No. 22-939

In The
Supreme Court of the United States

ROBERT FRESE,

Petitioner,

v.

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

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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QUESTION(S) PRESENTED

1. Whether the First Amendment tolerates criminal prosecution for alleged defamation of a public official.

2. Whether New Hampshire's common law of civil defamation is too vague to define a criminal restriction on speech, particularly where the state authorizes police departments to initiate prosecutions without the participation of a licensed attorney.

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended expressive rights nationwide through public advocacy, targeted litigation, and *amicus curiae* participation, including cases in which the government arrested a critic. Br. of FIRE as *Amicus Curiae* in Support of Petitioner, *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022); Br. of FIRE as *Amicus Curiae* in Support of Respondents, *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021); Br. of FIRE as *Amicus Curie* in support of Appellee, *Smith v. Rogers*, No. 22-30352 (5th Cir. Jan 27, 2023); *Villarreal v. City of Laredo*, No. 20-40359 (5th. Cir. 2022) (reh'g en banc pending).

FIRE has observed public officials using vague and obscure criminal statutes—including criminal defamation statutes—to target critics and dissenters. That disturbing trend endangers the robust public debate essential to a free society and effective self-government. This case presents an opportunity for the Court to purge criminal seditious libel from our constitutional order, upholding the First

[1] Under Rule 37.6, FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. FIRE provided timely notice of this brief under Rule 37.2.

Amendment's guarantee that Americans are free to criticize the government without being thrown in jail for it. FIRE urges the Court to grant *certiorari* and reverse.

SUMMARY OF ARGUMENT

Americans are facing a troubling pattern of public officials dusting off antiquated and seldom enforced penal statutes to punish their critics. That pattern highlights the need to vanquish criminal seditious libel for good.

Take Jerry Rogers. Jerry disagreed with how the local police were handling a 2017 murder investigation in St. Tammany Parish, Louisiana. So he voiced his concerns to the victim's family over email. True to the cherished American tradition of sharply criticizing public officials, Jerry called the lead detective "clueless" and dubbed the local sheriff "dumbo."[2] No one would have imagined the police throwing Jerry in jail for a few unkind words.

Yet that's exactly what the police did. Soon after learning about Jerry's emails, police obtained a warrant for his arrest under Louisiana's criminal libel

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[2] Katie Moore, *Emails sent by a federal agent to Nanette Krentel's sister: What did they say about the investigation*, 4 WWL-TV Eyewitness News (Feb. 14, 2020), https://www.wwltv.com/article/news/investigations/bardstown/emails-sent-by-a-federal-agent-to-nanette-krentels-sister-what-did-they-say/289-b7b76c0b-f6fc-4b9b-ab38-51e235f658e3.

statute[3]—the same one this Court declared unconstitutional as to public officials over 50 years ago in *Garrison v. Louisiana*.[4] In fact, the police arrested Jerry after the district attorney told them it was unconstitutional.[5]

Jerry's plight echoes that of Petitioner Robert Frese, who local police arrested under New Hampshire's criminal libel statute for his online comments condemning the police.[6] These examples show that in the United States, the practice of arresting government critics for libel is not extinct. But it should be.

Throwing someone in jail for badmouthing a public official is profoundly undemocratic and un-American. From a colonial jury refusing to imprison John Peter Zenger for criticizing New York's colonial governor, to the near-universal anger over the Sedition Act of 1798, founding-era Americans rejected criminalizing speech about the government. As the Court reminded us over 150 years later, "the attack upon [the Sedition Act's] validity has carried the day in the court of history."[7] Alas, the Court declined in *Garrison* to vanquish criminal seditious libel for good.

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[3] *Rogers v. Smith*, 603 F. Supp. 3d 295, 298–99 (E.D. La. 2022).

[4] 379 U.S. 64, 77 (1964). Louisiana finally repealed the statute in 2021. La. Acts 2021, No. 60, § 1.

[5] *Rogers*, 603 F.Supp.3d at 298.

[6] *See Frese v. Formella*, 53 F.4th 1 (1st Cir. 2022).

[7] *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

Four years after *Garrison*, the Court struck what should have been the death knell for criminal seditious libel. In *Brandenburg v. Ohio*, the Court affirmed that the First Amendment protects even advocacy for violent action unless directed toward imminent and likely lawlessness.[8] If the First Amendment protects calling for a march on Congress while advocating forceful "revengeance" (like Clarence Brandenburg did), then it surely protects those who criticize government officials from the pain of criminal penalty.

For all that, over a dozen states maintain criminal libel statutes despite lacking any legitimate interest in doing so. Making a crime out of sharp words about the governor or the police chief, even if knowingly false, deters no serious public injury. On the other hand, the force of a state's penal system harms the public's expressive liberty. The threat of jail time, the stigma of a criminal record—and even the chill from criminal libel complaints empowering officials to search a critic's electronic devices—make criminal libel laws especially menacing to the public's right to free expression.

Amplifying that menace is the trend of public officials selectively wielding similar antiquated and obscure criminal statutes against peaceful dissent. The examples are stark. In Connecticut, police exploited a 1917 advertising law to arrest citizens for mere insults. Officials in Laredo, Texas, dug up a mothballed state statute to throw a popular citizen

[8] 395 U.S. 444, 446 (1969).

journalist and frequent critic in jail for asking a police officer questions while reporting the news. And police in Washington charged a woman under a "malicious mischief" statute after she chalked messages on a public sidewalk decrying the city commissioner. If anything, this trend highlights the ongoing threat that criminal libel laws pose, supplying an archaic "instrument[ ] of destruction"[9] for officials bent on silencing government detractors like Robert Frese.

At its core, the First Amendment promises Americans the freedom to criticize those who serve the public, without going to jail for exercising that freedom. And so FIRE urges the Court to grant *certiorari* to "categorically repudiate the doctrine of criminal seditious libel,"[10] ensuring that relic from the crown's Star Chamber no longer threatens our nation's "uninhibited, robust, and wide-open" public debate.[11]

ARGUMENT

I. Making Government Criticism a Crime Offends Both Historical and Modern First Amendment Values.

The freedom to criticize the government and its officials anchors Americans' expressive liberty—and it has since before the Founding. Making that essential freedom a crime defies both the historical

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[9] *Garrison*, 379 U.S. at 85 (Douglas, J., concurring).

[10] Pet. for Cert. at 10.

[11] *Sullivan*, 376 U.S. at 270.

and modern values that underpin the First Amendment. *See Houston v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.")

While Blackstone claimed seditious libel was rooted in common law,[12] he likely got it backwards. "Seditious libel is in fact the creation of the Court of Star Chamber, the most iniquitous tribunal in English history." Irving Brant, *Seditious Libel: Myth and Reality*, 39 N.Y.U. L. Rev. 1, 11 (1964).[13] The English commoner preferred a civil remedy for libel, but the English crown and nobility used the Star Chamber to prosecute seditious libel and quash dissent, forbidding those accused from defending themselves with the truth. *E.g.,* Gregory C. Lisby, *No Place in the Law: The Ignominy of Criminal Libel in American Jurisprudence*, 9 Commc'n L. & Pol'y 433, 447–48 (2004); Note, *Constitutionality of the Law of Criminal Libel*, 52 Colum. L. Rev. 521, 522–23 (1952).

Early Americans rejected such tyranny—including the government's attempts to jail critics. For instance, in 1738, New York's colonial governor indicted famed

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[12] 4 Sir William Blackstone, *Commentaries on the Laws of England* 150–51 (1736).

[13] *See also* A.T. Carter, *A History of English Legal Institutions* 156 (Butterworth & Co. 4th Ed.) (1910) (identifying libel as one of "[t]he main offences punished in the Star Chamber," and "for the most part unknown to the common law").

printer John Peter Zenger for seditious libel because Zenger criticized the governor. Yet the jury acquitted Zenger, nullifying the English rule that truth was no defense.[14] And when Congress and President Adams pushed the Sedition Act of 1798[15] to silence anti-Federalist detractors, the backlash was overwhelming. *Sullivan*, 376 U.S. at 273-74. As James Madison explained in the Virginia Resolutions opposing the Act, the First Amendment secures the "right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right." *Id.* at 274 (quoting 4 Elliot's Debates on the Constitution (1876), 553–54).

The hostility to the short-lived Sedition Act shone a light on the First Amendment and its intolerance for prosecuting speech about public officials. Yet many state and local officials kept targeting government detractors under criminal libel laws. Robert A. Leflar, *The Social Utility of the Criminal Law of Defamation*, 34 Tex. L. Rev. 984, 986–97 (1956) (detailing examples of criminal libel prosecutions involving public officials and politicians). Consider the first half of the 20th century: Critics of governors, mayors, police chiefs,

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[14] *The Tryal of John Peter Zenger*, Hist. Soc'y of N.Y. Courts, (1738), https://history.nycourts.gov/wp-content/uploads/2018/11/History_Tryal-John-Peter-Zenger.pdf [https://perma.cc/7YGK-DHPD].

[15] 1 Stat. 596 (1798).

and elected district attorneys all faced criminal convictions for their sharp words. *Id.*

At the same time, the Court began emphasizing the First Amendment's unyielding commitment to the liberty to criticize public officials. In *Bridges v. California*, this Court ruled a state court violated the First Amendment by holding a newspaper and citizen in contempt for criticizing judicial proceedings. 314 U.S. 252 (1941). Explaining that "disrespect for the judiciary" and "disorderly and unfair administration of justice" are no grounds to punish critics, the Court declared, "it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *Id.* at 270. And two decades later, the Court re-emphasized that "prized American privilege," affirming the First Amendment's footing in "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Sullivan*, 376 U.S. at 269–70.

Against that historical and modern backdrop of core First Amendment principles, seditious libel has no place in American penal codes. As the Court has pointed out, there existed a "broad consensus that the [Sedition] Act . . . was inconsistent with the First Amendment." *Sullivan*, 376 U.S. at 276.

Still, even while holding Louisiana's criminal libel law unconstitutional, the Court in *Garrison* left open the door for criminal seditious libel against knowing and reckless falsehoods. 379 U.S. at 75; *id.* at 82

(Douglas, J., concurring). That was the last time the Court considered seditious libel. Since then, Americans like Robert Frese have continued to face arrest and the stigma of a criminal record for criticizing public officials. Closing the door that *Garrison* left open is long overdue.

II. *Brandenburg* Wiped Out the Justifications for Criminal Seditious Libel.

Five years after issuing *Garrison*, the Court decided *Brandenburg*. There, it struck what should have been the final blow for "the old, discredited English Star Chamber law of seditious criminal libel." *Garrison,* 379 U.S. at 80 (Black, J., concurring). In particular, *Brandenburg* confirms that the First Amendment rejects the two bases for criminal seditious libel that the Court identified in *Garrison*: preventing breaches of the peace and limiting falsehoods as "political tools." *Id.* at 75.

At its core, criticizing the government is political advocacy. And the Court's holding in *Brandenburg* makes clear that the First Amendment forbids throwing citizens in jail for mere advocacy. 395 U.S. at 447–48. Even if speech tends to breach the peace or lead to unrest, the First Amendment protects it unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

To that end, *Brandenburg*'s holding negates "the breach of the peace justification for criminal libel laws." *Garrison*, 379 U.S. at 69. As the Court observed in *Garrison*, by the 19th century, the civil remedy for

libel had "substantially eroded" the breach of the peace justification. *Id.* Two years later, the Court held Kentucky's common law criminal libel doctrine was unconstitutionally vague because it stood on a "breach of the peace" standard. *Ashton v. Kentucky*, 384 U.S. 195, 199 (1966).

Brandenburg washed away what was left of that standard. If a state could not show intent, imminence, and likelihood of breaching the peace to indict a Ku Klux Klan member advocating for vengeance against minority groups, then criminalizing mere disparaging words about a public official does not meet that narrow First Amendment exception. *See Brandenburg*, 395 U.S. at 446–47.[16]

Brandenburg's holding also negates the second justification *Garrison* identified for criminal seditious libel: using "the deliberate or reckless falsehood as an effective political tool." *Garrison*, 379 U.S. at 75. In upholding a broad First Amendment right for political advocacy, the Court overruled its prior decision in *Whitney v. California* that "'advocating' violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it." *Brandenburg*, 395 U.S. at 447 (citing *Whitney*, 274 U.S. 357 (1927)). If the First Amendment forbids states from criminalizing

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[16] *See also* Lisby, *supra* page 6 at 462 (" . . . the only remaining viable analysis—the modern test—for determining when state governments may restrict speech based on the prevention of violence rationale is the "imminent lawless action" test from *Brandenburg v. Ohio* . . .").

advocacy for "violent means to affect political and economic change," then it also forbids states from criminalizing mere criticism of public officials to affect political and economic change.

Even knowingly false criticism, without more, does not meet the "imminent lawless action" threshold the Constitution demands. *See Brandenburg*, 395 U.S. at 448 (stating that "a statute which fails to draw" a distinction between mere advocacy and that directed toward imminent lawless action "sweeps within its condemnation speech which our Constitution has immunized from governmental control"). As the Court bluntly put it when invalidating a federal statute that criminalized lies about military honors, "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." *United States v. Alvarez*, 567 U.S. 709, 723 (2012).

In essence, *Brandenburg* brings Justice Brandeis's concurring words in *Whitney* full circle:

> …[I]t it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

274 U.S. at 375 (Brandeis, J., concurring). The Founders understood that the greater danger to democracy and stability is the government stifling the

people's speech, not callous words that public officials have a far-reaching platform to counter and disprove. "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.* at 377.

In the end, unkind words about public officials, even if knowingly false, are political advocacy protected by the First Amendment against criminal penalty. The risk to free speech is too great to allow otherwise. The Court should step in to ensure states like New Hampshire may no longer arrest Americans for criminal seditious libel.

III. Rather Than Deter a Public Wrong, Criminal Libel Statutes Threaten Free Speech Under Pain and Stigma of Penal Sanctions.

Lacking any historical or modern anchor, "[i]t has become clear that the real interest being protected by criminal defamation statutes is personal reputation." *Gottschalk v. Alaska*, 575 P.2d 289, 292 (Alaska 1978). Of course, states have an interest in remedying reputational harm—which they meet by providing a civil remedy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). In any event, there is a stark difference between compensating individuals for reputational injury and punishing speakers for disparaging public officials.

"Civil libel is a tort; as an alleged *private* wrong, the opposing parties are equal before the law. Criminal libel, on the other hand, is an alleged *public* wrong, and the state is one of the opposing parties." *See Lisby,*

supra page 6 at 435 (emphasis added). But as the decisions discussed above show, there is no "public wrong" from disparaging words about a public official. Indeed, "[p]ublications injurious to reputation are part and parcel of the political process in a democratic system." *Constitutionality of the Law of Criminal Libel,* 52 Colum. L. Rev. at 521, 533. So even if there were some public injury from falsely criticizing public officials, it could not justify the even greater public injury that flows from criminal seditious libel.

Justice Black summed it up well: "Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it." *Garrison*, 379 U.S. at 79–80 (Black, J., concurring). Justice Black rightly recognized the hazard that criminal sanction is to free speech. The Court echoed that concern more recently, concluding that the "severity of criminal sanctions" poses "greater First Amendment concerns" than civil regulations, especially when a vague criminal statute is at play. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 872 (1997).[17]

Consider what those criminal sanctions might include. There might be jail time and probation. Or perhaps paying a fine. In all cases, there's the social stigma of a criminal record to bear for the government critic seeking a job or maintaining a professional

[17] As Frese explains in his petition and FIRE highlights here, criminal libel statutes suffer from that very vagueness. Pet. for Cert. at 27–29; *see infra* Section IV.A.

license. *E.g., United States v. Dionisio*, 410 U.S. 1, 10 (1973) (noting that an arrest "results in a record involving social stigma."); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (recognizing that even a misdemeanor "remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions.").

Making matters worse, officials can use criminal libel complaints "as a means to empower law enforcement officials to search homes and seize property, which, in turn, is a way to intimidate and silence critics." Jane E. Kirtley & Casey Carmody, *Criminal Defamation: Still "An Instrument of Destruction" in the Age of Fake News,* 8 J. Int'l Media & Ent. L. 163, 167-68 (2020). That skewed power dynamic highlights a key difference from civil defamation: While the pain of defending a public official libel lawsuit can (and often does) chill free expression, the full power of a state's penal system can snuff it out.

No state can justify those harsh criminal sanctions, nor the stigma that comes with them, for exercising the prized American privilege to criticize a public official. But so long as the Court leaves open the crack for seditious libel that *Garrison* did not close, criminal libel statutes will continue to threaten free speech—all the more because those statutes enable selective enforcement against government critics.

IV. Government Officials Harm Public Debate When They Selectively Enforce Antiquated or Vague Criminal Laws.

FIRE has witnessed a concerning trend: Law enforcement officials often rely on the vague language of old or infrequently enforced laws to silence critics and dissidents. "This pattern of selective enforcement" creates a "standardless sweep allow[ing] policemen, prosecutors, and juries to pursue their personal predilections." *Gottschalk*, 575 P.2d at 294 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)).

The time-honored constitutional promise of unfettered public debate means nothing if officials have free-range to dig through an arsenal of vague, antiquated laws and aim them at their detractors—like the police did with Robert Frese.[18]Statutes like New Hampshire's criminal defamation law invite arbitrary enforcement subject to the whims of law enforcement. They have no place in a nation dedicated to robust public discourse.

A. Vague penal statutes foster selective enforcement.

"Vague laws in any area suffer a constitutional infirmity." *Ashton*, 384 U.S. at 200. And as this Court has repeatedly recognized, vague criminal laws have a particularly pernicious effect on free and unfettered expression. *Id.*; *see also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99

[18] *See* Pet. for Cert. at 27–29.

(1982). Simply put, vague statutes are "harsh" and "convenient" enforcement tools that encourage officials to discriminately silence speakers who "merit their displeasure." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972)).

Indeed, Exeter Police abused New Hampshire's vague criminal libel law to punish Frese for his sharp words about them.[19] Criminal libel laws like New Hampshire's, often riddled with subjective elements, invite selective enforcement. *See Garrison*, 379 U.S. at 79–80 (Black, J., concurring). As Judge Thompson perceived in her concurrence below, if vague statutes such as New Hampshire's criminal defamation law "were robustly enforced, dockets . . . would be positively teeming with prosecutions." *Frese*, 53 F.4th at 13 (Thompson, J., concurring). But the dockets tell a different story. *Id.* Law enforcement officials too often treat criminal libel statutes as tools to target government critics—and only critics. *See id*. at 13–14. As long as these vaguely worded and selectively invoked laws stay on the books, they will menace the robust public debate the First Amendment protects.

B. Officials regularly enforce archaic and obscure statutes to silence critics and dissenters.

Frese's arrest illustrates a disturbing pattern of public officials dusting off antiquated criminal

[19] *See* Pet. for Cert. at 28–30.

statutes—including criminal defamation laws—to target their critics.

Consider the misfortune of Jerry Rogers, thrown in jail for calling the sheriff "dumbo," under the same unrestrained criminal libel law the Court nullified in *Garrison*. *Rogers*, 603 F. Supp. 3d at 298–99. More recently, North Carolina Attorney General Josh Stein's political opponent sought to prosecute Stein under the state's 90-year-old criminal defamation law after Stein accused him of mishandling untested rape kits. *Grimmett v. Freeman*, 59 F.4th 689, 691–92 (4th Cir. 2023) (holding North Carolina's criminal defamation law is likely unconstitutional).

The Connecticut Supreme Court recently narrowed a 1917 advertising law that police had abused to punish non-commercial speech they found offensive. *Cerame v. Lamont*, 346 Conn. 422, 424, 431 (Conn. 2023). For years, state law enforcement officials repeatedly enforced the law—which prohibited "advertisement" "ridicul[ing]" members of a protected class—in contexts completely devoid of commercial speech. Brief of FIRE & Eugene Volokh as *Amici Curiae* in Support of Plaintiff at 13–21, *Cerame v. Lamont*, 346 Conn. 422. Take, for instance, the white police officers who arrested a man under the Connecticut statute for referring to them as "crackers." *Id.* at 19. Or consider the homeless woman charged under the statute after calling an officer a "piece of shit." *Id.* at 21. Those officials turned an old law intended to rid discrimination from business

accommodations[20] into a license to arrest those who exercised their right to ridicule the police. *Id.* at 10.

Officials in Missouri similarly misused an antiquated statute against a dissenter. After a police officer learned that Frank Snider mutilated an American flag in his own front yard, the officer arrested Frank under the state's flag desecration statute—a statute rendered unconstitutional decades ago by this Court's decision in *Texas v. Johnson*. *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1154, 1156 (8th Cir. 2014) (citing *Johnson*, 491 U.S. 397 (1989)).

This speech-chilling trend extends to public officials selectively relying on rarely invoked laws to silence detractors. In Washington, for example, authorities charged Jaina Bledsoe with "malicious mischief" after she wrote chalk messages condemning the city commissioner's comments on the sidewalk outside the county commissioners' building. *Bledsoe v. Ferry Cnty.*, 499 F. Supp. 3d 856, 866–69 (E.D. Wash. 2020). They charged Jaina even though county prosecutors admitted that no other malicious mischief charges had ever been filed for chalk markings on public property and that "the content of Ms. Bledsoe's speech

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[20] *See Cerame v. Lamont*, 346 Conn. at 429–31 (footnote omitted) ("Any doubt regarding the legislature's intent is removed by an examination of the circumstances giving rise to the passage of chapter 202 of the 1917 Public Acts, titled 'An Act Concerning Discrimination at Places of Public Accommodation.'").

was certainly part of the reason [she] was prosecuted." *Id.* at 868 (citation omitted).

In Laredo, Texas, officials dug up a thirty-year-old criminal statute—one they never enforced before—to arrest popular citizen journalist Priscilla Villarreal. *Villarreal v. City of Laredo*, 44 F.4th 363, 368 (5th Cir. 2022), *reh'g en banc granted*, *vacated*, 52 F.4th 265 (5th Cir. 2022)[21] Months after Priscilla asked a police officer for newsworthy information—something the press does every day—local officials orchestrated her arrest under the obscure Texas law. *Id.* at 368–69. As Judge Ho put it: "There's no way the police officers here would have ever enforced § 39.06(c) against a citizen whose views they agreed with, and whose questions they welcomed." *Id.* at 382 (Ho, J., concurring).

Just up Interstate 35 from Laredo, the mayor of Castle Hills, Texas, conspired with local police to arrest 72-year-old city council member Sylvia Gonzalez under a rarely used Texas law barring the concealment or impairment of government records. *Gonzalez v. Trevino*, 42 F.4th 487, 489–90 (5th Cir. 2022), pet. for cert. filed, No. 22-1025, Apr. 20, 2023. After the outspoken Sylvia momentarily misplaced a petition to oust the city manager, local officials punished her under the Texas law, even though "most indictments under the statute involved fake government IDs." *Id.* at 490. If Castle Hills's

[21] *Amicus* currently represents Villarreal before the United States Court of Appeals for the Fifth Circuit, where a decision *en banc* is pending.

authorities wished to silence the city manager's critic, they succeeded: Sylvia stated she would never again run for political office or engage in any other "public expression of her political speech." *Id.* at 490. When the Fifth Circuit denied rehearing *en banc*, Judge Ho offered another poignant warning, this time in dissent. "Courts must," he wrote, "make certain that law enforcement officials exercise their significant coercive powers to combat crime—not to police political discourse." *Gonzalez v. Trevino*, 60 F.4th 906, 908 (5th Cir. 2023) (Ho, J., dissenting).

In none of these instances did a speaker threaten somebody. Nor did they call for imminent violence. They simply exercised their right to express dissent. Yet for exercising that right, they faced penal sanction under antiquated, derelict, and misapplied statutes. That is not what the Constitution promises Americans. *See* 4 Annals of Cong. 934 (1794) ("If we advert to nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.")

Not only is this trend of selective enforcement against speech troubling on its own, but it also highlights the ever-present risk of officials wielding criminal libel laws against their critics. Bloated penal codes pose enough of a threat to free expression[22]

[22] *See Nieves v. Bartlett*, 139 S. Ct. 1715, 1730 (2019) (Gorsuch, J., concurring in part and dissenting in part) (". . . criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for

without including archaic criminal libel statutes that *directly* criminalize speech. By granting *certiorari*, the Court can abate the threat that criminal libel laws pose to free expression about public officials.

CONCLUSION

This case provides the Court a long-overdue opportunity to finally rid seditious libel from state penal codes and uphold the prized American privilege to speak our mind about the government and its officials, free of risking criminal penalty for it.

For all of these reasons, *amicus* urges the Court to grant the petition for writ of *certiorari*.

April 27, 2023

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their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties . . . ").

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