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 AMICI CURIAE UNIVERSITY OF VIRGINIA SCHOOL OF LAW FIRST AMENDMENT CLINIC AND FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION MEDIA FREEDOM AND INFORMATION ACCESS CLINIC IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICI CURIAE[1]

Amici curiae are the University of Virginia School of Law First Amendment Clinic and the Media Freedom and Information Access Clinic at Yale Law School. As entities whose mission includes defending the First Amendment rights of journalists, news organizations, and others, amici have a strong interest in this case, which concerns a state law that allows government officials to initiate and pursue criminal prosecutions to punish any statement that a speaker or publisher "knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule."

Amici write to underscore the chilling effect that actual and potential criminal libel prosecutions have on journalists and media organizations who regularly shine a critical light on the activities of local government officials. As the facts of this case confirm, a reconsideration of the constitutionality of criminal libel laws by this Court is needed in light of the long history of public officials using the discretion conferred by such laws to punish their critics.

[1] Pursuant to Supreme Court Rule 37, counsel for amici state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the amici curiae, their members or their counsel made a monetary contribution intended to fund the preparation or submission of this brief; and counsel of record for all parties were given timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

Criminal prosecutions for allegedly libelous or defamatory speech are "notoriously intertwined with the history of governmental attempts to suppress criticism."[2] From the founding through the abolitionist movement and into the twentieth century, members of the press were frequent targets of these prosecutions, which were often brought to silence reporting on government officials and matters of public concern.

Though numerous state criminal libel statutes were struck down in the years following this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the prosecution of journalists and other members of the public continues in states like New Hampshire where such laws remain. These charges are often made pretextually in a manner plainly intended to deter critical reporting.

The mere potential for criminal prosecution of libel imposes a chilling effect that offends the First Amendment because the consequences of the initiation of criminal process are immediate and irreversible. Tort law, in contrast, provides numerous procedural and substantive offramps and presents defendants the ability to assess the costs of defense, settlement, and judgment. Journalists and the news media are frequently the targets of ill-founded or harassing defamation claims, and the use of these laws against them

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[2] *Fitts v. Kolb*, 779 F. Supp. 1502, 1506 (D.S.C. 1991).

illustrates the unconstitutional chill on protected speech imposed by such laws.

Given the extensive history and present-day continuation of criminal libel prosecutions against journalists and news publishers, amici urge the Court to grant certiorari to answer the question posed in Judge Thompson's concurrence below: "Can the continued existence of speech-chilling criminal defamation laws be reconciled with the democratic ideals of the First Amendment?" *Frese v. Formella*, 53 F.4th 1, 12 (1st Cir. 2022) (Thompson, J., concurring). For the reasons set forth below, amici respectfully submit it cannot.

ARGUMENT

I. Criminal libel laws have long been used to silence members of the media and stifle reporting on issues of public concern.

"[O]ne of the most celebrated trials in American history," the 1734 prosecution of Peter Zenger, involved an attempt to silence a member of the press through a criminal libel prosecution. *Bursey v. United States*, 466 F.2d 1059, 1089 (9th Cir. 1972). Zenger, the printer of "an anti-administration paper called the *New York Weekly Journal*," was arrested for seditious libel after drawing the ire of William Cosby, the British governor of New York.[3] A grand jury twice refused to indict

[3] Arthur E. Sutherland, *A Brief Narrative of the Case and Trial of John Peter Zenger*, 77 Harv. L. Rev. 787 (1964).

Zenger, but Cosby persevered, bypassing the grand jury and bringing a criminal charge against him on an "information."[4] Even though a royal judge denied Zenger's use of truth as a defense, "the jury disregarded the charge and acquitted Zenger." *Fitts*, 779 F. Supp. at 1507. His "case became a symbol of the oppressions of the Crown during the revolution," *id.*, and it helped inspire "our founding fathers [to] incorporate[] into the Fifth Amendment the requirement that no person shall be held to answer for an infamous crime except upon the presentment or indictment of a grand jury."[5]

In the early nineteenth century, abolitionist newspapers became the target of criminal libel laws.[6] To take one example, the publishers of the *Genius of Universal Emancipation*, William Lloyd Garrison and Benjamin Lundy, circulated a work condemning individuals engaged in transporting slaves.[7] The pair faced multiple criminal libel charges, including a prosecution for publishing an article critical of ship owner Francis Todd.[8] Garrison was convicted by a jury, and, unable to pay a $50 fine, imprisoned for seven weeks

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[4] William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. St. B.J. 48, 50 (1996) (explaining that an information was a "sometimes used but highly unpopular procedure" to bring a criminal charge).

[5] *Bursey*, 466 F.2d at 1089.

[6] *See* Amy Reynolds, *William Lloyd Garrison, Benjamin Lundy and Criminal Libel: The Abolitionists' Plea for Press Freedom*, 6 Comm. L. & Pol'y 577 (2001).

[7] *Id* at 590–91.

[8] *Id*. at 591.

and released only after a wealthy philanthropist paid his penalty.[9]

Prosecutions against the press for criminal libel persisted into the twentieth century and often arose from embarrassing or critical news reporting about powerful politicians. In 1909, the publisher of the *New York World* newspaper was charged with fourteen counts of criminal libel. *United States v. Press Publ'g Co.*, 219 U.S. 1, 2 (1911). The charges related to six issues of the newspaper which alleged that "friends of President Theodore Roosevelt and presidential candidate William Howard Taft had profited from the government's purchase of the Panama Canal."[10] The Supreme Court ultimately rejected, on jurisdictional grounds, President Roosevelt's attempt to charge the publisher with a federal crime based on the newspaper's circulation on federal land.[11] The owners of the *Indianapolis News* were also charged with criminal libel following the publication of similar newspaper articles. *United States v. Smith*, 173 F. 227, 229–30, 232 (D. Ind. 1909) (holding that the court lacked jurisdiction to hear the case). The articles published by both newspapers implicated "matter[s] of great public concern," as the judge in *Smith* noted that "circumstances

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[9] *Id*. at 592.

[10] Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 Fordham L. Rev. 263, 290 (1986).

[11] *Id.* at 290–93 (describing wide criticism by contemporary legal scholars who feared that Roosevelt was attempting to revive the law of seditious libel, which would allow him to direct the resources of the federal government against disfavored media).

surrounding the revolution in Panama [and the canal's construction] were unusual and peculiar," and admitted even he had "a curiosity to know what the real truth was." *Id.* at 229.

President Roosevelt was far from the only politician to seek criminal charges against journalists reporting on political issues—indeed, political figures from wide-ranging levels and branches of government attempted to quiet critics through such prosecutions. *E.g.*, *State v. Kountz*, 12 Mo. App. 511, 511 (Mo. Ct. App. 1882) (affirming conviction of criminal libel for an editorial calling a candidate for harbor master a "defaulter"); *State v. Landy*, 153 N.W. 258, 258 (Minn. 1915) (ordering dismissal of a criminal suit targeting the author of an article that endorsed a candidate for governor and stated that his opponent "ha[d] the backing of certain corporations in the state that are not in sympathy with the masses"); *State v. Pape*, 96 A. 313, 315 (Conn. 1916) (involving article editorializing that a Senator had "sold out his constituents and traded their wishes and interests and his own soul for an office"); *State v. Greenville Publ'g Co.*, 102 S.E. 318, 319 (N.C. 1920) (ordering new trial in a case involving "an editorial comment [alleging] that [a] prosecutor had been unfaithful and criminally negligent in the performance of his official duties").

Efforts by journalists to provide oversight of judges and other individuals involved in legal proceedings also resulted in criminal defamation charges. In *Copeland v. Huff*, the publisher of a weekly newspaper was charged with sixteen counts of criminal libel. 261

S.W.2d 2, 3 (Ark. 1953). The newspaper had published statements that a judge was "a thief, that he has been engaged in stealing cars, that he associate[d] with professional gamblers, and that he [was] otherwise lacking in integrity." *Id*.[12] These cases posed additional fairness concerns, as the allegedly libeled judge would occasionally preside over the associated criminal case. In *Copeland*, for example, the Supreme Court of Arkansas ultimately disqualified a judge after he declined to recuse himself from the case and had appeared as a witness before the grand jury. 261 S.W.2d at 4; *see also In re Lyons*, 6 Haw. 452, 452 (Haw. 1884) (sustaining criminal libel conviction regarding article that criticized a decision of the same court). And in *State v. Putnam*, after publishing an article critical of a grand jury's decision not to pursue charges for attempted murder, a newspaper editor was indicted for criminal libel by the same grand jury to which he had referred in the publication. 53 Or. 266, 268 (Or. 1909).

Historically, the punitive measures for a conviction under criminal libel laws have been severe. In addition to the abolitionist Garrison, other members of the media have faced arrest and imprisonment following criminal libel convictions. *See Annenberg v. Coleman*, 163 So. 405, 405–06 (Fla. 1935) (rejecting habeas corpus claim brought by "publishers of a newspaper

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[12] *See also Garland v. State*, 84 S.E.2d 13, 13 (Ga. 1954) (dismissing claim that a newspaper article had "tend[ed] to blacken the character, honesty, virtue, integrity, and reputation of twelve named individuals, who constituted the trial jury" in a murder case).

[held in custody] for alleged criminal libel"); *Koen v. State*, 53 N.W. 595, 595–97 (Neb. 1892) (remanding for trial court to reduce a sentence of "imprisonment in the penitentiary for three years" imposed on a journalist for criminal libel). Such sentences no doubt resulted in "a chilling of the free press and a hampering of the ability to uncover important stories in the public interest."[13]

Given this history, it is unsurprising that this Court has strongly cautioned against imposing criminal penalties for speech—even false speech—on matters of public concern. *United States v. Alvarez*, 567 U.S. 709, 723 (2012); *id.* at 736–37 (Breyer, J., concurring). Yet, as described below, even after the landmark decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), criminal libel prosecutions have continued in many states.

II. While some criminal libel laws have been struck down since *Sullivan*, members of the press still face the threat of criminal libel liability.

In more recent years, journalists have continued to face the specter of criminal liability connected to their reporting. While press defendants have succeeded in challenging the constitutionality of certain

[13] RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 Minn. L. Rev. 585, 619 (2008) ("[R]eporters who feel threatened by . . . the real possibility of jail time . . . will shy away from stories that might give rise" to such a penalty.).

criminal libel statutes that lacked the "actual malice" fault standard adopted in *Sullivan*, even state laws like New Hampshire's that require actual malice remain subject to abuse and impose an unconstitutional chilling impact.

Even after *Sullivan*, state criminal libel laws lacking an actual malice requirement have been used to punish the press. For instance, in the 1970s, the publisher of a newspaper was convicted of "thirteen counts of criminal libel . . . [arising] out of his attacks against four officials" of a Pennsylvania county. *Commonwealth v. Mason*, 322 A.2d 357, 358 (Pa. 1974). The Pennsylvania Supreme Court ultimately overturned the publisher's conviction and held the state's criminal libel statute unconstitutional. *Id*. Similarly, in *Weston v. State*, the Arkansas Supreme Court found that the state's criminal libel statute "fail[ed] to prohibit punishment for truthful criticism," and that it did not possess an actual malice requirement standard for speech made about public figures. 258 S.W.2d 412, 415 (Ark. 1975). The court ruled the statute unconstitutional and overturned the conviction of a newspaper editor who had criticized a local sheriff for failing to stop a drug ring.

And in 1988, James Fitts, a journalist in South Carolina, published an article, in which he referred to two state legislators as "'black traitors' who participated in 'corrupt dealings.'" *Fitts*, 779 F. Supp. at 1505. The two senators pursued criminal libel charges against Fitts, and warrants were issued for his arrest. *Id.* After spending two nights in jail, Fitts was released

from custody, and his charges were later dropped at the senators' request. *Id.* at 1505–06. Around the same time, Drew Wilder, another journalist, was charged under the same statute after reporting that a school principal had been charged for assaulting his wife. *Id.* at 1506.[14] Wilder was arrested but released on his own recognizance, and the charges were subsequently dropped at a preliminary hearing. *Id.*

A few years later, Fitts, Wilder, and the South Carolina Press Association filed suit, seeking a declaratory judgment that South Carolina's criminal libel statute was unconstitutional. *Id*. at 1505. They argued that the statute was both vague and overbroad in violation of the First Amendment. *Id.* at 1513. The court agreed, finding the law facially unconstitutional as it failed to incorporate an actual malice standard. *Id.* at 1516.

The Puerto Rico criminal libel statute has also come under First Amendment scrutiny. In 1995, an investigative journalist at the newspaper *El Vocero de Puerto Rico* published a series of articles examining allegations that a narcotics squad of the local police had been infiltrated by organized crime. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 52 (1st Cir. 2003). These articles contained evidence that a drug dealer who was targeted by the squad was paying bribes to officers and alleged that an officer in the squad was having an affair with the same drug dealer. *Id*. at 53. After filing a

[14] While police had responded to the incident, the principal and his wife maintained that the reporting was false as no formal charges had in fact been brought. *Id.*

civil suit, the named officer submitted a complaint to the police department, and criminal libel charges were filed against the journalist. *Id*. He responded by filing suit in federal court, arguing that the criminal libel statute violated the First Amendment and that he had "refrained from further investigating political corruption for fear of being prosecuted again." *Id*. The district court eventually dismissed the criminal cases, as the prosecution failed to proffer evidence regarding the falsity of the journalist's statements. *Id.*

Mangual, another investigative journalist at *El Vocero*, reported on the criminal charges brought against his colleague, "accus[sing] the Caguas police . . . of being corrupt and of pursuing the libel charge against [the other journalist] in an attempt to silence him." *Id*. Fearing reprisal from the police department, Mangual filed a complaint requesting a declaration that the criminal libel statute was unconstitutional under the First Amendment. *Id.* at 54–55. The First Circuit found the statute unconstitutional. *Id* at. 65. The court held that the "threatened" speech was "at the heart of the First Amendment protections of speech and the press," and that the statute did not incorporate an actual malice standard when applied to speech about public officials and figures. *Id.* at 64–66.

While these constitutionally infirm statutes have been struck down, criminal libel statutes remain in force in many states and continue to be used against the press. For example, a Kansas-based newspaper and its publisher faced ten counts of criminal defamation following its publication of articles about the mayor of

Kansas City and her husband, a county judge. *State v. Carson*, 95 P.3d 1042, 2004 WL 1878312 (Kan. Ct. App. Aug. 20, 2004). These articles restated rumors that the couple lived outside of the county, which would render them unable to serve in their elected positions. *Id.* at *1–2.[15] Arrest warrants were filed for the newspaper's publisher, and a jury ultimately convicted defendants on seven counts of criminal defamation. *Carson*, 95 P.3d at *2.

Claims of criminal defamation have also been levied against members of the student press. In *Mink v. Knox*, a university student was charged with libel related to his editorial column parodying a professor. 613 F.3d 995, 998 (10th Cir. 2010). The professor who was parodied in the column contacted the police, who subsequently searched the student's home and confiscated his computer and written materials referencing the column. *Id*. at 999.[16]

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[15] Members of the press routinely investigate issues of public official residence as a form of public oversight. *See*, *e.g.*, Luis Ferré-Sadurni, *Lawmaker's Victory May Cost Him Coveted Manhattan Apartment*, N.Y. Times (Jan. 6, 2023), https://perma.cc/M6DZ-X3JG (reporting on resolution of a conflict over a state assemblyman's residential eligibility).

[16] Such an intrusion is particularly troubling for journalists, as Congress recognized in passing the Privacy Protection Act of 1980, which "generally prohibits government officials from searching for and seizing documentary materials possessed by a person in connection with a purpose to disseminate information to the public." *Citicasters v. McCaskill*, 89 F.3d 1350, 1353 (8th Cir. 1996); 42 U.S.C. § 2000aa(b).

Even when not directly targeted with prosecution, the press's ability to report news on topics of public importance is often harmed when their sources face criminal defamation charges. In Louisiana, a police department obtained a subpoena forcing the local newspaper to reveal the source of a story about the chief of police's alleged attempt to prevent state police from subjecting one of his officers to DUI testing, and then issued an arrest warrant for the source on a charge of criminal defamation under La. R.S. § 14:47. *Simmons v. City of Mamou*, No. 09-Civ-663, 2012 WL 912858, at *1–6 (W.D. La. Mar. 15, 2012). The source was arrested and held in jail overnight until he was able to post a $1,000 bond. *Id.* A federal district court later criticized the officers' reliance on the criminal defamation statute, which had been declared unconstitutional as applied in nearly identical circumstances over forty years earlier. *Id.* at *5.

III. Criminal libel laws are intrinsically inconsistent with the First Amendment.

A. Criminal libel prosecutions cause intense self-censorship.

As demonstrated above, government officials can and do use criminal libel laws to punish their critics. The record in this case proves the point. The Exeter Police Department's arrest of Petitioner for violating New Hampshire's criminal defamation statute was so plainly motivated by retribution that the Attorney General intervened and determined the police

department had no probable cause for believing a violation had occurred. *Frese*, 53 F.4th 1, 5 (1st Cir. 2022).

Yet, even if the Exeter Police Department had not directly acted against Petitioner, the simple existence of New Hampshire's criminal statute targeting false speech raises First Amendment concerns. As this Court has recognized, the mere "threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements." *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment) (citing *Gertz v. Robert Welch*, 418 U.S. 323, 340–41 (1974)). The New Hampshire law at issue does just that because it criminalizes "purportedly false speech . . . [on] matters of public concern . . . [where] it is perilous to permit the state to be the arbiter of truth." *Id.* at 751–52 (Alito, J., dissenting). Although the Court once upheld the constitutionality of such statutes in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964), this persistent chill—and examples of actual enforcement drawn from the decades following *Garrison* discussed above—make clear that these laws are incompatible with the First Amendment.

Indeed, the chill created by criminal libel statutes is particularly severe due to the broad discretion enjoyed by government officials tasked with enforcing these laws. This discretion is analogous to that found unconstitutional in other circumstances. In *Staub v. City of Baxley*, for example, the Court invalidated a city permitting scheme because making "the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an

official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." 355 U.S. 313, 322 (1958).[17]

This discretion can lead to self-censorship, "even if the discretion and power are never actually abused." *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988) (striking down ordinance granting mayor authority to grant or deny applications for permits to place news racks on public property); *Riley v. Nat'l Fed'n of the Blind of N. Carolina*, 487 U.S. 781, 794–95 (1988) (striking down state law governing the professional solicitation of charitable contributions where the potential for litigation "must necessarily chill speech in direct contravention of the First Amendment's dictates").

These concerns are further magnified in the context of defamation because the line between protected speech and criminally punishable defamation is often blurry, allowing a government official to "decide who may speak and who may not based upon the content of the speech or viewpoint of the speaker." *Lakewood*, 486

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[17] Although the speech regulation imposed by a criminal defamation statute differs from a licensing requirement, *Staub*'s insight into the dangers created when government officials are granted the ability to regulate speech is nonetheless instructive. *See Near v. Minnesota*, 283 U.S. 697, 703–04 (1931) (striking down a state law authorizing prosecutors to obtain injunctions against the publication of "malicious scandalous, and defamatory newspapers[s]").

U.S. at 763–64 (criticizing licensing scheme without clear standards).

The New Hampshire statute creates just such an ambiguity, punishing speech that will "tend to expose" someone to "public hatred, contempt, or ridicule." N.H. Rev. Stat. § 644.11(I). In other words, individuals may be uncertain of the exact line demarcating acceptable from unlawful speech used to criticize a public official in the heat of public debate.

The press is not immune from this chilling effect. A California court recognized the harm that results from uncertainty regarding potential criminal liability for news reporting when it struck down a provision in the state's financial code criminalizing making "an untrue statement or rumor . . . which is directly or by inference derogatory to a bank's financial condition." *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 683–86 (Cal. Ct. App. 2012). The court found that "journalists, politicians, and members of the general public who question the financial strength and stability of our banking system or even suggest that a bank is financially unstable, as well as any person who aids in the making or circulation of such statements, can only guess as to whether their communications will subject them to criminal liability." *Id*. at 689. As recent headlines demonstrate, it is important for the press to report on financial issues without fear of criminal liability.[18]

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[18] *See*, *e.g.*, Eric Wallerstein, *Bank Failures Rattle Market for Short-Term Lending*, Wall St. J. (Apr. 15, 2023), https://

The risk of criminal prosecution for defamation creates a chilling effect on speech. New Hampshire residents who wish to criticize New Hampshire police officials must weigh the possibility that their words will so irk local police that speaking produces criminal charges. They must assess before speaking whether political criticism might be deemed to run afoul of the statute's vague prohibition on false statements that "will tend to expose any other living person to public hatred, contempt, or ridicule." N.H. Rev. Stat. § 644.11(I). The First Amendment does not permit the criminal law to impose such a pall on speech.

B. Tort law provides some safeguards for speech that are lacking in the criminal context, further underscoring criminal libel laws' incompatibility with the First Amendment.

The threat of civil liability, much like a potential criminal penalty, can chill speech and cause self-censorship. But civil law operates according to a different framework, allowing more opportunities for speakers to dispose of claims against them or otherwise mitigate legal exposure. For instance, media organizations can enter into insurance policies or indemnification agreements which prevent threats of civil liability from interfering with the reporting of

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tinyurl.com/mry5sd3b (documenting market effects triggered by the collapse of Silicon Valley Bank).

news. These mechanisms, however, do not insulate the press from criminal liability.

Civil defamation, like tort law in general, "fix[es] the dividing lines between those cases in which a man is liable for the harm he has done, and those in which he is not."[19] Functionally, tort liability is addressed to the compensation for and prevention of injuries stemming from that harm, as well as the imposition of a penalty for violation of a plaintiff's tort right, when appropriate.[20] And systemically, tort law is "formed by the active accommodation of conflicting considerations of policy, in particular the prevention of harm, and the freedom to engage in valued activity."[21]

Where defamation is alleged, the valued activity is First Amendment-protected speech and the harm is damage to reputation.[22] Importantly, as described below, the balancing inherent in tort law allows private actors like journalists and news organizations to internalize risk stemming from their speech. And it allows both legislators and jurists to enact procedural and substantive off-ramps from ill-founded defamation claims (including those incompatible with the First Amendment) without subjecting the speakers or

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[19] Oliver Wendell Holmes, The Common Law 79 (1881).

[20] Mark A. Geistfeld, Essentials: Tort Law 43–45 (2008).

[21] *Id*. at 83.

[22] Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 692 (1986).

publishers in those cases to threatened or actual criminal prosecution.

In addition to general commercial liability insurance, news organizations frequently choose to carry an errors and omissions policy or media liability insurance, a specialized form of insurance covering liability arising from publication-based or newsgathering torts.[23] These policies can be structured "to cover defense costs in addition to any settlement or judgment" arising in tort.[24] They may also be structured to include or exclude non-staff contributors like freelance reporters.[25]

Journalists may also choose to purchase professional liability coverage that mitigates risk stemming from lawsuits connected to their work.[26] As with policies held by news organizations, professional liability coverage can defray costs that would otherwise be

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[23] *See* Michelle Worrall Tilton, *Writers Beware Media Liability Exposures for Attorneys and Law Firms*, Am. Bar Ass'n Brief, Winter 2020, at 46; James T. Borelli, *Caveat Emptor: A Buyer's Guide to Media Liability Insurance*, Commc'n Law, Winter 2006, at 23.

[24] Borelli, *supra*, at 23.

[25] Freelance Investigative Reporters and Editors, *The Case for Protecting Freelancers: A Public Interest Argument for Fair Contracts*, https://perma.cc/L94B-QULZ (last visited Apr. 18, 2023); Global Investigative Journalism Network, *Freelancing: Media Liability Insurance*, https://perma.cc/A9FG-ULK5 (last visited Apr. 18, 2023) ("freelancers working for established publishers are often covered by the publisher's policy").

[26] *See* Annalyn Kurtz, *I am a Freelance Journalist. Do I Need to Buy Liability Insurance?*, Columbia Journalism Review (Nov. 13, 2017).

borne by journalists sued for defamation in tort like the cost of legal defense, settlements, or judgments arising from those lawsuits.[27] This backstop for defense and liability costs from civil defamation can be particularly important for freelance reporters, given their lack of institutional affiliation.[28]

Moreover, in many instances journalists and news organizations contractually allocate risk stemming from civil defamation and similar claims through indemnification clauses and liability waivers.[29] In general, "indemnification allocates the responsibility of making right a wrong," and "[i]n freelance contribution agreements, this duty or responsibility will often fall on . . . the creator, if someone sues the publication for some reason related to the article."[30] Waiver clauses, meanwhile, hold one party to the agreement harmless in the event of litigation over reporting or a published piece.[31]

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[27] *See*, *e.g.*, Authors Guild, *Media Liability Insurance*, https://perma.cc/WW4J-FBS2 (last visited Apr. 18, 2023); Society of Professional Journalists, *Insurance Considerations for Freelance Journalists*, https://perma.cc/S8U3-K9ZR (last visited Apr. 18, 2023).

[28] Kurtz, *supra*.

[29] Maya Kroth, *Three Clauses Freelancers Should Know (and Negotiate), According to Lawyers*, Columbia Journalism Review (May 25, 2018), https://perma.cc/HAL2-9C5H; *see also* Global Investigative Journalism Network, *supra*.

[30] Art Neill, *What Exactly is Indemnification and How Does it Affect a Freelance Contributor*, Forbes (Nov. 14, 2018), https://perma.cc/QR6M-NY3L.

[31] Global Investigative Journalism Network, *supra*.

But criminal prosecution carries the risk that it cannot be insured against or reallocated by contractual agreement. The sanctions of a civil judgment can be defrayed through the mechanisms discussed above, and many civil defamation defendants also enjoy the protections of "anti-SLAPP" motions, which hold civil libel plaintiffs to heightened pre-trial evidentiary standards to maintain their claims.[32] In contrast, criminal defamation charges can entail arrest, detention, and police searches—and their accompanying, irreversible harm—before any judicial determination of the merits of the defamation claim. These are not imagined harms, but part and parcel of the enforcement of criminal defamation statutes.[33]

This is of particular concern to journalists and news organizations for several reasons, including because the volume of information they publish is significantly greater than most members of the public. A 2016 accounting, for example, found that the *Washington Post* alone "publishes an average of 1,200 stories,

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[32] "Anti-SLAPP laws provide defendants a way to quickly dismiss meritless lawsuits—known as 'SLAPPs' or 'Strategic Lawsuits Against Public Participation'—filed against them for exercising their First Amendment rights." Austin Vining and Sarah Matthews, *Overview of Anti-SLAPP Laws*, Reporters Committee for Freedom of the Press, https://perma.cc/B8NY-L6Y8 (last visited Apr. 18, 2023).

[33] *See* 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 (2020) ("[P]ublic officials are able to utilize criminal 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.").

graphics, and videos per day."[34] The nature of the stories published by the news media, too, heightens the risk of criminal prosecution to members of the profession; as detailed above, that criminal libel laws allow public officials to prosecute critical reporting inevitably chills speech about those in positions to bring such charges.

Because of this, and because journalists and news organizations exist in a highly intermediated system of writing, editing, and publishing, the possibility of an ill-founded criminal prosecution of a journalist or news organization imposes costs not present in tort. Freelancers cannot, for instance, protect themselves against an arrest record as they could against the cost of litigation. And legislative or procedural cures for suits brought to discourage legitimate speech that exist in the civil realm, like the anti-SLAPP laws present in most states,[35] do not extend to similarly harassing criminal prosecutions. Accordingly, to the extent criminal libel statutes like that in this case are in force, the public and press remain subject to criminal prosecution, which unconstitutionally discourages reporting on issues of public concern.

[34] Robinson Meyer, *How Many Stories Do Newspapers Publish Per Day?*, Atlantic (May 26, 2016), https://perma.cc/Q8LR-KPHS.

[35] Vining and Matthews, *supra*.

CONCLUSION

For the foregoing reasons, amici curiae respectfully urge that this court to grant Petitioner's writ of certiorari.

Respectfully submitted,

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[36] This brief does not purport to represent the institutional views of the University of Virginia or Yale Law School, if any.