enforcement mechanisms on a facial vagueness claim, it ultimately held that it must ignore the manner in which the statute is enforced—

even on a hybrid claim challenging the Act *as applied* in the context of New Hampshire's process for prosecuting Class B misdemeanors.

The district court's initial rulings were correct. Constitutional rights cannot be reduced to semantics, and courts cannot effectively evaluate a constitutional challenge by abstracting the challenged statute from the broader procedural context in which it is enforced. Thus, even when it comes to purely facial vagueness challenges, courts must be free to evaluate the challenged statutory provisions "in their context and with a view to their place in the overall statutory scheme." *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 273 (4th Cir. 2019) (holding that the challenged statute permitting civil interdiction of "habitual drunkards" must be considered quasi-criminal in nature, even though the statute itself did not define criminal penalties, because it was a necessary predicate for imposing the increased criminal penalties set forth in the other statutes addressing interdiction) (internal quotation marks omitted) (quoting *Davis*, 489 U.S. at 809). To hold otherwise would be to embrace a formalism that would undermine constitutional enforcement.

Indeed, the district court's ruling is internally inconsistent on this point. The court held that the Criminal Defamation Statute contains an intelligible standard because it "adopts part of the common law standard for civil defamation," together with "narrowing constructions of the common law defamation standard applied by the New Hampshire courts, as well as the federal courts." Add. 27, 29. Although the

court was willing to consider a whole corpus judicial decisions defining civil defamation, it was ultimately unwilling to consider whether the statutorily defined process for prosecuting Class B misdemeanors plausibly exacerbated the excessive discretion conferred on law enforcement by the Criminal Defamation Statute's text. There is no reason why going outside of the statutory text is permissible in one case but not the other.

Even if there were any doubt about whether a court may consider the enforcement process on a purely facial vagueness challenge, such a rule would not bar Frese's hybrid vagueness claim, which specifically challenges the Criminal Defamation Statute "as applied in the context of New Hampshire's system for prosecuting class B misdemeanors." J.A. 158. This alternative claim 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 the Criminal Defamation Statute outside the context of New Hampshire's particular misdemeanor process. "The label is not what matters." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). The key point is that Frese's request for relief reaches beyond his particular circumstances to encompass every application of the Criminal Defamation Statute under New Hampshire's misdemeanor process. He must satisfy the requirements for a facial challenge "to the extent of that reach," but not further. *Id.* The particular features of New Hampshire's misdemeanor process are at least relevant to Frese's hybrid vagueness claim.

The district court was therefore obligated to consider the particular characteristics of New Hampshire's misdemeanor criminal process in determining whether the Criminal Defamation Statute entrusts too much discretion to police officers. The fact that New Hampshire authorizes municipal police department to initiate prosecutions under the Criminal Defamation Statute "without input or approval from a state-employed and legally trained prosecutor," the fact that "criminal defamation defendants are not entitled to trial by jury," and the fact that "state law does not afford indigent criminal defamation defendants the right to court-appointed counsel," all support the conclusion that the broad and ill-defined sweep of the Criminal Defamation Statute is at least susceptible to arbitrary and discriminatory enforcement. J.A. 107 (collecting state law authorities). The court erred by refusing to take these aspects of New Hampshire's misdemeanor process into account in its January 12, 2021 order dismissing the case.

The court should also have allowed Frese to develop a factual record regarding the enforcement of criminal defamation laws, including New Hampshire's Criminal Defamation Statute. In fact, Plaintiff had built the necessary record during the discovery period in this case, only to have the district court dismiss this case three days before the discovery deadline.[4] The district court, however, concluded that

[4] While outside the motion to dismiss record, here are some examples of the information Plaintiff accumulated during the discovery process and planned to present to the district court on summary judgment: (1) records showing that six of

enforcement history is irrelevant to Frese's facial and hybrd vagueness claims, because "identified instances of a statute's misapplication do not tell us whether the law is [facially] unconstitutional." Add 32 (quoting *Agnew v. Gov't of the District of Columbia*, 920 F.3d 49, 60 (D.C. Cir. 2019)). *But see* J.A. 127–28, 143. It may be true that "identified instances of a statute's misapplication" are not, by themselves, sufficient to demonstrate that an otherwise definite statute is facially vague. But it is simply not the case that a demonstrated pattern of arbitrary, selective, or discriminatory enforcement can never inform a court's vagueness analysis where, as here, there are facially apparent reasons to be concerned that a statute confers excessive discretion on law enforcement. *See* J.A. 124–28, 135–37 (holding that Frese has plausibly alleged a facial vagueness claim).

To the contrary, the Supreme Court itself has rested its analysis of facial excessive discretion claims on extrinsic enforcement evidence. In *Johnson v. United*

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the 26 identified prosecutions for the period between 2009 and 2017 (which excludes Frese's case) stemmed from statements to or about the police—including one from 2009 in which a woman was charged with, and pleaded guilty to, criminal defamation for "purposefully communicat[ing] orally, in open court to [the judge] during her arraignment, that [a police officer] undertook an illegal search of [her] person and property … [which was] heard by numerous by other persons in the courtroom"; (2) records showing that three prosecutions during this period involved statements about other public officials or government employees; (3) interrogatories acknowledging that, aside from the memo addressing Frese's prosecution, the New Hampshire Department of Justice has not provided any guidance or trainings to enforcement officials regarding RSA 644:11; and (4) an expert report addressing the Criminal Defamation Statute's susceptibility to selective enforcement.

States, 576 U.S. 591 (2015), the Court cited a string of Supreme Court and lower court decisions inconsistently applying the Armed Career Criminal Act to support its conclusion that the ACCA's residual clause invites arbitrary or discriminatory enforcement. *See id.* at 598–602. And in *Kolender*, 461 U.S. at 360, the Supreme Court cited California's representation at oral argument about how the State's anti-loitering statute operated in practice to support its conclusion that the statute conferred excessive discretion on police officers. Other courts have also recognized the relevance of extrinsic enforcement evidence to vagueness challenges based on excessive discretion. *See Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 372 (4th Cir. 2012) ("When the terms of a regulation are clear and not subject to attack for vagueness, the plaintiff bears a high burden to show that the standards used by officials enforcing the statute nevertheless give rise to a vagueness challenge. We will evaluate alleged vagueness in the enforcement of an otherwise-valid statute only 'if and when a pattern of unlawful favoritism appears.'" (citation omitted)).

Indeed, one state supreme court has already relied on extrinsic enforcement evidence in holding that a criminal defamation law was unconstitutionally vague. In *Gottschalk*, the Alaska Supreme Court held that the State's criminal defamation law was unconstitutionally vague after reviewing a number of studies showing that similarly worded criminal defamation laws across the country have been disproportionately enforced against those who criticize the government, 575 P.2d at

294–95 & n.13. As the court explained, "[t]his pattern of selective enforcement is both the hallmark and the vice of a vague criminal statute. Because one must guess at what is forbidden, a vague statute's standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections, and thereby encourages arbitrary and erratic arrests and convictions." *Id.* at 295 (citations and internal quotation marks omitted).

The district court's ruling treats both a statute's enforcement mechanisms and its enforcement history as irrelevant to the vagueness analysis. Such an approach would rigidly require courts to determine in the abstract whether a given statute is susceptible to arbitrary, selective, or discriminatory enforcement, without the aid of statutory context or enforcement patterns. The rules governing facial and hybrid challenges do not require courts to tie the blindfold quite so tightly. As Justice Holmes famously observed, "[t]he life of the law has not been logic: it has been experience." Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881). Courts should be able to draw on both context and experience in order to ascertain whether a plausibly vague statute confers too much discretion on enforcement officials.

ii. The Criminal Defamation Statute's broad sweep renders it susceptible to arbitrary, selective, or discriminatory enforcement, particularly by unlicensed police-prosecutors.

"Perhaps the most meaningful aspect of the 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," so that officials may not abuse a wide-ranging standard "to pursue their personal predilections." *Smith*, 415 U.S. at 575; *accord Kolender*, 461 U.S. at 352. The "need to eliminate the impermissible risk of discriminatory enforcement" is especially important with respect to 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 Nevada*, 501 U.S. 1030, 1051 (1991) (citations omitted).

Experience has long demonstrated that criminal defamation laws, which broadly criminalize false speech that tends to injure the victim's reputation, are susceptible to precisely this sort of abuse. "Defamations are the stock-in-trade of loose talk, both oral and written, and few indeed are the loose talkers who go through a week without making a statement which if legally tested would satisfy the law's definition of defamatory crime." Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 Tex. L. Rev. 984, 984 (1956). Writing in 1956, Dean Leflar concluded that criminal defamation is "committed in this country a thousand times, and possibly ten or twenty thousand times, daily." *Id.*

With the advent of the Internet, that number has risen dramatically. Major social media platforms such as Facebook and Twitter are constantly expanding, instantly searchable, databases of defamatory speech. If criminal defamation laws

were vigorously and impartially enforced, prosecutions would be ubiquitous. Yet although criminal defamation laws continue to be sporadically enforced, prosecutions remain rare. For instance, there were roughly 25 prosecutions brought under New Hampshire's Criminal Defamation Statute between January 1, 2009 and December 31, 2017. J.A. 155, 168–188.

The prosecutions that have been brought over the past century "fall into [a] fairly definite pattern that helps to explain what is happening[.]" Leflar, 34 Tex. L. Rev. at 985. Surveying the 110 reported criminal defamation prosecutions from 1920 through 1955, Dean Leflar found that "[n]early half . . . can be classified as basically political." *Id.* Many of these cases involved "prosecutions of persons who, feeling aggrieved, made disagreeable statements about persons firmly entrenched in public office or power." *Id.* at 986. Dean Leflar concluded that the criminal defamation laws were not invoked "against persons or groups in positions of influence or power," but rather were "used on behalf of such persons and groups against their detractors who were less fortunately situated." *Id.* at 1032; *accord* Note, *Constitutionality of the Law of Criminal Libel*, 52 Colum. L. Rev. 521, 533 (1952).

Nor has the skew changed appreciably over the past several decades. 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." *Criminalizing Speech About*

Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison, 2003 Media L. Resource Bull., No.1, 37–38 (Mar. 2003). It also found that law enforcement officers and elected officials were the two most frequent complainants, comprising 19.5 percent and 14.3 percent of cases, respectively. *Id.* at 38. 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. 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 Def. Resource Center Bull., No. 2, 97 (Mar. 27, 2002)). Yet another study, focusing on Wisconsin, found that 39 percent of criminal defamation prosecutions involved either public officeholders or government employees, including numerous allegations 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).

There is no reason to believe that New Hampshire's Criminal Defamation Statute is immune from these trends. *See supra* note 4. Indeed, the particular characteristics of New Hampshire's misdemeanor criminal process exacerbate the Criminal Defamation Statute's susceptibility to arbitrary, selective, or discriminatory enforcement. Police officers in New Hampshire are authorized to

prosecute Class B misdemeanors, including violations of the Criminal Defamation Statute, on their own initiative and without the participation of a licensed prosecutor. *State v. Aberizk*, 115 N.H. 535, 535, 345 A.2d 407, 408 (1975) (citing *State v. Urban*, 98 N.H. 346, 100 A.2d 897 (1953)); *see also* N.H. RSA § 41:10-a. Indigent persons charged with Class B misdemeanors in New Hampshire have no right to court-appointed counsel either at trial or on appeal. *State v. Westover*, 140 N.H. 375, 378, 666 A.2d 1344, 1347 (1995). And defendants who do not face the possibility of incarceration have no right to a jury trial. *State v. Foote*, 149 N.H. 323, 324, 821 A.2d 1072, 1073 (2003).

Police officers' authority to prosecute violations of the Criminal Defamation Statute is especially troubling. The decision to bring a criminal charge is the most consequential exercise of discretion 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 "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 Frese's case, for example, the local prosecutor employed by the Exeter Police Department was initially looped into the prosecution, but she was subsequently conflicted out due to her relationship with the Department. J.A. 381. That obvious conflict-of-interest, however, did not prevent one of the Department's own detectives from prosecuting Frese on his own initiative.

As Frese's case further demonstrates, police officers are likely to jump from the belief that a person is obviously wrong to the assumption that the person must be lying, especially when that person is criticizing a friend or colleague. The human tendency to make such logical leaps is understandable, though it is legally insufficient to establish probable cause. *See Nevins*, 1993 WL 764212, at *7 ("[K]nowledge of falsity may not be inferred solely from the falsity of the information communicated."). People often say things that are false, sometimes even obviously false, with total sincerity; however, police officers may fail to appreciate the distinction between obvious inaccuracy and intentional lying when initiating

prosecutions under the Criminal Defamation Statute. *See Susan B. Anthony List*, 573 U.S. at 163 ("SBA's insistence that the allegations in its press release were true did not prevent the Commission panel from finding probable cause to believe that SBA had violated the law the first time around."); *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring in the judgment) ("[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."). Such prosecutions may collapse on close scrutiny, but a Class B misdemeanor prosecution charge is not likely to receive significant scrutiny, especially if it results in a guilty plea.

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). Most 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.*

(footnote omitted).

Given New Hampshire's reliance on police-prosecutors, and its minimal procedural protections for misdemeanor defendants, it is at least plausible that the Criminal Defamation Statute's broad sweep entrusts 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 individuals. *Id.* (citations and internal quotation marks omitted). The temptation for police officers to bring criminal defamation charges against those who criticize their friends and colleagues will often be hard to resist, as Frese's 2018 prosecution demonstrates. The district court should therefore have allowed Frese the opportunity to build a record regarding the enforcement of criminal defamation laws, including the Criminal Defamation Statute. Such a record would shed significant light on Frese's excessive discretion challenge. *See supra* note 4.

B. The Criminal Defamation Statue fails to provide adequate notice about what speech is prohibited, because it defines defamation according to the elastic standards of the victim's professional and social groups.

The district court's dismissal order did not formally address Frese's argument

that the Criminal Defamation Statute fails to provide adequate notice about what speech is prohibited. Although the district court's order is not explicit on this point, it appears the court accepted the State's argument that plaintiffs cannot bring facial or hybrid vagueness challenges for lack of notice if they do not separately plead a sufficient as-applied claim. *See* Add. 25 ("[T]he court presumes . . . that plaintiffs may bring facial vagueness challenges *against statutes that invite excessively discretionary enforcement*, without pleading a sufficient as-applied claim." (emphasis added)).

If so, the district court erred. Although the Supreme Court held in *Holder v. Humanitarian Law Project*, that "a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice," 561 U.S. 1, 20 (2010), it did not hold that a plaintiff must separately plead an as-applied challenge in order to bring a facial vagueness claim. As the district court recognized, "[Frese's] plans to criticize public officials, including police officers, are not conduct clearly proscribed or permitted by the criminal defamation statute's plain text." Add. 25. Furthermore, to the extent *Holder* might be construed to bar facial vagueness claims that are not accompanied by a valid as-applied challenge, it is no longer good law. *See Henry v. Spearman*, 899 F.3d 703, 709 (9th Cir. 2018) (citing *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 n.3 (2018)). Accordingly, Frese's vagueness challenge for lack of notice was properly

before the court.

While the district court did not expressly address Frese's notice challenge, its analysis of Frese's arbitrary enforcement challenge focused largely on notice issues. In particular, the court held that the Criminal Defamation Statute's "adoption of the common law defamation standard does much to rein in any alleged vagueness . . . by giving persons of ordinary intelligence a familiar standard of conduct by which to abide." Add. 28. To the contrary, the common law of civil defamation is not stable or precise enough to define a criminal restriction on speech. *See Ashton v. Kentucky*, 384 U.S. 195, 198 (1966) (suggesting in dicta that "the elements of the [common law] crime [of defamation] are so indefinite and uncertain that it should not be enforced as a penal offense in Kenucky"); *accord Tollett v. United States*, 485 F.2d 1087, 1098 (8th Cir. 1973); *Gottschalk*, 575 P.2d at 292–93. *But see How v. City of Baxter Springs*, 369 F. Supp. 2d 1300, 1306 (D. Kan. 2005).

The Alaska Supreme Court's decision in *Gottschalk* is instructive. There, the court held that Alaska's criminal defamation statute was unconstitutionally vague, even after concluding that the statute incorporated the common law of civil defamation, in part because the common law standard "falls far short of the reasonable precision necessary to define criminal conduct." *Gottschalk*, 575 P.2d at 292. That is because the factual question about "[w]hether an utterance is defamatory depends on the values of the listener," *id.* at 293. Even in a "homogeneous culture

these values will not be uniform, and it is not always easy to predict what will be taken as defamatory." *Id.* at 293. For example, "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.* at 293 n.11 (citing William Prosser, *Handbook on the Law of Torts* § 111, 744 nn.3, 4 (4th ed. 1971)); *see also State v. Shank*, 795 So.2d 1067, 1070 (Fla. Dist. Ct. App. 2001) (per curiam) (holding that a statute criminalizing publications that tended to expose persons to hatred, contempt or ridicule was unconstitutionally vague "because 'ridicule,' 'contempt,' or 'hatred' may arise from different situations, depending upon the recipient of the communication").

Moreover, different groups within society will have different standards for determining what is and is not defamatory. *Id.* Thus, "[e]stablishing a standard against which potentially defamatory statements may be measured generates considerable difficulty in a democratic society which prides itself on pluralism." *Id.* These problems are exacerbated by the Internet, which facilitates routine interaction between people from vastly different backgrounds, with different viewpoints, and, accordingly, different understandings about what speech is defamatory. A multiplicity of shifting standards may be tolerable in the civil context, but it is considerably more troublesome for a criminal restriction on speech.

The district court distinguished *Gottschalk* on the ground that Alaska's

common law defamation standard, which was similarly incorporated into that state's criminal defamation statute, defined defamatory speech to include any statement that would hold the subject "up to public hatred, contempt or ridicule, *or to cause him to be shunned or avoided*." J.A. 412 n.41 (emphasis in original). Defamation is similarly formulated under New Hampshire common law. *See, e.g.*, *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 338, 929 A.2d 993, 1015 (2007) (holding that words can "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" (citation omitted)). Although the district court suggested that the Criminal Defamation Statute "arguably imposes a higher threshold" than the common law, because it omits the final clause of the common law formulation, it did not identify where this threshold lies. Add. 27 n.38. If the common law must be imported to save the Criminal Defamation Statute from vagueness, it cannot be simultaneously disregarded in favor of some unspecified standard.[5]

Assuming *arguendo* that the common law standard for civil defamation were sufficient to define a criminal restriction on speech, the Criminal Defamation Statute differs from the common law standard in at least one material respect: Whereas the

[5] *Gottschalk* also held that Alaska's criminal defamation statute was unconstitutionally overbroad. 575 P.2d at 296. Contrary to the district court's supposition, Add. 30, *Gottschalk*'s overbreadth holding does not undermine the persuasive force of its independent vagueness holding.

common law imposes civil liability for any statement that tends to injure the subject's reputation in the eyes of a "substantial and respectable minority" of the public, not just "a single individual or a very small group of persons," Restatement (Second) of Torts § 559 cmt. e (Am. Law Inst. 1977), the Criminal Defamation Statute criminalizes any statement that tends to injure the subject's reputation in "any professional or social group of which [they are] a member," N.H. RSA 644:11(II), no matter how small the group or how peculiar its views.

As Frese has consistently argued, Dist. Ct. ECF No. 22 at 3, this is a constitutionally significant departure from the common law's objective standard. Different professional and social groups will often have different, sometimes conflicting, standards for what constitutes defamation; the Criminal Defamation Statute incorporates each of these standards as a yardstick for criminal conviction. Although the district court suggested that the Criminal Defamation Statute incorporates the common law element of objectively reasonable defamatory meaning, Add. 28, the court cannot rewrite a state statute to conform it to the common law standard when that construction is not readily apparent from the statutory text. *See Boos v. Barry*, 485 U.S. 312, 330 (1988). The elasticity of the Criminal Defamation Statute renders it susceptible to the same vice as laws that criminalize speech calculated to incite a breach of the peace. "It involves calculations as to the boiling point of a *particular* person or a *particular* group, not an appraisal

of the nature of the comments per se." *Ashton*, 384 U.S. at 200 (emphases added).

Finally, the question of whether a communication includes a defamatory statement of fact is further complicated by the fact that the Supreme Court's "decisions since the 1960's have narrowed the scope of the traditional categorical exceptions for defamation." *R.A.V.*, 505 U.S. at 383 (citations omitted). For instance, "[t]he common law rule that an expression of [pure] opinion . . . may be the basis of an action for defamation now appears to have been rendered unconstitutional by U.S. Supreme Court decisions," while statements of opinion that imply undisclosed defamatory facts remain unprotected. Restatement (Second) of Torts § 566 cmt. c (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)). Courts must therefore determine "whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct." *Id. See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). As this Court has recognized, "[t]he determination of whether a statement is one of opinion or fact . . . is difficult to make and perhaps unreliable as a basis for decision." *Bose Corp. v. Consumers Union of U.S., Inc.*, 692 F.2d 189, 194 (1st Cir. 1982) (citation omitted), *aff'd*, 466 U.S. 485 (1984). Although this sort of judicial line drawing is sometimes necessary to resolve civil disputes, it does not supply a sufficiently definite and intelligible standard for a criminal restriction on speech.

Below, the State argued that any vagueness inherent in the Criminal Defamation Statute is cured by its *mens rea* requirement. Dist. Ct. ECF No. 11-1 at 12. However, a *mens rea* requirement cannot dispel the vagueness inherent in such a Protean standard. *See Smith*, 415 U.S. at 580 (rejecting the government's contention that a statute criminalizing contemptuous treatment of the flag would survive vagueness review if limited to intentionally contemptuous treatment, because this construction of the statute still would not sufficiently "clarify what conduct constitutes contempt, whether intentional or inadvertent"). In *Ashton*, for instance, the Supreme Court held that Kentucky's common law of criminal defamation was unconstitutionally vague, even though it required the government to demonstrate both that the defendant spoke with malice and that the statement was "*calculated* to create disturbances of the peace." 384 U.S. at 200 (emphasis added). The Court held that criminalizing statements "'calculated to create disturbances of the peace' leaves wide open the standard of responsibility," notwithstanding the crime's *mens rea* requirement, because it "involves calculations as to the boiling point of a particular person or a particular group." *Id.*

Those concerns control here as well. Although the Criminal Defamation Statute ostensibly applies only to intentionally false and defamatory statements, "it still ranges very broadly," and "that breadth means that it creates a significant risk of First Amendment harm." *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring in the

judgment). In particular, the Criminal Defamation Statute's breadth creates "a risk of chilling [protected speech] 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." *Id.* Indeed, this is exactly what happened to Frese. "[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" or other forms of government malfeasance. *State v. Allard*, 148 N.H. 702, 706, 813 A.2d 506, 510 (2002); *see also Tollett*, 485 F.2d at 1096 & nn.20, 21.

II. Insofar as *Garrison v. Louisiana*, 379 U.S. 64 (1964), holds that criminal defamation laws do not violate the First Amendment if they include an actual malice requirement, it should be revisited by the U.S. Supreme Court.

The Criminal Defamation Statute also violates the First Amendment. "The actual malice standard, and other constitutional protections of criticisms of public officials, were extended to the criminal libel context" in *Garrison v. Louisiana*, 379 U.S. 64 (1964), where the Supreme Court "held that criminal libel statutes share the constitutional limitations of civil libel law." *Mangual v. Rotger-Sabat*, 317 F.3d 45, 66 (1st Cir. 2003) (holding that Puerto Rico's criminal defamation statute violated the First Amendment as applied to speech about public officials and public figures, because it dd not require the government to demonstrate falsity or actual malice as elements of the offense). The *Garrison* Court, however, declined to go further and

hold that criminal defamation laws are unconstitutional *per se*. The time has come to revisit that decision.[6]

Garrison identified two traditional justifications for criminal defamation laws, neither of which retain any vitality under American constitutional law. On the one hand, criminal defamation laws were designed to suppress duels by outraged victims. *See Garrison*, 379 U.S. at 68 (citing Edward Livingston, *A System of Penal Law for the State of Louisiana* 177 (1833)). However, the availability of money damages in a civil action "substantially eroded the breach of the peace justification for criminal libel laws"—so much so that criminal defamation prosecutions "fell into virtual desuetude." *Id.* at 69. Today, "[i]t goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit." *Id.* at 69–70 (approvingly quoting Model Penal Code § 250.7 cmts. at 44 (Tent. Draft No. 13, 1961)).

The other traditional justification for criminal justification laws is that they are necessary to prevent seditious libel. *See id.* at 69. In *Garrison*, the Court asserted that criminal defamation laws may serve a legitimate governmental purpose insofar as they protect the public from "those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the

[6] Plaintiff acknowledges that this Court does not have the power to revisit the Supreme Court's decisions. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998). He raises this argument in order to preserve it for the Supreme Court's consideration.

public servant or even topple an administration." *Id.* at 75. Remarking that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection," the Court suggested that criminal defamation laws may be consistent with the First Amendment—even insofar as the criminalize speech about public officials and public affairs—so long as they require the government to demonstrate that the defendant published the defamatory matter with actual malice. *Id.*

Justices Black, Douglas, and Goldberg each wrote separate concurrences arguing that the Court should finally repudiate the long-discredited doctrine of seditious libel by holding that criminal defamation laws are unconstitutional insofar as they criminalize criticism of public officials. *See id.* at 79–88. In his concurrence, Justice Black expressed his belief "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 (Black, J., concurring); *see also id.* at 81 (Douglas, J., concurring). He argued that the Court's attempted balancing of interests obscures the fundamental truth that "[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.* at 80 (Black, J., concurring) (citations omitted); *see also id.* at 83 (Douglas, J., concurring); *id*. at 88 (Goldberg, J., concurring).

Plaintiff does not dispute the *Garrison* Court's admonition that "the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Id.* at 75. However, subsequent Supreme Court precedent supports the *Garrison* concurrences' conclusion that the First Amendment rightly prohibits any criminal restriction on criticism of public officials.

First, in *R.A.V.*, the Supreme Court definitively stated that, although "the government may proscribe libel," it "may not make the further content discrimination of proscribing *only* libel critical of the government," 505 U.S. at 384 (emphasis in original), thus negating the sole remaining justification for criminal defamation laws after *Garrison*—namely, that they are necessary to prevent the destabilizing effects of seditious libel. *See United States v. Eichman*, 496 U.S. 310, 317–18 (1990) (noting that even a broadly worded statute may be content based if its "restriction on expression cannot be justified without reference to the content of

the regulated speech" (internal quotation marks omitted) (quoting *Boos*, 485 U.S. 312, 320 (1988)).

Second, in *United States v. Alvarez*, 567 U.S. 709 (2012) (striking down a portion of the federal Stolen Valor Act), the Court rejected *Garrison*'s dicta that knowingly false speech is categorically unprotected by the First Amendment. *See id.* at 718–19 (citing *Garrison*, 379 U.S. at 75). Although the *Alvarez* Court divided over particulars, all nine Justices shared the conviction that criminalization of false speech on matters of public concern raises grave First Amendment problems. The plurality wrote that "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *Id.* at 723. Justice Breyer's concurrence reasoned that the Stolen Valor Act's "breadth . . . creates a significant risk of First Amendment harm," because "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." *Id.* at 736–37 (Breyer, J., concurring in part and concurring in the judgment). Even the dissenting justices recognized that allowing "the state to be the arbiter of truth" on matters of public concern "would present a grave and unacceptable danger of suppressing truthful speech." *Id.* at 751–52 (Alito, J., dissenting).

Although *Alvarez* did not pass on the constitutionality of criminal defamation laws, it highlights many of the dangers presented by these broadly framed criminal

restrictions on speech. Indeed, New Hampshire's Criminal Defamation Statute criminalizes much more speech than the Stolen Valor Act ever did. *Compare* N.H. RSA 644:11 *with* 18 U.S.C. §§ 704(b), (c). The Criminal Defamation Statute confers on police officers, prosecutors, and (most perniciously) police-prosecutors an extraordinarily broad remit to prosecute their critics, with few safeguards in place to protect First Amendment rights. It is time to reconsider whether these laws are consistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

CONCLUSION

Criminal defamation laws are anachronisms that have no place in American constitutional democracy. These sweeping criminal restrictions on speech have historically been, and continue to be, arbitrarily and selectively enforced. New Hampshire's reliance on police-prosecutors exacerbates this dangerous tendency, as Frese's case demonstrates. At the very least, Plaintiff has stated a claim and should have been afforded the opportunity to present his case on summary judgment. Accordingly, and for the foregoing reasons, this Court should therefore reverse.

Dated: May 7, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) [no more than 13,000 words] and the typeface requirement of Fed. R. App. P. 32(a)(5)(A) [proportionally spaced face 14-point or larger]. The brief, containing 12,829 words, exclusive of those items that, under Fed. R. App. P. 32(f), are excluded from the word count, was prepared in proportionally spaced Times New Roman 14-point type.

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Dated: May 7, 2021

CERTIFICATE OF SERVICE

I certify that this Brief is served to all counsel of record registered in ECF on May 7, 2021, including the opposing counsel at the New Hampshire Department of Justice, 33 Capitol Street, Concord, NH 03301.

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Dated: May 7, 2021

ADDENDUM

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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 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]

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

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

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 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

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[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).

[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).

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, 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]

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[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.

[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).

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 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

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[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.

[11] Frese's Notice of Supp. Authority (Doc. No. 18).

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

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 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

[13] Id. at 24-25.

[14] See State's Mot for Reconsideration (Doc. No. 21).

[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).

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.

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 refence 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 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

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[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).

[19] Am. Compl. (Doc. No. 31, ¶ 33).

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 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

[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).

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 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]

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

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[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)).

[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 Commc'n Law and Policy 433 (2004)).

criminalizes any and all false, defamatory 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 court[27]): 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] 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)).

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[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.

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

[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).

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 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 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

[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.

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 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

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[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 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.

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 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

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

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 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).

[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.

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 "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

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[35] Am. Compl. (Doc. No. 31, ¶ 37).

[36] Id.

[37] Id. ¶ 39.

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 (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 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

[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.

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

[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.

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. 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

[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.

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 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

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[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.").

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

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[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)).

New Hampshire Department of Justice later concluded that there was no probable cause to arrest or prosecute Frese.[44]

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 permit selective or discriminatory enforcement. See, e.g., Bronstein, 849 F.3d at 1107 (explaining that a

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[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 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.

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 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

[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).

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 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,

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

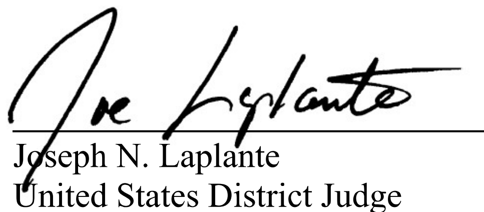
[50] See State's Mot. to Dismiss Mem. (Doc. No. 11-1, at 11-12) (examining the definitions of the terms "purposely" and "knowingly," but not for the clause "will tend to expose [a] living person to hatred, contempt, or ridicule."). The court specifically found that the State's cited authorities for this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

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 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.
Henry Klementowicz, Esq.
John M. Greabe, Esq.
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[52] Doc. No. 33 (motion to dismiss); Doc. No. 31 (amended complaint).

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Robert Frese

v.

Case No. 18-cv-1180-JL

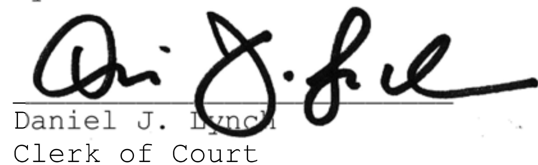
NH Attorney General

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:



Daniel J. Lynch
Clerk of Court

Date: January 19, 2021

cc: Brian M. Hauss, Esq.
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Revised Statutes Annotated of the State of New Hampshire
Title LXII. Criminal Code (Ch. 625 to 651-F) (Refs & Annos)
Chapter 644. Breaches of the Peace and Related Offenses

N.H. Rev. Stat. § 644:11

644:11 Criminal Defamation.

Currentness

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.

Credits
Source. 1971, 518:1. 1992, 269:17, eff. July 1, 1992.

Notes of Decisions (9)

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United States Court of Appeals
For the First Circuit

No. 21-1068

ROBERT FRESE,

Plaintiff - Appellant,

v.

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

Defendant - Appellee.

APPELLEE'S BRIEFING NOTICE

Issued: May 7, 2021

Appellee's brief must be filed by **June 7, 2021**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **September, 2021** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.

Maria R. Hamilton, Clerk

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