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.

On Appeal from the United States District Court for the
District of New Hampshire

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT OF ISSUES

I. Mr. Frese brings a facial vagueness challenge to New Hampshire Revised Statute Annotated (RSA) § 644:11. That statute provides that "[a] person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." RSA 644:11, I. The New Hampshire Criminal Code provides statutory definitions for what constitutes "purposeful" or "knowing" conduct. *See* RSA 626:2, II(a), (b). RSA 644:11 incorporates "part of the common law standard for civil defamation," J.A. 409, under which the defamatory meaning of a statement turns on an objective analysis, *see, e.g.*, *Boyle v. Dwyer*, 172 N.H. 548, 554, 216 A.3d 89, 95 (2019).

The first issue presented is:

Does the language of RSA 644:11 set forth a sufficiently discernable standard of conduct to survive a facial vagueness challenge?

II. Mr. Frese contends that RSA 644:11 is unconstitutionally vague "as applied in the context of New Hampshire's system for prosecuting Class B Misdemeanors." J.A. 158 ¶ 36. He characterizes this as a

"hybrid" facial/as-applied claim. *See, e.g.*, Pl.'s Br. 4. The district court concluded that this purported "hybrid" claim was subject to the same analytical focus as Mr. Frese's facial vagueness claim because Mr. Frese sought relief beyond his own personal circumstances.

The second issue presented is:

Does Mr. Frese's purported "hybrid" claim require an analysis distinct from the analysis that applies to his facial vagueness claim?

III. Mr. Frese also contends that RSA 644:11 violates the First Amendment. J.A. 160. The district court concluded that this claim was precluded by the Supreme Court's decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964). J.A. 396–398. Mr. Frese does not dispute this conclusion, but suggests that *Garrison* should be reconsidered. Pl.'s Br. 49–54

The third issue presented is:

Does this Court have any authority to reconsider a binding Supreme Court precedent?

STATEMENT OF CASE

I. Statement of the facts.

Between February 26 and May 2, 2012, Mr. Frese made "over thirty postings" on Craiglist impugning the character and integrity of Michael Robillard, who was promoting his life-coaching business on that forum. J.A. 210. Mr. Frese posted, among other things:

- "Been molested by Mike Robillard (Londonderry)- Has anyone been molested, bothered, or harassed by a a [sic] Mike Robillard in Londonderry?"
- "[M]olested by Mike Robillard? (Londonderry)- Anyone been molested, harassed, or bothered by Mike Robillard out of Londonderry?"
- "[H]ear about Mike Robillard? (NH) Involved in a 'road rage' incident in 2007, distribution of heroine [sic] in 2009, charged with willful concealment in 2011, sounds like Mike needs a life coach."

J.A. 213, 251, 252, 253 (formatting altered). Mr. Robillard, who did not previously know Mr. Frese, J.A. 214, contacted him by email and asked him to stop. J.A. 202, 229–235. When that effort proved fruitless, *see* J.A. 229–235, Mr. Robillard contacted the Hudson Police Department, J.A. 202.

A police officer interviewed Mr. Frese, who admitted both that he made the posts in question and that he knew they contained false in-

formation. J.A. 211, 216. Mr. Frese was charged with criminal defamation under RSA 644:11. J.A. 199. Mr. Frese pleaded guilty and was sentenced to a fine, most of which was suspended. J.A. 192. Mr. Frese has never suggested during this litigation that he did not know that his posts with respect to Mr. Robillard would "tend to expose" Mr. Robillard "to public hatred, contempt or ridicule." RSA 644:11, I.

Six years later, Mr. Frese read a May 4, 2018 article in the *Exeter News-Letter* that portrayed retiring Exeter Police Officer Dan D'Amato in a favorable light. J.A. 291–293, 361–365. That same day, Mr. Frese published a comment on the *Exeter News-Letter* website under the pseudonym "Bob William" that read:

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

J.A. 296. The *Exeter News-Letter* removed the comment upon the request of the Exeter Police Chief. J.A. 350–354. Mr. Frese then posted another comment under the pseudonym "Bob Exeter":

> D'Amato is the most corrupt cop I have ever known. He and his known prostitute daughter Isabella Soprano who now goes by the name Angela Green made false complaints against me which were dismissed in court. The coward Chief Shupe did nothing about it and covered up for this dirty cop. This is the most corrupt bunch of cops I have ever known that they continue to lie in court and harass people. D'Amato will be dismissed by no one, and I would not trust this guy around children or anyone else.

J.A. 359.

During an interview with the Exeter Police Department, Mr. Frese admitted to making both posts. J.A. 292. He insisted that the information contained in those posts was true. J.A. 292–293. Nevertheless, the Exeter Police Department charged Mr. Frese with criminal defamation under RSA 644:11. J.A. 295. The criminal complaint alleged that Mr. Frese "purposely communicated on a public website, in writing, information which he knows to be false and knows will tend to expose another person to public contempt, by posting that Chief Shupe covered up for a dirty cop." J.A. 295.

Soon thereafter, the Civil Rights Unit at the New Hampshire Attorney General's Office prepared a six-page memorandum regarding the charge against Mr. Frese. J.A. 274–279. The memorandum emphasized that the *mens rea* requirements contained in RSA 644:11 meet or exceed the "actual malice" standard set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964), and adopted in *Garrison v. Louisiana*, 379 U.S. 64 (1964). J.A. 276–277. The memorandum nonetheless concluded that the Exeter Police Department lacked probable cause to charge Mr. Frese with criminal defamation because there was no evidence that Mr. Frese "made the statements at issue with knowledge that they were false." J.A. 277. The memorandum observed that "[t]he incident report makes clear that the Exeter Police Department failed to consider this requirement when determining whether to arrest or charge Mr. Frese." J.A. 278. Three days later, the Exeter Police Department voluntarily dismissed the charge. J.A. 157 ¶ 31.

II. The district court proceedings.

Mr. Frese initiated this action on December 18, 2018, by filing a single-count complaint against the New Hampshire Attorney General in his official capacity (the "appellee"). ECF Doc. No. 1. Mr. Frese asked

the district court to declare RSA 644:11 unconstitutionally vague on its face in violation of the First and Fourteenth Amendments and enjoin any enforcement of the statute. ECF Doc. No. 1 at 9–12. The appellee moved to dismiss the complaint for lack of standing and failure to state a claim. *See* ECF Doc. No. 11. The district court denied that motion after oral argument. J.A. 105–129. In its order, the district court expressed discomfort with the fact that, in New Hampshire, Class B misdemeanors such as criminal defamation are commonly prosecuted by police prosecutors without formal legal training and defendants do not have a right to counsel or a jury trial. J.A. 107, 118–119, 120, 127–128. The appellee moved for reconsideration, arguing that extrinsic considerations such as how a statute is applied do not bear on whether a statute is void-for-vagueness on its face. J.A. 138–141. The district court denied that motion, declining to consider the appellee's text-based argument on reconsideration, but nonetheless observing that it may ultimately have merit. J.A. 138–141.

On April 13, 2020, Mr. Frese filed a two-count amended complaint. J.A. 149–162. In the first count, Mr. Frese contended 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 ¶ 36. In the second count, Mr. Frese contended that RSA 644:11 violates the First Amendment. *See* J.A. 160 ¶¶ 41–47. Mr. Frese again sought only declaratory and injunctive relief. J.A. 160–161.

The appellee moved to dismiss the amended complaint, this time directly raising the text-based argument that the district court had previously declined to consider. ECF Doc. No. 33. The district court granted the appellee's motion and dismissed the amended complaint in its entirety. J.A. 383–418. The district court concluded that a facial vagueness challenge "requires a textual analysis," J.A. 417, and accordingly assessed Mr. Frese's facial challenge to RSA 644:11 by "applying the tools of statutory construction" to "the language of the statute," J.A. 418. The district court concluded that RSA 644:11 sets forth a sufficiently clear standard of conduct to survive a facial vagueness challenge, particularly given that it incorporates part of the New Hampshire Supreme Court's "discernable, normative standard" for common-law civil defamation. J.A. 409. The district court accordingly dismissed Mr. Frese's facial vagueness challenge to RSA 644:11 for failure to state a claim. J.A. 415.

The district court likewise dismissed Mr. Frese's challenge to RSA 644:11 "as applied in the context of New Hampshire's system for prosecuting Class B misdemeanors." J.A. 158 ¶ 36. The district court concluded that this challenge was subject to the same standard as Mr. Frese's facial vagueness claim because it sought relief beyond Mr. Frese's own circumstances, J.A. 415–416 (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010)). The district court also dismissed Mr. Frese's First Amendment claim, concluding that it was precluded by the Supreme Court's decision in *Garrison v. Louisiana*. J.A. 396–398. Mr. Frese timely appealed the district court's decision.

SUMMARY OF ARGUMENT

The district court correctly dismissed each of Mr. Frese's claims. Mr. Frese's facial vagueness challenge to RSA 644:11 failed as a matter of law because the language of RSA 644:11, when properly construed, is not impermissibly vague. "The vagueness analysis . . . is objective" and "turns on the tools of statutory interpretation." *United States v. Bronstein*. *See* 849 F.3d 1101, 1104 (D.C. Cir. 2017). A statute is impermissibly vague only if, "after applying [those tools], its meaning 'specifies no standard of conduct at all.'" *Id.* (brackets and ellipsis omitted) (quoting *Roth v. United States*, 354 U.S. 476, 491 (1957)).

Applying the tools of statutory interpretation to RSA 644:11 reveals an objectively discernible standard of conduct. To be guilty of criminal defamation, a person must (1) *purposely* communicate information orally or in writing, (2) *know* that information is false, and (3) *know* that information "will tend to expose any other living person to public hatred, contempt or ridicule." RSA 644:11, I. The New Hampshire Criminal Code defines what constitutes "purposeful" and "knowing" conduct, *see* RSA 626:2, II(a), (b), and analogous *mens rea* requirements have been routinely upheld against vagueness challenges, *see,*

e.g., *United States v. Hoffert*, 949 F.3d 782, 788 (3d Cir.), *cert. denied*, 141 S. Ct. 393, 208 L. Ed. 2d 106 (2020) (observing that a "knowing or having reason to know" *mens rea* requirement "has withstood numerous vagueness challenges" and collecting cases); *United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997) (noting that "'[a] statutory requirement that an act must be willful or purposeful" will "relieve the statute of the objection that it punishes without warning an office of which the accused was unaware'" (quoting *Screws v. United States*, 325 U.S. 91, 101–02 (1945) (Douglas, J., concurring)). Moreover, RSA 644:11 adopts, at least in part, New Hampshire's common-law defamation standard, which the New Hampshire Supreme Court has made clear involves an objective analysis, *see, e.g.*, *Boyle*, 172 N.H. at 554, 216 A.3d at 95. In light of these facts, RSA 644:11 sets forth "a discernable, normative standard" that a person of ordinary intelligence would understand. J.A. at 409.

Mr. Frese's arguments to the contrary lack merit. His contention that RSA 644:11 "expressly departs from the common law standard in a manner that exacerbates the statute's vagueness," Pl.'s Br. 23, fails because it misreads both the language of RSA 644:11 and the New Hamp-

shire Supreme Court's defamation jurisprudence. His reliance on *Gottschalk v. State* 75 P.2d 289 (Alaska 1978), fails because, unlike the subjective standard at issue in *Gottschalk*, New Hampshire's common-law defamation standard is objective. Mr. Frese's suggestion that the district court should have taken into consideration how RSA 644:11 is enforced and how it has historically been (or hypothetically could be) applied also fails, as decisions from the U.S. Supreme Court, this Court, and several other federal courts of appeals make clear that such extrinsic considerations do not bear on whether a statute is unconstitutionally vague *on its face*. For similar reasons, the district court was not required to consider how RSA 644:11 has been applied to Mr. Frese or how criminal defamation laws have been applied throughout the United States in assessing Mr. Frese's facial vagueness challenge.

The district court likewise did not err when it dismissed Mr. Frese's purported "hybrid" vagueness claim. Mr. Frese premised that claim on an assertion that RSA 644:11 is unconstitutionally vague "as applied in the context of New Hampshire's system for prosecuting Class B Misdemeanors." J.A. 158 ¶ 36. As the district court correctly noted, however, such a claim is subject to the same standard at the facial

vagueness claim because Mr. Frese seeks relief beyond his own circumstances. *See John Doe No. 1*, 561 U.S. at 194. The "hybrid" vagueness claim accordingly fails for the same reasons as the facial vagueness claim.

Finally, the district court also correctly concluded that Mr. Frese's First Amendment claim is barred by *Garrison v. Louisiana*. Mr. Frese does not dispute as much, but suggests that *Garrison* should be reconsidered. Pl.'s Br. 49–54. The Supreme Court has made clear that only *it* may reconsider one of its own precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Because this Court lacks the authority to overrule *Garrison*, it must affirm the district court's dismissal of Mr. Frese's First Amendment claim.

STANDARD OF REVIEW

The district court dismissed Mr. Frese's claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. J.A. 416–418. This Court's review of that dismissal is de novo. *Barchock v. CVS Health Corp.*, 886 F.3d 43, 48 (1st Cir. 2018). In conducting its de novo review, the Court "take[s] the complaint's well-pleaded facts as true," and "draw[s] all reasonable inferences in the plaintiff['s] favor." *Id.* (citation omitted). "Well-pleaded facts must be 'non-conclusory' and 'non-speculative.'" *Id.* (citation and quotation marks omitted). The Court "may consider implications from documents attached to or fairly incorporated into the complaint." *Id.* (citation and quotation marks omitted). "To survive dismissal, however, the complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Id.* "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." *Id.* (citation and quotation marks omitted).

ARGUMENT

I. The district court correctly dismissed Mr. Frese's facial vagueness challenge to RSA 644:11.

A. The vagueness doctrine generally.

"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* (*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," 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. (alteration in original) (quoting *Grayned*, 408 U.S. at 108–09). "In view of this last interest, the Constitution requires a 'greater degree of specificity' in cases involving First Amendment rights." *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (subsequent history omitted)).

"Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second

it may authorize and even encourage arbitrary enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion) (citing *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)).

"Even under the heightened standard for First Amendment cases, though, not all vagueness rises to the level of constitutional concern." *McKee*, 649 F.3d at 62. "Because words are rough-hewn tools, not surgically precise instruments, some degree of inexactitude is acceptable in statutory language." *Draper v. Healey*, 827 F.3d 1, 4 (1st Cir. 2016) (*Souter*, J.) (cleaned up). "Reasonable breadth in the terms employed by [a statute] does not require that it be invalidated on vagueness grounds." *Id.* (citation, quotation marks, and brackets omitted). "Moreover, the mere fact that a regulation requires interpretation does not make it vague." *McKee*, 649 F.3d at 62 (citation, quotation marks, and brackets omitted). Rather, "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." *Id.* (citation, quotation marks, and ellipsis omitted).

B. Determining whether a statute is facially vague requires a purely textual analysis.

The parties dispute the extent to which a federal court can consider extrinsic evidence or hypothetical examples of how a statute is applied or enforced when assessing a facial vagueness challenge. The district court concluded that a facial vagueness challenge "requires a textual analysis." J.A. 417. It therefore assessed Mr. Frese's facial challenge to RSA 644:11 by "applying the tools of statutory construction" to "the language of the statute." J.A. 418. In light of this focus, the district court concluded that "[Mr.] Frese's enforcement-based allegations . . . do not support his facial vagueness claim." J.A. 417.

The district court's textual approach finds ample support in the vagueness jurisprudence of the Supreme Court, this Court, and other federal courts of appeals. The Supreme Court has made clear that, when assessing a vagueness claim based on a lack-of-notice theory, "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made *on the basis of the statute itself and other pertinent law*, rather than on the basis of an ad hoc appraisal of the subjective expectations of particular defendants." *Bouie v. City of Columbia*, 378 U.S. 347, 355 n.5 (1964) (emphasis added). The Supreme

Court has likewise emphasized that a facial vagueness claim based on an arbitrary-enforcement theory turns not on "the mere fact that close cases can be envisioned," but rather on whether the statutory language is indeterminate. *See United States v. Williams*, 553 U.S. 285, 305–06 (2008). "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 precisely what that fact is." *Id.* at 306. Thus, while a statute might be unconstitutionally vague if it "tie[s] criminal culpability to . . . wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *id.*, it passes constitutional muster even when "it may be difficult in some cases to determine whether [the statute's] clear requirements have been met," *id.*

This Court has adhered to the text-bound approach reflected in the Supreme Court's precedents. For instance, this Court emphasized in *McKee* that "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." 649 F.3d at 62 (citations, quotation marks, and ellipsis omitted; empha-

sis added). The Court then went on to apply canons of statutory interpretation to conclude that the terms "promoting," "support," "opposition," "influencing," and "initiation," as used in several Maine election laws, did not render those laws unconstitutionally vague on their face. *See id.* at 62–70. In reaching this conclusion, the Court limited its analysis solely to the statutory language without considering how that language had been or could be applied. *See id.*

This Court conducted a similar analysis in *Donovan v. City of Haverhill*. *See* 311 F.3d 74 (1st Cir. 2002). There, the Court rejected a facial vagueness challenge to a city ordinance, noting that "the *terms* of the . . . ordinance clearly specify the conduct that is prohibited: the plaintiffs cannot move their house without a permit." *Id.* at 77 (citation and footnote omitted; emphasis added). The Court further noted that, under Massachusetts law, a "mayor's discretion in the grant of permits is not unrestrained," and observed that "[w]here a standard is not so vague that reasonably intelligent people must necessarily guess at its meeting, [a federal court] must presume that state courts will give it a limiting construction that will preserve its facial constitutionality." *Id.* at 78 (cleaned up). In other words, the Court premised its analysis on

"statutory definitions, narrowing context, [and] settled legal meanings," *Williams*, 556 U.S. at 306, and not extrinsic evidence of the ordinance's historic application or speculation about how it could be applied in the future.

Likewise, in *Modern Continental/Obayashi v. Occupational Safety and Health Review Commissioner* (*MC/O*), this Court rejected a facial challenge to a provision in the Code of Federal Regulations because the regulation was "clear on its face." 196 F.3d 274, 281 (1st Cir. 1999). After quoting the challenged regulation, the Court concluded that its "*plain language* identifies a specific hazard and delineates a specific precaution." *Id.* (emphasis added). The Court noted that because the regulation's application was clear "from a plain reading of the regulation," it was inappropriate to "inquire into industry standards." *Id.* The Court's focus on the plain language of the regulation once again reflects a well-worn principle of statutory interpretation. *See United States v. Gelin*, 712 F.3d 612, 617 (1st Cir. 2013) (noting when construing a stat-

ute, "[t]he starting point of [the] inquiry is the text of the statute itself" (citations and quotation marks omitted)).[1]

The district court correctly observed that several recent D.C. Circuit decisions reflect and expound upon this textual approach. J.A. 403–405. For example, in *Agnew v. Government of the District of Columbia*, the D.C. Circuit considered a facial vagueness challenge to a statue that "makes it a misdemeanor 'to crowed, obstruct, or incommode' the use of streets, sidewalks, or building entrances, and 'continue or resume the crowding, obstructing, or incommoding after being instructed by a law enforcement officer to cease' doing so." 920 F.3d 49, 51 (D.C. Cir. 2019) (quoting D.C. Code § 22-1307(a)). The plaintiffs challenged the statute "on the ground that it authorizes an impermissible degree of enforcement discretion." *Id.* In rejecting that challenge, the D.C. Circuit conducted a detailed analysis of the statutory language, turning to dictionary definitions and canons of statutory construction. *See id.* at 56–61. The court rebuffed the plaintiffs' contention that how the statute had

[1] Though admittedly nonbinding, this Court recently cited *MC/O* in an unpublished order for the proposition that a court "can and must consider the actual text of the relevant statute when addressing" a facial vagueness challenge. *Maravelias v. Coughlin*, No. 19-2244, 2021 WL 2229817, at *1 (1st Cir. Apr. 23, 2021); *see id.* (characterizing *MC/O* as "looking to 'plain language' of regulation when considering vagueness challenge").

been enforced bore on the relevant inquiry, emphasizing that "identified instances of a statute's misapplication do not tell [a court] whether the law is unconstitutional in every application." *Id.* at 60. The court observed that, while "similar allegations could bolster an as-applied challenge," "[t]hey do not . . . support" a facial vagueness challenge. *Id.*

The D.C. Circuit reached a similar conclusion in *United States v. Bronstein*. The plaintiffs in *Bronstein* brought a facial vagueness challenge to a federal statute making it a crime to "make a harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court Building or grounds." 849 F.3d at 1104 (quoting 40 U.S.C. § 6134). The district court "held the terms 'harangue' and 'oration' unconstitutionally vague." *Id.* (citation omitted). The D.C. Circuit reversed, emphasizing that "[t]he vagueness analysis . . . is objective" and "turns on the tools of statutory interpretation." *Id.*

The D.C. Circuit noted that "[w]hether 'harangue' or 'oration' is unconstitutionally vague within § 6134 involves only 'pure questions of law.'" *Id.* at 1106 (citation omitted). The court observed that a statute "is either susceptible to judicial construction or is void for vagueness based on the application of traditional rules of statutory interpretation."

Id. The court emphasized that "the question is whether the term [at issue] provides a discernable standard when legally construed." *Id.* at 1107. The court noted that "a statutory term is not rendered unconstitutionally vague because it 'does not mean the same thing to all people, all the time, everywhere.'" *Id.* (brackets omitted) (quoting *Roth*, 354 U.S. at 491).

Rather, the D.C. Circuit emphasized that a statute is impermissibly vague only if, after "applying the rules for interpreting legal texts, its meaning 'specifies no standard of conduct at all.'" *Id.* (brackets and ellipsis omitted) (quoting *Roth*, 354 U.S. at 491). The court stressed that, "'as a general matter,' the vagueness doctrine 'does not doubt the constitutionality of laws that call for the application of a qualitative standard to real-world conduct'" and that "'the law is full of instances where a man's fate depends on his estimating rightly some matter of degree.'" *Id.* at 1108 (brackets and ellipses omitted) (quoting *Johnson v. United States*, 576 U.S. 591, 603–04 (2015)). The court noted that "[t]he question is whether the terms converge upon certain behavior that is useful as a descriptor of the core behavior to which the statute may constitutionally be applied." *Id.* at 1108 (cleaned up). The court thus turned

to common interpretative tools, including dictionary definitions and canons of construction, when conducting its analysis. *See id.* at 1108–11. Applying this objective framework to § 6134, the court concluded that the words "harangue" and "oration," when "[p]roperly interpreted," are not facially vague. *Id.* at 1108. Ultimately, the court concluded that "a person of ordinary intelligence could read [the challenged] law and understand that, as a member of the Supreme Court's oral argument audience, making disruptive public speeches is clearly proscribed behavior—even in staccato bursts, seriatim." *Id.* at 1111.

The D.C. Circuit applied this same analytical approach in *Act Now to Stop War and End Racism Coalition and Muslim American Society Freedom Foundation v. District of Columbia* (*Act Now*). 846 F.3d 391, 396 (D.C. Cir. 2017). There, the D.C. Circuit considered, among other things, a facial vagueness challenge to a District of Columbia regulation requiring the removal of signs relating to events "within 30 days after the event" even though other signs could remain posted "for up to 180 days." *See id.* at 396. The plaintiffs contended that the regulation was unconstitutionally vague because it "delegates impermissibly unbridled enforcement discretion." *Id.* at 409. The D.C. Circuit disagreed, conclud-

ing that the challenged regulation "sets reasonably clear guidelines for law enforcement officers to determine whether a sign is event related, and therefore is not unconstitutionally vague." *Id.* at 411.

The D.C. Circuit once again reached its conclusion based solely on an assessment of the plain meaning of the challenged regulation's language. *Id.* at 411–13. While the court observed that "there [was] some evidence in th[e] record" that the challenged regulation "is susceptible of inconsistent application," *id.* at 411, it emphasized that "the most the evidence shows is that [the challenged regulation] might be misapplied in certain cases." *Id.* at 412. The court reiterated that "'[w]hat renders a statute vague . . . is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.'" *Id.* (quoting *Williams*, 553 U.S. at 306). The court stressed that "'the success of a facial challenge on the grounds that an ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion unlawfully, but whether there is *anything in the ordinanc*e preventing him from doing so.'" *Id.*

(emphasis added) (quoting *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992)).

To the extent controlling precedent does not itself compel the district court's text-based focus when assessing Mr. Frese's facial vagueness claim, *see supra* pp. 17–21 (discussing relevant Supreme Court and First Circuit precedent), each of these D.C. Circuit decisions persuasively demonstrates that the district court's focus was nonetheless correct. If more were needed, however, it can be found in the decisions of several other federal courts of appeals. Take, for example, the Second Circuit's decision in *Keepers, Inc. v. City of Milford*. *See* 807 F.3d 24 (2d Cir. 2015). There, the Second Circuit affirmed a district court ruling upholding against a vagueness challenge a city ordinance that regulated "adult-oriented establishments." *Id.* at 27. The plaintiff contended that the district court improperly considered an affidavit supplied by the city's chief of police "because it contradicted testimony given by [the city's] former city attorney in a deposition taken" under Rule 30(b)(6). *Id.* The Second Circuit held that the failure to strike the affidavit was at most harmless error because the affidavit itself did not (and could not) bear on the vagueness inquiry. *See id.* at 37–38.

The Second Circuit emphasized that "a court evaluating a challenge for vagueness must begin with the text of [the challenged provision] itself." *Id.* (citation, quotation marks, and brackets omitted). The court observed that the district court had "concluded that the ordinance was clear on its face without relying on any extrinsic evidence at all." *Id.* The court stressed that this was the correct inquiry. *See id.* (noting that the district court "focused, *as it should have*, primarily on the ordinance's plain meaning" (emphasis added)). The court then reasoned that none of the evidence in the record—including the allegedly improper affidavit—could have affected the district court's conclusion. *See id.* at 37–38 ("When the text of an ordinance is sufficiently clear to satisfy the Due Process Clause, a municipal officer's inability to supply precise answers regarding its hypothetical application is insufficient to render that ordinance unconstitutionally vague."). This decision further supports the proposition that extrinsic evidence of how a challenged provision has been or could be applied does not bear on whether that provision is unconstitutionally vague on its face.

Other circuits have employed a similar mode of analysis. In *United States v. Schales*, the Ninth Circuit noted that "'[t]he Constitution

does not require impossible standards; all that is required is that *the language conveys* sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'" 546 F.3d 965, 972 (9th Cir. 2008) (quoting *Hamling v. United States*, 418 U.S. 87, 111 (1974)); *see also Miguel-Miguel v. Gonzales*, 500 F.3d 941, 950 (9th Cir. 2007) (observing "constitutional vagueness requirements apply only to 'vague statutory language' or to 'unforeseeable and retroactive judicial expansion of statutory language that appears narrow and precise on its face'" (quoting *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001)). Recently, the Ninth Circuit rejected a facial vagueness challenge to the phrase "designed to shoot" in a federal firearms statute by employing traditional interpretative tools—including dictionary definitions—in order to "give [the] phrase its ordinary meaning." *United States v. Kuzma*, 967 F.3d 959, 968–70 (9th Cir. 2020). Even more recently, the Eighth Circuit rejected a vagueness challenge to a St. Louis traffic ordinance because "[t]he ordinance uses terms that are widely used and well understood." *Langford v. City of St. Louis, Mo.*, 3 F.4th 1054, 2021 WL 2793564, at *3 (8th Cir. July 6, 2021) (citation and quotation marks omitted). The court emphasized "[t]hat officers must em-

ploy some degree of judgment in determining whether a person [is violating the ordinance] does not render the ordinance unconstitutional." *Id.*

The through line in all of these decisions is clear: determining whether a statute is unconstitutionally vague on its face requires only an objective assessment of the statute's terms using the traditional tools of statutory interpretation. Extrinsic evidence of how the statute has been applied has no bearing on this inquiry, nor does speculation that a statute might be applied in an inconsistent manner sometime in the future. In dismissing Mr. Frese's amended complaint, the district court faithfully adhered to this analytical framework. This Court should do the same.

C. RSA 644:11 sets forth an objectively discernible standard of conduct.

RSA 644:11 provides that "[a] person is guilty of a class B misdemeanor if he purposely communicates to any person, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." RSA 644:11, I. It further defines "public" to "include[] any professional or social group of which the victim of the defamation is a member." RSA

644:11, II. This language, when properly construed, is sufficiently definite to both put a person of ordinary intelligence on notice of what conduct is prohibited and guard against arbitrary enforcement. It is accordingly not unconstitutionally vague on its face.

That RSA 644:11 contains express *mens rea* requirements goes a long way toward "ameliorat[ing] any vagueness concerns." *United States v. Nieves-Castano*, 480 F.3d 597, 603 (1st Cir. 2007) (citing *Hill v. Colorado*, 530 U.S. 703, 732 (2000)). Specifically, RSA 644:11 contains three *mens rea* requirements. First, a person must *purposely* communicate information, either orally or in writing. RSA 644:11, I. Second, that person must *know* that the information communicated is false. *Id.* Third, the person must also *know* that the information will tend to expose another living person to public hatred, contempt, or ridicule. *Id.*

The New Hampshire Criminal Code contains specific definitions for both "purposeful" and "knowing" conduct. *See* RSA 626:2, II. "A person acts purposely with respect to a material element of an offense when his conscious object is to cause the result or engage in the conduct that comprises the element." RSA 626:2, II(a). "A person acts knowingly with respect to conduct or to a circumstance that is a material element

of an offense when he is aware that his conduct is of such nature or that such circumstance exists." RSA 626:2, II(b). Mr. Frese has never suggested that these definitions are somehow vague. Nor could he realistically do so, given that federal courts have routinely upheld analogous *mens rea* requirements against vagueness challenges. *See, e.g.*, *Hoffert*, 949 F.3d. at 788 (observing that a "knowing or having reason to know" *mens rea* requirement "has withstood numerous vagueness challenges" and collecting cases); *Corrow*, 119 F.3d at 804 (noting that "'[a] statutory requirement that an act must be willful or purposeful" will "relieve the statute of the objection that it punishes without warning an office of which the accused was unaware'" (quoting *Screws*, 325 U.S. at 101–02 (Douglas, J., concurring)).

In light of these definitions, a person commits criminal defamation under RSA 644:11 only when it is his "conscious object" to communicate information orally or in writing that he "is aware" is both false and "will tend to expose any other living person to public hatred, contempt or ridicule." RSA 644:11, I; RSA 626:2, II(a), (b). There is no meaningful dispute in this case that a person of ordinary intelligence would understand what it means to communicate information orally or in writing or

what it means for that information to be false. Indeed, "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." *See Williams*, 553 U.S. at 306. "And they similarly pass every day upon the reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation." *Id.* Mr. Frese does not suggest otherwise in his brief.

Rather, Mr. Frese's primary critique of the district court's textual analysis centers around the court's conclusion that the phrase "will tend to expose any other living person to public hatred, contempt or ridicule," RSA 644:11, I, is sufficiently clear to survive a facial vagueness challenge because it incorporates New Hampshire's common-law civil defamation standard. The district court observed that "[a]t oral argument, [Mr.] Frese's counsel agreed that the criminal defamation statute adopts part of the common law standard for civil defamation," which the court characterized as "a discernable, normative standard which New Hampshire courts have consistently construed, and New Hampshire juries have regularly applied, for over one hundred years." J.A. 409. Mr.

Frese does not dispute the district court's characterization of his counsel's position on whether RSA 644:11 incorporates at least part of the standard for common-law civil defamation.[2] He nonetheless contends that "the common law of civil defamation is too indefinite and uncertain to define a criminal restriction on speech." Pl.'s Br. 23.

It bears emphasizing at the outset that there was nothing improper about the district court considering how the New Hampshire Supreme Court has construed the common-law defamation standard as part of its analysis of Mr. Frese's facial vagueness claim. Indeed, the district court was required to do so. *See Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 494 n.5 (1982) ("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."); *see also Williams*, 553 U.S. at 306 (noting that a court can consider "statutory definitions, narrowing context, settled legal mean-

[2] In any event, the oral argument transcript supports the characterization. *See* J.A. 13 ("Mr. Hauss: Meaning it adopts the—the New Hampshire Supreme Court decisions regarding defamation it seems to me from the text of the statute are designed to be adopted into the criminal law of defamation. So if you have a New Hampshire Supreme Court decision saying that is defamatory, that would be adopted into the criminal statute.").

ings”). The appellee does not read Mr. Frese’s brief to suggest otherwise. But to the extent it does, the suggestion is misplaced.

The district court also correctly observed that the requirement in RSA 644:11 that the information communicated must “tend to expose any other living person to public hatred, contempt or ridicule” is itself narrower than the common-law standard. J.A. 409 n.38 (quoting *Thomas v. Tel. Publ’g Co.*, 155 N.H. 314, 338, 929 A.2d 993 (2007)). This statutory requirement, unlike the common-law defamation standard, does not allow for a communication to be defamatory merely because it “tend[s] to impair [a person’s] standing in the community.” *Boyle*, 172 N.H. at 554, 216 A.3d at 95 (cleaned up). In other words, RSA 644:11 drops an ostensible catchall from the common-law standard. In doing so, it cabins the scope of potential criminal exposure.

The New Hampshire Supreme Court has narrowed that exposure further still through its construction of what constitutes defamation at common law. The court has made clear that “the defamatory meaning must be one that could be ascribed to words by persons of common or reasonable understanding.” *Boyle*, 172 N.H. at 553, 216 A.3d at 95. The court has further held that a civil defamation claim “cannot be main-

tained on an artificial, unreasonable, or tortured construction imposed upon innocent words, nor when only supersensitive persons, with morbid imaginations would consider the words defamatory." *Thomson v. Cash*, 119 N.H. 371, 373, 402 A.2d 651, 653 (1979) (citation and quotation marks omitted). Thus, whether a statement is defamatory under common-law requires neither "an ad hoc appraisal of the subjective expectations of particular defendants," *Bouie*, 378 U.S. at 355 n.5, nor "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings," *Williams*, 553 U.S. at 306. Rather, as the district court recognized, the "defamatory meaning" of a statement turns on an objective analysis that would be familiar to persons of ordinary intelligence. J.A. 409–411.

In resisting this conclusion, Mr. Frese primarily relies on *Gottschalk*. *See* Pl.'s Br 43–45. The court in *Gottschalk* held that the Alaska criminal defamation statute, which incorporated Alaska's common-law defamation standard, was unconstitutionally vague. *See* 575 P.2d at 292–96. As the district court correctly noted, however, the defamation standard at issue in *Gottschalk* differed materially from the standard at issue in this case. J.A. 411–413. By adopting Alaska's com-

mon-law standard for defamation, the statute at issue in *Gottschalk* "expansively criminal[ized] any statement [that] would cause another 'to be shunned or avoided,' even if the speaker believed that his or her statements were true." J.A. 412 (internal citations omitted) (quoting *Gottschalk*, 545 P.2d at 292). In contrast, criminal liability attaches under RSA 644:11 only when a person purposely communicates information that he or she *knows* to be false. RSA 644:11, I. Moreover, unlike in *Gottschalk*, defamation under New Hampshire common law turns on an objective inquiry that does not "'depend on the values of the listener,'" as the district court correctly observed. J.A. 411–412 (quoting *Gottschalk*, 545 P.2d at 292–93). The circumstances in *Gottschalk* therefore bear little similarity to the circumstances at issue here.

The district court also observed that, "[i]n the 40 years since *Gottschalk* was decided," the Supreme Court and federal courts of appeals have continued to refine the vagueness standard. J.A. 412. The district court noted that, "[d]uring 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." J.A. 412 (citations omitted).

Yet, as the district court observed, "at least one district court has found that a defamation ordinance criminalizing [defamatory] speech . . . was not unconstitutionally vague on its face." J.A. 412–413 (quoting *How v. City of Baxter Springs, Kan.*, 369 F. Supp. 2d 1300, 1306 (D. Kan. 2005)). As the district court noted, "[t]hese developments undercut [Mr.] Frese's reliance on *Gottschalk* to breathe life into his facial vagueness claim." J.A. 413.

Mr. Frese nonetheless suggests that RSA 644:11 "expressly departs from the common law standard in a manner that exacerbates the statute's vagueness." Pl.'s Br. 23. He contends that, "[w]hereas the common law defines defamation as false statements tending to injure the victim's reputation with any substantial and respectable minority of the public," RSA 644:11 "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." Pl.'s Br. 23. He contends that this purportedly "elastic standard" renders RSA 644:11 vague. Pl.'s Br. 23. This argument also lacks merit.

Contrary to Mr. Frese's suggestion, *see* Pl.'s Br. 46, nothing in RSA 644:11 supplants the common law's objective standard for determining whether a statement is defamatory with a malleable standard that turns on "wholly subjective judgments," *Williams*, 553 U.S. at 306, or "an ad hoc appraisal of the subjective expectations of particular defendants," *Bouie*, 378 U.S. at 355 n.5. Rather, the statute merely defines the scope of the community in which a statement must tend to subject a person to "hatred, contempt or ridicule" before that statement might trigger criminal exposure. RSA 644:11, I, II. That the scope of the community might be smaller than the public at large fully comports with the common law, under which the relevant community can be "*any* substantial and respectable group, even though it might be quite a small minority." *Boyle*, 172 N.H. at 554, 216 A.3d at 95 (citation and quotation marks omitted; emphasis added). When determining whether a statement would "tend to lower the plaintiff in the esteem" *of* that community, once it is defined, the New Hampshire Supreme Court has made clear that an objective standard applies. *See id.*; *Thomson*, 119 N.H. at 373, 402 A.2d at 653. Mr. Frese offers no explanation for why that is not true within the context of RSA 644:11. *See* J.A. 409 ("At oral

argument, [Mr.] Frese's counsel agreed that the criminal defamation statute adopts part of the common law standard for civil defamation . . . . "). His contention that RSA 644:11 departs from the common-law's objective standard is accordingly misplaced.

It does not matter that "[d]ifferent professional and social groups will often have different, sometimes conflicting, standards for what constitutes defamation." Pl.'s Br. 46. Again, whether a statement is defamatory under New Hampshire common law does not turn on the subjective understanding of any person or group. *Boyle*, 172 N.H. at 554, 216 A.3d at 95; *Thomson*, 119 N.H. at 373, 402 A.2d at 653. And in any event, "a statutory term is not rendered unconstitutionally vague because it 'does not mean the same thing to all people, all the time, everywhere.'" *Bronstein*, 849 F.3d at 1107 (brackets omitted) (quoting *Roth*, 354 U.S. at 491). Rather, a statute is impermissibly vague only if, after "applying the rules for interpreting legal texts, its meaning 'specifies no standard of conduct at all.'" *Id.* (brackets and ellipsis omitted) (quoting *Roth*, 354 U.S. at 491). As the district court correctly concluded, RSA 644:11 specifies a discernible standard of conduct.

Mr. Frese's contention that RSA 644:11 is impermissibly vague because it is not always easy to distinguish between statements of opinion and statements of fact fails for similar reasons. *See* Pl.'s Br. 47–48. To be sure, the New Hampshire Supreme Court has indicated that "an opinion [can be] actionable for defamation when the opinion may reasonably be understood to imply the existence of defamatory fact as a basis for the opinion." *Boyle*, 172 N.H. at 553, 216 A.3d at 94 (citations and quotation marks omitted). But the court has also made clear that determining whether a statement of opinion implies a statement of fact also involves a purely objective inquiry: "[w]here an expressive phrase, though pejorative and unflattering, cannot be *objectively verified*, it belongs squarely in the category of opinion." *Id.* at 557, 216 A.3d at 98 (citation and quotation marks omitted). Thus, this determination, too, does not turn on the subjective whims of a particular individual or group such that it might render RSA 641:11 impermissibly vague. *See Williams*, 553 U.S. at 306; *Bouie*, 378 U.S. at 355 n.5.

Mr. Frese otherwise trains his arguments on the scope of the district court's inquiry. He contends that the district court erred by failing to consider the context in which RSA 644:11 is typically enforced—

namely, by police prosecutors without formal legal training—when assessing whether RSA 644:11 is vague on its face. Pl.'s Br. 27–31. He further contends that the district court improperly failed to credit allegations in his amended complaint (and, ultimately, to allow him to develop and present extrinsic evidence that might show) that RSA 644:11 has been enforced in an arbitrary manner. Pl.'s Br. 31–34. Neither argument saves his facial vagueness claim.

The district court did not disregard the context in which RSA 644:11 is enforced when it dismissed Mr. Frese's facial vagueness challenge. J.A. 413–414 (specifically addressing that context). The court simply concluded that this context did not bear on whether RSA 644:11 is vague on its face. J.A. 413–415. This conclusion was manifestly correct. Whether a statute is facially vague does not turn on who is enforcing the statute or what conduct he or she might subjectively believe the statute proscribes. Rather, "the question is whether [the statute] provides a discernable standard when legally construed." *Bronstein*, 849 F.3d at 1107. This is an "objective" inquiry that "turns on the tools of statutory interpretation." *Id.* at 1104. The district court correctly employed those tools and determined that RSA 644:11 contains an objec-

tively discernable standard of conduct. J.A. 408–415. "When the text of a [law] is sufficiently clear to satisfy due process," the mere fact that the officer tasked with enforcing it may not be able to "supply precise answers regarding its hypothetical application is insufficient to render that [law] unconstitutionally vague." *Keepers, Inc.*, 807 F.3d at 37–38.

That an officer might misapply a law likewise does mean that the law is vague. Again, "a statutory term is not rendered unconstitutionally vague because it 'does not mean the same thing to all people, all the time, everywhere.'" *Bronstein*, 849 F.3d at 1107 (brackets omitted) (quoting *Roth*, 354 U.S. at 491). "Because words are rough-hewn tools, not surgically precise instruments, some degree of inexactitude is acceptable in statutory language." *Draper*, 827 F.3d at 4 (cleaned up). Thus, "the success of a facial challenge on the grounds that a [law] delegates overly broad discretion to the decisionmaker rests not on whether the [decisionmaker] has exercised his discretion unlawfully, but whether there is *anything in the [law]* preventing him from doing so.' *Act Now*, 846 F.3d at 412 (emphasis added) (quoting *Forsyth Cnty., Ga.*, 505 U.S. at 133 n.10). Put differently, while "identified instances of a statute's misapplication" may "bolster an as-applied challenge," they "do not

tell [a court] whether the law is" vague on its face. *Agnew*, 920 F.3d at 60. Mr. Frese's continued reliance on instances in which RSA 644:11 has purportedly been misapplied is therefore unavailing.

Mr. Frese's own circumstances illustrate this point. Mr. Frese acknowledged to law enforcement that he purposely made the statements that resulted in his first prosecution for criminal defamation and that he knew those statements contained false information. J.A. 211, 216. Notably, he has never suggested during this litigation that he did not know that the statements in question—which implied that Mr. Robillard had "molested" one or more persons and asserted that Mr. Robillard committed several specific crimes, J.A. 213, 251, 252, 253—would "tend to expose" Mr. Robillard "to public hatred, contempt or ridicule," RSA 644:11, I. Indeed, Mr. Frese pleaded guilty to the charge. J.A. 192. There is nothing about the circumstances of this prosecution that would suggest that Mr. Frese, the law enforcement officers who investigated and prosecuted him, or the judge who sentenced him had any serious question about what sort of conduct RSA 644:11 prohibits.

Mr. Frese's second prosecution likewise did not flow from some indeterminacy in the statutory language, but rather from an obvious mis-

application of a clear statutory standard. Specifically, the Exeter Police Department overlooked that a person is not guilty of criminal defamation under RSA 644:11 unless he *knows* that the statements in question are false. RSA 644:11, I; J.A. 277. While this oversight was unfortunate, it in no way suggest that RSA 644:11 is vague on its face. "Whether someone held a belief or had an intent is a true-or-false determination" that cannot animate a facial challenge. *Williams*, 553 U.S. at 306. "[C]ourts 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 works and conduct, from which, in ordinary human experience, mental condition may be inferred." *Id.* (citation and quotation marks omitted). "And they similarly pass every day upon the reasonable import of a defendant's statements—whether, for example, they fairly convey a false representation." *Id.* That the Exeter Police Department misapplied one of RSA 644:11 requirements when it brought a criminal defamation charge against Mr. Frese does not mean that the requirement itself is unclear.

Relatedly, Mr. Frese's assertion that police officers have in the past brought prosecutions under RSA 644:11 for improper purposes

(and that an improper purpose may have motivated his second prosecution) does not bear on whether RSA 644:11 is vague on its face. If anything, the suggestion that an officer might *choose* to misapply RSA 644:11 supports the notion that the conduct the statute proscribes is objectively discernable. In any event, Mr. Frese points to no authority holding that a plaintiff can maintain a facial vagueness challenge to a statute simply because an unscrupulous prosecutor might enforce it based on bad motives. If that were true, then virtually any criminal statute would be open to facial invalidation based on vagueness.

Also unavailing is Mr. Frese's contention that the district court was somehow required to consider the context in which RSA 644:11 is enforced and how it has been historically applied because it considered the common-law defamation standard. *See* Pl.'s Br. 21. This argument reflects a basic false equivalency. "In evaluating a facial challenge to a state law, a federal court *must* . . . consider any limiting construction that a state court or enforcement agency has proffered." *Vill. of Hoffman Ests.*, 455 U.S. at 494 n.5 (emphasis added); *see also Williams*, 553 U.S. at 306 (noting that a court can consider "statutory definitions, narrowing context, settled legal meanings" when determining whether a

statute is vague). As the district court observed, a limiting construction can be discerned from how a state court has interpreted a common-law doctrine that is analogous to or incorporated within the terms of the challenged statute. *See* J.A. 409–411 (collecting cases). Thus, consulting relevant decisional law is a traditional "tool[] of statutory interpretation" intrinsic to the relevant analysis. *Bronstein*, 849 F.3d at 1104.

The same cannot be said of inquiries into who might be tasked with applying the challenged statute or the specific circumstances in which the statute has been or could be enforced. These considerations are necessarily *extrinsic* to the proper analysis, as they do not speak to whether the language of a statute "provides a discernable standard when legally construed." *Id.* at 1107. Rather, they at most inform whether a statute "might be misapplied in certain cases." *Act Now*, 846 F.3d at 396. "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 precisely what that fact is." *Williams*, 553 U.S. at 306. Mr. Frese's attempt to equate how a statute might be *subjectively* applied with what its language *objectively* proscribes collapses this essential distinction.

Despite his contention otherwise, Pl.'s Br. 32–34, Mr. Frese has not pointed to any decision, other than perhaps *Gottschalk*, in which a court considered the type of extrinsic materials he contends the district court should have considered in this case. The Supreme Court did not do so in *Johnson v. United States*; rather, it simply pointed to the difficulties faced by various courts when applying the residual clause of the Armed Career Criminal Act to *support* its text-based reasons for concluding the statute was facially vague. *See* 576 U.S. at 597–602. This discussion is a far cry from the type of inquiry Mr. Frese advocates here. And Mr. Frese has pointed to no case in which a *court* has had trouble applying RSA 644:11. Mr. Frese's reliance on *Johnson* is therefore misplaced.

The same is true of the other two cases cited in Mr. Frese's brief, *Kolender v. Lawson*, 461 U.S. 352, and *Wag More Dogs, LLC v. Cozart* (*Wag More*), 680 F.3d 359 (4th Cir. 2012). *See* Pl.'s Br. 33. The passage Mr. Frese relies on in *Kolender*—which notably follows a lengthy discussion of the challenged provision's text and how state courts had construed it, *see* 461 U.S. at 355–59—merely reflects that counsel was asked a hypothetical question at oral argument, *see id.* at 360. This is

hardly a full-throated endorsement of the type of analysis Mr. Frese envisions in this case. And while the Fourth Circuit's decision in *Wag More* contemplates that a court can entertain a facial vagueness challenge to an otherwise clear provision "if and when a pattern of unlawful favoritism appears," the court pulled that standard from a prior Fourth Circuit opinion, which in turn pulled it from a Supreme Court decision that involved a First Amendment challenge, not one based on vagueness. *See Wag More*, 680 F.3d at 372 (quoting *Green v. City of Raleigh*, 523 F.3d 293, 306 (4th Cir. 2008) (quoting, in turn, *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002) (addressing whether an ordinance violates the First Amendment when it is enforced to discriminate against "disfavored speakers"))). Notably, no federal court of appeals other than the Fourth Circuit appears to have ever even *cited Wag More*, much less adopted its reasoning. *Wag More* is accordingly of little persuasive value.

Finally, the district court also correctly concluded that "[Mr.] Frese's examples highlighting the history of selective criminal defamation prosecutions in America" do not bear on whether RSA 644:11 is vague on its face. J.A. 413. Again, while "identified instances of a stat-

ute's misapplication" may "bolster an as-applied challenge," they "do not tell [a court] whether the law is" vague on its face. *Agnew*, 920 F.3d at 60. Mr. Frese's lengthy discussion of law review articles and studies that purportedly highlight this history therefore cannot save his facial vagueness claim. *See* Pl.'s Br. 1, 34–41. The district court correctly observed as much. *See* J.A. 414 (quoting *Agnew*, 920 F.3d at 60).

D. Summary

In sum, RSA 644:11, when properly construed, sets forth an objectively discernable standard of conduct. Mr. Frese's arguments to the contrary misapply or misconstrue the relevant analytical framework. The district court faithfully applied that framework when dismissing Mr. Frese's facial vagueness claim. For the foregoing reasons, this Court should affirm that decision.

II. The district court properly concluded that Mr. Frese's "hybrid" vagueness claim triggers the same standard as his facial challenge.

Mr. Frese further contends that the district court erred in dismissing his purported "hybrid" vagueness claim. *See, e.g.*, Pl.'s Br. 30. That claim is premised on an assertion that RSA 644:11 is unconstitutionally vague "as applied in the context of New Hampshire's system for prose-

cuting Class B Misdemeanors." J.A. 158 ¶ 36. The district court concluded that this "hybrid" claim was subject to the same text-bound analysis as Mr. Frese's facial vagueness claim. J.A. 415–416. This conclusion was correct as a matter of law.

Simply put, there is no such thing as a "hybrid" vagueness claim. "[T]he Supreme Court has confronted similar half-fish, half-fowl . . . challenges and instructed that where the challengers 'do not seek to strike [a statute] in all its applications' but the relief sought 'reaches beyond the particular circumstances of the plaintiffs,' they must 'satisfy the standards for a facial challenge to the extent of that reach.'" *Project Veritas Action Fund v. Rollins*, 982 F.3d 813, 826 (1st Cir. 2020), *pet. cert. filed* No. 20-1598 (filed May 12, 2021) (brackets and emphasis omitted) (quoting *John Doe No. 1*, 561 U.S. at 194). Because Mr. Frese's "hybrid" challenge necessarily seeks relief that extends beyond his own circumstances, it is subject to the same standard as his facial challenge. *See John Doe No. 1*, 561 U.S. at 194. "The label is not what matters." *Id.*

A claim that a statute is vague on its face triggers the text-bound analysis described in the preceding section. Extrinsic considerations

such as who enforces a statute or how the statute has been or could be applied have no bearing on that analysis. This does not change when a plaintiff seeks to invalidate a statute in many, but perhaps not all, of its applications, as Mr. Frese does through his "hybrid" claim. The only thing that changes is "the extent to which the invalidity of the challenged law must be demonstrated"—*i.e.*, that it is invalid in all of the *challenged* circumstances—"and the corresponding breadth of the remedy,"—*i.e.*, that it should be struck down in all of those circumstances, even if it might survive in other contexts. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) (citation and quotation marks omitted); *see id.* at 1127–28 ("Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek.").

Mr. Frese's "hybrid" vagueness claim is accordingly subject to the same textual analysis as his facial vagueness claim. It fails for the same reasons. The district court correctly concluded as much, and this Court should affirm that decision.

III. This Court lacks the authority to reconsider *Garrison v. Louisiana*.

The district court concluded that the Supreme Court's decision in *Garrison v. Louisiana* precluded any First Amendment challenge to RSA 644:11. J.A. 396–398. While Mr. Frese does not dispute this conclusion, he devotes several pages of his brief to arguing why, in his view, it is time for *Garrison* to be reconsidered. Pl.'s Br. 49–54. Whatever one might think of these arguments in the abstract, they have no bearing on the resolution of this appeal. The Supreme Court has made clear that if one of its precedents "has direct application in a case," lower courts "should follow [that precedent], leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (citation and quotation marks omitted). This rule applies even when a precedent "appears to rest on reasons rejected in some other line of decisions." *Id.* (same omissions). This Court should therefore affirm the district court's dismissal of Mr. Frese's First Amendment claim.

CONCLUSION

For the foregoing reasons, the district court correctly dismissed each of Mr. Frese's claims. This Court should therefore affirm the district court's decision.

Respectfully submitted,

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By his attorney

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July 30, 2021

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CERTIFICATE OF COMPLIANCE

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I hereby certify that on July 30, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and will be served via the CM/ECF System: Gilles Bissonette, Henry R. Klementowicz, Brian Hauss, and Emerson Sykes.

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