

No. \_\_\_\_\_

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IN THE  
**Supreme Court of the United States**

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ROBERT Frese,

*Petitioner,*

– v. –

JOHN M. FORMELLA,

in his official capacity as Attorney General  
of the State of New Hampshire,

*Respondent.*

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

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**APPLICATION FOR A 45-DAY EXTENSION OF TIME  
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

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To the Honorable Ketanji Brown Jackson, Associate Justice of the Supreme Court of the United States and Circuit Justice to the United States Court of Appeals for the First Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Applicant Robert Frese respectfully moves for an extension of time of 45 days, up to and including March 23, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

1. Applicant Robert Frese and his counsel respectfully request additional time to file a petition for certiorari in *Frese v. Formella*, 53 F.4th 1 (1st Cir. 2022) (No. 21-1068). (Attached hereto as Exhibit A.) The court of appeals issued its judgment on November 8, 2022. (Attached hereto as Exhibit B.) Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 6, 2023. This application is timely because it is filed more than 10 days before the petition is due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. This case presents substantial and important questions of federal law. New Hampshire's Criminal Defamation Statute, N.H. Rev. Stat. Ann. ("RSA") § 644:11 (2022), makes it a crime to "purposely communicate[] 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." Mr. Frese was charged under the statute for social media comments stating that the police chief for

the Town of Exeter was “covering up for a dirty cop.”<sup>2</sup> The forthcoming Petition will ask this Court to decide: (1) whether Mr. Frese has plausibly alleged that the Criminal Defamation Statute violates the First Amendment insofar as it criminalizes defamatory speech directed at public officials, and whether this Court should revisit its decision in *Garrison v. Louisiana*, 379 U.S. 64 (1964); and (2) whether Mr. Frese has plausibly alleged that the Criminal Defamation Statute is unconstitutionally vague.

3. Below, a three-judge panel of the First Circuit held that *Garrison* forecloses Mr. Frese’s First Amendment claim, while acknowledging that he has preserved the argument that this Court should revisit *Garrison*. *Frese*, 53 F.4th at 6. The court also held that the Criminal Defamation Statute was not unconstitutionally vague because—construed to incorporate the common law of civil defamation—the statute provides adequate guidelines for law enforcement, *id.* at 7, and adequate notice about what is prohibited, *id.* at 10. Finally, the court held that the challenged law was not vague notwithstanding New Hampshire’s idiosyncratic misdemeanor process, which empowers police departments and private individuals to prosecute minor misdemeanors, *id.* at 4, 11.

4. Judge O. Rogeriee Thompson concurred, stating that, while precedent—in particular, this Court’s decision in *Garrison*—required her to join the panel’s decision, this case showcases “sweeping concerns and important questions” under the

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<sup>2</sup> The court of appeals opinion incorrectly identified the defamatory statements that allegedly formed the basis for Frese’s charge. *See Frese*, 53 F.4th at 5. The district court’s decision denying the initial motion to dismiss the case correctly identified the offending statements. *See Frese v. Macdonald*, 425 F.Supp.3d 64, 71 (D.N.H. 2019).

First Amendment. 53 F.4th at 12. “Each of these concerns and questions,” she stated, “stem from this overarching query: Can the continued existence of speech-chilling criminal defamation laws be reconciled with the democratic ideals of the First Amendment?” *Id.* at 14. Judge Thompson argued that criminal defamation laws “have their genesis in undemocratic systems that criminalized any speech criticizing public officials,” *id.* at 13; that these laws are susceptible to prosecutorial abuse because “there is no readily discernible boundary between what gossip or loose talk amounts to being criminal and that which does not,” *id.*; and that criminal defamation laws are in tension with more recent precedent from this Court highlighting the “sweeping dangers posed by criminal restrictions on speech regarding matters of public concern,” *id.* at 14 n.13 (citing *United States v. Alvarez*, 567 U.S. 709, 723 (2012)). She concluded her concurrence by stating that “criminal defamation laws—even the ones that require knowledge of the falsity of the speech—simply cannot be reconciled with our democratic ideals of robust debate and uninhibited free speech.” *Id.* at 14.

5. Good cause exists for an extension. Brian M. Hauss is counsel of record for Applicant. Mr. Hauss is currently engaged in pretrial motions practice and trial preparations for bifurcated jury trials in *Shaw v. Jones* in the U.S. District Court for the District of Kansas, Civil Action No. 19-1343. Those trials are schedule to take place in Kansas City, KS from February 6 to 17, 2023. Mr. Hauss will also be drafting a reply brief in support of the petition for certiorari in *Arkansas Times LP v. Waldrip*, No. 22-379, during the last two weeks of January 2023. These and other personal and

professional commitments make it difficult for counsel to prepare the petition for writ of certiorari in this case on or before February 6, 2023.

Accordingly, Applicant Robert Frese respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 45 days, up to and including March 23, 2023.

Dated: January 19, 2023

Respectfully submitted,

*/s/ Brian M. Hauss*

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