

STATE OF NEW HAMPSHIRE

Superior Court

Merrimack, ss.

April Term, 2025

State of New Hampshire

No. 217-2024-CR-1167

v.

Anna Barbara Hantz Marconi

**MOTION TO DISMISS CHARGE OF ATTEMPT  
TO COMMIT IMPROPER INFLUENCE**

The defense moves to dismiss the indictment for Attempt to Commit Improper Influence because, under the State’s interpretation, the statutes which define this crime are unconstitutionally overbroad and vague, both facially and as applied in this case. The correct interpretation of the statutes does not require a finding of unconstitutionality. However, the State’s interpretations render the statutes unconstitutional.<sup>1</sup> The statutes as interpreted by the State are, facially and as applied, unconstitutionally overbroad because they punish the exercise of First Amendment rights. The statutes as interpreted by the State are, facially and as applied, unconstitutionally vague because they fail to put an ordinary reasonable person on notice of what conduct is prohibited and because they invite discriminatory enforcement by the State. For these reasons, as detailed below, the Court should dismiss this indictment.

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<sup>1</sup> The defense previously challenged all the indictments as violative of the First Amendment. *See Def. Mot. to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity*, ¶¶ 12-36 [hereafter *Def. Mot. to Dismiss*]. The State had not provided the defense with discovery at the time the prior motion was filed. The defense specifically noted in that prior motion that, once it had discovery, it would raise detailed challenges to vagueness and overbreadth. *See id.* at 11, n. 1 (“The defense will make additional overbreadth and vagueness arguments in subsequent motions”).

1. The State alleges that Justice Anna Barbara Hantz Marconi committed the crime of Attempt to Commit Improper Influence (CID 2257290C), in violation of RSA 640:3, I(b) and RSA 629:1.

2. Specifically, the State alleges Justice Anna Barbara Hantz Marconi, “with a purpose that the crime of Improper Influence be committed,” took “a substantial step toward the commission of said crime...by telling Governor Christopher Sununu that an investigation into Geno Marconi was the result of personal, petty, and/or political biases; that there was no merit to allegations against or subsequent investigation into Geno Marconi; and/or that the investigation into Geno Marconi needed to wrap up quickly because she was recused from important cases pending or imminently pending before the New Hampshire Supreme Court; or words to that effect[.]” *Indictment* (CID 2257290C).

3. Thus, the State charged the crime of attempting to commit Improper Influence rather than a substantive crime.

4. “A person is guilty of an attempt to commit a crime if, with a purpose that a crime be committed, he does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step toward the commission of the crime.” RSA 629:1, I. A “‘substantial step’ means conduct that is strongly corroborative of the actor’s criminal purpose.” RSA 629:1, II.

5. To charge the crime of Attempt, the State is required “to identify the intended offense” but does not need “to plead and prove the elements of the intended offense.” *State v. Johnson*, 144 N.H. 175, 178 (1999). Nonetheless, “a clear understanding of the requisite mental state in a particular case necessitates an analysis of the elements of the crime to which the anticipatory offense relates” because the “crime of attempt does not exist in the abstract, but rather exists only

in relation to other offenses; a defendant must be charged with an attempt to commit a specifically designated crime.” Wayne LaFave, 2 Subst. Crim. L. § 11.3(a) (3d ed. Oct. 2024).

6. Moreover, “if the defendant intended to do something...which in fact was not unlawful, then he cannot be said to have engaged in a criminal attempt.” *Id.* See also *United States v. Oviedo*, 525 F.2d 881, 883 (5th Cir. 1976) (explaining how pure legal impossibility “occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime”); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (“To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort”).

7. In other words, if the intended conduct is beyond the scope of the prohibitions in the substantive statute, there cannot be a purpose to violate the substantive statute, and therefore there cannot be an attempt to commit a crime.

8. Here, the State has not alleged that Justice Hantz Marconi attempted to do anything unlawful. Rather, the indictment only alleges that Justice Hantz Marconi told then-Governor Sununu that “an investigation was the result of personal, petty, and/or political biases; that there was no merit to allegations against or subsequent investigation into Geno Marconi; and/or that the investigation into Geno Marconi needed to wrap up quickly because she was recused from important cases pending or imminently pending before the New Hampshire Supreme Court.” *Indictment* (CID 2257290C).

9. As explained below, the alleged conduct is lawful because it falls outside the scope of RSA 640:3, I(b) and RSA 629:1, and, because it is constitutionally protected speech.

The Plain Text of the Improper Influence Statute Does Not Apply to the Governor and a Criminal Prosecution.

10. The relevant text of Improper Influence statute, RSA 640:3, I(b) provides that a “person is guilty of a class B felony if he...[p]rivately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law[.]” (underline added). Thus, the plain text requires that any private addresses be made to a “public servant who has or will have an official discretion in a judicial or administrative proceeding.” RSA 640:3, I(b) (underline added).

11. As a matter of law, then-Governor Christopher Sununu did not possess “an official discretion” in the purported criminal investigation relating to Geno Marconi. Therefore, Justice Hantz Marconi could not Attempt to violate RSA 640:3, I(b) by making any statements to Sununu regarding Geno Marconi.

12. In New Hampshire, the Attorney General is a constitutional officer—appointed by the Governor and approved by the Executive Council. In criminal matters, the Attorney General is statutorily independent of the Governor’s office—free from the politics of the Governor’s office and political influence. The Supreme Court has been clear about the Attorney General’s obligation for independence in criminal investigations.

13. In *Wyman v. Danais*, 101 N.H. 487 (1958), the Supreme Court reviewed three sections of RSA 7 and explained that “[c]onstrued together they demonstrate a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest.” *Id.* at 490 (underline added); *see also id.* (“...the Attorney General has by statute the ultimate responsibility for criminal law

enforcement in the state...”) (underline added). The court reiterated the “broad language” from *State v. Swift*, 101 N.H. 340, 342-343 (1958) that the Attorney General “is specifically charged with the enforcement of the criminal laws of the state, and with supervision of criminal causes pending before the Supreme and Superior Courts,” and that this is “supported by broad statutory language.” *Wyman*, 101 N.H. at 490. Therefore, the Governor cannot be understood to have authority over the Attorney General’s criminal prosecutions because to hold otherwise would negate the Attorney General’s “ultimate responsibility.” *See also Reid v. N.H. AG*, 169 N.H. 509, 525 (2016); *Eames v. Rudman*, 115 N.H. 91, 92 (1975); *Bokowsky v. State*, 111 N.H. 57, 58 (1971); *State v. Martineau*, 148 N.H. 259, 264 (2002) (Nadeau, J., concurring); *Ramsay v. McCormack*, No. 98-408-JD, 1999 U.S. Dist. LEXIS 24098, at \*10, \*14-15 (D.N.H. June 29, 1999); 1 McNamara NH Practice Series: Criminal Practice & Procedure § 2.01 (2024) (“The New Hampshire Attorney General occupies a pivotal and unique role in the State’s criminal justice system. He or she is the chief law enforcement officer in the State.... Thus, it is the Attorney General who is ultimately responsible for the investigation of crime in New Hampshire.”).

14. The State has already acknowledged this principle of law in its pleadings. *See St. Obj. to D. Mot. to Disqualify* at ¶ 12 (“The New Hampshire Attorney General occupies a pivotal and unique role in the state’s criminal justice system. He is the chief law enforcement officer of the state. The Attorney General is specifically charged with enforcement of the criminal laws of state and has been given **ultimate responsibility** for criminal law enforcement by the legislature”) (quoting McNamara at § 2.01) (bolding and underlining in original); *id.* at ¶ 20 (“All prosecutors in the State of New Hampshire operate under the supervisory direction and control of the Attorney General, and their power to prosecute criminal cases is derivative of the authority of the Attorney General to oversee the prosecution of all criminal cases”).

15. In summary, because, as matter of law, then-Governor Sununu did not have official discretion over a judicial or administrative proceeding, specifically the Attorney General's investigation into Geno Marconi, Justice Hantz Marconi could not have attempted to improperly influence the then-Governor.

The Improper Influence Statute Does Not Apply to Executive or Legislative Branch Officials.

16. The alternative view of the alleged conduct put forth by the State, attempting to cause the then-Governor to influence a criminal investigation, also falls outside the scope of the Improper Influence statute because, as confirmed by the legislative history of RSA 640:3, the statute was not intended to reach a discussion in which a citizen expresses opinions or concerns to an executive or legislative official.<sup>2</sup>

17. The New Hampshire legislature adopted the RSA 640:3 in 1971. The current version of section I(b) is identical to the original: "A person is guilty of a class B felony if he . . . (b) Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law." RSA 640:3, I(b).

18. Paragraph I(b) of our statute derives from a provision in the Model Penal Code with the same language. When New Hampshire adopted its Criminal Code, the *Report of Commission to Recommend Codification of Criminal Laws* was issued. The report offered commentary and

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<sup>2</sup> The case law and associated commentary regarding the statute say that "pleas" to legislative and executive officials are beyond the scope of the statute. In this case, there is no allegation in the indictments or in the discovery that Justice Hantz Marconi made a "plea," in the sense of a request, to any public official. To the contrary, Sununu and Duprey deny that there was any "ask." Thus, references to "pleas" made to public officials in this motion and other related motions use that term because it is used in the case law and commentary, and because, if a "plea" to an executive or legislative official is beyond the scope of the statute, an expression of opinion or concern surely falls outside the scope of the prohibited conduct as well.

explained the origins of much of our code from the Model Penal Code. As explained in the Commission's report:

This section is a modified version of Model Penal Code, § 240.2. Like the bribery law, it is designed to preserve the integrity of the government process. Paragraph I protects persons with key roles in this process from intimidation aimed at influencing their decisions. The prohibition in paragraph II is limited to judicial and administrative proceedings because legislative and executive officers are traditionally subject to such a variety of special pleas for the exercise of their discretion that there are no prevailing norms, short of penalties for threat or outright bribery, that prohibit communications to them for favor. In the absence of a widely held view that there is something wrong about appealing to legislative and executive personnel, the law ought not to create the condemnation on its own. But in judicial and administrative proceedings, the situation is quite different.

Commission to Recommend Codification of Criminal Laws, *Report of Commission to Recommend Codification of Criminal Laws* § 585:2 cmts at 84-85 (1969) (underline added).

Crucially, the comment notes that I(b) is limited to “judicial and administrative proceedings” because legislative and executive officials are so frequently subject to lobbying that there is no prevailing norm prohibiting such entreaties. *Id.* Thus, the very text of the law, combined with the clear legislative history, indicates that discussions with the then-Governor cannot fall within the ambit of the statute.

19. This commentary is important because the New Hampshire Supreme Court has often looked at this legislative history to clarify ambiguous statutes. *See State v. Chandonnet*, 124 N.H. 778, 780 (1984) (“We have held, however, that in addition to the language of the statute itself, ‘the legislative history of a statute can be taken into consideration in arriving at its meaning....Reports of commissions established to prepare or recommend statutory revisions can prove to be valuable aids in construing particular statutes.’”) (quoting *Corson v. Brown Prods., Inc.*, 119 N.H. 20, 23 (1979)). *See also State v. Gagne*, 165 N.H. 363, 371 (2013) (looking at the *Report* to interpret “property of another” in the context of RSA 637); *State v. Gunnip*, 174 N.H. 778, 782 (2022) (looking to the *Report* to interpret falsifying physical evidence in the context of

RSA 641:6); *State v. Rivera*, 162 N.H. 182, 185 (2011) (relying on the *Report* to determine the scope of accomplice liability).

20. The Commentary to the Model Penal Code itself proves the same. Model Penal Code § 240.2(1)(d), upon which RSA 640:3, I(b) is based, has the same statutory language and similar commentary. *Model Penal Code and Commentaries*, pt. II, vol. 3 §240.2 cmt at 3 at 55-58 (1980). That comment notes that “Subsection (1)(d) [the “privately address” section upon which RSA 640:3, I(b) is modeled] does not reach attempts to influence legislators or ordinary executive officials in their exercise of discretion or performance of duties” because “there is no tradition or commonly accepted morality governing the kinds of communications that may appropriately be addressed to such officials.” *Id.* at 56 (underline added). While this case only involves informing an elected official and a constituent’s opinions, the Commentary to the Model Penal Code goes much further: “[a]ll sorts of pleas for special favors are made to legislative and executive officials.” *Id.* And while such pleas may affect the operation of government, “[s]pecial legislation dealing with lobbying and codes of proper official behavior are certainly appropriate measures to be considered in this area” but they “should be enforced primarily by civil disciplinary measures...and are in any event beyond the scope of the Model Code.” *Id.* (underline added).

21. The Model Penal Code Commentary goes on to explain that “Subsection (1)(d) is confined to ‘private’ communications in order to prevent it from being applied to the press and to other forms of public comment.” *Id.* Furthermore, “application of this provision to communications that are merely inappropriate rather than reprehensible is precluded by the requirement of specific purpose” because the “actor must have a purpose to influence the outcome of a proceeding ‘on the basis of considerations other than those authorized by law.’” *Id.* at 57. As the Commentary adds, “this language is intended to require not only that the actor

intend to influence the outcome on the basis of certain factors, but also that he knows that those considerations are not authorized by law” and “[a]nyone who acts without such knowledge need not be apprehensive of conviction under this section.” *Id.*

22. These comments again matter because “we look to the Model Penal Code and its commentaries for guidance.” *State v. Formella*, 158 N.H. 114, 117 (2008). *See also State v. Lamy*, 158 N.H. 511, 515 (2009) (because “our Criminal Code is largely derived from the Model Penal Code...we have looked to the Model Penal Code and its commentaries when interpreting analogous New Hampshire statutes”) (citing *State v. Donohue*, 150 N.H. 180, 183 (2003)). This commentary reiterates that the statute’s drafters did not intend the Improper Influence statute to reach discussions with executive officials; that legislation dealing with lobbying and codes of conduct are the methods for dealing with any concerns; and that the actor must know these considerations are not authorized by law. Furthermore, it makes sense that both the Model Penal Code Commentary and the *Report of Commission to Recommend Codification of Criminal Laws* would include these caveats because to criminalize such lobbying and petitioning would run afoul of the First Amendment to the United States Constitution, as explained below.

Beyond the Statute’s Text and Legislative History, the Improper Influence Statute Is Constitutionally Void for Overbreadth, Both Facially and As Applied.<sup>3</sup>

23. The point of the foregoing is that the Court should not reach the constitutional arguments raised herein because the statute does not apply to the conduct described in the

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<sup>3</sup> The defense notes that two superior court judges have found portions of RSA 640:3 to be unconstitutional. *See State v. Joseph Haas, Jr.*, Merrimack County Superior Court, No 05-S-0068 (March 16, 2005) (Order on Defendant’s Motion to Dismiss Due to Unconstitutional Overbreadth of Charging Statute, McGuire, J.) (finding RSA 640:3, I facially unconstitutionally overbroad) [attached to this motion]; *State v. Robert O’Brien*, Merrimack County Superior Court, No. 95-S-241 (July 14, 1995) (Order on Defendant’s Motion to Dismiss, Smuckler, J.) (same) [referenced in the attached *State v. Haas* at pp. 4-5]. However, those prosecutions were under the first prong of RSA 640:3, dealing with threats of harm to public officials. *See* RSA 630:3, I(a). After those decisions, the legislature passed 2005 NH SB 256, enacted April 18, 2006, to add the following language: “provided that harm shall not be construed to include the exercise of any conduct protected under the First Amendment to the United States Constitution or any provision of the federal or state constitutions.”

indictment. However, if the Court accepts the State's interpretation of the statutes and finds the conduct described in the indictments is covered by the statutes, then the defense challenges the Improper Influence statute, in combination with the Attempt statute, as unconstitutionally overbroad, on its face and as applied in this case.

*Overbreadth.*

24. The First and Fourteenth Amendments to the United States Constitution, as well as Part I, Article 22 of the New Hampshire Constitution, prohibit unconstitutionally overbroad laws. "A statute is void for overbreadth 'if it attempts to control [conduct] by means which invade areas of protected freedom.'" *State v. Pike*, 128 N.H. 447, 450-51 (1986) (quoting *State v. Smith*, 127 N.H. 433, 439 (1985)). *See also NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (explaining that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms"); *State v. Albers*, 113 N.H. 132, 134 (1973) (quoting same). "The crucial question...is whether the statute...sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Albers*, 113 N.H. at 134 (quotation and citation omitted). Furthermore, the "State's exercise of its police power may not unreasonably interfere with an individual's right to free speech." *Op. of the Justices*, 128 N.H. 46, 49 (1986). As the defense previously explained in detail, the United States and New Hampshire Constitutions protect the rights of citizens to express their concerns about governmental and social issues to public officials and to petition for redress of grievances. U.S. Const. amends. I and XIV; N.H. Const. pt. I, arts. 14, 15, 22, and 32. *See Def. Mot. to Dismiss All Indictments Because the Alleged Conduct Is Protected by the First Amendment, the Constitutional Right of Redress, and Judicial Immunity*, ¶¶ 12-36 [hereafter *Def. Mot. to Dismiss*].

25. “The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *State v. Brobst*, 151 N.H. 420, 421 (2004) (quotation and citation omitted).

26. The State’s attempt to criminalize the conversations at issue in this case risks chilling the rights of all citizens in New Hampshire from raising their concerns with their elected or appointed officials for fear that the State will then prosecute them. The defense asks this Court to look to the statute’s plain text and legislative history to interpretate RSA 640:3, I(b) to “supply a limiting construction of the statute” that would “limit the scope of the statute without invading the province of the legislature.” *Brobst*, 151 N.H. at 423. But if it does not, and it accepts the State’s interpretation, contrary to the plain text of the law and its legislative history, the statute is also unconstitutionally overbroad, both facially and as applied.

*Facial Overbreadth.*

27. “The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute’s plainly legitimate sweep.” *State v. MacElman*, 154 N.H. 304, 310 (2006) (quoting *Chicago v. Morales*, 527 U.S. 41, 52 (1999)). Additionally, the doctrine “applies to constitutional challenges of statutes that prohibit conduct, as well as challenges to those statutes prohibiting ‘pure speech’ and ‘conduct plus speech,’” because the “purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *MacElman*, 154 N.H. at 310 (citing *Brobst*, 151 N.H. at 422). “[A]pplication of the overbreadth doctrine is strong medicine to be employed only as a last resort” and thus “[l]egislative enactments are

construed to avoid conflict with constitutional rights, and provisions may be cured through judicial construction.” *MacElman*, 154 N.H. at 310 (citing *Brobst*, 151 N.H. at 420; *State v. Smith*, 127 N.H. 433, 439 (1985)).

28. If the Court accepts the State’s proposed interpretation of RSA 640:3, I(b) in the context of a crime of Attempt under RSA 629:1, the combination is unconstitutionally overbroad.

29. Any statute which seeks to criminalize discussions with legislative or executive officials is antithetical to the eight-hundred years of common law legal history protecting the right to petition government officials for redress of grievances. *See Def. Mot. to Dismiss*, ¶¶ 12-25. The State’s interpretation of the Improper Influence statute is substantially overbroad because it seeks to criminalize constitutionally protected discussions or expressions of opinion and concern to legislative or executive officials while providing no notice as to what specific words or conduct are criminally prohibited. It “extend[s] to speech traditionally accorded the most solicitous protection of the first amendment; namely, criticism of the government’s performance of its duties.” *In re Petition of Brooks*, 140 N.H. 813, 819 (1996).

30. In *Brooks*, our Supreme Court struck down Supreme Court Rule 37(17) which provided for confidentiality in the attorney disciplinary process. *Id.* at 815. The rule at issue permanently barred criticism of the PCC process and hindered mere “public discussion,” debate which “lies at the heart of the first amendment” and whose regulation “must pass the strictest of constitutional tests.” *Id.* at 819.

31. Similarly here, the citizens of New Hampshire who may wish to inform or complain to their elected officials “may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” *MacElman*, 154 N.H. at 310. By the State’s logic, if the Department of Justice initiates a civil or criminal investigation,

the citizens of New Hampshire are prohibited from commenting on those investigations to their elected officials, even when those officials have no influence over the investigations. The State could prosecute any citizen's comment to a public official criticizing government activity merely by alleging that such commentary was intended to "improperly influence" government officials. Nothing could be more antithetical to representative government.

32. The United States Supreme Court has already cautioned against these overbroad interpretations that threaten to chill constitutionally protected speech. In *McDonnell v. United States*, 579 U.S. 550 (2016), the Court explained that expansive interpretations of criminal statutes related to corruption would "raise significant constitutional concerns" because the "basic compact underlying representative government *assumes* that public officials will hear from constituents and act appropriately on their concerns[.]" *Id.* at 574-75 (italics in original).

33. The State's interpretation of the Improper Influence statute is not content neutral because it applies only to critics of state action. A citizen would not be prosecuted for telling the Governor what a great job he was doing if his Attorney General initiated an investigation into someone. "Content-based laws – those that target speech based on its communicative content – are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (citations omitted).

34. The State's expansive interpretation is not narrowly tailored to serve a compelling state interest. Its interpretation of the Improper Influence statute provides for no time, place, and manner restrictions or other narrow tailoring that our Courts have frequently used to uphold restrictions on First Amendment-protected conduct. *See State v. Bailey*, 166 N.H. 537, 545-46 (2014) (upholding park curfew ordinance because of the city's "significant interest in ensuring that its parks are adequately protected, and because that interest would be less efficiently

achieved without the park curfew than with it, the regulation satisfies the requirement of narrow tailoring”); *State v. Gubitosi*, 157 N.H. 720, 728 (2008) (holding portion of harassment statute not unconstitutionally overbroad because it “is narrowly tailored to the illegal communications sought to be prevented”); *State v. Hodgkiss*, 132 N.H. 376, 388 (1989) (signage ordinance not unconstitutionally overbroad because “the ordinance does not burden any expressive activity beyond what is necessary to achieve its substantial and legitimate goal, and is therefore tailored with sufficient limits to satisfy first amendment standards”). Here, by contrast, the State has ignored the statute’s plain text and legislative history to advance an interpretation of the Attempt and Improper Influence statutes that could criminalize any number of discussions, arguments, opinions, petitions, and the like aimed at public officials.

35. Thus, if the statute only applied to private addresses to public servants who have or will have official discretion in a judicial or administrative proceeding, the argument might be different. But by using the Attempt statute to sidestep these limitations and instead prosecute a citizen for a public meeting with an elected official who has no influence over a state investigation, the State has unmoored the Improper Influence statute from its constitutionally required limitations. Any citizen’s comments, anywhere, at anytime, on any matter, are criminalized.

*As Applied Overbreadth.*

36. Even if this Court determines that the combination of the Attempt and Improper Influence statutes is not facially overbroad, the Court still should determine whether that combination is “unconstitutional as applied to the particular facts of this case.” *State v. Theriault*, 158 N.H. 123, 126 (2008).

37. They are here. The State alleges that Justice Hantz Marconi committed a “substantial step toward the commission of said crime...by telling Governor Christopher Sununu that an

investigation into Geno Marconi was the result of personal, petty, and/or political biases; that there was no merit to allegations against or subsequent investigation into Geno Marconi; and/or that the investigation into Geno Marconi needed to wrap up quickly because she was recused from important cases pending or imminently pending before the New Hampshire Supreme Court; or words to that effect[.]” *Indictment* (CID 2257290C).

38. As the defense has consistently maintained, the State alleges no threats, promises, bribes, asks, or anything of the like. *See Def. Mot. to Dismiss* at ¶¶ 8-11, 25; *D. Reply St. Obj. Mot. Dismiss* at ¶¶ 13-17, 23.<sup>4</sup>

39. The plain text of the relevant portion of the Improper Influence statute requires that the private address be “on the basis of considerations other than those authorized by law.” RSA 640:3, I(b). But if the State can successfully allege that the mere expression of opinion, without any improper asks, threats, bribes, or the like, constitutes improper influence without authorization by law, then the State’s interpretation sweeps in broad swaths of constitutionally protected conduct. Moreover, defendants will be forced to wait through the State’s presentation of evidence before raising an as applied challenge, forcing them to bear the significant burdens of a criminal prosecution, trial, and potential appeal before they can vindicate their constitutional rights. *See, e.g., State v. Sargent*, 176 N.H. 713 (2024) (conviction reversed on non-constitutional grounds).

40. Under the State’s interpretation, a citizen cannot complain to their representative about the length of time a cold case sits dormant. A citizen cannot comment to a government

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<sup>4</sup> The discovery produced by the State confirms that the State does not have any such evidence. If the State has any evidence of other conduct or circumstances alleged to support its charge of Attempt to Commit Improper Influence, beyond what is set forth in the indictment, in the documents already in the record of this case, or in discovery, the Court should require the State to make a proffer of that evidence with citations to discovery that has been provided to the defense. (The defense makes the same request in its Motion for a Bill of Particulars.) The Court should then rule on the as applied overbreadth challenge and dismiss this indictment.

official about perceived failures or impacts of governmental action so long as an investigation is pending. And, in this situation, a neighbor, family member, or former colleague of Geno Marconi's cannot express concern directly to officials (or by op-ed) about the perceived unfairness of the investigation and suspension. Any commentary on an open investigation is an Attempt to Improperly Influence. The State's interpretation sweeps too broadly.

As Interpreted by the State, the Statutes Are Also Void for Vagueness, Both Facially and As Applied.

41. Just as the United States Supreme Court in *McDonnell* had overbreadth concerns, so too did it express vagueness concerns: "public officials could be subject to prosecution, without fair notice, for the most prosaic interactions." 579 U.S. at 576. The defense challenges the Improper Influence statute, in combination with the Attempt statute, as unconstitutionally vague, on its face and as applied in this case.

42. Vague statutes are unconstitutional pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and Part I, Article 15 of the New Hampshire Constitution. *See State v. Porelle*, 149 N.H. 420, 422 (2003). "A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." *State v. Wilson*, 169 N.H. 755, 770 (2017) (quoting *State v. Hynes*, 159 N.H. 187, 200 (2009)). "The underlying principle of vagueness is that no person should be held criminally responsible for conduct which he or she could not reasonably understand to be proscribed." *State v. Pratte*, 158 N.H. 45, 48 (2008) (quoting *State v. Lamarche*, 157 N.H. 337, 340-41 (2008)). When "First Amendment interests are at stake, courts apply the vagueness doctrine with special exactitude." *Montenegro v. N.H. DMV*, 166 N.H. 215, 222 (2014) (quotation and citation omitted).

*Facially Vague.*

43. As explained above, the Court should interpret the statutes as intended by the legislature and in a manner that avoids constitutional problems. However, if the Court accepts the State's interpretation of RSA 640:3, I(b), in combination with the Attempt statute, then the statute is unconstitutionally vague on its face because it fails to supply the citizens of New Hampshire with "a reasonable opportunity to understand what conduct is prohibited" and because it "authorizes or even encourages arbitrary and discriminatory enforcement." *Wilson*, 169 N.H. at 770.

44. "A statute is not unconstitutionally vague as long as its prohibitions 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.'" *State v. Lamarche*, 157 N.H. 337, 340 (2008) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 608 (1973)). The relevant portion of the Improper Influence statute criminalizes "[p]rivate[] addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law[.]" RSA 640:3, I(b).

45. Crucially, "privately addresses," "official discretion," and "considerations other than those authorized by law" are not defined in the statute. *Id.* Citizens of this State are therefore left to speculate, at their own risk, about the precise scope of any of these terms. Does a private address include a publicly scheduled meeting with an elected official where the public official's legal counsel is present? Does it encompass a private phone call or message to a public official? What about an off-hand remark to a public official at the grocery store? What about an op-ed in the newspaper or a Facebook comment on a politician's official page? In short, as the statute is

read by the prosecution, citizens do not know what they can say to public officials without falling afoul of the law.

46. If, as the State alleges, a public official can have “official discretion” even when the constitution and statutory laws say otherwise, how can a citizen know who does or does not have official discretion? Does that mean any public official who may or may not have implied influence over another public official may not be spoken to by constituents? According to the State’s vague interpretation of the statute, citizens cannot know to whom they may speak.

47. And because the State advances an interpretation of the statute that does not define “considerations other than those authorized by law,” the citizens of this State are left guessing as to what “considerations” are allowed and what are not. Does it encompass statements of opinion?

48. Moreover, the State’s alternative construction of the Attempt crime compounds the vagueness: that the defendant attempted to cause a public official to “privately” solicit another public official with direction to influence that discretion for reasons not authorized by law. *See St. Obj. to Mot. to Dismiss Indictments Alleging Attempt or Criminal Solicitation of Improper Influence* [hereafter *St. Obj.*]. A citizen would be hard pressed to glean from the language of this statute this unintuitive construction and how to comply.

49. Likewise, the State’s reading of the statute encourages arbitrary or discriminatory enforcement. ““A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory enforcement.”” *Montenegro*, 166 N.H. at 222 (quoting *Grayned v. City of Rockford*, 408 U.S. 108-09 (1972)). ““The absence of clear standards guiding the discretion of the public official vested with the authority to enforce the enactment invites abuse by enabling the official to administer the policy on the basis of impermissible factors.””

*Montenegro*, 166 N.H. at 222 (quoting *United Food v. Southwest Ohio Regional Transit*, 163 F.3d 341, 359 (6th Cir. 1998)).

50. Clear standards for enforcement are especially important in the First Amendment context because a vague statute “operates to inhibit the exercise of those freedoms” and because “[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.” *Montenegro*, 166 N.H. at 222 (quoting *Grayned*, 408 U.S. at 109). And while “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity,” nevertheless “when First Amendment interests are at stake, ‘[c]ourts apply the vagueness doctrine with special exactitude.’” *Montenegro*, 166 N.H. at 222 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008) and *Act Now to Stop War v. District of Columbia*, 905 F. Supp. 2d 317, 351 (D.D.C. 2012)).

51. The Improper Influence statute as interpreted by the State leaves unfettered discretion to law enforcement and prosecutors to unilaterally determine what constitutes the sort of improper speech that violates the statute. It lets them pick and choose which statements to public officials are allegedly influential and which are not.

52. This discretion is apparent from an investigation into another prominent official in the state. Public records reveal that in 2013, then-Executive Councilor Christopher Sununu wrote an *ex parte* character reference letter, on Executive Council letterhead, directly to Judge Michael Sullivan when Sununu’s political associate was being sentenced in a criminal matter. D614. Jason Grosky, then prosecuting attorney for the Salem Police Department, wrote to the Public Integrity Unit of the Department of Justice referring the matter and explicitly mentioning the crime of Improper Influence. D641-42. The Attorney General’s Office eventually concluded that

there was no violation of any provision of the criminal code. D607. But the DOJ never explained its decision-making or provided guidance to the public as to what constitutes Improper Influence.

*Vague As Applied.*

53. The State's construction of RSA 640:3, I(b) is unconstitutional as applied to Justice Hantz Marconi. The sole specific act alleged in the Attempt to Commit Improper Influence indictment is that Justice Hantz Marconi told then-Governor Sununu her opinions after the investigation into her husband was announced coincident with his suspension and its effect on her ability to fulfill her duties as a Justice of the New Hampshire Supreme Court. *See Indictment* (CID 2257290C). Thus, the sole criminal act alleged is Justice Hantz Marconi's expression of her opinion about the suspension and investigation and its effect on the Court.

54. As an initial matter, that cannot form the basis for criminal liability under RSA 640:3, I(b) because the plain language of the statute exempts "any representation, argument or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law[.]"

55. Justice Hantz Marconi's expressions of her opinions about the cause for the suspension, investigation and its effect on the Supreme Court are a basis of consideration authorized by law. That is, the First Amendment of the United States Constitution and Part I, Article 22 of the New Hampshire Constitution protect the rights of citizens to express their opinions to elected officials. *See, e.g., State v. Nickerson*, 120 N.H. 821, 824 (1980) *superseded by statute as stated in State v. Biondolillo*, 164 N.H. 370, 378 (2012) ("It is not surprising that both the State and Federal Constitutions address themselves to the right of the people to...raise public attention to matters they consider of importance because '[m]aintenance of the opportunity for free political discussion is a basic tenant of our constitutional democracy.'") (quoting *Cox v. Louisiana*, 379 U.S. 536, 552 (1965)). A statute explicitly protects her "full right

to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies.” RSA 98-E:1.

56. According to the discovery produced by the State, Sununu says, that in the June 6, 2024, meeting there was “no ask,” no request for any action, and no request for any benefit, and nothing illegal about the meeting. Sununu’s own conclusion was, “I don’t think there was anything illegal about it.” D154/D37. *See also* D144/27.

I think she was, yeah, I think she was talking about the court itself, that the cases would – every time she has to recuse herself my, from what I understand, they have to bring somebody else in usually to take her, her position. And there’s a process to do all of that, but I think she felt like because it was a large number of cases she was concerned the court as whole was gonna get backed up. These cases were gonna, you know, get backed up themselves and the, the work of the court was, it was impeding the work of the court from getting done is what her concern was. D126/9.

No, there was no ask, there was nothing Governor, I wish you could do this, or there was nothing like that. There’s no, there’s no request of me or anything like that, and – and there was no, yeah, no. It was more just expressing her frustration with the process, with, you know, what – what she was dealing with I should say, not the process but what, you know, what she was dealing with. But there was no ask, or expression that I should be doing anything. D131/14.

It was kind of just coming in, sitting down, expressing frustration and hoping that the thing would, would move quicker, and that’s, that’s all she said. D132/15.

It seems like she was just expressing frustration ‘cause there – like I said, there was no action request, no ask, frustration with the process. Hoping that it would move along, and that’s kind of how we left it. D133/16

She was expressing frustration. Clearly not asking me to do anything. D134/17.

She didn’t ask anything of me. She was frustrated with, that she had to recuse herself. Frustrated seeing the process as a wife. But I think, I think that was it. D137/20.

I, I didn’t get the sense that, I didn’t get the sense that anything was illegal about the conversation. D144/27

No, I mean about halfway through the conversation I kept waiting, is she gonna ask me for something, or for something, or to do something, like and even imply that I should, Governor, you need to dah, dah, dah, no, never came. So there’s technically no ask of me. D147/30

But I, I reiterated, I don't think there was anything illegal about it, but I'm, I'm not a lawyer. D154/37.

(underline added).

57. The Governor's legal counsel, Rudy Ogden, was present for the June 6th meeting. He confirmed the substance of the conversation.

. . . but to be clear there was never a, this needs to end quickly and can you please ask DOJ to end this quickly. There was never anything like that. D196/15.

[T]hat's why I say in terms of her not asking for anything, it – it never was, it never went more than saying this needs to end quickly. . . Like it was never it needs to end quickly and geez, if you talk to them you should tell them that, or this needs to end quickly and I think you can do that. It was never anything like that. D196-97/15-16.

[T]o be clear she never said you should get this to conclude quickly, or – or like DOJ, you should engage with DOJ to get them to conclude quickly. It was always this, you know, this needs to be wrapped up. It's hard, and it's hard on both me and my colleagues. D206-07/25-26.

(underline added).

58. If this conversation is truly the basis of the indictment, how is an accused person supposed to know what "conduct" is prohibited? The State's position simply defies logic and common sense, leaving citizens without notice of that conduct is unlawful in a situation that is ripe for arbitrary and discriminatory enforcement.

Using the Inchoate Crime of Attempt Does Not Render Vague Statutes Clear.

59. The State's decision to charge the inchoate crime of Attempt, rather than the substantive crime of Improper Influence, does not save the indictment. As explained above, the Attempt statute requires the accused to commit an act or omission "constituting a substantial step toward the commission of the crime." RSA 629:1, I. A "substantial step" is defined as "conduct that is strongly corroborative of the actor's criminal purpose." RSA 629:1, II.

60. Constitutionally protected First Amendment activity, that is, petitioning officials for the redress of grievances or commenting on government operations, cannot form the basis of

“conduct that is strongly corroborative of the actor’s criminal purpose.” To hold otherwise would mean that any “plea” to an official would constitute the necessary *actus reus* for a criminal offense. First Amendment activity is not criminal activity.

61. Furthermore, the Commentary to the Model Penal Code makes clear that

in order to constitute an attempt...it is of course necessary that the result desired or intended by the actor constitute a crime. If, according to his beliefs as to relevant facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt....This is in accord with present authority, and follows,...from the principle of legality.

Model Penal Code Commentary § 5.01(c), Criminal Attempt 318 (1985). *See also* Wayne LaFave, 2 Subst. Crim. L. § 11.5(a)(3) Legal Impossibility (3d ed. Oct. 2024) (“the principle of legality” holds that “the defendant did not intend to do anything which had been made criminal, and what is not criminal may not be turned into a crime after the fact by characterizing his acts as an attempt”); G. Williams, *Criminal Law, The General Part* 633 (2d ed. 1961) (“It should need no demonstration that a person who commits or attempts to commit what is not a crime in law cannot be convicted of attempting to commit a crime, and it makes no difference that he thinks it is a crime.”); *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1954) (the “principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed”); *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997) (quoting same and citing to H. Packer, *The Limits of the Criminal Sanction* 79-96 (1968) and the “principle of legality” by which “conduct may not be treated as criminal unless it has been so defined by [a competent] authority”).

62. Nor does the State’s alternative explication of the Attempt crime, *see St. Obj.*, add clarity, rather it adds confusion. That the accused allegedly attempted to convince another to engage in improper influence cannot be deduced from the language of the statute.

63. Thus, since the intended conduct – expressing opinions to the Governor – was not unlawful, the purpose to engage in that conduct cannot constitute an Attempt to commit a crime. Nor Is the State Saved by the “Speech Integral to Criminal Conduct” Exception to the First Amendment.

64. The so-called “speech integral to criminal conduct” exception to the First Amendment arises from the Supreme Court’s statement that speech “intended to bring about a particular unlawful act has no social value; therefore, it is unprotected.” *United States v. Hansen*, 599 U.S. 762, 783 (2023) (citing *United States v. Williams*, 553 U.S. 285, 298 (2008)). Thus, “offers to provide or requests to obtain child pornography are categorically excluded from the First Amendment.” *Williams*, 553 U.S. at 299, as is solicitation of unlawful sex discrimination in employment, *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973), and picketing where the “sole, unlawful and immediate objective was to induce [a target] to violate” anti-trade-restraint law, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

65. To “qualify as speech integral to criminal conduct, the speech must be integral to conduct that constitutes another offense that does not involve protected speech, such as anti-trust conspiracy, extortion, or in-person harassment.” *United States v. Sryniawski*, 48 F.4th 583, 588 (8th Cir. 2022) (internal citations omitted). *See also People v. Burkman*, 15 N.W.3d 216, 236 (Mich. 2024) (explaining that “for the exception to apply, the speech must be integral to some conduct or scheme that is illegal in nature and independent of the speech that might be used to facilitate or accomplish the conduct or scheme”). But “[i]f a defendant is doing nothing but exercising a right of free speech, without engaging in any non-speech conduct, the exception for speech integral to criminal conduct shouldn’t apply.” *United States v. Osinger*, 753 F.3d 939, 954 (9th Cir. 2014) (Watford, J., concurring).

66. *Sryniawski* is instructive because it also involved speech in the political realm. *Sryniawski*, 48 F.4th at 585. The defendant was charged with cyberstalking and extortion for a series of emails he sent to a legislative candidate. *Id.* On appeal, the Eighth Circuit concluded that the evidence was insufficient to support a cyberstalking conviction consistent with the First Amendment. *Id.* at 585, 587-89. For that court, the *mens rea* element, that the “defendant act with the intent to harass or intimidate,” when construed in the broadest sense “would infringe on rights protected by the First Amendment” because the First Amendment “prohibits Congress from punishing political speech intended to harass or intimidate in the broad senses of these words.” *Id.* at 587 (quotation and citations omitted). The statute “cannot be applied constitutionally to a defendant who directs speech on a matter of public concern to a political candidate with intent merely to trouble or annoy the candidate.” *Id.* The same holds true for expressing opinions to politicians.

67. The government “may not define speech as a crime, and then render the speech unprotected by the First Amendment merely because it is integral to speech that [the government] has criminalized.” *Sryniawski*, 48 F.4th at 588. *See also Burkman*, 15 N.W.3d at 236 (explaining how “[s]ince *Giboney*, courts and legal scholars have expressed the need to apply the speech-integral-to-criminal-conduct exception with caution” because “[o]therwise, under the broadest interpretation of the exception, if the government criminalized any type of speech, then anyone engaging in that speech could be punished because the speech would automatically be integral to committing the offense”) (quotations and citations omitted). In drafting the criminal laws, the legislature cannot define constitutionally protected speech as a crime. Put simply, the First Amendment (and Article 22) limits the Legislature; the Legislature does not limit the First Amendment.

68. The Supreme Court’s decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), does not change the analysis.<sup>5</sup> *Counterman* dealt with “true threats of violence” and the mental state required to place such threats outside the scope of First Amendment protections. *Counterman* recognized, but did not involve, political speech. Political speech is not treated as threats of violence. “Dissenting political speech [is] at the First Amendment’s core.” *Counterman*, 600 U.S. at 81. See also *R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (“Core political speech occupies the highest, most protected position” of constitutional protection, while “obscenity and fighting words receive the least protection of all”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”); *Meyer v. Grant*, 486 U.S. 414, 425 (1988) (“discussion of political issues” is “an area in which the importance of First Amendment protections is ‘at its zenith.’”); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 186-87 (1999) (quoting same).

69. The discussions of *scienter* in *Counterman* have no application to the circumstances in this case where there was no threat of violence, no threat of any criminal conduct, and no request for any criminal conduct – only the discussion of concerns and expressions of opinion to an executive official. Unlike the threats of violence in *Counterman*, the alleged discussions here are “core” and “most protected” speech under the First Amendment. This Court must afford those discussions the First Amendment protection they deserve.

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<sup>5</sup> Similarly, *United States v. Varani*, 435 F.2d 758, 762 (6th Cir. 1970) was a “true threats” case where an anti-tax activist told an IRS agent, *inter alia*, “I’m an expert rifleman and I’ll blow your head off... That is not a threat; it’s a promise; what I’m going to do to you.” *Id.* at 760-61. Likewise, *State v. Briggs*, 147 N.H. 431 (2002) is not a case about speech at all but about physical interference with a Fish and Game Officer.

Conclusion.

For all of the foregoing reasons, the Court should dismiss the indictment for Attempt to Commit Improper Influence.

WHEREFORE, the defense respectfully requests that the Court dismiss the indictment for Attempt to Commit Improper Influence.

Dated this 18th day of April, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Richard Guerriero, do hereby certify that Senior Assistant Attorney General Dan Jimenez and Assistant Attorney General Joseph Fincham are registered e-filers in the Court's electronic filing system and that when filing this motion, I am electing for them to receive a copy of the document through the electronic filing system's system for electronic service.

*/s/ Richard Guerriero*

THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

State of New Hampshire

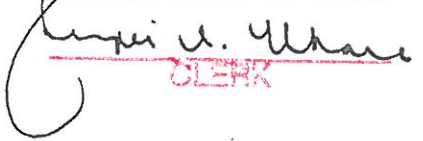
v.

Joseph Haas, Jr.

No. 05-S-0068

ORDER

A TRUE COPY ATTEST:

  
CLERK

The State of New Hampshire has indicted Joseph Haas, Jr. (“defendant”) on one count of improper influence contrary to RSA 640:3. Before the Court is the defendant’s motion to dismiss arguing that RSA 640:3 is overbroad and unconstitutional on its face. The Court held a hearing on this matter on March 8, 2005. Considering the parties’ written and oral arguments and the evidence presented, the Court **GRANTS** the defendant’s motion.

For purposes of the motion to dismiss, the Court presumes that the facts are as alleged by the State. The State contends that the defendant threatened, via an email message, to harm the Attorney General’s child if she did not nol pros certain charges against a Gus Breton. As a result of the defendant’s threat, he was charged with improper influence contrary to RSA 640:3. The defendant has moved to dismiss the charge against him on the ground that the statute is unconstitutionally overbroad on its face in violation of the Fifth and Fourteenth Amendments to the United States Constitution, and Part I, Article 15 of the New Hampshire Constitution. He contends that the statute impermissibly sweeps constitutionally protected speech into its purview. He further

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contends that because the Legislature demonstrated an intent to apply the statute broadly, the Court cannot apply a limiting construction to the statute.

“The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.” State v. Brobst, 151 N.H. \_\_\_, (decided September 9, 2004) (slip op. at 2) (quotation and citations omitted). Statutes regulating speech “must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973). “[T]he application of the overbreadth doctrine is ‘strong medicine’ to be employed ‘only as a last resort’”. Brobst, 151 N.H. (slip op. at 2) (quoting Broadrick, 413 U.S. at 613). “To provide guidance in this area the United States Supreme Court has held that the overbreadth of a statute must be real and substantial, judged in relation to the statute’s plainly legitimate sweep.” Id. “If a statute is found to be substantially overbroad, ‘the statute must be invalidated unless the court can supply a limiting construction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications.’” Id. (quoting People v. Hickman, 988 P.2d 628, 635 (Colo. 1999)).

RSA 640:3 states, in pertinent part:

- I. A person is guilty of a class B felony if he:
  - (a) Threatens any harm to a public servant, party official or voter with the purpose of influencing his action, decision, opinion, recommendation, nomination, vote or other exercise of discretion . . .
- II. ‘Harm’ means any disadvantage or injury, pecuniary or otherwise, including disadvantage or injury to any other person or entity in whose welfare the public servant, party official, or voter is interested.

(emphasis added). The State has provided the Court with a copy of the email which is the subject of this indictment. There can be no doubt that its repulsive message is prohibited by RSA 640:3. However, when statutes regulate or proscribe speech, “[i]t matters not that the words [the defendant] used might have been constitutionally prohibited under a narrowly and precisely drawn statute.” Gooding v. Wilson, 405 U.S. 518, 520 (1972).

RSA 640:3 can be easily read to include both constitutionally protected and unprotected speech. Under the statute, a person who threatens any harm, which is broadly defined as any disadvantage or injury, pecuniary or otherwise to a public servant, with the purpose of influencing the public servant’s action, decision, opinion, recommendation, nomination, vote, or other exercise of discretion, is guilty of a class B felony. Such broad language could include such protected expressions of speech as threatening not to vote for a public official, or to petition to remove a public official from office.

The State argues that this case is analogous to Watts v. United States, 394 U.S. 705 (1969). In that case, the Supreme Court held that the statute in issue, which prohibited any person from “knowingly and willfully . . . [making] any threat to take the life of or to inflict bodily harm upon the President of the United States,” was “[c]ertainly . . . constitutional on its face.” Id. at 705, 707. The State argues that because the Supreme Court found a statute which prohibited “any threat” not overbroad, a similar fate should await RSA 640:3 as it also prohibits “any threat”. The State’s analysis misses the mark, however, because the conduct that had to be threatened under the statute in Watts was specifically delineated and was itself a crime. Willful threats to kill or inflict bodily harm upon the President are not protected speech. Whether such expressions are willful threats

is a matter of fact for decision in each case. The narrowly and precisely drawn statute in Watts is a marked contrast to the statute at issue here, which can be read to include any number of protected expressions.

Having found the statute substantially overbroad, the Court must determine whether it can be construed to be limited to unprotected expressions of speech. See Gooding, 405 U.S. at 522 (statutes regulating speech “must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.”); and State v. Smith, 127 N.H. 433, 439 (1985) (“Legislative enactments are construed to avoid conflict with constitutional rights, and provisions may be cured through judicial construction.”).

Several reasons suggest that RSA 640:3 cannot be construed to be limited to unprotected expressions of speech. First, RSA 640:3 was modeled on § 240:2 of the Model Penal Code. Under that provision, the offense of improper influence is committed when one “threatens unlawful harm” to an official in order to influence that official. When the legislature passed RSA 640:3, it substituted “unlawful harm” with “any harm”. The defendant contends that the manifest intent of the Legislature, when drafting RSA 640:3, was to have the statute read broadly. See Motion to Dismiss ¶ 7. Therefore, the Court cannot apply a limiting or narrow construction to the statute and, at the same time, uphold the manifest intent of the Legislature. See id. The Court agrees.

Second, the Court is unaware of any judicial construction of RSA 640:3 limiting its application to unprotected speech. Rather, the only judicial opinion on this issue of which the Court is aware, found the statute overbroad and not susceptible of construction “to avoid constitutional infirmity”. State v. Robert O’Brien, Merrimack County Superior


Court, No. 95-S-241 (July 14, 1995) (Order on Defendant's Motion to Dismiss, Smuckler, J. at 12). Compare Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) (New Hampshire Supreme Court had long sharply limited statutory language "offensive, derisive or annoying word" to "fighting words").

Finally, the recent case of State v. Brobst, *supra*, suggests that the New Hampshire Supreme Court would not construe RSA 640:3 to be limited in application to unprotected speech. In that case, the Supreme Court upheld the trial court's determination that RSA 644:4, which criminalized telephone calls placed with the intent to "annoy or alarm another", was unconstitutionally overbroad. *Id.* (slip op. at 1-2). The court found that the statute covered "a substantial amount of protected First Amendment speech, and that there exists a real likelihood that it may discourage citizens from exercising that speech." *Id.* (slip op. at 4). The Brobst court further observed that the State "advanced no persuasive construction, nor can we envision one, that would allow us to limit the scope of the statute without invading the province of the legislature." *Id.* Similarly, in this case, the statute covers a substantial amount of protected speech, and the State has advanced no persuasive construction of RSA 640:3, nor is the Court aware of one, which would permit the Court to limit the application of the statute without intruding into the province of the legislature.

Accordingly, since RSA 640:3 is unconstitutionally overbroad in that it criminalizes both protected and non-protected speech, and since the Court cannot apply a saving construction, the motion to dismiss is **GRANTED**.

So Ordered.

3/16/05  
Date

  
Kathleen A. McGuire  
Presiding Justice