No. 22-939

IN THE

Supreme Court of the United States

ROBERT FRESE,

Petitioner,

—v.—

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

Respondent.

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

REPLY BRIEF FOR PETITIONER

David D. Cole
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, N.W.
Washington, D.C. 20005

Gilles R. Bissonnette
Henry R. Klementowicz
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
18 Low Avenue
Concord, NH 03301

John M. Greabe
296 Gage Hill Road
Hopkinton, NH 03229

Brian M. Hauss
Counsel of Record
Emerson Sykes
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Fl.
New York, NY 10004
(212) 549-2500
bhauss@aclu.org

Lawrence A. Vogelman
SHAHEEN & GORDON, PA
353 Central Ave., Suite 200
P.O. Box 977
Dover, NH 03821

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INTRODUCTION

This Petition presents two questions for the Court's review: (1) whether the First Amendment tolerates criminal prosecution for defamation of public officials, historically known as criminal seditious libel; and (2) whether the common law of civil defamation provides a sufficiently precise yardstick for a criminal restriction on speech.

Respondent argues that the first question is foreclosed by this Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964), and subsequent decisions citing *Garrison*. But the passage from *Garrison* on which Respondent relies was dicta that was unnecessary to the Court's disposition of that criminal appeal, and none of the other cases Respondent cites addressed criminal defamation at all. This Court therefore need not conduct a *stare decisis* analysis to bring its caselaw into line with Madison's central insight into the meaning and purpose of the First Amendment—namely, that it categorically bars criminal prosecution for criticism of the government or its officials. Respondent's public policy arguments to the contrary are misplaced. Such a ruling would not undermine public officials' civil defamation claims—the *only* available remedy in most states—nor would it prevent the government from addressing other types of false speech, such as the fraudulent impersonation of government officials.

With respect to the second question, Respondent fails to reconcile the conflict between the Alaska Supreme Court's decision in *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978), which held that the common law of civil libel is too vague to define a criminal restriction on speech, and the decision below, which

reached the opposite conclusion. Furthermore, Respondent does not dispute that New Hampshire allows police officers to initiate criminal defamation prosecutions without the participation of a licensed attorney and that, unlike most states, it denies jury trial rights to criminal defamation defendants. As Petitioner's own case demonstrates, the criminal defamation statute's broad sweep—combined with the absence of procedural protections—invites retaliatory prosecutions against those who criticize law enforcement.

ARGUMENT

I. This Court has never affirmed a criminal conviction for defamation of a public official.

Although Respondent asserts that "a long line of this Court's precedents" foreclose Petitioner's First Amendment claim, Opp. 13, he does not identify a single case upholding a seditious libel conviction. Respondent instead falls back on dicta from *Garrison*, as well as stray statements from other cases that did not address criminal defamation prosecutions. These statements do not have *stare decisis* effect.

Respondent relies, first and foremost, on *Garrison*'s suggestion that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." Opp. 14 (quoting *Garrison*, 379 U.S. at 75). As Petitioner previously pointed out, Pet. 21–22, this statement was not essential to the disposition in *Garrison*, which *reversed* a conviction under Louisiana's criminal defamation statute because the statute did not require the government to demonstrate actual malice. *See Garrison*, 379 U.S. at

77–79. While it is true that the Court did not categorically bar seditious libel prosecutions, *see id.* at 75, it did not need to reach that issue to resolve the case before it, and its statements to that effect are therefore dicta. *See Tyler v. Cain*, 533 U.S. 656, 663 n.4 (2001) (stating that a case's holding "include[s] the final disposition of a case as well as the preceding determinations '*necessary* to that result'" (parenthetically quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996))). Justice Black acknowledged as much in his concurrence, writing 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." *Garrison*, 379 U.S. at 80 (Black, J., concurring) (citations omitted).[1]

Respondent also places weight on the citations to *Garrison* in *McDonald v. Smith*, 472 U.S. 479, 484 (1985), and *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 687 n.34 (1989). Opp. 14–15. But those civil libel cases do not even discuss the First Amendment's application to seditious libel prosecutions. And although the plurality opinion in *United States v. Alvarez* acknowledged the longstanding exception for knowingly false and defamatory speech, it did so in the context of criticizing the government for "invert[ing] the

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[1] The fact that Justices Black, Douglas, and Goldberg concurred with the Court's opinion—even as they asserted that the First Amendment categorically bars seditious libel prosecutions—is itself strong evidence that the Court did not actually *hold* to the contrary. Had the Court actually reached that question, the concurrences would have been dissents or concurrences in the judgment only.

rationale for the exception" by "seek[ing] to convert a rule that limits liability even in defamation cases *where the law permits recovery for tortious wrongs* into a rule that expands liability in a different, far greater realm of discourse and expression." 567 U.S. 709, 719 (2012) (emphasis added). In other words, the *Alvarez* Court rejected the government's invocation of the *New York Times* standard outside the civil defamation context. As the plurality went on to explain, "[t]he requirements of a knowing falsehood or reckless disregard for the truth *as the condition for recovery* in certain defamation cases exists to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it." *Id.* at 719–20 (emphasis added). Yet that is precisely what Respondent attempts to do here by citing this Court's civil libel cases to justify seditious libel prosecutions.

At bottom, Respondent argues that the First Amendment allows seditious libel prosecutions because it does not protect knowingly false and defamatory speech. Opp. 15–16. But the recognized exceptions to the First Amendment are not "categories of speech entirely invisible to the Constitution," and this Court's precedents "surely do not establish the proposition that the First Amendment imposes no obstacle whatsoever to regulation of particular instances of such proscribable expression, so that the government 'may regulate [them] freely.'" *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (alteration in original) (citation omitted). For example, the government may not impose content-based restrictions on unprotected speech that are "unrelated to [the speech's] distinctively proscribable content," such as by exclusively prohibiting libel of the

government. *Id.* at 384. Likewise, the availability of civil remedies for defamation of a public official under certain circumstances does not resolve whether the government may criminally prosecute the same speech. Aside from dicta in *Garrison*, this Court has not addressed that question. The Court therefore need not conduct a *stare decisis* analysis to hold that the First Amendment bars seditious libel prosecutions.[2]

II. Respondent does not dispute that Madison repudiated the constitutionality of seditious libel prosecutions.

There are good reasons to conclude that the First Amendment bars criminal prosecution for defamation of public officials. The First Amendment's author, James Madison, inveighed against the constitutionality of seditious libel prosecutions in his Report on the Virginia Resolutions opposing the Alien and Sedition Acts. Madison argued that, in order to secure America's republican form of government, the First Amendment necessarily denied public officials the authority to prosecute their critics. Instead, Madison asserted, public officials should be limited to ordinary civil remedies for defamation. Pet. 19 (citing James Madison, *Report on the Virginia Resolutions*, *reprinted in* 4 Debates of the State Conventions on the Federal Constitution 569 (Jonathan Elliot ed.,

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[2] Even if a *stare decisis* analysis were necessary, it would favor Petitioner. *Garrison*'s reasoning on the question presented here was attenuated and ungrounded in either historical sources or caselaw. Furthermore, *Alvarez* undermined *Garrison*'s assertion that knowingly false statements are inherently unworthy of constitutional protection. *See Alvarez*, 567 U.S. at 718–19 (plurality opinion); *id.* at 732–33 (Breyer, J., concurring in the judgment).

Philadelphia, J.B. Lippincott 1876) [hereinafter Elliot's Debates]); Wendell Bird, *Criminal Dissent: Prosecutions Under the Alien and Sedition Acts of 1798*, at 166 (2020); Leonard Levy, *Emergence of a Free Press* 320 (1985)). Other prominent constitutional theorists—including St. George Tucker, the author of "the most important early American edition of Blackstone's Commentaries," *District of Columbia v. Heller*, 554 U.S. 570, 594 (2008)—likely shared Madison's view that the First Amendment limits public officials to civil remedies for injuries to their individual reputations. *See* Levy at 326–27.

Respondent offers no response to these authorities. Instead, he inappositely observes that "Justice Thomas . . . has questioned whether the *New York Times Co.* 'actual malice' rule has any grounding in the First and Fourteenth Amendments as an original, historical matter." Opp. 18 (citing *McKee v. Cosby*, 139 S. Ct. 675, 680–82 (2019) (Thomas, J., concurring in the denial of certiorari); *Berisha v. Lawson*, 141 S. Ct. 2424, 2425 (2021) (Thomas, J., dissenting from the denial of certiorari)). Like *McDonald* and *Harte-Hanks*, however, *McKee* and *Berisha* were both civil libel cases. In criticizing the *New York Times* actual malice standard, Justice Thomas asserted that "constitutional opposition to the Sedition Act—a federal law directly criminalizing criticism of the Government—does not necessarily support a constitutional actual-malice rule in all *civil libel actions* brought by public figures. Madison did not contend that the Constitution abrogated the common law *applicable to these private actions*." *McKee*, 139 S. Ct. at 682 (emphases added). *See also Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting from the denial of certiorari) ("Rather, those

exercising the freedom of the press had a responsibility to try to get the facts right—or, like anyone else, *answer in tort* for the injuries they caused." (emphasis added)). As *amicus* Foundation for Individual Rights & Expression (FIRE) points out, "[t]here is a stark difference between compensating individuals for reputational injury and [criminally] punishing speakers for disparaging public officials." FIRE Br. 12. Whatever side one takes in the dispute over the appropriate scope of First Amendment protection for civil libel claims, there is robust historical support for the proposition that the First Amendment categorically bars seditious libel prosecutions.[3]

III. Barring seditious libel prosecutions would not prevent the government from addressing harmful online speech.

Respondent argues that the government needs robust prosecutorial authority to address various social ills associated with online speech. He asserts, for instance, that "[c]yber abuse and cyberbullying have . . . become a national problem adversely affecting the wellbeing and mental health of adolescents and young adults and leading in some cases to self-harm and suicide." Opp. 19–20. Cyberbullying is a serious problem, but public officials are not children, and our Constitution requires them to show greater fortitude in the face of public criticism.

[3] While the Sedition Act of 1798 was a federal statute, Madison's Report makes clear that he also disapproved state seditious libel prosecutions. *See* 4 Elliot's Debates at 570–71. In any event, the Fourteenth Amendment extended the First Amendment's Speech and Press Clauses to the states. *See, e.g.*, *Grosjean v. Am. Press Co.*, 297 U.S. 233, 243–44 (1936).

"The language of the political arena . . . is often vituperative, abusive, and inexact." *Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam). And Madison viewed the right to freely "canvass[] the merits and measures" of public officials without fear of prosecution—even when those officials feel, rightly or wrongly, that the accusations levelled against them are made in bad faith—as a fundamental principle of democratic self-government. 4 Elliot's Debates at 570. The alternative, as America's experiment with the Sedition Act and countless other examples demonstrate, is authoritarian censorship. *See* Br. of Institute for Free Speech 15–25 (listing domestic and foreign examples of the abuse of criminal defamation laws to stifle legitimate criticism of public officials, including President Theodore Roosevelt's failed seditious libel prosecution against Joseph Pulitzer for reporting that suggested Roosevelt's friends and family had corruptly profited from the Panama Canal deal).

A First Amendment bar on seditious libel prosecutions would not prevent the government from restricting false speech that is more than merely defamatory—such as the fraudulent impersonation of government officers, *see* 18 U.S.C. § 912—provided those restrictions otherwise satisfy First Amendment standards. Where defamation is concerned, however, the inherent danger of allowing the government to criminally prosecute its critics outweighs any marginal benefits such prosecutions may provide. That does not mean public officials are without redress for undue injuries to their reputation; it just means that they are properly limited to "the civil remedy [that] virtually pre-empted the field of defamation" centuries ago. *Garrison*, 379 U.S. at 69.

Respondent does not even attempt to show that the civil remedy for defamation, the exclusive remedy in most states, is inadequate.

IV. Respondent fails to reconcile the decision below with the Alaska Supreme Court's decision in *Gottschalk*.

Finally, this Court's review is warranted to resolve the conflict between the decision below and the Alaska Supreme Court's decision in *Gottschalk*. Although Respondent argues that *Gottschalk* "turned on vagueness concerns not present in this case," Opp. 23–24, he does not identify any material differences between the vagueness concerns raised in *Gottschalk* and the vagueness problems inherent in New Hampshire's statute. Like the First Circuit here, the Alaska Supreme Court construed the state's criminal defamation law to incorporate the common law of civil defamation. Unlike the First Circuit, however, the Alaska Supreme Court held that the common law of civil defamation is not stable or precise enough to define a criminal restriction on speech. *Gottschalk* reasoned that "[e]stablishing a standard against which potentially defamatory statements may be measured generates considerable difficulty in a democratic society which prides itself on pluralism," since different groups will consider different statements defamatory or not, and even within particular groups "what is defamatory changes over time." 575 P.2d at 293 n.11.

These problems present themselves any time a criminal defamation statute incorporates the common law of civil defamation. That is because the common law of civil defamation—with its focus on injury to individual reputation, rather than breach of the peace

or societal harm—was not developed for application in the criminal context. *Cf. Ashton v. Kentucky*, 384 U.S. 195, 198–99 (1966) (holding that the traditional common law of criminal defamation, which focused on speech tending to breach the peace, was unconstitutionally vague). Criminal restrictions on speech receive much more stringent vagueness scrutiny than civil regulations because they are more likely to chill speech and invite arbitrary enforcement. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). *See also* Br. of University of Virginia Law School First Amendment Clinic & Floyd Abrams Institute for Freedom of Expression Media Freedom & Information Access Clinic 17–22 (observing that tort law, unlike criminal law, allows news organizations to efficiently allocate risk arising from nonmeritorious defamation claims). The civil defamation standard simply cannot withstand the heightened vagueness scrutiny required for criminal restrictions on speech. Even assuming that New Hampshire's criminal defamation statute requires the government to show that the offending statement lowered the victim's esteem in the eyes of a substantial and respectable portion of the community,[4] law enforcement officers are still given nearly limitless discretion to decide what counts as a substantial and respectable group, what the group's shared values are, and whether the offending statement would tend to lower the victim's esteem

[4] *See Boyle v. Dwyer*, 216 A.3d 89, 94 (N.H. 2019) (requiring this showing in the context of civil defamation claims). *But see* N.H. Rev. Stat. Ann. § 644:11(II) (West 2023) (defining the "public" to include "any professional or social group of which the victim of the defamation is a member"). The statute provides no definition for "social group."

within that group. As *Gottschalk* recognized, this is an open invitation to arbitrary or selective enforcement.[5]

The risk of arbitrary or selective enforcement is particularly acute in New Hampshire, which allows municipal police departments to initiate criminal defamation prosecutions without the participation of licensed attorneys and, unlike most states, denies defendants the right to a jury trial. Respondent attempts to wave away these unhelpful facts by asserting that "the manner [in which] a statute might be enforced—be it by attorneys, police officers, or laypeople"—does not bear on the statute's facial vagueness. Opp. 27. To the contrary, the degree of indeterminacy tolerated by the Due Process Clause "depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). This Court has often focused its vagueness analysis on whether a particular statute effectively "entrust[s] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith*, 415 U.S. at 575 (quoting *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring)); *accord Kolender v. Lawson*, 461 U.S. 352,

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[5] The *only* plausible distinction Respondent identifies between this case and *Gottschalk* is that Alaska's criminal defamation law did not require the government to demonstrate actual malice. But as Petitioner previously noted, Pet. 29, the absence of an actual malice requirement in *Gottschalk* raised First Amendment overbreadth problems separate and apart from the Alaska Supreme Court's vagueness concerns. *See* 575 P.2d at 296 ("Even if our criminal defamation statutes were sufficiently precise to escape the defect of vagueness, they would still be overbroad."). A *mens rea* requirement cannot cure the arbitrary enforcement problems presented by such a vague criminal restriction on speech. *See, e.g.*, *Smith v. Goguen*, 415 U.S. 566, 580 (1974).

360 (1983). The broad sweep of New Hampshire's criminal defamation statute, combined with the near total absence of procedural checks and balances with respect to criminal defamation prosecutions, effectively authorizes police officers to act as sole arbiters in a highly sensitive area of criminal speech regulation. This Court's review is warranted to determine whether such ad hoc determinations are appropriate, especially when it comes to core First Amendment speech concerning public officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian M. Hauss
Counsel of Record
Emerson Sykes
AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
125 Broad St., Fl. 18
New York, NY 10004
Tel: (212) 549-2500
bhauss@aclu.org

David D. Cole
AMERICAN CIVIL
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FOUNDATION
915 15th Street, N.W.
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John M. Greabe
296 Gage Hill Road
Hopkinton, NH 03229

Lawrence A. Vogelman
SHAHEEN & GORDON, PA
353 Central Avenue,
Suite 200
P.O. Box 977
Dover, NH 03821

Counsel for Petitioner

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