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November 16, 2022

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Patricia S. Connor, Clerk of Court
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

Re: Grimmett v. Freeman, No. 22-1844

Dear Ms. Connor:

Pursuant to Federal Rule of Appellate Procedure 28(j), I write on behalf of Appellants to bring to the panel's attention the recent decision of the First Circuit in *Frese v. Formella*, No. 21-1068, 2022 WL 16754060 (Nov. 8, 2022), which affirmed a district court decision cited in our Reply Brief at 7-8.

In *Frese*, the First Circuit upheld New Hampshire's criminal defamation statute as constitutional. The court rejected a First Amendment challenge to the statute based on its view—conceded by the plaintiff in that case—that *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), “forecloses” such challenges, 2022 WL 16754060, at *3. Judge Thompson filed a concurring opinion expressing her concern 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 *9.

Frese offers no support to Defendant for at least three reasons:

First, as noted, the plaintiff in *Frese* “concede[d]” that *Garrison* controlled. *Id.* at *3. As a result, the First Circuit had no occasion to conduct a thorough analysis of that decision. Unsurprisingly, then, the decision failed to address that no criminal libel statute incorporating the actual-malice standard from *New York Times v. Sullivan*, 376 US. 254 (1964), was before the *Garrison* Court, rendering *Garrison*'s comments on that issue dictum rather than holding. *See* Reply Br. at 2-4.

Beyond that, the First Circuit's decision fails to discuss subsequent Supreme Court decisions, including *United States v. Alvarez*, 567 U.S. 709 (2012); *Reed v. Town of Gilbert*, 576 U.S. 155 (2015); and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). These decisions have undermined the broad reading of *Garrison* advanced by Defendant here. *See* Reply Br. at 4-7.

In any event, the First Circuit did not address a statute like North Carolina's, which reaches and prohibits *truthful* derogatory speech and selectively focuses on candidate-related statements.



See Reply Br. at 7-8. The First Circuit's decision thus does not support the constitutionality of North Carolina's statute.

Respectfully submitted,

/s/ Michael R. Dreeben

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Cc: All counsel (via ECF)